UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI,	)	
Plaintiff,	)	
v.	)	Case No. 3:07-cv-01074-JCH
DEPARTMENT OF HOMELAND SECURITY, ET AL.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA

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INTRODUCTION

As starkly noted by the 9-11 Commission, more aggressive enforcement of immigration laws might have prevented the worst terrorist attack on American soil. Some of the September 11th hijackers overstayed their authorized time in our country, for example, but none was arrested for this seemingly mundane immigration violation. Determined to address this vulnerability, and in direct response to the recommendations of the 9-11 Commission, the government created a special division at U.S. Immigration and Customs Enforcement ("ICE") dedicated to identifying foreign nationals who have violated the terms of their admission to the United States. Every week, this division receives automated reports of aliens who have potentially overstayed their time in the country and then prioritizes cases for investigation.

In 2004, one of these overstay reports contained the name of Plaintiff Rashad El Badrawi, a Lebanese national admitted to the United States on a temporary work visa but who did not depart the country by the time his period of admission expired. A routine records check then revealed that the State Department had revoked Plaintiff's visa on national security grounds [redacted] Plaintiff thus epitomized the ideal target for post-September 11th immigration investigations: he may have overstayed his authorized time in the country, and he presented a possible threat to the national security of the United States. Accordingly, ICE designated Plaintiff's case as a Priority [redacted] investigation [redacted] which led to Plaintiff's arrest and detention. An immigration judge found Plaintiff to be removable for overstaying his authorized time in the country and granted Plaintiff's request to voluntarily depart the country.

Plaintiff now seeks damages from the United States for false arrest and abuse of process under the Federal Tort Claims Act. Plaintiff argues that, contrary to the finding of the

immigration judge, he was legally entitled to overstay his period of admission in the United States because he filed for an extension, which provided him with additional temporary work authorization. Plaintiff also contends that he was arbitrarily detained for forty-two days after the immigration judge granted him voluntary departure, which he alleges was an abuse of process. According to Plaintiff, the government's actions arose from Operation Frontline, which Plaintiff characterizes as a secret government initiative that indiscriminately arrested and detained Muslims and Arabs. Although these allegations may have been sufficient to withstand a motion to dismiss, they cannot defeat this motion for summary judgment, in which the evidence now controls. The evidence, gathered through Plaintiff's extensive discovery, shows that Plaintiff's race, religion, and ethnicity played no role in the decision to investigate, arrest, or detain him.

The undisputed facts show that Operation Frontline was not created to target any ethnic or religious group, but to respond to a very real threat. In March 2004, just days before the general elections in Spain, terrorists bombed commuter trains in Madrid, killing over 200 people in what was widely viewed as an attempt to influence the elections there. More alarmingly, then-classified information indicated that al-Qaida may have been preparing a similar attack in the United States prior to the then-upcoming presidential election. In response, the Department of Homeland Security coordinated a government-wide counterterrorism initiative, which included Operation Frontline and nearly 600 other programs. Operation Frontline provided additional resources and higher priorities to ICE's existing efforts to identify immigration status violators, but it had no impact on standard policies and procedures relating to the arrest and detention of aliens.

As to Plaintiff's claim that he was detained longer than necessary, the government has now presented incontrovertible evidence that a 42-day detention pending departure to Lebanon is

well within the timeframe reasonably needed to effect such departures, which require careful coordination with other federal officials, foreign governments, and commercial airlines. In fact, the Second Circuit recently rejected nearly identical factual allegations by an alien who was detained almost four months after being granted voluntary departure. *See Turkman v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009). Likewise, new case law also supports the government's position that an alien's work authorization provides no safe harbor from arrest for being illegally present in the country. *See Matter of Rotimi*, 24 I. & N. Dec. 567, 578 (B.I.A. 2008) ("work authorization is not equivalent to a lawful status; nor is it necessarily reflective of a right to lawfully be or remain in this country"), *upheld by Rotimi v. Holder*, 577 F.3d 133, 140 (2d Cir. 2009).

In sum, after extensive discovery in which Plaintiff was granted access to virtually every government record he requested, there is no factual or legal support to show that any federal employee did anything wrong in his case. To the contrary, discovery has shown that the system worked exactly as it was designed. Indeed, the 9-11 Commission specifically highlighted the need to stop terrorists who abuse the system by filing to extend their authorized time country:

> In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country until the petition was adjudicated. Terrorists were free to conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, acquire necessary materials, and execute an attack.

9-11 AND TERRORIST TRAVEL, Staff Report of the National Commission on Terrorist Attacks in the United States (2004), at 98, attached as Ex. 55. Although the government's heightened enforcement efforts may have led to harsh results for Plaintiff, who unquestionably made a good-faith effort to extend his lawful status, that does not entitle him to damages. The Federal Tort Claims Act predicates liability not on harm to a plaintiff, but on wrongdoing by an individual

government employee. Here, all federal employees involved with Plaintiff's case followed policies and procedures duly implemented after the September 11th terrorist attacks. Therefore, for the reasons set forth below, this Court should grant summary judgment in favor of the United States.

STATEMENT

A. Procedural History

Plaintiff's original and amended complaints seek damages for alleged violations of his civil rights regarding his arrest and detention by ICE officers in late 2004. *See* Docket Nos. 1, 83, 95. Specifically, he sought damages against two ICE officers in their individual capacities for alleged violations of his Fourth and Fifth Amendment rights, and he also sought damages against the United States under the Federal Tort Claims Act ("FTCA") for false arrest, malicious prosecution, intentional infliction of emotional distress, and abuse of process. *See* 28 U.S.C.§ 1396(b)(2); 2671-2680 (2006). In addition, Plaintiff sought expungement of all records relating to his arrest and of all references to him in various government national security databases. The United States and the individual defendants filed motions to dismiss, challenging both the jurisdiction of the Court and the merits of Plaintiff's claims. *See* Docket Nos. 22, 25.

The Court dismissed most of Plaintiff's claims against the federal defendants. *See El Badrawi v. Dep't of Homeland Sec.*, 579 F.Supp.2d 249 (D. Conn. 2008). It dismissed all claims against the individual ICE defendants, finding that the Immigration and Nationality Act, combined with the national security aspects of the case, are special factors that precluded a *Bivens* remedy. *Id.* at 262-64. The Court also dismissed several claims against the United States for lack of jurisdiction, including the ones for malicious prosecution and expungement. *Id.* at 265, 279-80. Nonetheless, the Court held that Plaintiff's claim for false arrest could proceed because he alleged that he was arrested for overstaying his authorized time in the country despite

having valid temporary employment authorization. *Id.* at 275-77. Likewise, the Court allowed Plaintiff to proceed on his claim for abuse of process to the extent he alleged that he was arbitrarily detained for forty-two days after his immigration proceedings concluded. *Id.* at 277-78. These two claims, for false arrest and abuse of process, are the only remaining ones against the United States.[1]

B. Factual Background

1. Operation Frontline and the Government's Efforts to Prevent Another Terrorist Attack after September 11th

It is widely recognized that "[t]he terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws." *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (citing NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9-11 Commission Report 384 (2004)). In response, Congress overhauled our nation's immigration system, creating a new immigration enforcement agency, ICE. An important part of ICE's mission is to uphold public safety and protect the United States from terrorist attacks by investigating and interdicting the people, money, and materials that support terrorist and criminal activity. *See* Ex. 6 ¶ 1. In 2003, ICE created an investigative component at its headquarters, the Compliance Enforcement Unit, dedicated to identifying aliens who may have violated the terms of their admission to the United States. *See id.* ¶ 3; *see also* Ex. 3 at 30 (explaining that the Compliance Enforcement Unit was created in response to the recommendation of the 9-11 Commission that there be consequences to immigration violations).

The Compliance Enforcement Unit was one of many government components that heightened its counterterrorism efforts in the spring of 2004, after terrorists bombed commuter

[1] Plaintiff's claim for intentional infliction of emotional distress was dismissed with prejudice during discovery. *See* Docket No. 225.

trains in Madrid, Spain, killing over 200 people just days before the country's general elections. *See American-Arab Anti-Discrimination Comm. v. Massachusetts Bay Transp. Auth.*, No. 04-11652-GAO, 2004 WL 1682859, *2 (D. Mass. July 28, 2004) (observing that "[i]t is at least plausible, if not likely, that the attack in Madrid was timed to maximize its disruptive effect on the Spanish elections, pointing up the attractiveness to terrorists of timing a terrorist event to have an impact on the democratic process"). Moreover, according to then-classified intelligence, al-Qaida may have been planning a similar attack in our country prior to the presidential election that November. *See* Ex. 16. In response, President George W. Bush convened his Homeland Security Council, and he directed the Department of Homeland Security to coordinate the development and implementation of a government-wide security plan to cover the upcoming period of increased risk. *See* Ex. 17. This process led to the issuance of a comprehensive interagency security plan designed "to prevent, protect against, prepare for, respond to, and recover from terrorist attacks." Ex. 18 at US01143.

