UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES D. SANDERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 00-CV-00652 (WBB)
UNITED STATES, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS & AUTHORITIES IN
SUPPORT OF TRANSFER OF VENUE AND IN OPPOSITION
TO DEFENDANTS' ALTERNATIVE MOTION TO DISMISS

1. VENUE

Defendants have submitted a Motion and Memorandum of Points and Authorities ("motion") in support of their alternative request that venue be transferred in this case to the Eastern District of New York. For the reasons set forth below, plaintiffs join in the relief requested by the defendants that the case be transferred.

In the event that the Court grants that request at the outset, plaintiffs' opposition to the defendants alternative motion to dismiss, may be of little or no relevance to any issue then pending before this Court. However, in the event that the Court denies the joint motion of the defendants and the plaintiffs to transfer venue, plaintiffs respectfully request that the Court consider the merits of the arguments set forth by the plaintiffs in their opposition to the motion to dismiss.

At the time that the complaint was filed, the plaintiffs believed that at least one federal officer defendant would be a resident of the District of Columbia; the plaintiffs

continue to believe that that may be the case. In that event, venue for the official actions of the defendants would lie under 28 U.S.C. § 1391(e)(1). Under that provision:

> A civil Action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides…

Therefore, damages caused by the actions of all of the defendants, in their official capacities, could properly be brought in any judicial district where any one defendant resided. However, the plaintiffs have been unable to ascertain the address of a certain federal officer who is a defendant in this case and, due to that deficiency and the fact that various John Doe potential defendants have not as yet been identified, plaintiffs agree with the defendants that, under the present circumstances, venue now would be properly placed under 28 U.S.C. § 1391(b).

Under section 1391(b), because not all of the defendants reside in the same state, venue would have to arise in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred…" 28 U.S.C. § 1391(b)(2). Under this section, the plaintiffs concede that venue should be placed in the Eastern District of New York, where the federal actions underlying the Bivens' claims occurred. The plaintiffs, therefore, join in the defendants' motion to transfer venue to that jurisdiction for these constitutional claims.

2. BACKGROUND, CONSPIRACY

A. The Disaster

On July 17, 1996, hours before the disaster, the military activated a National Defense Operating Area zone ("Military Zone") south and east of Long Island, to warn

disaster,[2] and multiple radar facilities recorded the missile's having caused Flight 800's crash. The radar data also points to a surface ship as having been the source of the missile.[3]

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[2] Id. ¶ 33: At approximately 8:31 p.m., numerous military personnel and hundreds of civilian witnesses forming a 360-degree circle around TWA Flight 800 reported seeing an object consistent with a missile streaking into the sky and a fiery blaze falling into the ocean. These witnesses, in boats, on the ground, and in the air, include:

(a) Senior Navy NCO Dwight Brumley… aboard U.S. Air Flight 217 at 20,000 feet headed north toward Long Island, saw from a window… what appeared to be a missile rising into the air… traveling at a much higher rate of speed. The missile… streaked northward past his airplane and, about ten seconds later… explo[ded].

(b) Major Fred Meyer and Captain Christian Bauer… in a helicopter … observed a streak of light followed by a series of explosions as TWA Flight 800 began its terminal descent;

(c) Paul Angelides… observed a flare-like object accelerate to… mach 3 plus… headed in a south-southwest direct for about ten-miles, whereupon… series of explosive events… shook the house… consistent with a missile…

(d) William Gallagher… trawling… eight to ten miles west of TWA Flight 800... observed… [t]his object "corkscrewed upward," and, in a last second corrected course before slamming into the right side of TWA Flight 800.

(e) A cluster of witnesses about one mile from Angelides' location saw the same object… [and] a series of explosive events on the horizon.

Id. ¶ 27-28: Hundreds of eyewitnesses saw a streak of light, consistent with a missile, moments before Flight 800 crashed. Several of these witnesses saw the missile and plane separately and later recounted the mid-air break up in detail -- reporting that the front section of the aircraft fell away from the main fuselage and wings. Witnesses surrounding the tragedy described the streak of light as ascending at a high rate of speed. Of the 102 eyewitnesses who reported to the FBI the origin of the streak of light, 96, according to the FBI, said that it rose from the surface. (The FBI still withholds over 95% of the field notes of its witness interviews.)

[3] Id. ¶ 29: The FAA's radar:

(a) Reveals the presence of a surface ship in the same area as where witnesses heard and saw a missile launch;

(b) May have captured a missile in its early stage of flight, in the immediate area of a ship, less than twenty seconds before a missile impacted Flight 800 -- coinciding with the precise time required to launch and impact Flight 800, ten miles away;

(c) Shows over 30 surface targets moving in an organized fashion into zone W-105;

(d) Saw multiple 300-plus knot blips, without transponders, before and after the 747 crashed; and

(e) Reflects debris being blasted from Flight 800 at Mach 2 (over 1,200 mph).

B. Background & Summary

Because neither of plaintiffs' convictions nor sentences (probation) can be within the scope of this suit, they do not seek damages for their convictions of 49 U.S.C. §1155(b), receiving material from a crash scene.[4] This litigation regards the manner in which the process unfolded.

Actionable conduct done in furtherance of successful or unsuccessful prosecutions is treated equally, with specific exceptions, none of which are present here.

Defendants deny illegality and any transgression of plaintiffs' constitutional or statutory rights, assert immunity, claim preclusion, want of personal jurisdiction, and ask to transfer venue.

As set forth in this response, the law is to the contrary. Defendants several times crossed the line between lawful and unlawful conduct, litigation of actionable wrongful conduct is not precluded, defendants are not immune from their conduct, and this Court has valid personal jurisdiction.

The genesis of the government's intrusion into plaintiffs' lives was the publication of the March 10, 1997, edition of the Riverside, California Press-Enterprise newspaper. Its headline, *New Data Show Missile May Have Nailed TWA 800*, subtitled, *Debris Pattern Provides Key To Mystery*, includes this map.

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[4] In reviewing the convictions, the Second Circuit held that constitutional protections recognized by that circuit protecting journalists from being compelled to reveal their sources did not reach prosecutors' actions in using their discretion only of whom to prosecute. U.S. V. Sanders, 211 F.3d 711, 719 (2nd Cir. 2000).

OVERVIEW OF MILITARY ZONES IN WATERS ALONG THE INITIAL FLIGHT PATH OF TWA FLIGHT 800.

Defendants' conduct falls squarely under the protections afforded by the Privacy Protection Act of 1980, 42 U.S.C. § 2000 et seq. (PPA), or constitutes violations of the First, Fourth, and Fifth Amendment to the United States Constitution.

Defendants wrongfully denied plaintiff his journalist status to try and circumvent the PPA's statutory scheme, including its mandatory regulations appearing in the C.F.R., laws designed to implement society's paramount interest in safeguarding a journalist's work product. Here, all seizures violated the PPA and those utilizing grand jury subpoenas violated the PPA's corresponding C.F.R.

Defendants' denial that James Sanders, identified in the above-the-fold front-page news article as an "investigative journalist," was in fact a journalist, is integral to this case, for several reasons, including the unavailability of any qualified immunity defense in PPA actions.

All of the thirteen sets of facts alleged listed below inculpate defendants in meritorious claims involving constitutional violations. Transgressions of published, mandatory guidelines bear on the qualified immunity's "objectively reasonable" standard and may be considered as evidence of whether constitutional violations in fact occurred. In the majority of instances here, wrongful conduct was in violation of laws and guidelines. (Harlow v. Fitzgerald's[5] admonition to terminate early "insubstantial" Bivens claims refers to, among other things, cases where a qualified immunity defense is available.)

The well-settled law of civil conspiracy holds all defendants vicariously liable: The constitutional and statutory violations alleged "could reasonably be foreseen as necessary or natural consequences" of the defendants' overall conspiracy to cover up the true cause of the crash. (Defendants' Federal Tort Claims Act arguments have nothing to do with this law of civil conspiracy – which holds defendants vicariously liable, but is not an independently actionable tort). Defendants' motion twice quotes its attachment D, a 28-page memorandum order in another case brought in this Court. That opinion recognized the validity of plaintiff's claims based of conspiracy liability (but ruled it irrelevant ruling that there an insufficient showing of named defendants' participation in the conspiracy):

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[5] 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396.

> Plaintiff emphasizes that his theory against Agent Monroe is one of vicarious liability… plaintiff states [Monroe] "is vicariously liable only under the law of civil conspiracy"… That is, plaintiff alleges that Monroe is liable for the subsidiary conspiracy based on his involvement in the broader conspiracy to obstruct justice, and because the subsidiary conspiracy was foreseeable. As discussed, however, there is nothing in the record sufficient to support an inference that Monroe was party to any overarching agreement to obstruct justice.

Defendants here cannot successfully plead that they were not "part[ies] to any overarching agreement to obstruct justice" based on plaintiffs' complaint, particularly by way of Rule 12 (b) motion. (Defendants conclude their motion by using their attachment D in an effort to impugn plaintiffs' motives in litigating this case (an irrelevant inquiry) by calling them, and apparently counsel, a name – "conspiracy theorist."[6])

Plaintiffs respectfully ask the Court to read the instant motion so as to include an allegation not yet alleged in the complaint, exploratory searches[7] (actionable with or without a warrant[8]). Plaintiffs will seek leave to amend their complaint.

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6 Motion at 78: "Indeed, it is plain from the complaint that plaintiffs are merely seeking a legal launching pad from which Mr. Sanders can continue to "investigate," through civil discovery, his *conspiracy theories*… This Court has previously been very cautious about opposing counsel using this Court as a means to publicize the *conspiracy theories* of his clients. *See Knowlton*, slip op. at 24-25 (attached as Exh. D hereto)… opposing counsel concerning *conspiracy theories* regarding the death of Vince Foster… Sanders has already written two books… this Court should not permit him to use this suit to investigate further his *conspiracy theories*…

7 Plaintiffs respectfully ask that the Court read their complaint to include the following:

> Defendant's warrantless searches of plaintiff's computer and materials from Hollywood producer Neil Russell, and their subpoenaing of materials from Kensington Publishing Corporation constitute unreasonable exploratory searches.

8 United States v. Rabinowitz, 339 US 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).

Lastly, damages are presumed under the PPA, they are not an element of force cases, and plaintiffs' complaint alleges damages for all constitutional transgressions.