Among the nearly 600 initiatives in the Interagency Security Plan was Operation Frontline. *See* Ex. 18 at US01144, 1169. Operation Frontline was conceived and implemented by ICE's Compliance Enforcement Unit in May 2004 to respond to the increased threat. *See* Ex. 21 at US00466-67; Ex. 3 at 12-13. The goal of Operation Frontline was to detect, prevent, and disrupt terrorist activities by following the 9-11 Commission's recommendation to ensure routine consequences for immigration violations. *See* Ex. 21 at US00466-67; *see also* Ex. 22. Although Operation Frontline encompassed several different law enforcement initiatives at ICE, the only one that affected Plaintiff was Operation Frontline II, which was implemented in October 2004. *See* Ex. 3 at 20-21; 24-25. Operation Frontline II targeted only potential immigration status violators, prioritizing investigations based in part on information regarding known and suspected

terrorists. *See* Ex. 21 at US 467. This was the same work that the Compliance Enforcement Unit was already doing as part of its usual duties, and Operation Frontline II provided a surge of resources to ensure that high-priority investigations were completed before the presidential election, when the risk of a terrorist attack was at its highest. *See* Ex. 3 at 25-27.

Consistent with standard practice at the Compliance Enforcement Unit, investigations under Operation Frontline II were assigned to and conducted by field offices, and those field offices decided whether to arrest and detain aliens for violating immigration laws. *See* Ex. 3 at 110-11, 125-26. Before any case could be assigned for investigation, reasonable suspicion must exist that an alien violated his or her immigration status. *See* Ex. 19 at US00241. An alien's race, religion, or ethnicity played no role in Operation Frontline or Operation Frontline II. *See* Ex. 23 at US00215; Ex. 3 at 63, 83. ICE Headquarters instructed field offices that Operation Frontline "in no way impacts current ICE detention policy and procedures" and that "[i]ndividuals arrested pursuant to an Operation Front Line lead are to be afforded the same due process with respects [*sic*] to bond determination as any other arrestee." Ex. 20 at US00777; *see also* Ex. 3 at 126 ("there was no change in detention policy under Operation Frontline"); Ex. 23 at US00215.

2. Plaintiff's Entry into the United States and the State Department's Revocation of His Visa on National Security Grounds

In 2003, Plaintiff applied for and was granted an H1-B visa to travel to the United States for temporary employment as a research associate at the University of Connecticut. Ex. 14 ¶¶ 5-6. Plaintiff arrived in the United States on June 1, 2003, and he was given authorization to remain in the country until May 1, 2004. *See id.* ¶ 8. That October, the State Department administratively revoked his visa on national security grounds, effective upon his departure from the United States. *See id.* ¶¶ 11-12, 14; 8 U.S.C. § 1201(i) (allowing an authorized officer of the State Department to revoke visas "at any time, in his discretion"). The visa revocation did not

affect Plaintiff's legal authorization to remain in the country until his period of admission expired on May 1, 2004, but if he left the country at any time before then, he would not be allowed to reenter without applying for, and being granted, a new visa. *See* Ex. 14 ¶¶ 11-12, 14; 22 C.F.R. § 41.112(a).

Pursuant to standard policies and procedures, any time the State Department revokes a visa on national security grounds, ICE opens an investigation. *See* Ex. 24 at US00294. According to guidance provided to ICE agents, "the mere fact that an alien has had his/her visa revoked by the Department of State is not in and of itself grounds for removal" and agents should thus "be on the lookout for other immigration violations." Ex. 19 at US00240. In March 2004, ICE initiated an investigation into Plaintiff based on his visa revocation, and two ICE agents interviewed Plaintiff at his place of employment. *See* Ex. 25; Ex. 3 at 145; Ex. 8 at 151. After speaking to Plaintiff and verifying his employment documents, the ICE agents determined that he was lawfully maintaining his immigration status and closed the investigation. *See id*.

3. Plaintiff's Unsuccessful Attempt to Extend His Authorized Time in the Country

Soon after the ICE agents interviewed him in March 2004, Plaintiff and his employer filed a timely application to extend his lawful status in the United States beyond the impending May 1st expiration. *See* Ex. 14 ¶ 16, 18. Such extension requests are adjudicated by officials at U.S. Citizenship and Immigration Services and entail two separate determinations: first, whether to extend the employer's work petition under the H1-B program, allowing the alien to continue working in the country; and second, whether to extend the alien's authorized nonimmigrant status, *i.e.*, allowing the alien to continue residing in the country. *See* 8 C.F.R. § 214.2(h)(15)(i). A timely-filed application automatically extends the work authorization of an alien for up to 240 additional days after the alien's status expires. *See* 8 C.F.R. § 274a.12(b)(20). In Plaintiff's case,

the government neither approved nor denied his request for an extension. *See* Ex. 14 at ¶¶ 17-18. The law allows government officials to withhold action on applications for extensions when the petitioner is under investigation and notification would prejudice the investigation. *See* 8 C.F.R. § 103.2(8).

Plaintiff remained in the United States after his period of admission expired on May 1, 2004, apparently because his employer and counsel told him that his pending application entitled him to do so. *See* Ex. 2 at 325; Ex. 14 ¶¶ 8, 10. In addition, both Plaintiff and his employer repeatedly followed up with government officials to inquire about the status of his request for an extension. *See* Ex. 51. At one [redacted] Ex. 52.* In addition, [redacted] Ex. 53.*

4. Plaintiff's Arrest for Overstaying His Authorized Time in the Country

When Plaintiff did not exit the country after his initial period of admission expired on May 1, 2004, an automatic alert was generated by the National Security Entry-Exit Registration System ("NSEERS"), an immigration database put in place after September 11, 2001. *See* Ex. 3 at 138-39, 261-62. The alert regarding Plaintiff's apparent overstay was received at ICE's Compliance Enforcement Unit, which had approximately 150,000 other cases involving potential immigration status violators. *See* Ex. 21 at US00467; Ex. 3 at 52, 138. Operation Frontline II

* Plaintiff designated these documents as confidential under the Court's protective order and requested that all references to them be redacted from this brief and filed under seal.

used specific criteria to prioritize these cases, and Plaintiff's case was [redacted] *See* Ex. 21 at US00466-467; Ex. 3 at 30-34, 68-70, 141-42, 146-47, 203, 208-209, 261.

At ICE Headquarters, a special agent and his supervisor reviewed the information pertaining to Plaintiff and determined that his case presented a viable lead. *See* Ex. 3 at 147-48, 150-52. Both the special agent and his supervisor were aware that Plaintiff had filed a request for an extension, and they requested that the Boston field office initiate an investigation into whether Plaintiff overstayed his authorized time in the country. *See id.* at 150; Ex. 26 at US00159-160. The Boston field office conducted a preliminary investigation and then referred the case to its Hartford sub-office for further investigation. *See* Ex. 4 at 20-21, 100. In their report to the Hartford office, the Boston case agent and supervisor advised that Plaintiff may be subject to removal, and they again noted that Plaintiff had a pending application for an extension. *See* Ex. 27.

At the Hartford ICE office, Senior Special Agent Michael Loser investigated the case. Ex. 8 at 94-95. Agent Loser learned that Plaintiff had filed an application for an extension, and Agent Loser personally contacted the government service center that was responsible for adjudicating that application and confirmed that the application had not been adjudicated. *See id.* at 161-165. Agent Loser then determined that Plaintiff illegally overstayed his authorized time in the country, as Plaintiff had been admitted for a temporary period not to exceed May 1, 2004 but remained in the country after that date without having been granted an extension. *See id*. at 94-95; 163 ("The filing of the [extension request] had no bearing on his legal status in the United States"), and 165 ("I'm well aware of the fact based on training and experience that employment

authorization is not the equivalent of legal status in the United States"). Agent Loser then wrote up a report summarizing his investigation, recommending the issuance of an arrest warrant and formal charging documents. *See id.* at 153; *see also* Ex. 29.