The ten defendants are the United States, eight individuals, and unknown individuals, "John Doe." The individual defendants are:

1. James T. Hall, *Chairman, NTSB*
2. Bernard Loeb, *NTSB Director of safety*
3. Dr. Merritt Birky, *NTSB head of Fire & explosion team*
4. James Kallstrom, *ADIC, FBI NY field office*
5. James Kinsley, *Agent, FBI NY field office*
6. Valerie Caproni, *DOJ Criminal Division*
7. Benton Campbell, *DOJ AUSA Criminal Division*
8. David Pitofsky, *DOJ AUSA Criminal Division*
9. John Doe

The complaint has four counts:

Count 1:	Violation of 42 U.S.C. § 2000 et seq., Privacy Protection Act of 1980
Count 2:	Violations of the First Amendment to the United States Constitution
	Violations of the Fourth Amendment to the United States Constitution
	Violations of the Fifth Amendment to the United States Constitution
Count 3:	Intentional Infliction of Emotional Distress
Count 4:	Civil Conspiracy

SUMMARY OF CONTENTS

1. VENUE. 1
2. BACKGROUND, CONSPIRACY. 2
3. ACTIONABLE CONDUCT. 19
4. ARGUMENT 31
   - I. Personal jurisdiction in this Court. 31
   - II. Plaintiffs state a valid civil conspiracy claim. 31
   - III. Plaintiffs state valid claims against the United States under the Privacy Protection Act, 42 U.S.C.§2000aa et seq. 43
   - IV. Plaintiffs state a cause of action for Bivens-type claims 58
   - V. Defendants are not entitled to qualified immunity 73
   - VI. None of plaintiff's claims are barred under *collateral estoppel* or Heck v. Humphrey. 76

TABLE OF CONTENTS

1. VENUE. 1

2. BACKGROUND, CONSPIRACY. 2
   A. The Disaster. 2
   B. Background & Summary. 5
   C. Overt acts in furtherance of the conspiracy – not involving plaintiffs – before the March 10, 1997 publication of the Press-Enterprise article. 13
   D. Plaintiff James Sanders' investigation into the cause of the disaster. 15
   E. Additional overt acts in furtherance of the conspiracy – – also not involving plaintiffs – beginning upon the March, 10, 1997. 17
   publication of the Press-Enterprise article 18
   F. Summary of issues. 18

3. ACTIONABLE CONDUCT. 19
   1. Warrantless seizure of computer. 20
   2. Warrantless search of computer. 20
   3. Warrantless search and seizure of work product from movie producer. 21
   4. Warrentless search of personnel files. 22
   5. Threatening indictment for refusal to divulge privileged information. 22
   6. Seeking interrogation despite requests to the contrary. 23
   7. "Perp walks" – unreasonable use of force and unreasonable invasion of privacy. 24
   8. Unreasonable use of force at arrest. 26
   9. Subpoena of work product from publisher. 26
   10. Subjective mischaracterization and defamatory statements in banner on web site. 27
   11. False allegations and impermissible statements in press release. . . 28
   12. FBI's false statements demanding that TWA terminate Elizabeth Sanders on pain of TWA's being excluded from the official Flight 800 probe. 29
   13. Material false statements in affidavit in support of arrest warrant. 30

4. ARGUMENT. 31
I. Personal jurisdiction in this Court. 31
II. Plaintiffs state a valid civil conspiracy claim. 33
   A. Whether a conspiracy exists in this case is a relevant inquiry. . . . 33
   B. Vicarious conspiracy liability generally. 34

V. Defendants are not entitled to qualified immunity. 73
A. Qualified immunity is unavailable under the PPA. 73
B. Qualified immunity is unavailable in this case for plaintiffs' Bivens claims. 73

VI. None of plaintiff's claims are barred under collateral estoppel or Heck v. Humphrey 76

Conclusion. 79

A-P-P-E-N-D-I-X A (Selected provisions):

- 42 U.S.C. § 2000aa et seq., Privacy Protection Act of 1980 (PPA)
- PPA Legislative History
- Code of Federal Regulations
- FBI *Legal Handbook for Special Agents*

This case involves fundamental rights. A journalist's newsgathering process of a highly controversial tragedy that led to criminal convictions warrant careful review to ensure that he there have not been deprivations of his civil rights under the PPA, or under the First, Fourth and Fifth Amendments to the United States Constitution; particularly where all actionable conduct would not have occurred but for a journalist's refusal to reveal a confidential news source. Plaintiffs allege that defendants either unlawfully circumnavigated or broke laws reflecting the paramount public interest in protecting individuals' fundamental rights guaranteed under our Bill of Rights.

49 U.S.C. § 1131(a)(2) et seq." (id. ¶ 41), which mandates the NTSB's having primary jurisdiction and be the controlling agency. James Kallstrom joined in Caproni's efforts to violate 49 U.S.C. § 1131(a)(2) et seq. (id. ¶¶ 46-47), including stating his intention to declare the disaster a crime, which would have given the FBI primary jurisdiction. But the FBI never declared the disaster a crime scene, and so the NTSB maintained primary jurisdiction throughout the four-year probe. (Before the March 10, 1997, publication of the Press-Enterprise, the government also began to receive cockpit voice recorder analysis evidencing a high order explosive event.[12])

D. Plaintiff James Sanders' investigation into the cause of the disaster

Shortly after the crash of TWA Flight 800, James Sanders began an independent investigation into the accident in order to "learn the truth of the downing of Flight 800." Id. ¶¶ 9, 89.

In the fall of 1996, James Sanders wife, plaintiff Elizabeth Sanders, spoke with a TWA coworker of hers, Captain Terrell Stacey, a pilot who had been assigned to the TWA Flight investigation, regarding her husband's crash investigation. Id. ¶ 85. Stacey knew James Sanders was an investigative journalist. Id. ¶ 89.

Subsequently, Captain Stacey told James Sanders of the FBI's undocumented removal of pieces of the aircraft, the FBI's failure to share the test results and other information with the NTSB, the failure to cumulatively review the evidence, the absence chain-of-custody records, the implausibility of the center-wing-tank explosion

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[12] Sound Spectrum experts told defendants that the cockpit voice recorder, properly analyzed, would reveal the initiating event, differentiating between a low order event (consistent with fuel-air mechanical), and a high order explosive event (consistent with missile fire.)

hypothesis, the FBI's establishment of the flight path of the missile, and inculpating remarks by a senior-level FAA official. Id. ¶ 90. In January of 1997, Stacey provided James Sanders with a 33-page computer printout listing material that was recovered from the crash (id. 91) and two pieces of seat-backing material from the pieces of containing

Id.

material), received from an unidentified individual inside the official NTSB crash investigation. Id. ¶ 108.

Defendants sought to learn from James Sanders who had given him the seat-backing material. Plaintiff refused, whereupon defendants' targeted both James and his wife Elizabeth, culminating in their being charged with removing property from a civil aircraft involved in an accident in violation of 49 U.S.C. § 1155(b), as well as conspiracy to commit that offense in violation of 18 U. S. C. § 371. Plaintiffs were convicted of those offenses in the summer of 1999. Id. ¶ 221.

E. Additional overt acts in furtherance of the conspiracy – *also not involving plaintiffs* – after the March, 10, 1997 Press-Enterprise

During this time, defendants committed many, many more wrongful acts in furtherance of the conspiracy to conceal the true case of the disaster.[14]

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[14] Compl.: Including removing the balance of the reddish-orange residue trail across the upper seatbacks (id. ¶¶ 111, 228(b)), disassembling the left wing to prevent important evidence from being photographed (id. ¶228(a)), removing seats eight and ten from rows 17 and 18 (id. ¶ 228(c)), altering the front spar as well as a significant portion of the span-wise beam number three (id. ¶ 228(d)), falsifying the description of the potable water bottle damage (id. ¶ 228(e)), significantly altering portions of the center-wing-tank and cabin interior (id. ¶ 228(h)), Loeb's falsely testifying before Congress that "a reddish-orange substance" was "on all of the seats in the airplane" and that it was "an adhesive" (id. ¶¶ 111-113), President Clinton's signing of an Executive Order removing Navy personnel assigned to the recovery mission, as well as personnel who monitored the Navy exercise, from the protections of the "Whistle Blower Protection Act" (id. ¶ 114), Kallstrom's falsely testifying before Congress that "Flight 800 was definitely not brought down by friendly fire" (id. ¶¶ 154-55), Hall's falsely testifying before Congress that "[t]here is no evidence of a bomb or a missile impact in the wreckage [b]ased on evaluation of the recovered wreckage and a detailed evaluation of the sequence of events," and that "we have determined that… the center-fuel-tank exploded and that the explosion of the tank initiated the breakup of the airplane" (id. ¶¶ 156-57), Kallstrom's giving false written statements to Congressman James Trafficant that defendants had not prohibited NTSB from participating in witness interviews or seeing witness statements (id. ¶ 166), ordering that the results of missile residue tests not be shared with NTSB investigators (id. ¶ 168), Kallstrom's late-1997 press conferences wherein he stated that "[t]he seat cushion residue, reported in the Riverside, California press… [is] contact adhesive… without any doubt whatsoever" (id. ¶¶ 170, 179), the FBI's public release and subsequent broadcasting of a CIA-produced video animation of the disaster positing that all witnesses were incorrect – containing at least four patent falsehoods (id. ¶ 171) as well as misrepresenting to NTSB investigators the basis for the video (id. ¶ 172), the FBI's reinterviewing of witnesses while trying to obtain admissions that their earlier accounts were incorrect (id. ¶ 173), Kallstrom's falsely reporting that the "blip" on FAA radar tapes was a Navy plane more than 7,000 feet from the disaster (and later changing his story it was "a commercial flight, not a missile") (id. ¶ 178), Kallstrom's writing Hall asking that the public hearings in Baltimore exclude the presentation of witnesses' statements or testimony (id. ¶ 181), Birky's falsely reporting in the NTSB's Fire & Explosion Team Factual Report that NASA Chemist Dr. Charles Bassett had tested the residue that James Sanders had obtained and determined it to be glue (id. ¶ 210), and Kallstrom's falsely reporting to the *Baltimore Sun* that his critics have "have seen none of the evidence."

Defendants:

1. James T. Hall, *Chairman, NTSB*
2. Bernard Loeb, *NTSB Director of safety*
3. Dr. Merritt Birky, *NTSB head of Fire & explosion team*
4. James Kallstrom, *ADIC, FBI NY field office*
5. James Kinsley, *Agent, FBI NY field office*
6. Valerie Caproni, *DOJ Criminal Division*
7. Benton Campbell, *DOJ AUSA Criminal Division*
8. David Pitofsky, *DOJ AUSA Criminal Division,* &
9. John Doe

3. ACTIONABLE CONDUCT

Below is a recitation of defendants' wrongful, actionable conduct, committed in furtherance of the conspiracy to cover up the true cause of the disaster, beginning with the March, 1997 publication of the Press-Enterprise article, as set forth in the complaint.