Agent Loser's supervisor, Resident Agent in Charge Gregory Manack, reviewed all available information and likewise determined that probable cause existed to arrest Plaintiff for overstaying his authorized time in the country. *See* Ex. 9 at 169-70, 176-77, 179 (explaining that a pending application for an extension has no effect on the probable cause determination of whether an alien overstayed his authorized time in the country), 182 (stating that employment authorization is a "completely different" concept from overstaying one's authorized time in the country). *See also* Ex. 10 at 61-62. Accordingly, Agent Manack signed a warrant authorizing Plaintiff's arrest, and he also signed a Notice to Appear charging Plaintiff as removable based on his overstay, thereby initiating removal proceedings. *See* Ex. 9 at 137-38, 176-177; Ex. 30; Ex. 31.

On October 29, 2004, Agent Loser and another law enforcement officer waited for Plaintiff outside of his apartment building and arrested him when he came outside to go to work that morning. *See* Ex. 8 at 95, Ex. 2 at 100-105, 326-329, Ex. 34; Ex. 35. Agent Manack determined that Plaintiff should be held without bond primarily because Plaintiff's visa was revoked on national security grounds, which made him a possible threat to the community. *See* Ex. 9 at 196-200; Ex. 33. Plaintiff was then transferred to the custody of ICE's Office of Detention and Removal Operations, which moved him to the Hartford Correctional Center. *See* Ex. 8 at 210; Ex. 14 ¶ 31. Neither Agent Manack nor Agent Loser had any further involvement with Plaintiff's detention and removal, though as a matter of practice, their investigative file was

not closed until after Plaintiff departed the country. *See* Ex. 9 at 203, 226, 241, 295; Ex. 8 at 97, 221-22, 273.

After Plaintiff's arrest, ICE Headquarters contacted U.S. Citizenship and Immigration Services and requested that a hold be placed on Plaintiff's pending extension request because he "is the target of a current national security investigation." Ex. 36; *see also* Ex. 3 at 180-81. In addition, the Compliance Enforcement Unit at ICE Headquarters requested that ICE's Cyber Crime Center research e-mail addresses that Plaintiff used. *See* Ex. 3 at 162; Ex. 12 at 11-15. The Cyber Crime Center had been supporting Operation Frontline by conducting technical research regarding names and e-mail addresses obtained during field investigations. *See* Ex. 12 at 15. In Plaintiff's case, the Cyber Crime Center conducted research on Plaintiff and sent administrative subpoenas to his Internet e-mail providers for his subscriber information. *See id.* at 30, 71; Ex. 37. This research continued during and after Plaintiff's immigration proceedings, but it had it no effect on Plaintiff's detention or removal from the United States. *See* Ex.7 at 43, 58, 102, 104-06 ("C3 [the Cyber Crime Center] has no influence over arrest, release, detention, length of detention"); Ex. 12 at 86-88.

5. Plaintiff's Immigration Removal Proceedings and Departure from the Country

On November 3, 2004, Plaintiff appeared in immigration court, represented by attorney William Anastasi, who had been practicing immigration law for over twenty years. Ex. 14 ¶ 34; Ex. 1 at 8; Ex. 40 at 5. Attorney Anastasi moved to terminate the proceedings, arguing that Plaintiff's arrest and detention were inappropriate under 8 C.F.R. 274a, the regulation that provided Plaintiff with temporary work authorization. *See* Ex. 14 ¶ 38. The immigration judge, however, did not dismiss the charges, noting that just because someone has work authorization does not necessarily mean that the person has lawful status: "That reg deals with employment

obligations. . . . I'm more interested in his nonimmigrant status. That's what I'm more interested in." Ex. 40 at 11. The immigration judge then continued the hearing for one week, at which time further arguments would be heard on this issue. *See* Ex. 14 ¶ 40. The immigration judge also declined to release Plaintiff on bond, ordering that his detention continue. *See id.* ¶ 42; Ex. 39; Ex. 1 at 18.

At the next immigration hearing, Plaintiff decided not to challenge the charge against him and instead requested voluntary departure. *See* Ex. 14 ¶¶ 45-49. Voluntary departure is a benefit allowing certain aliens who have violated immigration law to leave the country at their own expense, in lieu of removal proceedings. *See* 8 U.S.C. § 1229c(a); 8 C.F.R. § 1240.26. The primary benefit of voluntary departure is that aliens are not subject to the otherwise standard bar on reentry to the country that applies to aliens found removable. *See id.* § 1182(a)(9)(A)(i); Ex. 14 ¶ 50. For an alien to be granted voluntary departure prior to the completion of removal hearings, the alien must concede removability and agree to waive appeal of all issues. 8 C.F.R. § 1240.26(b)(1)(i). In addition, ICE may attach "any conditions it deems necessary" to an order of voluntary departure to ensure that the alien actually leaves the country, including "continued detention pending departure." 8 C.F.R. § 240.25; *See also* 8 U.S.C. § 1229c(e); 8 C.F.R. § 1240.26(b)(3). In this case, the Immigration Judge found that Plaintiff was removable for overstaying his authorized time in the county, and the Judge granted Plaintiff voluntary departure under safeguards. Ex. 14 ¶¶ 51-52. Voluntary departure "under safeguards" meant that Plaintiff's detention would continue until ICE escorted him out of the country. Ex. 1 at 40, 44; Ex, 10 at 69-72; Ex. 11 at 34.

Before any detained alien may leave the country, the United States must provide advance notice to the recipient country, which then must grant permission for the alien to be removed

there. *See* Ex. 5 ¶¶ 4, 13. The country notification and clearance process applies to all detained aliens in ICE custody, including those granted voluntary departure under safeguards. *Id.* ¶ 8. Lebanese officials, for example, checked each and every individual that ICE removed to Lebanon to ensure the individual was who he or she claimed to be and had the right of abode in Lebanon. *Id.* ¶ 12. This vetting occurred regardless of whether the individual held a current Lebanese passport, as even that was no guarantee that the alien would be allowed to return there. If such permission was not issued prior to an alien's scheduled removal, the alien's travel plans had to be cancelled and the removal would be rescheduled for a later date. *Id.* Logistically, at least eleven steps had to be completed before an alien such as Plaintiff could be released to Lebanon. *Id.* ¶ 13.

In Plaintiff's case, the Immigration Judge's order noted that if Lebanon did not advise the United States within three months that it would accept Plaintiff, Plaintiff would be removed to Egypt instead. *See* Ex. 42. Thus, although the immigration judge ordered that Plaintiff depart the country within 30 days, the judge's order recognized that Plaintiff might not be able to actually depart the country that quickly. *See id*; Ex. 41. In the end, Plaintiff departed the country for Lebanon on December 22, 2004, forty-two days after he was granted voluntary departure. *See* Ex. 14 ¶¶ 56-57. The government lacks records to document each and every step taken to effect Plaintiff's departure, but supervisory ICE officials in both Hartford and at Headquarters have testified that his 42-day detention was well within the timeframe reasonably needed to effect such departures. *See* Ex. 5 ¶ 13; Ex. 11 at 21-22. Likewise, Plaintiff's immigration attorney testified that based on his experience, removals usually take between twenty and forty days. Ex. 1 at 55-56. Plaintiff's immigration attorney also testified that he had no reason to believe that anyone at ICE intentionally delayed his client's departure from the country. *See id.*

ARGUMENT

I. El Badrawi Cannot Establish a Claim for False Arrest Because He Relies on a Flawed Legal Theory Previously Rejected in His Immigration Proceedings

Under the FTCA, Plaintiff can recover damages against the United States for false arrest only if the officers who arrested him lacked probable cause to do so under state law. "The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest." *Walczyk v. Rio*, 496 F.3d 139, 152 n.14 (2d Cir. 2007). To determine whether probable cause existed for an arrest, the Supreme Court has adopted a highly flexible "totality of the circumstances" analysis. *Illinois v. Gates*, 462 U.S. 213, 214 (1983). "[F]ederal and Connecticut law are identical in holding that probable cause to arrest exists when police officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient" to reasonably indicate that someone has committed a crime. *Walczyk*, 496 F.3d at 156 (quotations and citation omitted). Probable cause does not require certainty that someone violated the law, only a "fair probability." *State v. Vincent*, 640 A.2d 94, 99 (Conn. 1994) ("it is axiomatic that '[a] significantly lower *quanta* of proof is required to establish probable cause than guilt'") (quoting *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972)).