As plaintiffs have already pointed out, the individuals identified below as having participated in wrongful conduct (as principals in the first or second degree) are not the only defendants liable for the conduct alleged. Under the law of civil conspiracy, so long as the actionable wrongs were within the scope of the unlawful conspiracy to cover up the cause of the TWA Flight 800 disaster, all participants in that conspiracy are liable for acts that "could reasonably be foreseen as necessary or natural consequences" of the conspiracy.

For the violations of the PPA only the United States is liable.

1. Warrantless seizure of computer

Following the publication of the *Press-Enterprise* newspaper article, James Sanders spent approximately two weeks in Kansas City, Missouri, at Ms. Lee Taylor's apartment (id. ¶ 124), where he continued his journalistic endeavors by working on his manuscript exposing defendants' wrongdoing. Id. ¶ 125. When James Sanders moved out

of Taylor's apartment, he stored his computer and other personal items there, with the explicit understanding that he would retrieve them later. Id. ¶ 126. In September of 1997, FBI agents seized the computer at the direction of defendants Kinsley and Doe (id. ¶ 161), without a warrant, unlawfully. Id. ¶¶ 162-63.

2. Warrantless search of computer

In June of 1998, the FBI circumvented plaintiff's password protection and recovered (a) numerous word-processing documents, (b) fax documents, (c) deleted files, (d) e-mail correspondence, and (d) HTML files evidencing web browsing activity (id. ¶ 215), hundreds of pages of manuscript, confidential notes, correspondence, memoranda and other materials protected by the First Amendment and the PPA, including confidential correspondence with other journalists regarding ongoing journalistic investigations other than the downing of Flight 800 Id. ¶¶ 216-17.

Both the September 1997 seizure of the computer and the June 1998 search of its password-protected contents violated plaintiffs':

- Constitutional rights as guaranteed by the First Amendment (id. ¶¶ 164, 219);
- Legitimate expectation of privacy in his personal papers (id. ¶ 218) guaranteed under the Fourth Amendment (id. ¶¶ 164, 219);
- Rights to due process of law prior to seizure of property under the Fifth Amendment to the Constitution (id. ¶ 251); and
- Protections afforded by the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq. Id. ¶¶ 165, 220.

The *Legal Handbook for Special Agents* prohibits such a warrantless seizure and search.[15]

[15] See *Legal Handbook for Special Agents*, Section 4-54.2: "It is the policy of the FBI to obtain a search warrant before conducting a search for evidence."

3. Warrantless search and seizure of work product from movie producer

"In August 1997, defendants caused Hollywood movie producer Neil Russell to be visited and encouraged to decline to exercise his option with JAMES SANDERS to make a movie for *The Downing of TWA Flight 800*. Russell succumbed to defendants' pressure, and agreed." Id. ¶ 158. "Defendants' exercise of influence over Russell prevented plaintiff… from utilizing a significant vehicle for disseminating the truth of the disaster to the American people." Id. ¶ 159.

Plaintiffs believe that defendants illegally seized plaintiff's journalistic work product from Russell (id. ¶ 160) in violation of:

- Plaintiffs' reasonable expectation of privacy in his journalistic work product under the Fourth Amendment to the Constitution (id. ¶ 254(c));
- Plaintiffs' rights under the First Amendment to the Constitution (id. ¶ 251);
- Rights to due process of law prior to seizure of property under the Fifth Amendment to the Constitution; and
- Protections afforded by the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq. Id. ¶ 246(d).

The *Legal Handbook for Special Agents*, Section 5-11.2 reiterates the PPA's prohibition of seizing work product, including where the alleged criminal conduct is a "possessory offense" – where the only offense of which the possessor is suspected is the receipt, possession, communication, or withholding of the materials – as here.

4. Warrentless search of personnel files

Sometime prior to his December, 1997 appearance before the grand jury, Kinsley traveled to Seal Beach, California and reviewed plaintiff's personnel files generated during his ten-year tenure as a police officer at the Seal Beach, California, police department, in violation of state law. Id. ¶ 214. Kinsley's actions were in violation of:

- Plaintiffs' reasonable expectation of privacy in his confidential files under the Fourth Amendment to the Constitution; and

- In violation of Fifth Amendment guarantees to due process of law.

5. Threatening indictment for refusal to divulge privileged information

On April 14, 1997, defendants Campbell, Caproni and Kinsley[16] advised plaintiff that if he did not disclose his source he would find himself "on the wrong side of an indictment" (id. ¶ 137), and that they would treat plaintiff Elizabeth Sanders as a "target" and would indict her as well if neither she nor James Sanders revealed the identity of James Sanders' confidential source. Id. ¶ 138. Defendants announced their intention of declaring Elizabeth Sanders a "target" – before they learned the identity of the only individual who even remotely connected Elizabeth Sanders to the removal of the residue, Captain Terrell Stacey Id. ¶ 145. These three defendants were not informing Elizabeth of the options she faced as a result of a realistic assessment of incriminating evidence known to the government, but were rather engaged in a calculated effort to use the specter of indictment, notwithstanding the absence of any indication of culpability, solely as a means of pressuring plaintiffs to betray the identity of a confidential source. Id. ¶ 146. Defendants' ignored laws reflecting the paramount public interest of maintaining a vigorous, aggressive, and independent press capable of participating in robust, unfettered

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[16] See *Legal Handbook for Special Agents*, Section 7-5*: Interview of subject by US Attorney*, mandated that Kinsley produce an FD-302 report of this interview. He took notes, and defendants videotaped the meeting. Defendants withheld the notes, the corresponding 302, and the videotape, containing exculpatory evidence, throughout plaintiffs' criminal proceedings. (The *Legal Handbook for Special Agents*, Section 7-14*: Tape recording of interviews*, required that the videotape be treated as evidence and that documentation of chain-of-custody be maintained.)

debate over controversial matters. Id. ¶ 143. Their use of the threat of indictment as a means of compelling revelation of a journalist's confidential source was intended to:

- Serve the impermissible purposes of penalizing acts that are protected under the First Amendment (id. ¶ 139) and reflects defendant's malicious motive (id. ¶ 140); and

- Circumvent the procedural safeguards afforded by New York's "Shield Law," N.Y. Civ. Rights Law § 79-h(b), designed to protect the First Amendment rights associated with newsgathering. Id. ¶ 143.

6. Seeking interrogation despite requests to the contrary

Within hours of the article's March 10 publication, the FBI aggressively sought to interrogate Elizabeth Sanders, despite her having informed the agents that she did not want to speak with them. Id. ¶ 118. Notwithstanding plaintiffs' retained counsel having specifically advised defendant Campbell by telephone and letter on March 13, 1997, that counsel would receive communications on plaintiffs' behalf, and for the FBI to cease its attempts to contact Elizabeth Sanders (id. ¶ 119), defendant Kinsley interrogated Ms. Sanders' friends in Williamsburg and friends and coworkers at TWA to attempt to learn where she resided in St. Louis – and traveled to Norfolk to try and intercept Elizabeth Sanders as she returned there from St. Louis. Id. ¶ 120. To avoid further FBI harassment (conducted in violation of defendants' obligation to contact plaintiff only through counsel (id. ¶ 122)),[17] Elizabeth sought refuge where she could be free of the FBI's efforts to pursue her, requiring her to abandon her employment at TWA and to leave her home, husband, son, and friends. Id. ¶ 121. Defendants' eight-month persecution of Elizabeth

[17] Defendants continued to contact senior TWA management in New York and St. Louis, repeatedly demanding that plaintiff Elizabeth Sanders submit to FBI interrogation. This harassment forced plaintiff Elizabeth Sanders to take an extended leave of absence, from late March until December 17, 1997.

caused her extreme emotional distress and the onset of depression, which continues to the present day. Id. ¶ 122. Defendants' aggressive efforts to interrogate Elizabeth Sanders, despite her having informed the agents that she did not want to speak with them:

- Transgressed her legitimate demands to be left alone – in violation of her rights guaranteed under the Fourth Amendment.

7. "Perp walks" – unreasonable use of force and unreasonable invasion of privacy

Kinsley also rejected an FBI agent's request that plaintiffs be transported to court from an exit that would avoid the large media presence that had gathered outside the FBI's Melville, New York, field office. Instead, Kinsley paraded plaintiffs through the crowd of reporters and photographers who had been notified of the arrests by press releases (issued by defendants). This procedure is commonly referred to as a "perp walk."

Upon the cars' arrival at the courthouse, Kinsley ordered that the cars stop in front of the courthouse, adjacent to where a large number of camera operators and reporters had gathered, notwithstanding being informed by the car's driver that proper procedure was to use a ramp in the rear of the building. As plaintiffs were removed from the cars, a bailiff again informed Kinsley that the proper procedure was to use a ramp in the rear of the building, but Kinsley again refused. Only after the bailiff three times insisted that Kinsley use a ramp in the rear of the building, Kinsley reluctantly agreed, abandoning for the moment his plan to subject plaintiffs to a second "perp walk." Id. ¶ 207. Hours later, on Kinsley's orders, plaintiffs were again handcuffed, hands behind their backs, and escorted past the designated courtroom and were again paraded in front of the throng of reporters and photographers (id. ¶ 207), again violating DOJ guidelines, 28 CFR, 50.2.

Kinsley's outrageous conduct in willfully subjecting plaintiffs to these "perp walks," handcuffed hands behind their backs, was extreme, and wanton, and caused plaintiffs to suffer severe emotional distress, including feelings of degradation and shame. Id. ¶¶ 206, 209. Kinsley's oppressive conduct was:

- An unreasonable seizure by excessive use of force in contravention of plaintiffs' legitimate expectation of privacy guaranteed under the Fourth Amendment;

- Made to chill plaintiffs' exercise of their rights under the First Amendment to the Constitution, and to penalize and retaliate against them for exercising those rights;

- In a clearly arbitrary, unreasonable and oppressive manner, and damaged plaintiffs' reputation and good name – among the liberty interests protected by the Due Process Clause of the Fifth Amendment by public government action;

This procedure, a "perp walk" violated DOJ press guidelines, 28 CFR, 50.2, (4)(b)(7) *Guidelines to criminal actions*, which mandate that "personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person held or transported in Federal custody." Id. ¶ 204.

8. Unreasonable use of force at arrest

Pursuant to agreement, plaintiffs voluntarily surrendered at the Melville, New York, FBI field office, [18] at which time defendant Kinsley was in charge of the arrest detail. Id. ¶ 199. Kinsley rejected an FBI agent's request that plaintiffs not be handcuffed while in the FBI office nor during their transportation to the federal district courthouse in

[18] See *Legal Handbook for Special Agents*, Section 2-1, *Definitions,* "When a federal criminal prosecution is initiated… jurisdiction over the defendant can be obtained by either a warrant or a summons.