The last time the Court considered Plaintiff's false arrest claim, it relied only on "the facts as set out in El Badrawi's Complaint, drawing all factual inferences in his favor." 579 F. Supp. 2d at 264. Now, on summary judgment, Plaintiff cannot rely merely on his complaint's allegations but must come forward with evidence showing a genuine issue for trial. *See* Fed. R. Civ. P. 56(e)(2). Probably the most important piece of evidence (not mentioned in the complaint) is that an immigration judge knew that Plaintiff had valid work authorization and still issued an order finding that Plaintiff was removable for overstaying his authorized time in the country. Ex. 14 ¶¶ 38, 51; Ex. 40 at 5-6; Ex. 42; Ex. 31. This ruling alone shows that probable cause existed

to arrest Plaintiff. As the Second Circuit stated in another immigration tort case, "IJs' findings of removability . . . constitute a good deal more than probable cause." *Turkmen v. Ashcroft*, 589 F.3d 542, 549 (2d Cir. 2009).

Plaintiff appears to contend that the immigration judge wrongly discounted the regulation that provided Plaintiff with temporary work authorization at the time of his arrest. But even if the immigration judge erred, Plaintiff still does not prevail in this case. The test for liability in a false arrest action is not whether a plaintiff did in fact violate the law, but only whether the arresting officers had probable cause to believe so. "[P]robable cause can exist even where it is based on mistaken information, so long as the arresting officer acted reasonably and in good faith in relying on that information." *Bernard v. United States,* 25 F.3d 98, 102 (2d Cir. 1994). "While probable cause requires more than a mere suspicion of wrongdoing, its focus is on probabilities, not hard certainties. In assessing probabilities, a judicial officer must look to the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Walczyk*, 496 F.3d at 156 (quotations and citations omitted) (applying Connecticut law).

In this case, Plaintiff was arrested not based on a mere suspicion of wrongdoing, but on undisputed evidence that: (1) he was admitted to the United States for a temporary period not to exceed May 1, 2004; (2) he remained in the country beyond that date; and (3) the government had not granted his request for an extension. *See* Ex. 14 ¶¶ 8, 10, 17. These facts show that it was at least *probable* that Plaintiff violated the law. Whether a regulation providing temporary work authorization also provides a safe harbor from removal is a question of law to be resolved by lawyers and judges in court, not by immigration agents in the field. In any event, as detailed below, the law is well settled that an alien's work authorization does not provide legal

justification to remain in the country after one's period of admission expires. Moreover, because Plaintiff's removability was previously adjudicated in his immigration proceedings, the doctrine of collateral estoppel precludes Plaintiff from re-litigating the issue here.

A. Temporary Employment Authorization Does Not Insulate Aliens from Arrest for Overstaying Their Authorized Time in the Country

Plaintiff's entire case for false arrest rests on his interpretation of a regulation that provided him with temporary employment authorization, 8 C.F.R. § 274a.12. This regulation, titled "Classes of aliens authorized to accept employment," lists over 50 categories of aliens authorized to accept employment in the United States. 8 C.F.R. § 274a.12. One of these categories includes aliens like Plaintiff, whose lawful status has expired but who filed a timely application for an extension. *See* 8 C.F.R. § 274a.12(b)(20). These aliens are authorized to continue their employment for up to 240 days after their status expires. *See id.* The regulation is silent, however, on whether this temporary employment authorization precludes the government from arresting these aliens for being out of status while the 240-day period is in effect. Thus, the first step to resolving Plaintiff's claim for false arrest is to determine the proper construction of the regulation, which reads as follows:

> **§ 274a.12 Classes of aliens authorized to accept employment**
> …
> (b) Aliens authorized for employment with a specific employer incident to status.
> . . .
> (20) A nonimmigrant alien . . . whose status has expired but who has filed a timely application for an extension of such stay pursuant to §§ 214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision.

8 C.F.R. § 274a.12(b)(20).[2]

When disputes arise over the interpretation of an agency regulation, the Supreme Court has instructed courts to defer to the agency's interpretation: "In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, (1945)). In *Larionoff*, for example, the Supreme Court confronted regulations that contained several ambiguities, but the Court did not analyze the various possible interpretations of those regulations to determine the most reasonable construction. *Id.* Rather, because there was no dispute on how the government interpreted the regulation, the Supreme Court concluded that it "need not tarry . . . over the various ambiguous terms and complex interrelations of the regulations" and should instead defer to the agency. *Id. See also Auer v. Robbins*, 519 U.S. 452**,** 463 (1997) ("A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute").

The Second Circuit has likewise held that when resolving disputes over the interpretation of regulations, "'courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.'" *New York v. Lyng*, 829 F.2d 346, 350 (2d Cir. 1987) (quoting *Knebel v. Hein*, 429 U.S. 288, 294 n.14 (1977). "[J]udicial deference to the

[2] 8 C.F.R. § 274a.12 was first promulgated in 1987 to implement employer sanctions contained in the Immigration Reform and Control Act of 1986, Pub. L. 99-603. *See* Control of Employment of Aliens, 52 Fed. Reg. 16216 (May 1, 1987). In the original version of the regulation, an alien's employment authorization was automatically extended for up to 120 days after the alien's status expired. *See id.* at 16220*; see also* 8 C.F.R. § 274a.12(b)(15) (1988 version). In 1991, the regulation was amended to extend the 120-day period to the current 240-day period. *See* Control of Employment of Aliens, 56 Fed. Reg. 41767, 41781 (Aug. 23, 1991).

Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). *Cf. El Badrawi*, 579 F.Supp.2d at 263 (dismissing *Bivens* claims in this case because "imposing liability on Manack and Loser [the arresting officers] would be to second-guess their judgment on how best to respond to a perceived national security threat").

Of course, this deference has its limits. An agency may not interpret a regulation in a manner inconsistent with its plain language. *See Larionoff*, 431 U.S. at 872-73. Here, however, the plain language of the regulation discusses only employment authorization; there is no explicit provision that protects aliens from arrest or removal. By contrast, other immigration regulations do explicitly prohibit the government from removing aliens who timely file certain applications for immigration relief. For example, when aliens file applications for temporary protective status, not only do they receive automatic temporary employment authorization, but the government "shall not remove the alien from the United States" while such applications are pending. 8 U.S.C. § 1254a; *see also* 8 C.F.R. § 244.10. Plaintiff, however, did not apply for temporary protective status, and no similar law explicitly precluded the government from removing him in this case.

Although there can be no doubt that the plain language of the regulation did not explicitly prohibit the government from initiating removal proceedings against Plaintiff, that conclusion does not address the Court's previous concern about the regulation's implicit meaning. Specifically, the Court asked how someone can be allowed to legally work in the country without having the concomitant right to remain physically present here. The answer to this question can be found in a recent decision by the Board of Immigration Appeals, which explained that "work

authorization is not equivalent to a lawful status; nor is it necessarily reflective of a right to lawfully be or remain in this country." *Matter of Rotimi*, 24 I. & N. Dec. 567, 578 (B.I.A. 2008), *upheld by Rotimi v. Holder*, 577 F.3d 133, 140 (2d Cir. 2009).

The alien in *Rotimi*, like Plaintiff, was admitted for a temporary period. He also timely filed an application for relief but was placed in removal proceedings despite having temporary work authorization. *See* 577 F.3d at 134; 24 I. & N. Dec. at 578. The alien conceded that he was removable, but contended that he was eligible for special immigration relief available to aliens who had "lawfully resided continuously" in the United States. 577 F.3d at 134-35. The government disagreed, arguing that the alien failed to maintain continuous lawful residence because he overstayed his initial period of admission. The alien countered that his residence was lawful because he timely filed applications for relief and had valid work authorization. 24 I. & N. Dec. at 578. The Board of Immigration Appeals ruled in favor of the government, finding that the alien's lawful status ended when his initial period of admission expired, regardless of whether the alien had timely filed for relief and regardless of whether the alien had work authorization. 24 I. & N. Dec. at 578. The Second Circuit upheld this decision, noting that that although it might have interpreted the law differently and reached the opposite conclusion, it was required to defer to the Board's decision because it was reasonable. *Rotimi*, 577 F.3d at 139 (citing *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).[3]

[3] Because the legal dispute in *Rotimi* centered on an ambiguous statutory provision, the Second Circuit applied the *Chevron* doctrine, which requires that an agency's interpretation be reasonable before it will be accepted by the courts. By contrast, when the only dispute is one of regulatory interpretation—as is currently the case—an even more deferential standard applies. *See Auer*, 519 U.S. at 463 (1997). *See also Linares Huarcaya v. Mukasey*, 550 F.3d 224, 229 (2d Cir. 2008) (noting the more substantial deference given to agencies under *Auer* than *Chevron*).

Central to the Board's reasoning in *Rotimi* was that "[t]he lawfulness of an alien's residence stems from the grant of a specific privilege to stay in this country, not the mere fact that he or she is an applicant for such a privilege." 24 I. & N. Dec. at 574. In the present case, the government never granted Plaintiff's application for an extension of his status. Although a regulation did allow Plaintiff to work in the country while that application was pending, "[a]n alien who is merely provided employment authorization, and who is allowed to remain here while awaiting a ruling on his applications for relief, is not in the same position as an alien who has been granted a valid immigration status or some other specific authorization to be here . . ." *Id.* at 578. As the Board explained, "there is a distinction to be drawn between permitting an alien's presence in this country for a limited purpose and legalizing his or her stay." *Id.* at 575. *See also Lok v. INS*, 681 F.2d 110 (2d Cir. 1982) (noting that the government's decision not to immediately remove an overstay was done "as a matter of grace, not as a matter of law"). Accordingly, in Plaintiff's case, although the regulation may have permitted him to work in the country while his application was pending, that did not legalize his status as an overstay, and he was thus removable at any time after his period of admission expired.

Other circuits have similarly recognized the distinction between immigration status and work authorization, holding that aliens can be illegally in the country even if they have valid employment authorization. *See, e.g., United States v. Bazargan*, 992 F.2d 844 (8th Cir.1993); *United States v. Flores*, 404 F.3d 320 (5th Cir. 2005). In *Bazargan*, the Eighth Circuit upheld a decision that an alien was illegally in the United States even though the alien filed a timely, non-frivolous application for asylum, which by regulation provided the alien with work authorization. 992 F.2d at 848-849. In so ruling, the Eighth Circuit stated that "[b]ecause the INS does not interpret the employment authorization to have any effect on the alien's status with respect to

anything other than his ability to engage in employment during the pendency of his case, we agree with the district court and the Immigration Judge that the employment authorization did not have the effect of converting Bazargan back into a legal alien." *Id.* at 849.

Similarly, in *Flores*, the Fifth Circuit ruled that an alien was unlawfully in the United States even though the alien had properly filed an application for relief and received temporary work authorization. 404 F.3d at 327. The Fifth Circuit reached this conclusion notwithstanding a federal law that mandated that the government "shall not remove the alien from the United States" while such applications were pending. 8 U.S.C. § 1254a; *see also* 8 C.F.R. § 244.10. The court explained that "it does not follow that an alien who has been granted limited temporary authorization *(i.e.*, a temporary stay of removal and a temporary work permit) is in the country legally for all purposes . . . ." 404 F.3d at 327. To the contrary, "an alien may be temporarily granted a stay of removal and be permitted to work during that stay, but still be considered 'illegally or unlawfully in the United States.'" *Id. See also* 8 U.S.C. § 1231(a)(7)(A) (providing work authorization to certain illegal aliens ordered removed).

As the above cases demonstrate, both DHS and the judiciary have long recognized that authorization to work in the country does not confer legal status upon aliens. The arresting officers followed this administrative interpretation when they arrested Plaintiff, and the Immigration Judge accepted this interpretation when he ruled that Plaintiff was removable. *See* Ex 8 at 94-95; 163, 165, 237-38; Ex. 9 at 169-70, 177, 179, 182; Ex. 10 at 40, 61-62, 66; Ex. 42. Thus, the government's interpretation of the regulation in this case should be accepted by the Court, and this is so regardless of whether Plaintiff's interpretation "is a much more reasonable one." *El Badrawi*, 579 F. Supp. 2d at 264. As the Second Circuit has explained, a court may not substitute another interpretation of a regulation even if "[it] concludes that its alternative

construction … is 'more equitable' or 'more reasonable.'" *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1108 (2d Cir. 1987) (quoting *Knebel v. Hein*, 429 U.S 288, 294 (1977)). Indeed, the Supreme Court has mandated that an agency's interpretation of a regulation be accepted by the courts even when such an interpretation produces "harsh" or "Kafkaesque" results. *Gardebring v. Jenkins*, 485 U.S. 415, 430-31 (1988). Therefore, as a matter of law, Plaintiff cannot rely on his interpretation of the regulation to establish the lack of probable cause necessary to his claim for false arrest.

B. A Timely Filed Application for An Extension Does Not Insulate Aliens from Arrest for Overstaying Their Authorized Time in the Country

To the extent that Plaintiff contends that his pending application for an extension was alone sufficient to preclude his arrest for overstaying his authorized time in the country, his claim also must fail. For more than thirty years, the administrative interpretation has been that a timely-filed, pending application for extension of nonimmigrant stay does not prevent an order of removal against an alien whose period of stay has actually expired. *See, e.g., Matter of Teberen*, 15 I. & N. Dec. 689, 690 (B.I.A. 1976) ("We reject counsel's contention that the respondent cannot be an 'overstay' until he receives a formal denial of an extension"). This principle is also reflected in the Board's more recent holding that a grant of employment authorization to an alien in an unlawful status, while some other application is pending, does not make the alien's presence in the United States lawful. *See Matter of Rotimi*, 24 I. & N. Dec. at 578. The courts have repeatedly affirmed this administrative interpretation. *See Rotimi v. Holder*, 577 F.3d at 140; *Sadegh-Nobari v. INS*, 676 F.2d 1348 (10th Cir. 1982) (finding an alien removable as an overstay even though the alien filed an application to remain in the country to receive urgent medical care); *Wellington v. INS*, 710 F.2d 1357, 1359 (8th Cir. 1983) ("Only the grant of an extension of stay can prevent an overstay from being deportable").

The Second Circuit follows the same test for removability that was established in *Teberen*: "to prove that an alien is subject to removal for overstaying his visa, DHS need only show that the alien was admitted as a nonimmigrant for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed." *Rajah*, 544 F.3d at 440 (quoting *Zerrei v. Gonzales*, 471 F.3d 342, 345 (2d Cir. 2006) (citing *Matter of Teberen*, 15 I. & N. Dec. at 690)). Here, there is no dispute that Plaintiff was admitted as a nonimmigrant worker for a temporary period not to exceed May 1, 2004, that period elapsed, and Plaintiff had not departed the country. Ex. 14 ¶¶ 8, 10. Accordingly, probable cause existed to arrest him under the Second Circuit's standard for removal.

In sum, the law and the facts of this case are fully consistent with the government's position that it can and sometimes will arrest aliens for overstaying their authorized time in the country upon the expiration of their initial period of admission, regardless of whether they have filed an application for an extension and have temporary work authorization. Although the evidence also shows that Plaintiff genuinely tried to keep his immigration status current prior to his arrest, those efforts do not entitle him to damages in this tort action. The FTCA conditions liability for false arrest on wrongdoing by federal law enforcement officers, and here those officers were doing exactly what Congress intended after September 11th—aggressively enforcing immigration laws against aliens who may pose threats to the national security of the United States. Therefore, because Plaintiff cannot meet his burden to show that the arresting officers lacked probable cause to believe he was in the country illegally, he cannot proceed with his claim for false arrest.

C. Plaintiff is Collaterally Estopped From Challenging the Same Issues Adjudicated During His Immigration Proceedings

Plaintiff is also collaterally estopped from using this lawsuit to challenge his arrest because a court has already ruled that he violated immigration law by overstaying his authorized time in the country. "The 'fundamental notion' of the doctrine of collateral estoppel, or issue preclusion, 'is that an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies.'" *Ali v. Mukasey*, 529 F.3d 478, 489 (2d Cir. 2008) (quoting *United States v. Alcan Aluminum Corp*., 990 F.2d 711, 718-19 (2d Cir. 1993)). "This doctrine has long been recognized to apply in immigration proceedings" and requires: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits. *See id.* All four elements are satisfied here.

First, the issue of whether Plaintiff was removable was raised in the previous immigration proceedings. Plaintiff's immigration attorney raised the exact same argument that is now before this Court: whether the regulation providing work authorization also immunized Plaintiff from arrest. *See* Ex. 14 ¶¶ 37-39. Second, the issue of Plaintiff's removability was actually litigated and decided, as the Immigration Judge heard arguments on the issue and ruled that Plaintiff was in fact removable for overstaying his period of admission. *See id.* ¶¶ 37-39, 51; Ex. 40 at 5-11; Ex. 10 at 62; Ex. 42; Ex. 31. Third, Plaintiff had a full and fair opportunity to challenge the issue, as he has admitted that "in his immigration proceedings, [he] "had a legal right to contest the government's allegation that he remained in the country illegally" but instead consented to voluntary departure. Ex. 14 ¶¶48-49. Finally, the resolution of Plaintiff's immigration status was

necessary to grant him the relief of voluntary departure, which is available only to aliens who concede they have violated immigration law. *See* 8 U.S.C. § 1229c(a); 8 C.F.R. § 1240.26(b)(1)(i)(C).