Uniondale, New York. (id. ¶ 200), and, also against the agent's suggestion, directed that plaintiffs be cuffed hands behind their backs. Id. ¶ 201.

Kinsley's cuffing plaintiffs, hands behind their backs, was use of force beyond that which was reasonably necessary to accomplish his lawful purpose of ensuring that plaintiffs continued to voluntarily remain in custody (id. ¶ 202) and did not pose an immediate threat to the safety of others. Under the totality of circumstances, viewed objectively, defendant's:

- Use of unreasonable and excessive force in violation of plaintiffs' Fourth Amendment rights; and
- Action was clearly arbitrary and unreasonable, had no substantial relation to any legitimate purpose, and violated plaintiffs' rights to substantive due process guaranteed under the Fifth Amendment.

9. Subpoena of work product from publisher

On March 24, 1997, defendant Campbell issued a subpoena to Kensington Publishing Corp. requiring the production before the grand jury "any all documents relating to any book… for James Sanders for 'The Downing of TWA Flight 800…'" Id. ¶ 149. This abuse of the federal court process by its use of a subpoena is another example of defendants' circumventing laws and regulations reflecting the public's paramount interest in a truly free press:

- The privileges and immunities guaranteed plaintiffs' under the First Amendment to the Constitution,
- Plaintiffs' reasonable expectation of privacy in his journalistic work product under the Fourth Amendment to the Constitution. Id. ¶ 254(b);
- Rights to due process of law prior to seizure of property under the Fifth Amendment to the Constitution (id. ¶ 251);
- 28 CFR § 50.10, DOJ guidelines designed to ensure compliance with First Amendment rights associated with newsgathering. (id. ¶ 150); and

- Protections afforded by the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq. Id. ¶ 246(d).

Shortly after the April 1997, publishing of plaintiff's book, *The Downing of TWA Flight 800*, detailing much of the evidence of a missile's having been responsible for the fatal midair explosion, as well as defendants' having "concealed this information from the American public" (id. ¶ 151), defendants interrogated Lee Taylor and Lucille Collins, who had been named in the book's acknowledgements (id. ¶ 152) – including asking them questions "of a highly personal nature concerning plaintiffs… marriage and private lives." Id. ¶ 153.

10. Subjective mischaracterization and defamatory statements in banner on web site

Beginning in December 5, 1997, the New York's DOJ/FBI web site displayed a moving banner across its homepage: "Conspiracy theorist and wife charged with theft of parts from airplane," designed to vilify plaintiffs. Id. ¶ 186. These actions by defendants:

- Were clearly arbitrary, unreasonable and oppressive and damaged plaintiffs' reputation and good name – among the liberty interests protected by the Due Process Clause of the Fifth Amendment by public government action; and

- Were retaliatory in nature – adverse consequences designed to retaliate against and chill political expression in exercise of First Amendment rights.

Defendants violated Justice Department *Guidelines to criminal actions*, 28 CFR, 50.2 (3), which mandate that such "[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations."

11. False allegations and impermissible statements in press release

Also on December 5, 1997, defendant Kallstrom and Zachary Carter issued a joint press release to announce criminal charges against plaintiffs (id. ¶ 188), a substantial

portion of which had no bearing on any alleged criminal conduct, but served only as a means of discrediting plaintiff's reporting, including falsely recounting that "[a]ccording to the criminal complaint, despite the laboratory test results, JAMES SANDERS misrepresented those results in media reports for which he was a source" (id. ¶ 189) – also in violation of 28 CFR 50.2(3).[19] Id. ¶ 190. The release also quoted Kallstrom as stating that the criminal charges were intended to hold them accountable for the "media reports" (id. ¶ 191) – thus declaring that the object of plaintiffs' prosecutions were to penalize them these "media reports" (id. ¶ 192). Plaintiff's advocacy that a missile caused the crash carries with it the corollary suggestion that nobody could take comfort in defendants' conclusion that the missile theory had been laid to rest. Id. ¶ 193.

These statements by a high-ranking official in a press release evidences the speech-based constitutionally intolerable motivation underlying the prosecution of plaintiffs (id. ¶ 194), as do the NBC Nightly News broadcast of the same day wherein Kallstrom stated that "the FBI says its investigation isn't finished, says still more may have been involved in what it calls a plot to rewrite the history of TWA 800." Id. ¶ 195-96.

By using its law enforcement authority for the purpose of retaliating against those who would dare to offer facts which dispute the official version of the history of Flight 800, and including knowingly false information in these highly-publicized statements, defendants:

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[19] See also *Legal Handbook for Special Agents*, Section 7-25*: Follow-up on Derogatory data:* "Derogatory data developed through interviews of witnesses and other sources must be completely proved or disproved, and accurately and factually established as applicable to the person under investigation."

- Violated the fundamental guarantee of the First Amendment" (id. ¶ 196), and sought to chill the exercise of those rights. Id. ¶ 197; and

- Acted in a clearly arbitrary, unreasonable and oppressive manner, and damaged plaintiffs' reputation and good name – among the liberty interests protected from public government action by the Due Process Clause of the Fifth Amendment.

These statements in the press release too violated DOJ *Guidelines to criminal actions*, 28 CFR, 50.2 (3), which mandate that such "[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations."

12. FBI's false statements demanding that TWA terminate Elizabeth Sanders on pain of TWA's being excluded from the official Flight 800 Probe

In December of 1997 defendant DOE pressured TWA to fire Elizabeth Sanders, but did not pressure TWA to engage in similar retaliatory action against Terry Stacey, despite the fact that defendants knew that Stacey had removed residue and documents from the Calverton hangar. Id. ¶ 211.[20] Then, regarding a hearing to determine disciplinary action against Elizabeth Sanders proposed by TWA, *at defendants' behest*, a letter written by TWA counsel stated that "[a]ccording to the FBI, your husband's book erroneously reported the results of those lab tests..." (id. ¶ 212) , false and known to be false. Id. ¶ 213. These actions too reflect a vindictive motive. Defendants' misrepresentation of facts to TWA was meant to have Elizabeth Sanders discharged:

- On the basis of facts known to be false when made.

- On the basis of, and in retaliation for, her husband's exercise of his constitutionally protected free speech under the First Amendment; and

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[20] TWA informed her that defendants had threatened to remove all TWA personnel from the investigation unless TWA immediately terminated Elizabeth's employment with TWA.

- In violation of plaintiff's Due Process rights under the Fifth Amendment to the Constitution.

13. Material false statements in affidavit in support of arrest warrant

Defendant Kinsley's affidavit in support of the arrest warrant (unauthorized removal of property that had been on an aircraft involved in an accident,[21] and conspiracy[22] (id. ¶ 182-83)), contains knowingly false statements of fact, including (a) representing that the Press-Enterprise article identified plaintiff as "author and investigative reporter," not as a "Virginia-based writer" – a difference of great consequence in this matter, (b) misrepresenting that the article said that plaintiff "had concluded that a U.S. Navy missile had shot down the plane;" (c) misrepresenting that plaintiff relied exclusively on the "test results" and "residue trail" to conclude that "a missile had punched through TWA 800" (id. ¶ 184), and falsely reporting that "[a]ccording to TWA maintenance records, the seats on which the residue can be seen had been refurbished, and glue was used...." but that "[o]ther rows of the airplane were not similarly refurbished, or were made by different manufacturers..." Id. ¶ 185.

Kinsley's misrepresentation that the Press-Enterprise article identified plaintiff as a 'Virginia-based writer," as opposed to truthfully representing that the article accurately stated that he was an "author and investigative reporter" vitiates the warrant. Defendant's Affidavit:

- Excluded plaintiff's "investigative reporter" status – had the magistrate known of defendants' having gleaned the affidavit's facts in violation of a First Amendment Civil Rights Statute, illegally, from an objective standard, he would not have granted the warrant.

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[21] 49 U.S.C. § 1155(b).

[22] 18 U.S.C. § 371.

- Contains a material misrepresentation made to circumvent the protections afforded plaintiff by the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq., designed to protect the First Amendment rights associated with newsgathering by protecting journalists from charges arising from their exercise of First Amendment rights.

4. ARGUMENT

I. Personal jurisdiction in this Court

The District of Columbia "Long-arm" statute, D.C. Code §§ 13-423(a), *Personal Jurisdiction based on Conduct*, provides in part:

> A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's –
>
> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia; or,
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly engages in any other persistent course of conduct… in the District of Columbia.

First, should this Court grant the parties' request that this case be transferred to New York, this argument will be moot as dismissal there on personal jurisdiction grounds would clearly be unwarranted.

Second, under the first provision, "transacting any business in the District of Columbia," certainly individuals employed by the NTSB had sufficient contacts under the District's "Long arm" statute.

Similarly, the named Justice Department employees fit within the statute. The government contacts doctrine precludes the assertion of personal jurisdiction over a nonresident entering the District of Columbia if the only contact the nonresident has with

conspiracy.[26] The contention that a conspiracy existed which deprived the plaintiff of rights guaranteed by federal laws makes each member of the conspiracy potentially liable for the effects of that depravation.[27]

Conspiracy is not an independently actionable tort. It is a theory of liability and legal mechanism by which defendants may held liable for plaintiffs' constitutional and statutory claims, rendering irrelevant defendants' discussion of whether conspiracy is a tort under the Federal Tort Claims Act.[28] Conspiracy is a relevant inquiry under all of plaintiffs claims – and the FTCA has no relevance to this case.

We are referring to a Bivens and PPA action – both civil rights actions.

B. Vicarious conspiracy liability generally

The defendant in Halberstam v. Welch, 705 F.2d 472 (D.C.Cir. 1983) was not present during the commission of a murder, but was found civilly liable at trial for the wrongful death of plaintiffs' decedent, committed during a robbery. On appeal, Judge Wald found the evidence sufficient to find defendant vicariously liable on either an aiding and abetting or a conspiracy theory. The opinion clearly delineated the difference between these two theories of vicarious liability:

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[26] United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990).

[27] Turner v. Upton, 915 F.2d 133, 137 (5th Cir. 1990).

[28] Motion at 72: "First, it is well established that the tort of civil conspiracy is not recognized under New York law… Because New York does not recognize a cause of action for civil conspiracy, the plaintiffs cannot state a tort claim for civil conspiracy under the FTCA…" (citations omitted)

> The primary issues raised by this appeal are what kind of activities of a secondary defendant (Hamilton) will establish vicarious liability for tortious conduct (burglary) by the primary wrongdoer (Welch), and to what extent will the secondary defendant be liable for another tortious act (murder) committed by primary tortfeasor while pursuing the tortious activity. Id. at 476.