The prior ruling that Plaintiff was in the country illegally is no less preclusive because the removal proceedings ended with Plaintiff being granted voluntary departure. An alien's agreement to accept voluntary departure is "akin to a plea bargain," *Landin-Zavala v. Gonzales*, 488 F.3d 1150 (9th Cir. 2007), and "[i]t is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case," *United States v. Podell*, 572 F.2d 31, 35 (2d Cir.1978). Just like a guilty plea, voluntary departure involves a confession of guilt and a waiver of one's right to challenge the government's evidence against him. *See* 8 C.F.R. § 1240.26(b)(1)(i) (allowing an immigration judge to grant voluntary departure only if the alien concedes removability and waives appeal of all issues). *See LaMagna v. United States*, 646 F.2d 775, 778 (2d Cir. 1981) (a guilty plea is "an admission of all the elements of a formal criminal charge" and is "as conclusive as a jury verdict"). Therefore, under the doctrine of collateral estoppel, Plaintiff may not challenge the prior ruling that he violated immigration law by overstaying his authorized time in the country, which effectively precludes his false arrest claim.

II. Plaintiff Cannot Establish a Claim for Abuse of Process Because His 42-Day Detention Fell Within the Timeframe Reasonably Needed to Effectuate His Departure

Previously, the Court dismissed Plaintiff's abuse of process claim as to his arrest and initial detention, but found that it did survive the United States' Motion to Dismiss "insofar as it is based on his post-voluntary-departure detention" because Plaintiff alleged that this period of detention was "without any legitimate immigration purpose." 579 F.Supp.2d at 278. *See also id.*

at 270 n.20 ("El Badrawi's detention probably would not have been constitutionally problematic if the government had detained him for only a period of time reasonably necessary to effectuate his voluntary departure order"). However, discovery has now demonstrated that there is no evidence that immigration officials used the detention process for illegitimate purposes. To the contrary, the evidence is now incontrovertible that a 42-day detention is well within the timeframe reasonably needed to process aliens for removal.

The "gist" of the tort of "abuse of process is the improper use of process after it is regularly issued." *Cook v. Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994) (internal quotation marks, citation, and alteration omitted). "The gravamen of th[e] tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends." *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994). "Abuse of process requires more than simply improper motive. There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question." *Lodges 743 & 1746, In'l Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 465 (2d Cir. 1975) (applying Connecticut law). As the Connecticut Supreme Court has explained:

> An action for abuse of process lies against any person using "a legal process against another in an improper manner or to accomplish a purpose for which it was not designed." Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of "a legal process ... against another *primarily* to accomplish a purpose for which it is not designed. ..." (Emphasis added.) Comment b to § 682 explains that the addition of "primarily" is meant to exclude liability "when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant."

Mozzochi v. Beck, 204 Conn. 490, 529 A.2d 171, 173 (1987) (internal citations omitted).

Examples of abuse of process typically include: "(i) using the pleadings as leverage to coerce the payment of a debt or surrendering of property unrelated to the litigation (ii) using unreasonable force, excessive attachment or extortionate methods to enforce a right of action; or (iii) using the process to gain a collateral advantage extraneous to the merits, *e.g.*, improper use of a subpoena." *Doctor's Assocs. v. Weible*, 92 F.3d 108, 114 (2d Cir. 1996) (internal citations omitted) (applying Connecticut law). In this case, there is no allegation or evidence that anyone used excessive force on Plaintiff or that anyone tried to extort anything from him. To the contrary, the evidence shows that ICE officials did exactly what they were supposed to do in carrying out the standard removal process. Under these circumstances, Plaintiff cannot meet his burden to show an abuse of process in this case.

A. The Standard Removal Process Involves Detailed Logistics and Considered Deliberations Among Federal and Foreign Officials

The immigration policy of the United States is inextricably intertwined with complex and important issues of foreign policy and national security. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.") As this Court previously recognized, "the executive's decision regarding when and how to send a foreign national to a foreign country plainly implicates our country's relationship with both the alien's home country and any potential foreign destination." *El Badrawi*, 579 F.Supp.2d 249 at 263. *See also Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (noting that decisions related to immigration "may implicate our relations with foreign powers").

Not only does the removal process implicate foreign relations, but domestic security as well, as the United States maintains a strong interest in ensuring that it does not release an alien

who has committed or intends to commit harm to our country. Accordingly, following the 9-11 attacks, ICE established a new process called a Third Agency Check to ensure that aliens with terrorist ties were not unknowingly removed to foreign countries. *See* Ex. 48; Ex. 13 at 124-125. For aliens subject to this process, ICE Headquarters conducts a search of classified intelligence to determine if there is any information of national security significance concerning the alien and whether any other federal agency wanted to take custody of the alien before he or she was removed.[4] *See* Ex. 13 at 13-14, 17, 19-20, 63. In 2004, when an alien was required to undergo a Third Agency Check, ICE policy prohibited the removal of the alien until the process was complete, even if the alien's immigration proceedings had concluded and the alien was otherwise ready for departure. *See* Ex. 48 at US00036 ("no alien from a SDC [specially designated country] will be released removed or transferred to another agency without the check being conducted"); Ex. 13 at 19-21, 166-67. This process normally took two weeks, but sometimes longer. *See* Ex. 13 at 19-21, 166-67; Ex. 11 at 22.

The Third Agency Check was only the first of many steps that were part of the standard process for aliens departing to Lebanon in 2004: second, the ICE field office ensured that the alien had a valid travel document which would be accepted by the Lebanese government; third, the ICE field office made any necessary travel arrangements; fourth, the ICE field office notified ICE Headquarters of the removal and the alien's travel plans; fifth, ICE Headquarters reviewed the information from the field and, if the information is complete, prepared and sent a cable to the State Department regarding the alien's removal and travel plans; sixth, the State Department

[4] Although a Third Agency Check was required for Plaintiff, ICE was unable to locate records indicating that such a check was done. *See* Ex. 13 at 99-101. There are a number of potential explanations for a lack of such records ranging from data loss during the implementation of a new computer system to a failure to initiate the check. *Id*. at 103-05, 111-12, 165-66.

notified the transit country, usually Italy in 2004, that the alien being removed had a connecting flight in that country (no direct flights to Lebanon existed in 2004); seventh, the United States Embassy in Beirut notified the Lebanese government of the alien's removal; eighth, the Lebanese government completed an internal inquiry and notified the State Department whether the particular alien was cleared to be removed there; ninth, the State Department notified ICE that the alien had been cleared for removal; tenth, ICE Headquarters and the ICE office in Frankfurt, Germany, coordinated compliance with requirements of transit countries and/or commercial airlines; and eleventh, the ICE field office made arrangements to have one of its officers transport the alien to the nearest airport. *See* Ex. 5 ¶ 13.

Foreign governments such as Lebanon do not differentiate between a final order of removal and an order granting voluntary departure under safeguards, and the above procedures applied to all detained aliens in ICE custody awaiting removal in 2004. *See id.* ¶¶ 4, 8. Moreover, although the Lebanese government required a minimum of ten business days notice before they would allow the United States to remove an alien there in 2004, Lebanese officials generally took closer to thirty days to issue the required permission. *See id.* ¶ 11; Ex. 49 at US00013; Ex. 50. If Lebanon did not grant permission for the United States to remove an alien there, then the alien's travel plans had to be cancelled or rescheduled. *See* Ex. 5 ¶ 12.

According to the director of the ICE Headquarters office that coordinated aliens' removals in 2004, a 42-day period from the time an alien is granted voluntary departure under safeguards to the date of departure was "well within the timeframe reasonably needed to effect such orders." *Id.* ¶ 13. *See also* Ex. 13 at 163-64 (noting that forty days "is pretty low for somebody to be returned to Lebanon"). Likewise, the supervisory agent at the ICE Hartford office who coordinated Plaintiff's removal also testified that forty-two days was not an unusual

amount of time in a case involving a Third Agency Check, and that removals in general averaged between one and three months in Hartford. *See* Ex. 11 at 21-22, 45, 49.

Even Plaintiff's immigration attorney, Mr. Anastasi, stated that in his over twenty years of immigration practice experience, it normally took twenty to forty days for an alien granted voluntary departure under safeguards to leave the country. *See* Ex. 1 at 8-9, 55-56. Mr. Anastasi explained that a number of factors outside the control of ICE made it impossible to determine how long it would take to effect a particular removal. *See id.* at 53-54. In addition, Mr. Anastasi testified that he did not have any reason to believe that anyone from ICE intentionally delayed the departure of his client. *See id*. at 57-58. Absent a showing that Plaintiff was treated any differently than was to be expected in the standard removal process, he cannot proceed with his claim. *See Mozzochi*, 529 A.2d at 174 (rejecting a claim for abuse of process involving vexatious litigation because the complaint did not distinguish how the defendants did anything other than to be expected in litigation).

B. Determining Whether an Alien is a Threat to the United States or Its Interests is a Legitimate Immigration Purpose

Even though it is not genuinely disputed that a 42-day detention falls within the timeframe reasonably needed to effect removals to Lebanon in 2004, Plaintiff appears to argue that he may nonetheless proceed with his claim for abuse of process because any national security investigation of him during this period would not constitute a legitimate immigration purpose. But full information about an alien is critical for coordination with the law enforcement and security services in the country of removal before removing the alien. *See* Ex. 5 ¶ 10. For example, releasing aliens with criminal or terrorist connections into another country without providing adequate warning to the appropriate officials in the receiving country could have

adverse consequences for the security of that country, which can lead to the souring of diplomatic relationships or other negative impact on foreign policy. *See id.*

Releasing aliens from the United States with suspected connections to terrorism could also profoundly impact our own national security. *See* Ex. 13 at 124-25. If enough information is developed concerning an alien, the United States may take a different course of action, such as criminal prosecution. *See id.* at 17-18, 63-64, 131. Indeed, the law allows the departure of an alien to be blocked when it would be deemed prejudicial to national security interests, such as if the alien has ties to terrorist organizations. *See* 8 C.F.R. §§ 215.2 and 215.3(b), (c). *See also* 8 U.S.C. § 1231(b)(2)(C)(iv) (allowing the government to refuse an alien's request to be removed to a particular country if the removal would be "prejudicial to the United States").

In part to allow sufficient time for any necessary investigation, Congress has provided ninety days to remove aliens. *See* 8 U.S.C. 1231 (a)(1)(A) ("Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days"). Although Plaintiff was granted voluntary departure, the 90-day law affects aliens in the exact same position as him—those who have been found removable by an immigration judge and must leave the country. *Cf. Thapa v. Gonzales*, 460 F.3d 323, 333-34 (2d Cir. 2006) (holding that a voluntary departure that contains an alternate order of removal is considered a 'final order of removal,' under the Immigration and Nationality Act's jurisdictional provisions). *See also Shehata v. Ashcroft*, No. 02-cv 2490, 2002 WL 538845 at *2 (S.D.N.Y. April 11, 2002) ("the 90 day period is quite limited in time, and serves a rational purpose, to allow INS to effect removal of a person already determined to be removable.")

In a case with similar facts, the plaintiffs, one of whom had been detained nearly four months after being granted voluntary departure, alleged due process violations claiming that the

government intentionally delayed their removal to investigate their ties to terrorism. *See Turkmen v. Ashcroft*, No. 02cv2307, 2006 WL 1662663, *39 (E.D.N.Y. June 14, 2006), *aff'd, rev'd on other grounds*, 589 F.3d 542 (2d Cir. 2009) (per curium). The district court rejected the plaintiffs' contentions that they should have been removed "as soon as they deemed it practicable (possibly only a matter of weeks after a removal order has issued according to plaintiffs)." *Id.*

> Such claims would significantly encroach on the executive branch in a realm where it has particular expertise, since it would require courts to decide what is necessary to effectuate an alien's removal and whether the government's efforts to secure removal have been sufficient. Such extraordinary judicial oversight would be entirely at odds with the Court's reasoning in *Zadvydas*, which demonstrated significant deference to the executive in recognizing the presumptively reasonable six-month period. *See Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001).
>
> Further, the plaintiffs' claims assume that all that is required for the Attorney General to secure removal is a deportation order and an airplane. This assumption ignores legitimate foreign policy considerations and significant administrative burdens involved in enforcing immigration law in general, and, specifically, those concerns immediately following a terrorist attack perpetrated on the United States by noncitizens, some of whom had violated the terms of their visas at the time of the attack.

2006 WL 1662663 *39.

The Second Circuit agreed with the district court that there was "no authority clearly establishing a due process right to immediate or prompt removal (following an order of removal or voluntary departure)." *Turkmen v. Ashcroft*, 589 F.3d 542, 550 (2d Cir. 2009). The Second Circuit affirmed the dismissal of the aliens' claims including those of the alien who had been detained for nearly four months after being granted voluntary departure: "Because plaintiffs were thus lawfully detained as aliens subject to orders of removal (or voluntary departure), they could not state a claim for unconstitutionally prolonged detention without pleading facts plausibly showing 'no significant likelihood of removal in the reasonably foreseeable future.'" *Id*. quoting *Wang v. Ashcroft*, 320 F.3d 130, 146 (2d Cir. 2003).

Although *Turkmen* involved constitutional torts as opposed to abuse of process, neither the district court nor the Second Circuit found an investigation of potential terrorist connections to be inappropriate after an alien is granted voluntary departure. To the contrary, the courts recognized that a national security-related investigation is a legitimate and established part of the removal process. *See* 2006 WL 1662663 at *39 and *41; 589 F.3d at 542. It necessarily follows that Plaintiff cannot, as a matter of law, show that a shorter delay, for comparable reasons, was illegitimate so as to amount to an abuse of process.

In any event, the only evidence that Plaintiff was being investigated after he was granted voluntary departure is the research done by ICE's Cyber Crime Center, which began shortly after Plaintiff's arrest and concluded on December 3, 2004. *See* Ex. 12 at 11, 33-34, 65; Ex. 37; Ex. 38. This research was conducted to determine if Plaintiff used the Internet in ways that would violate federal export laws relating to national security. Ex. 12 at 33-34. This research had no effect on length or the timing of Plaintiff's detention, as the Cyber Crime Center conducted its research independently of the removal proceedings and could continue its work even after aliens had departed the country. *See id.* at 11, 33-34, 64, 86-89; Ex. 7 at 43, 58, 102, 104-06, 153 ("C3 [the Cyber Crime Center] has no influence over arrest, release, detention, length of detention"); Ex. 11 at 29-30, 49-50. But even if Plaintiff could show that his departure was delayed by this or any other investigation, he cannot succeed on his abuse of process claim because, as explained above, investigation is a critical part of the removal process.

C. Plaintiff Cannot Meet His Burden of Proving an Abuse of the Standard Removal Process

As the Connecticut Supreme Court has explained, "the most frequent form of such abuse [of process by police officers] is by working upon the fears of the person under arrest, for the purpose of extorting money or other property, or of compelling him to sign some paper, to give

up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution." *McGann v. Alle*n, 134 A. 810 , 814 (Conn. 1926) (allowing a claim for abuse of process to proceed against police officers who allowed a store owner to detain an arrestee who allegedly received stolen goods). By contrast, the evidence in Plaintiff's case simply does not support the essential inference of collateral purpose necessary to prove his abuse of process claim. Rather, the evidence shows that that Plaintiff's detention furthered legitimate immigration purposes, followed standard removal procedures, and was authorized by an immigration judge.

Just five days after his arrest, Plaintiff appeared before an Immigration Judge, represented by counsel, and requested bond. *See* Ex. 39; Ex. 10 at 15, 25, 51, 61; Ex. 1 at 18. The Immigration Judge, however, learned that Plaintiff's visa had been revoked on national security grounds and declined to release him. *See* Ex. 10 at 63; Ex. 14 ¶ 42. Moreover, when the Immigration Judge granted Plaintiff voluntary departure, the Judge specified that it was to be "under safeguards," meaning that plaintiff's detention would continue until ICE escorted him out of the country. Ex. 14 ¶¶ 45-48; Ex. 41 at 2; Ex. 1 at 40, 44; Ex. 10 at 69-72; Ex. 11 at 34. *See also Matter of M.A.S.*, 24 I. & N. Dec. 766 (B.I.A. 2009) ("the term 'voluntary departure with safeguards' is commonly used to characterize the requirement that an alien remain in custody until he or she departs from the United States"). Thus, Plaintiff's post-voluntary departure detention resulted not from an arbitrary action of a law enforcement officer, but from the considered judgment of an immigration judge.