Halberstam discussed the difference between (1) vicarious liability by conspiracy and (2) vicarious liability by aiding abetting.[29]

The court set forth the common law[30] elements of civil conspiracy, stated that proof of a tacit, as opposed to an explicit agreement is sufficient to show the agreement,[31] and explained vicarious liability:[32]

> An agreement to participate in a wrongful course of action suffices to create vicarious liability... [O]nce the conspiracy is established, all parties to it would be liable for injuries from acts pursuant to and in furtherance of the common design, even if the parties had not actively participated or benefited by the particular acts resulting in injury...

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[29] Halberstam at 476 (emphasis added): "Over time, courts applied the principle of vicarious liability for concerted action to less obvious situations, covering tortfeasors whose relationship was more subtle than Prosser's "highwaymen." **The two variations significant here are (1) conspiracy, or concerted action by agreement,** and (2) aiding-abetting, or concerted action by substantial assistance. These two bases of liability correspond generally to the first two subsections in *the Restatement (Second) of Torts* § 876 (1979) on Persons acting in Concert": For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other **or pursuant to a common design** with him [conspiracy]... (emphasis supplied)

[30] Id. 478: "District law acknowledges the concept of civil conspiracy... basically, an agreement to take part in an unlawful action... and an overt tortious act in furtherance of the agreement that causes injury..."

[31] Id. 477: "Proof of a tacit, as opposed to explicit, understanding is sufficient to show agreement... The prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in wrongful activity..."

[32] Id. 479.

Halberstam recited the elements of civil conspiracy:

> A list of the separate elements of civil conspiracy includes:
>
> (1) an agreement between two or more persons;
>
> (2) to participate in an unlawful act, or a lawful act in an unlawful manner;
>
> (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement;
>
> (4) which overt act was done in furtherance of the common scheme.[33]

Conspiracy theory allows greater time and distance between the conspirator and the wrongful act,[34] and active participation in the conspiracy at issue here lasted for over four years.

C. Vicarious conspiracy liability requires that actionable conduct was done in furtherance of the conspiracy and reasonably foreseeable

The Supreme Court's holding in Pinkerton v. U.S., 328 U.S. 640 (1946) instructs that all defendants here are liable for their codefendants' actionable conduct. In that case, two brothers, Daniel and Walter, were charged with violating the Internal Revenue laws by conducting a moonshining business, as well as conspiracy to violate those laws. Daniel was convicted of substantive offenses committed entirely by Walter. There was no evidence that Daniel aided or abetted or even knew of the substantive offenses. In

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[33] Id. at 1012 (citation omitted).

[34] Id. at 480: "[T]he length of time two parties work closely together may also strengthen the likelihood that they are engaged in a common pursuit. Mutually supportive activity by parties in contact with one another over a long period suggests a common plan. In sum, we expect that the relationships between the actors and between the actions (e.g., the proximity in time and place of the acts, and the duration of the actors' joint activity are relevant in inferring an agreement in a civil conspiracy action. There may well be other significant factors in individual cases."

fact, Daniel was in prison at the time they were committed. Daniel argued that "in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the substantive offense or other evidence from which participation might fairly be inferred was necessary." The Court in Pinkerton (at 646) rejected that argument:

> We take a different view. We have here a continuous conspiracy. There is no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. Hyde v. UnitedStates, 225 U.S. 347, 369. As stated in that case, "Having joined the in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition is secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously through every moment of its existence." Id., p.369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." United States v. Kissel, 218 U.S. 601, 608... The act done was in execution of the enterprise...
>
> **A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as necessary or natural consequence of the unlawful agreement. But as we read this record, that is not the case.** (emphasis supplied)

The holding in Pinkerton applies to defendants' argument in the instant case.[35] In the case at bar, the actionable wrongful conduct is rightfully alleged to be "within the scope of the unlawful project" to obstruct justice into the investigation into the TWA

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[35] See also United States v. Heffington 682 F.2d at 1075 (4th Cir. 1982) (citing Pinkerton): "Conspirator can be found guilty of substantive offense based upon acts of co-conspirator done in furtherance of conspiracy except where act of co-conspirator does not fall within scope of unlawful project or is merely part of ramifications of plan which could not be reasonably foreseen as necessary and natural consequences of unlawful agreement."

D. Vicarious conspiracy liability in this case

1. Conspiracy liability applies in civil rights cases

The PPA is a civil rights Act. "Many federal courts have recognized… a [civil rights] cause of action for conspiracy"[36] "[I]t may be charged as the legal mechanism through which to impose liability on each and all of the Defendants without regard to the person doing the particular act."[37]

"[T]he act of entering into a conspiracy may render a person responsible for the acts of his co-conspirator and thus make him vulnerable to a [civil rights] damage suit."[38] "Conspiracy is merely the mechanism by which... [the civil rights violation imposes] liability on one defendant for the acts of others performed in pursuance of the conspiracy."[39]

2. Conspiracy liability applies in Bivens-type cases

Vicarious liability based on *respondeat superior* is unavailable to Bivens plaintiffs. Vicarious liability based on conspiracy is available to a Bivens plaintiff because it is civil rights cause of action, and "[m]any federal courts have recognized… a [civil rights] cause of action for conspiracy"[40] And those who set in motion of acts,

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[36] Safeguard Mutual Insurance Company v. Miller, 477 F. Supp. 1, 5, (ED PA, 1979).

[37] Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), cert. denied, 374 U.S. 975, 84 S.Ct. 489, 11 L.Ed2d 420 (1964); Hostrop v. Board of Junior College District No. 515, (7th Cir. 1975) (same).

[38] Mizzell v. North Broward Hospital District, 427 F.2d 468, 472-73 (5th Cir. 1970); Madison v. Purdy, 410 F.2d 99, 101 (5th Cir. 1969).

[39] Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980).

[40] Safeguard at 5.

which causes others to inflict constitutional injury, may be held vicariously liable for the constitutional injury.[41]

3. Conspiracy evidence is relevant on punitive damages, including the PPA

The PPA specifically allows punitive damages. Conspiracy evidence proves motive, plan, and intent,[42] all of which are relevant on the punitive issue.

4. Conspiracy evidence is relevant on qualified immunity

Objectively, as a matter of law, participation in unlawful conspiracy defeats qualified immunity, as such participation cannot be objectively reasonable. All of plaintiffs' allegations must be viewed cumulatively, not separately.[43] In any event, civil

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[41] Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991).

[42] See American Medical Ass'n v, U.S., 130 F.2d 233, 251, (DC Cir., 1942) ("Evidence has been admitted to prove background... when it is alleged that the accused persons conspired"); United States v. Papadakis, 510 F.2d 287, 294, (2nd Cir., 1974) ("The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement"); United States v. Angelilli, 660 F.2d 23, 38, (2nd Cir., 1981) ("Since the acts were part of the conspiracy, evidence of their occurrence was admissible to prove the conspiracy, regardless of whether they were performed by the defendants or by other coconspirators.")

[43] See Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), a conspiracy case where defendants sought qualified immunity:

> In an effort to overcome the obvious, defendants focus on the trial evidence and argue that each individual act that they were shown to have committed was lawful, and that they consequently are immune. This argument seriously misconstrues the nature of the qualified immunity defense, and in particular the separate questions of law and fact.

conspiracy allegations are not made to attack the official conclusion, as defendants posit.[44]

E. Plaintiffs have pled conspiracy and conspiratorial agreement with sufficient particularity to avoid defendants' motion to dismiss

The complaint specifies scores of overt acts in furtherance of the conspiracy to hide the missile. Defendants' motion (72-75):

- "Plaintiffs' complaint, however, alleges a conspiratorial agreement between the defendants in only the most conclusory of terms,"
- "[P]laintiffs' conspiracy allegations fail because they have not articulated any cognizable unlawful conduct as the object of the purported conspiracy,"
- "[T]here is no such thing as a conspiracy to engage in lawful conduct," and
- The complaint is "established solely on the timing of circumstances or a cluster of events."

The law of civil conspiracy is well settled, and over half of plaintiffs' complaint pleads specific facts of the conspiracy, to plead it properly.

Defendants' cannot rebut this law, so, in lieu of any such attempt, defendants' simply call the complaint a "very long disagreement"[45] with defendants' position that the initiating event of the disaster was the ignition of the center-wing-tank (still, according to defendants, caused by an unknown source).

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[44] Motion at 76: "Indeed, it is plain from the complaint that plaintiffs are merely seeking a legal launching pad from which Mr. Sanders can continue to "investigate," through civil discovery, his conspiracy theories regarding the Government's investigation of the TWA Flight 800 disaster."

[45] Motion at 3: plaintiffs' 99-page, 267-paragraph complaint is little more than one very long disagreement with the NTSB's conclusion that TWA Flight 800 was not shot down by a missile.

As measured against the standard set forth by our court in the 1984 seminal case of Hobson v. Wilson,[46] this court should not dismiss plaintiffs' complaint under the circumstances of plaintiffs' particularized pleading asserting fundamental rights and important questions of public policy:

> [I]n some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage, and that overly rigid application of the rule we articulate could lead to dismissal of meritorious claims. See 5 *C. Wright & A. Miller, Federal Practice and Procedure* 1230 (1969 & 1984 Supp.) ("The court should remember that fundamental rights and important questions of public policy are involved in actions under the various civil rights statutes and should not dismiss the complaint unless it clearly is frivolous or fails to state a claim for relief.")

A year before, Judge Wald's scholarly[47] opinion in Halberstam v. Welch[48] explained that plaintiffs can meet their burden under the law of civil conspiracy with indirect evidence. "In most cases the court will have to infer a conspiracy from indirect evidence, it must initially look to see if the alleged joint tortfeasors are pursuing the same goal – although performing different functions – and are in contact with one another."[49] Plaintiffs' complaint alleges just that. And a single overall agreement need not be

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[46] 737 F.2d 1, 31 (D.C. Cir. 1984).

[47] Williams v. Hall, 683 F. Supp. 639, 642 (E.D.Ky. 1988): "Much instruction as to the common law of civil conspiracy may be found in the scholarly opinion of the court in Halberstam v. Welch."

[48] 705 F.2d 472 (D.C.Cir. 1983).

[49] Halberstam v. Welch, 705 F.2d 472 (D.C.Cir. 1983).

manifested by continuous activity in that there may be suspension of activities, which does not divide single conspiracy into more than one.[50]

The correct legal standard for agreement is simply that the wrong-doers share in the same overall objective and plaintiffs' complaint alleges a plethora of specific overt acts in furtherance of the "general conspiratorial objective" of covering up the true cause of the TWA Flight 800 disaster.

Moreover, whether an individual conspirator's act was committed in furtherance of conspiracy is a question of fact[51] and numerous facts alleged in plaintiffs' complaint give rise to a reasonable inference of a conspiratorial agreement. It is axiomatic that defendants are not entitled to the relief prayed for under Rule 12(b).[52]

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[50] United States v. Bloch 696 F2d 1213 (9th Cir. 1982); United States v. Waldrop, 786 F Supp. 1194 (M.D.Pa 1991) (holding conspirator's participation in criminal conspiracy is presumed to continue until all objects of conspiracy have been accomplished or until last overt act is committed by any of conspirators).

[51] People v. Lowery, 246 Cal.Rptr. 443 (Cal.App.6th 1988).

[52] See Fludd v. United States Secret Service, 102 F.R.D. 803, (D.D.C. 1984): "On a motion to dismiss for failure to state a claim on which relief may be granted, the pleadings must be construed favorably to the plaintiff. See also Schueur v. Rhodes, 416 U.S. 232, 236 (1974). Furthermore, "[I]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle to relief.'" (citations omitted, emphasis added).

Plaintiffs here have exceeded the requirements of particularity in alleging conspiracy.[53]

III. Plaintiffs state valid claims against the United States under the Privacy Protection Act

The Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq. (PPA or Act), passed in response to the Supreme Court's 1978 decision in Zurcher v. Stanford Daily,[54] where the Court held that neither the First nor Fourth Amendments confer any special protections to the press against search and seizure. Thus, the PPA does provide special protections to the press against search and seizure of journalistic work product (and "other documents") as defined by the Act. Congress passed the PPA to regulate searches and seizures of journalistic work product, where the object of the work product is to disseminate it to the public. PPA plaintiffs need not show damages – the Act provides plaintiffs $1,000 minimum damages for each violation.

Its focus is work product and it prohibits government officers or employees in connection with the investigation or prosecution of a criminal offense to search for or seize any work-product (or documentary materials) possessed by a person whose purpose is to disseminate to the public – journalistic work product.

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[53] See also Brever v. Rockwell International Corporation, 40 F.3d 1119, 1128 (10th Cir. 1994): "**[T]he nature of conspiracies often makes it impossible to provide details at the pleading stage,"** 5 C. *Wright & C. Miller, Federal Practice and Procedure* 1233, at 257 (2d ed. 1990, and "[g]ranting defendants' motions[s] to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." When viewed in the light most favorable… we think **the complaint here meets the minimum requirements for the pleading a conspiracy."** (citation omitted, emphasis added).

[54] 436 U.S. 547, 565 (1978).

Contrary to defendants' arguments, plaintiffs' complaint meets all the elements to state a claim for violations of the PPA, as well as defendants' knowingly false statements in an effort to circumvent that statute – designed to:

- Prevent unnecessary search and seizure of journalists' files and papers;
- Protect the First Amendment rights of those reasonably believed to have a purpose of communicating to the public; &
- Prevent the squelch of criticism by the forceful means of seizure.

A. The PPA explicitly protects those in plaintiffs' position

Defendants claim that "the PPA explicitly excludes criminal suspects, like the plaintiffs, from its protection." Motion 30. In support of this argument, defendants omit the material provision of the PPA that explicitly excludes plaintiffs from the suspect exception. Below, plaintiffs bold the language that defendants omitted.

> Motion at 29-30:
> Criminal suspects, like plaintiffs, are expressly excluded from the protection from search and seizure that the PPA provides… The purpose of the PPA is to "regulate searches and seizures of materials possessed by a person with the purpose of disseminating them to the public through some form of public communication." [citation omitted] Specifically, the PPA prohibits:
>
> > **(a) Work product materials. Notwithstanding any other law, is shall be unlawful for** a government officer or employee, in connection with the investigation **or prosecution** of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communication... but this provision shall not impair or affect the ability of any government officer or employee, pursuant to other applicable law, to search for or seize such materials if... there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate**: Provided, however, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists**

> **of the receipt, possession, communication, or withholding of such materials or the information contained therein…**

42 U.S. C. § 2000aa(a).

Thus, it is clear that defendants' claim – that "[c]riminal suspects, like plaintiffs, are expressly excluded from the protection from search and seizure that the PPA provides" – is false. Plaintiffs fall squarely within this language:

> may not search for or seize such materials under the provisions of this paragraph <u>if the offense to which the materials relate consists of the receipt, possession</u>, communication, or withholding of such materials [work product] materials…

Plaintiffs' were convicted of "possession" of an aircraft in violation of 49 U.S.C. §1155(b), an "offense to which the materials relate" under the PPA, like, for example, receipt of stolen property. The PPA's legislative history uses receipt of stolen property as its example. <u>See</u> Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)) pp. 3957-58:

> The suspect exception may not, however, be invoked if the only offense of which the possessor is suspected is the **receipt, possession, communication, or withholding of the materials** of [sic] the information contained therein. The purpose of this provision is to prevent possible abuse by law enforcement authorities. For example, without this provision, if a reporter had knowingly received a stolen corporate report, the suspect exception could be invoked because the reporter might be said to be guilty of a crime of receipt of stolen property. To permit a search in such circumstances, in the Committee's view, might unduly broaden the suspect exception. **In other words, law enforcement agents could simply charge the journalist with possession or receipt of stolen goods**, generally very broad offenses, **and proceed to seize the desired materials because he was a suspect in that basically contrived offense**. The Justice Department has felt this was is not good law enforcement policy, and the Committee agrees that to **eliminate this part of the suspect exception would chill reporters' investigations of such areas as government corruption where whistle blowers' evidence is so important…**
> (emphasis supplied)

The *Legal Handbook for Special Agents* reiterates the PPA's restrictions on seizure of journal work product.[55]

Defendants cite United States v. Hunter, where the government executed a warrant amply supported by affidavit for records of drug transactions kept in a lawyer's home office, and the lawyer claimed that the search was subject to the PPA because he also ran a newsletter there.[56] The differences between Hunter's and plaintiffs' circumstances are too obvious for discussion, except to note that the government was excused by the suspect exception. Here they are not.

Defendants conclude their "*PPA explicitly excludes criminal suspects, like the plaintiffs, from its protection*" argument by observing, "[t]hus, the PPA does not immunize journalists from their own criminal conduct nor does it immunize journalists who are the subject of a criminal investigation from searches and seizures." Id. at 31. This is of course correct. This civil case has nothing to do with whether plaintiffs are immune "from their own criminal conduct," nor does the PPA somehow "immunize journalists who are the subject of a criminal investigation from searches and seizures." The PPA provides a civil cause of action for its violation and defendants repeatedly violated this law.

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[55] *Legal Handbook for Special Agents*, Section 5-11.2 reiterating the PPA's prohibition of seizing work product, including where the alleged criminal conduct is a "possessory offense."

[56] Motion at 31: "See, e.g., United States v. Hunter, 13 F. Supp. 2d 5 74, 5 82 (D. Vt. 1998) (PPA did not protect an attorney who published a legal newsletter out of his office because the government had reason to believe attorney had committed criminal offense to which seized materials related)."

B. Plaintiffs have standing to sue under the PPA

Defendants assert that plaintiffs also lack standing to sue under the PPA as their claims relate only to items seized or otherwise obtained from third parties. Contrary to this assertion, work product need not be in the immediate possession of the person who created it to fall under the protection of the PPA.

§ 2000aa-7(b) states in part:

> "Work product materials," as used in this act, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as a means of committing a criminal offense, and—
> (1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, **whether by the person in possession of the materials or by another person**;
> (2) are possessed for the purposes of communicating such materials to the public; and
> (3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.
> (emphasis supplied)

And § 2000aa-6, *Civil actions by aggrieved persons*, does not – nor logically would it – exclude the author of the work product from suing merely because the protected work product was "obtained from third parties." That conclusion is bolstered by the legislative history. Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)) p. 3960:

> *Section 106 (a) Civil action* – Subsection (a) of Section 106 provides for a civil cause of action for validations of the Act. Such an action may be brought by **any person aggrieved by a violation** of the statute.
> (emphasis supplied)

The issue here is whether they were "aggrieved" under the Act. (Defendants wrongfully denied plaintiff his journalist status for a reason.) These are issues of the Act's treatment First and Fourth Amendment rights. The PPA gives deference to the

traditional contours of the Fourth Amendment standard of reasonable expectation of privacy, but also imposes procedural safeguards to see to it that work product is not seized. Regarding First Amendment rights, the Act imposes rules reflecting a heightened standard of reasonable expectation of privacy in journalistic work product. As discussed below, the PPA's legislative history provides that "a general no-search rule applies" for journalistic work product.

Defendants argue that "plaintiffs also lack standing to sue under the PPA as their claims relate only to items seized or otherwise obtained from third parties… materials… from a telephone company, a Hollywood movie producer, a publishing house, a police department." (Motion 32). (The illegal police former employer Police department search did not violate the PPA.) Defendants cite Powell v. Tordoff[57] for their argument that it is *only* the person in possession of the materials who has standing to sue. But Powell involved defendants' execution of a valid warrant for "contraband" and the court decided the case on limitations grounds. The court there did quote the legislative history's observation that "it would be the person in possession of the materials" who has standing to sue, as in the ordinary Fourth Amendment case, but that same passage begins, "[i]t is not the intent of this proposed legislation to expand current law concerning which persons have standing to bring an action for unlawful search or seizure." In other words, the PPA follows common-law principles of standing, like plaintiffs' already adjudicated legitimate expectation of privacy in their computer in the possession of Lee Taylor. Defendants do not and cannot argue that a journalist has no legitimate expectation of privacy in his journalistic work product as defined under the PPA merely because the

[57] Powell v. Tordoff, 911 F. Supp. 1184, 1189 (N.D. Iowa 1995).

book-in-progress-work-product was also in the hands of the publisher, or the movie-in-progress-work-product was also in the hands of the producer. (Defendants' intimidation of those individuals *de facto* prevented them from publishing or producing.)

Moreover, defendants miss the point of the PPA. As explained in its legislative history (see next section), the PPA flatly prohibits seizures of journalistic work product – "a general no-search rule applies" – unless excused by its suspect exception. But, as recounted above, that exception is inapplicable where "the only offense" that plaintiffs were suspected of was the "receipt, possession [or] communication of the materials."[58]

Defendants assert (motion 47-50) that plaintiffs had no constitutionally protected reasonable expectation of privacy of possession of third parties, that this case is analogous to any other telephone records case, or to one involving business records of a third party, or to bank or tax records. But this case is not comparable to those cases as here plaintiffs have the standing to seek redress under the PPA, as well as under the Bill of Rights.

Congress passed the PPA in response to the Supreme Court's 1978 decision in Zurcher v. Stanford Daily,[59] where the Court held that neither the First nor Fourth Amendments confer any special protections to the press against search and seizure. The PPA does give special protections to the press against search and seizure.

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[58] Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)) pp. 3957-58:

> The suspect exception may not, however, be invoked if the only offense of which the possessor is suspected is the **receipt, possession, communication, or withholding of the materials** of [sic] the information contained therein.