Although the Immigration Judge stated that Plaintiff was to depart within thirty days of the order, the court also recognized that legal obstacles may prevent the United States from removing him that quickly. *See* Ex. 42. In fact, the court allowed up to ninety days for ICE to determine whether Plaintiff could be removed to his country of choice, Lebanon, or whether

Plaintiff would instead be removed to Egypt, which Plaintiff specified in court as his alternate country. *See* Ex. 42; Ex. 10 at 107-08; Ex. 41. In addition, the removal process for Plaintiff likely did not begin until the week after he was granted voluntary departure, as the ICE Counsel's Office routinely took between three days and one week to transfer an alien's file to ICE's Detention and Removal Office.[5] *See* Ex. 10 at 111-112, Ex. 11 at 48-49. In addition, Veterans Day fell on November 11th, the day after Plaintiff was granted voluntary departure.

As Judge Gleason indicated in *Turkmen*, the assumption that all that is required "to secure removal is a deportation order and an airplane . . . ignores legitimate foreign policy considerations and significant administrative burdens." 2006 WL 1662663 *39. Plaintiff was one of over 200,000 aliens formally removed from the United States in 2004, and ICE's ability to remove him and others was limited both by the agency's internal resources and external constraints. *See* Ex. 5 ¶ 13. *Cf. Rajah*, 544 F.3d at 447 ("The enforcement of immigration laws is subject to significant resource constraints"). In fact, nearly a dozen steps needed to occur before Plaintiff could be placed on a flight to Lebanon, including verifying travel documents, making

[5] After the Immigration Judge granted Plaintiff voluntary departure under safeguards, ICE trial attorney John Marley contacted an attorney at U.S. Citizenship and Immigration Services to let that attorney know that there was no longer a need to adjudicate the pending request for an extension of Plaintiff's stay because Plaintiff had been granted voluntary departure and that "once he departs the US (next week)" there will no longer be any visa to extend. Ex. 43. As Attorney Marley subsequently explained, he did not believe Plaintiff would actually depart the country in one week, and he likely meant only to convey that the removal process would begin the following week. *See* Ex. 10 at 92-95, 98-99, 111-112. In any event, as discussed above, the evidence is clear that a departure within one week would have been impossible because the single step of obtaining clearance from Lebanon alone required at least ten business days. *See* Ex. 5 ¶ 11. Similarly, the District Court in *Turkmen* found no cause of action for a plaintiff allegedly held to investigate terrorist activities for almost four months after he received his voluntary departure order, despite allegations that that immigration judge "assured" the plaintiff that he would be allowed to depart the United States "within a matter of days." 2006 WL 1662663 *15.

travel reservations, notifying the State Department, coordinating with the commercial airline, and determining whether Lebanon would accept Plaintiff. *See* Ex. 5 ¶ 13.

Although the government has been unable to locate records to document every step taken to effect Plaintiff's departure, the government has presented undisputed facts as to what the standard process is, and it may thus be inferred that the process was followed in this case. *See* Fed. R. Evid. 406 (evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice). According to documents that have been located, on November 20, 2004, ten days after being granted voluntary departure under safeguards, the ICE Hartford Detention and Removal Office prepared a standard notice informing Plaintiff that he was required to depart the country under safeguards within thirty days of the Immigration Judge's order. *See* Ex. 44. A few days later, on November 23, 2004, Plaintiff's employer sent an update to his colleagues stating, "FYI, Rashad is still in Hartford. DHS says that he needs different clearances from various agencies before they can send him home including clearance from his home gvt." Ex. 54.

After the Thanksgiving holiday, on December 6, 2004, ICE's travel agency issued a flight itinerary for Plaintiff, booking him on a commercial airline flight departing on December 22, 2004, from New York to Beirut through Milan, Italy. *See* Ex. 45. Also on December 6th, ICE Headquarters sent a cable regarding Plaintiff's removal to the American Embassy in Beirut, the American Consulate in Milan, and the American Consulate in Frankfurt. *See* Ex. 46; *see also* Ex. 5 ¶ 15. Pursuant to ICE policies and procedures, cables like this one are sent to the American Embassy in Beirut because the Regional Security Office there (referred to as "RSO" in the dissemination line) was responsible for notifying the Lebanese government of an alien's removal. *See* Ex. 5 ¶ 15. Also pursuant to ICE policies and procedures, cables like this one are

sent to the American consulate in Milan because the Italian government must also be notified when ICE is removing a Lebanese national through Italy. *See id.* Finally, pursuant to ICE policies and procedures, cables like this are sent to the American Consulate in Frankfurt because ICE maintains an office there, and that office reviews pending removals to ensure compliance with country and airline requirements. *See id.*

For unknown reasons, the December 6th cable listed a flight itinerary for Plaintiff that was different than the flight itinerary issued by ICE's travel agency that same day. *See* Exs. 45, 46. Instead of departing on December 22nd, as the travel itinerary stated, the cable stated that Plaintiff would be departing on December 13, 2004. The information in the cable may simply have been a mistake, as ICE's travel agency only has one record of a flight itinerary for Plaintiff, or it is possible that ICE needed additional time to remove Plaintiff, as flights were routinely changed due to a variety of reasons, including officer availability, lack of third agency check clearance, or initial refusal of Lebanon to accept Plaintiff on that date. *See* Ex. 11 at 27-8. Ex. 5 ¶¶ 6, 7, 9, 12, 16. In any event, the day after ICE issued the cable, ICE issued a second cable cancelling the notice provided in the first one, *see* Ex. 47, and Plaintiff departed the country on December 22, 2004, when ICE agents escorted him to JFK International Airport, *see* Ex. 14 ¶¶ 56-57.

Overall, Plaintiff was detained for forty-two days from the time he was granted voluntary departure until the time he departed the country, less than half of the time provided by Congress to effect removal orders. *See* 8 U.S.C. 1231 (a)(1)(A). The 42-day period also is consistent with the Supreme Court's ruling that a detention of up to six-months is presumed to be "reasonably necessary to effect removal." *Zadvydas*, 533 U.S. at 699. The rationale for this six-month period is to further "uniform administration in the federal courts," to provide the Executive with

"necessary . . . leeway," and "to limit the occasions when courts" may intrude into the Executive's core functions of administering the immigration laws and conducting the nation's foreign policy. *Id.* at 700-01. Thus, the Supreme Court held that only *after* this six-month period must the government be prepared to justify the detention by showing that the alien is likely to be removed in the reasonably foreseeable future. *See id.* at 701; *See also Wang*, 320 F.3d at 146. Although *Zadvydas* involved detained aliens subject to final removal orders, the Second Circuit recently applied this six-month "presumption of reasonableness" to an alien granted voluntary departure under safeguards who was detained nearly four months. *See Turkmen*, 589 F.3d at 548.

At the pleading stage, this Court concluded the *Zadvydas* six-month presumption was inapplicable in part because Plaintiff pled that his detention was unsupported by evidence that he posed a danger to the community or a flight risk. *El Badrawi*, 579 F.Supp.2d at 270. Now, however, the evidence shows that immigration officials had to treat plaintiff as both a potential danger to the community and a risk to flee. At the time Plaintiff was granted voluntary departure, [redacted] Ex. 15 ¶ 28; Ex. 3 at 203, 208, 242 [redacted] Ex. 8 at 169-70. In addition, the State Department had revoked Plaintiff's visa on national security grounds, and an immigration judge found that he violated the law and ordered him to depart the country. Therefore, Plaintiff's detention was not arbitrary and the *Zadvydas* presumption should apply.

In sum, just like with his arrest, Plaintiff's true grievance regarding his detention appears to be with the immigration system itself, not with tortious acts of individual federal employees. But again, the Federal Tort Claims Act is not the appropriate vehicle to challenge immigration policy. Although Plaintiff's detention may have lasted much longer than he anticipated, he cannot proceed on his claim for abuse of process because he cannot show that the removal process used in his case was any different than that applied to any other similarly situated alien. Even Plaintiff's own immigration attorney testified that he had no reason to believe that anyone at ICE intentionally delayed the departure of his client, noting that removals usually take between twenty to forty days. *See* Ex. 1 at 55-56, 57-58. Given these facts, Plaintiff cannot meet his burden to show that he was detained for a collateral purpose unrelated to his removal, and he thus cannot proceed with his claim for abuse of process.

CONCLUSION

For the reasons stated above, this Court should grant summary judgment to the United States.

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Certificate of Service

I hereby certify that on August 30, 2010, a redacted copy of this Memorandum of Law was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System. An unredacted copy of this memorandum was electronically sent to all counsel of record and all exhibits were sent to counsel via FedEx.

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