[59] 436 U.S. 547, 565 (1978).

C. The PPA restricts searches, seizures, *and* subpoenas

Defendants argue that "the [PPA] by its own terms restricts only searches and seizures, not subpoenas." The PPA's legislative history under *Unlawful Acts* instructs that "[w]hen the materials sought consist of work product, a general no-search rule applies. When the materials sought constitute documentary materials other than work product, a subpoena-first rule is generally applicable."[60] In other words, you may use subpoenas if it is not work product, otherwise, "a general no-search rule applies." Clear from the passage is that "no-search" includes subpoenas for journalistic work product, as happened in this case, so defendant's "PPA does not restrict subpoenas" argument is wrong. The PPA properly recognizes subpoenas as generally affording more protection by their very nature, and the PPA's legislative history reflects the law's purpose of giving the press the "opportunity to object in advance."[61] Again, that is what subpoenas generally provide, as defendants' own motion points out.[62]

Defendants cite Doe v. Stephens,[63] in summarizing the purpose of PPA, to "regulate searches and seizures of materials possessed by a person with the purpose of

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[60] Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)) p. 3956.

[61] See Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879) p. 3959:

> For the government to squelch such criticism by the forceful means of seizure, to which the press has had no opportunity to object in advance, comes very close to forcing the issue of First Amendment freedom versus the power of the government. Broader search powers would be susceptible of abuse in chilling critical comment about the government.

[62] Motion at 31: "'Indeed, the PPA specifically endorses the use of subpoenas as a means of... lessen[ing] greatly the threat otherwise ... pose[d] to the vigorous exercise of First Amendment rights' by searches and seizures. Id. (quoting Senate Report at 4-5, U.S. Code Cong. & Admin. News 1980, p. 3951)."

[63] 851 F.2d 1457, 1463-64 (1988).

disseminating them to the public through some form of public communication." (Motion 32). But Stephens is instructive on the government's unilateral use of its subpoena power here. The court there denied relief, noted the unavailability of the "discretionary function" defense where "governmental departure from clear regulatory standards," and noted the absence of standards for grand jury subpoenas in that case:

> In this case, however, appellant cites no regulations violated here that meaningfully cabin the U.S. Attorney's ordinarily discretionary authority to issue a subpoena.
>
> Id. 1462-63.

Here, defendants' first ignored mandatory procedural guidelines under the Act, then later broke those guidelines. Defendants circumvented the safeguards for subpoenas – by denying his journalist status in the one case, and, in the other case, did not afford him the opportunity to object in advance. Defendants' purported adherence to guidelines *after service of subpoenas* did not cure plaintiffs' opportunity to object in advance, but it does show that defendants were well aware of the mandatory element of the PPA's corresponding C.F.R.

First, in the instance of the subpoena of Bell Telephone records, plaintiff exercised his opportunity to object in advance, and the defendants responded by wrongfully denying him protections afforded by his "member of the media" status.

Second, in the subpoena seizing work product from Hollywood producer Neil Russell, because neither the defendants nor Russell notified plaintiff, the "opportunity to object in advance" objective of the PPA was thwarted. The Supreme Court recognized in Branzburg V. Hayes[64] that the government's use of subpoenas needed less protection

[64] 408 U.S. 665, 707 (1972).

because "grand juries are subject to judicial control and subpoenas to motions to quash." But not here.

Moreover, Section 2000aa (c), *Objections to court ordered subpoenas; affidavits,*[65] refers to court-ordered subpoenas and search warrant affidavits together, relegating regulation of the unilateral executive branch subpoenas to the C.F.R., requiring the Attorney General's review and decision whether to approve the use of a grand jury subpoena in such cases, *in advance*.

The Act's provision requiring the Attorney General implement these regulations, Section 2000aa-12, *Effect of guidelines; violations,* states that "the [g]uidelines issued by the Attorney General under this title shall have the full force and effect of Department of Justice Regulations… [but may not be] the basis for the suppression or exclusion of such evidence."

Defendants argue that these seizures, by "grand juries [ordinarily] subject to judicial control and subpoenas to motions to quash,"[66] are without the scope of the PPA because the Act's subpoena enforcement mechanism is incorporated in its corresponding mandatory C.F.R

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[65] 2000aa (c), *Objections to court ordered subpoenas; affidavits.*

> In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b), the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis of for any contention that the materials sought are subject to seizure.

(The section's reference to "the person possessing the materials" would include those with a possessory interest.)

[66] Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

Here, defendants used the most intrusive means available, a unilateral executive branch subpoena *ducas tecum*, to try to circumvent the Act's purpose of regulating searches and seizures of materials possessed by a person with the purpose of disseminating them to the public through some form of public communication.

As the Justice Department has long acknowledged in 28 C.F.R. 50.10 (2000), *Attorney General's Policy with regard to the issuance of subpoenas to members of the news media*, "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility…" And see Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879), p. 3959:

> For the government to squelch such criticism by the forceful means of seizure, to which the press has had no opportunity to object in advance, comes very close to forcing the issue of First Amendment freedom versus the power of the government. Broader search powers would be susceptible of abuse in chilling critical comment about the government.

D. The PPA's legislative history evidences an explicit waiver of sovereign immunity for punitive damages

Defendants' motion (at 33) asserts that "Section 2000aa-6(f) permits only actual damages against the United States for violations of the PPA. 42 U.S. C. § 2000aa-6(f). It does not provide a waiver of sovereign immunity to award punitive damages."[67] This too is false. The PPA's legislative history evidences an explicit waiver of waiver of sovereign immunity for punitive damages. Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)), *Section 106 [f]. Damages,* p. 3962, states in pertinent part:

> Punitive damages may also be awarded if warranted, as well as attorneys' fees and litigation costs. Since government units are exclusively liable for violations which occur when the officer is acting solely under color of

[67] Motion n. 18 at 33.

> office, and these are the instances in which awards of punitive damages are most likely to be warranted, it is appropriate that the government unit be liable for punitive damages. Governmental defendants are thus liable to the same extent as individual defendants, except that they are not liable for interest prior to judgment.

E. The PPA is not plaintiffs' exclusive remedy

Defendants correctly assert (motion at 36) that "in the PPA, Congress explicitly mandated that the remedy afforded by that statute is 'exclusive of any other civil action' against 'the officer or employee whose violation gave rise to the claim.' 42 U.S.C. § 2000aa-6(d)."

In other words, to the extent that defendants' misconduct is actionable under the PPA, that misconduct cannot form basis of plaintiffs' Bivens-type claims – plaintiffs cannot recover under both theories of liability. Defendants omit the PPA's legislative history clearly explaining that § 2000aa-6(d) "does not preclude the plaintiff from bringing a claim for wrongful acts other than a violation of the statute."[68]

And defendants go even further with their exclusive remedy theory, arguing that "[t]he fact that plaintiffs in this case may not be able to recover under the PPA is immaterial to the preclusive effect of that statute on plaintiffs' Bivens-type claims" (at 36). This argument fails as well.

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[68] Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)) p. 3961:

> The subsection provides that the remedy against a government unit which is provided by subsection (a)(1) is exclusive of any action against the offending officer for the same violation of the Act. However, this section does not preclude the plaintiff from bringing a claim for wrongful acts other than a violation of the statute which occur in the same course of events. Thus, even though the government unit is liable for damages for a violation of this statute, the plaintiff could, for example, proceed against the officer for trespass, destruction of property, or a violation of civil rights.

F. Plaintiffs state valid claims under the PPA

1. Warrantless seizure of computer

In April of 1997, plaintiff stored his computer in the home of a trusted friend, with the express understanding that he would retrieve it later.[69] Plaintiff's computer's hard drive contained hundreds of pages of manuscript, confidential notes, correspondence, memoranda and other materials.[70]

In September 1997, upon learning of the location of plaintiff's computer, defendant Kinsley participated in the seizure of the computer[71]– illegally[72] – without a warrant,[73] and in violation of plaintiff's legitimate expectation of privacy,[74] in violation of the PPA,[75] and in violation of the *Legal Handbook for Special Agents*.[76] The parties have already adjudicated the seizure of plaintiff's computer during plaintiff's criminal proceedings, defendants lost, and so they are collaterally estopped to deny its illegality. The PPA specifically excludes qualified immunity defenses, and so plaintiffs believe they are now entitled to summary judgment for violations of the PPA for the warrantless

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69 Comp. ¶ 126.

70 Id. ¶¶ 216-217.

71 Id. ¶ 161.

72 Id. ¶ 163.

73 Id. ¶ 162.

74 Id. ¶ 164.

75 Id. ¶ 165.

76 *Legal Handbook for Special Agents*, Section 5-6, abandoned property: "Agents should enter and search abandoned property only where it is impractical to obtain a search warrant." See also id., Section 4-54.2: "It is the policy of the FBI to obtain a search warrant before conducting a search for evidence."

computer seizure under provisions regarding both "work-product" and other "documentary materials."

2. Warrantless search of computer

And there is the warrantless search in June 1998 by an FBI Computer Analysis Response Team field examiner, including the recovery of deleted files and e-mail and web browsing. As plaintiffs are entitled to summary judgment on the seizure, so too are they for the subsequent illegal *search.* Plaintiffs therefore also have grounds to seek summary judgment on the search of both "work-product" and other "documentary materials" provisions of the PPA for the computer's search.

This warrantless illegal search of plaintiff's computer turned up work product and documentary materials on TWA Flight 800 and on other journalistic endeavors. The FBI notified the DOD of plaintiff's source for research he was doing on prisoners of war,[77] whereupon plaintiff's source for that story also became suddenly unavailable to provide further information. Plaintiffs seek punitive damages for violations of the PPA.[78]

3. Warrantless search and seizure of work product from movie producer

In August 1997, defendant Doe caused Hollywood movie producer Neil Russell to be visited whereupon without a warrant seized plaintiff 's journalistic work product in

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[77] Id. ¶¶ 216-217: "The hard drive contained, inter alia, hundreds of pages of manuscript, confidential notes, correspondence, memoranda and other materials protected by the First Amendment, including confidential correspondence with other journalists regarding ongoing journalistic investigations other than the downing of Flight 800, including JAMES SANDERS' investigation into the United States Department of Defense. Upon information and belief, plaintiffs aver that defendants provided JAMES SANDERS' ongoing work product regarding his investigation into activities of the Department of Defense to that agency.

[78] Id. ¶ 220.

Russell's possession. This PPA violation involved seizure of work product in the hands of a movie producer "in anticipation of communicating such materials to the public" (§ 2000aa-7(b)).

4. Subpoena of work product from publisher

The PPA and C.F.R work together to prevent the seizures of all journalistic work product. Subpoenas are a unilateral executive branch mechanism, and so are supposed to provide notice and the right to litigate. Of the four instances of actionable PPA violations, one involves defendants' wrongful use of subpoena power.

On March 24, 1997, defendant Campbell issued a subpoena to Kensington Publishing Corp., requiring it to produce "any and all docum

violations of laws and regulations are mentioned throughout this response, they are included in the Appendix attached hereto, and they too render all qualified immunity defenses issues of fact inappropriate for adjudication under Rule 12(b).

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land of naval forces. Or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, not \r be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just condensation.

The purpose behind the Bill of Rights and the Firsts Amendment in particular is to protect unpopular individuals from retaliation – at the hand of an intolerant society. Our society accords greater weight to the value of free speech than to the dangers of its misuse.[81]

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[81] McIntyre v. Ohio Elec. Comm., 514 U.S. 3345, 356, 115 S.Ct. 1511, 1524, 1341 L.Ed. 426 (1955).

It is within the jury's province to determine whether the complained of actions against plaintiffs were taken based on their exercise of their constitutional rights[82] and, if so, qualified immunity fails.[83] So now there are two independent reasons for denying defendants qualified immunity on plaintiffs' Bivens claims, (1) violations of mandatory guidelines and (2) unconstitutional motive.

1. Warrantless seizure computer
2. Warrantless search of computer

Two interests are protected by the Fourth Amendment – searches and seizures.[84] The interests at stake are those of privacy and of non-interference with one's possessory interest in property.[85]

Defendants lose on both counts by virtue of their being collaterally estopped from relitigating the issue – their warrantless search and seizure of the computer has already been adjudicated at plaintiffs' New York district court trial. It was unlawful. So, they assert qualified immunity on consent (defendants seized the computer from a third party), and argue that, because the district court remarked that it was a "close call, they are entitled to qualified immunity.

> [A]gents can rely on a claim of authority to consent if based on "the facts available to the officer at the moment, . . . a man of reasonable caution ... [would believe] that the consenting party had authority" to consent to a search of the premises).[86]

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82 Lowe v. City of Monrovia, 775 F.2d 998, 1099 (9th Cir. 1985).

83 Wheeler v. Mental Health & Mental Retardation Authority, 752 F.2d 1063, 1069 (5th Cir. 1985).

84 Soldal v. Cook County, 506 U.S. 56, 62, 113 S.Ct. 538, 544, 121 L.Ed.2d. 540 (1992).

85 Id.

86 Motion n. 24 at 53.

But that very argument has already been litigated. Defendants lost.

Moreover, clear questions of fact are outside the scope of the government's 12(b) motion, and consent cannot be presumed from the absence of proof that the person merely acquiesced.[87] In fact, many factors bear on whether a seizure was voluntarily, including the use of language or tone of voice indicating compliance with the request might me compelled,[88] official intimidation or harassment,[89] one's awareness of the right to refuse consent,[90] or expression of desire not to cooperate or to be left alone, or defendant's insistence that questions be answered,[91] or statements that could induce a reasonable person to believe the failure to cooperate would lead to detention.[92]

The burden of showing consent rests with defendants[93] – and is a clear question of fact to be determined from all the surrounding circumstances.[94] Once a warrantless search is established, the burden of going forward with the evidence passes to the defendants,[95] plaintiff had a legitimate expectation of privacy in the computer and its

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87 Bumper v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

88 United States v. Mendenhall, 446 US 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

89 Florida v. Bostick, 501 U.S. 429, 437, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389 (1991).

90 Lion Boulos v. Wilson, 834 F.2d 504, 508-09 (5th Cir. 1987).

91 Florida v. Royer, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324, 75 L.Ed. 2d 229 (1983).

92 Morgan v. Woessner, 975 F.2d 629, 638 (9th Cir. 1992).

93 Buffkins v. Omaha, 922 F.2d 465, 469 (8th Cir. 1990).

94 United Sates v. Al-Azzaway, 784 F.2d 890, 896 (9th Cir. 1985).

95 Gilker v. Baker, 576 F.2d 245, 246 (9th Cir. 1978).

contents,[96] and competent police officers are presumed to know the law and must act within its bounds.[97]

Plaintiffs suffered actual damages here because, among other things, defendants notified the Department of Defense of plaintiff's source for his journalistic endeavors on the DOD's culpability in abandoning prisoners of war,[98] whereupon that source too refused to provide plaintiff further information.

3. Warrantless search and seizure of work product from movie producer

Defendants point out that plaintiffs had no legitimate expectation of privacy in the business records of third parties.[99] Right. But to equate "business records of third parties" with the material seized — plaintiff's journalistic-work-product-in-progress — for a feature-length movie, ignores the Constitution.

The FBI's Legal Handbook for Special Agents, *Limitations on Search Authority*, defines work product as specifically including "scripts" and "drafts."[100] Plaintiff's legitimate expectation of privacy in his work product is patent. All warrantless seizures

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96 United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

97 Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

98 Id. ¶¶ 216-217. : "The hard drive contained, inter alia, hundreds of pages of manuscript, confidential notes, correspondence, memoranda and other materials protected by the First Amendment, including confidential correspondence with other journalists regarding ongoing journalistic investigations other than the downing of Flight 800, including JAMES SANDERS' investigation into the United States Department of Defense. Upon information and belief, plaintiffs aver that defendants provided JAMES SANDERS' ongoing work product regarding his investigation into activities of the Department of Defense to that agency.

99 United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

100 Section 50-11.1, *Limitations on Search Authority*: Work product specifically includes "scripts" and "drafts."

are per se unreasonable under the Fourth Amendment, [101] subject to only a few specifically established and well-delineated exceptions, and the government bears a heavy burden of demonstrating justification from the normal procedure of obtaining a warrant.[102] Failure to seek a warrant absent the necessity of immediate action will not be excused.

Again, the conduct establishes a legitimate expectation of privacy and resultant violations of First, Fourth, and Fifth Amendment rights.[103]

Additionally, defendants' conduct is also actionable as being an exploratory search, as noted above on page five.

4. Warrentless search of personnel files

"Sometime prior to defendant Kinsley's December 23, 1997 appearance before the grand jury, Kinsley traveled to Seal Beach, California, and, in violation of State law, perused James Sanders' personnel files generated during his ten-year tenure as a police officer at the Seal Beach, California, police department."[104]

To establish that Fourth Amendment rights were violated by a search, a plaintiff must show that a legitimate expectation of privacy in the area was had.[105] In fact, state law prohibited both this search and seizure. The interests at stake are those of privacy

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[101] California v. Acevedo, 500 U.S. 565, 579, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991).

[102] Unites States v. Driver, 776 F.2d 807, 810 (9th Cir. 1985); United States v. Alverez, 810 F.2d 879, 881 (9th Cir. 1987).

[103] United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

[104] Compl. ¶ 214.

[105] United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

and of non-interference with one's possessory interest in property for both searches and seizures.[106]

Once a warrantless search is established, the burden of going forward with the evidence passes to the defendants.[107]

5. Threatening indictment for refusal to divulge privileged information

The right to liberty includes the principle that a person acting under color of law may not abuse a person intentionally and without justification.[108] Government action designed to retaliate against and chill political expression strikes at the heart of the First Amendment, and the victim of such action is entitled to sue the responsible government agents.[109] The government's decisions here, based on the exercise of a constitutional right, are unconstitutional.[110] Our society accords greater weight to the value of free speech than to the dangers of its misuse.[111]

6. Seeking interrogation despite requests to the contrary

The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society,[112] and plaintiffs are fully

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106 Soldal v. Cook County, 506 U.S. 56, 62, 113 S.Ct. 538, 544, 121 L.Ed.2d. 540 (1992).

107 Gilker v. Baker, 576 F.2d 245, 246 (9th Cir. 1978).

108 United States v. Gwaltney, 790 F.2d 1378, 1387 (9th Cir. 1986).

109 Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972).

110 Bortdenkircher v. Hays, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978).

111 McIntyre v. Ohio Elec. Comm., 514 U.S. 3345, 356, 115 S.Ct. 1511, 1524, 1341 L.Ed. 426 (1955).

112 Wolf v. Colorado, 338 U.S. 25, 27, 69 S. Ct. 1359, 1361, 93 L.Ed. 1982 (1949).

protected by the Fourth Amendment whether or not they are suspected of criminal behavior.[113]

The right to be left alone is now firmly the law, and this right underlies many constitutional rights.[114] The standard is what a competent police officers would know, including knowing the law. They are presumed to know what the law is and to follow it.[115]

7. "Perp walks" – unreasonable use of force and unreasonable invasion of privacy

The perp walks are egregious violations of plaintiffs' First, Fourth, and Fifth Amendment rights.

The Due Process Clause secures the individual from the arbitrary exercise of the powers of government and prevents governmental power from being used for the purpose of oppression.[116]

Government action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.[117] The purpose behind the Bill of Rights and the Firsts Amendment in particular is to protect unpopular individuals from retaliation –

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[113] Camara v. Municiple Court of San Francisco, 387 U.S. 523, 530, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967).

[114] Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis Holmes, Bulter, and Stone, JJ., dissenting from denial of certiorari). See also Duran v. City of Douglas, Arizona, 904 F.2d 1372, 1376 (9th Cir. 1990).

[115] Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

[116] Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct 662, 665, 88 L.Ed. 662 (1986).

[117] Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972).

at the hand of an intolerant society. Our society accords greater weight to the value of free speech than to the dangers of its misuse.[118]

Plaintiffs have met their burden of establishing a violation of substantive due process by the "perp walks." The government's clearly arbitrary and unreasonable conduct had no substantial relation to the public health, safety, morals, or general welfare.[119] The right to liberty includes the principle that a person acting under color of law may not abuse a person intentionally and without justification.[120]

The guidelines prohibiting defendants' conduct are relevant on defendants' objective knowledge and may be offered as evidence of the conduct's exceeding constitutional boundaries.

Also, it is within the jury's province to determine whether the complained of actions were taken based on their exercise of their constitutional rights,[121] and damages is not an element of force cases. (Harlow v. Fitzgerald's[122] reference to "insubstantial Bivens cases" does not refer to insubstantial damages.)

The perp walks include the allegation of unreasonable use of force, as does the next incident.

Oppressive conduct bears on punitive damages.

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[118] McIntyre v. Ohio Elec. Comm., 514 U.S. 3345, 356, 115 S.Ct. 1511, 1524, 1341 L.Ed. 426 (1955).

[119] Sierra Lake Reserve v. Rocklin, 938 F.2d 951, 957 (9th Cir 1991).

[120] United States v. Gwaltney, 790 F.2d 1378, 1387 (9th Cir. 1986).

[121] Lowe v. City of Monrovia, 775 F.2d 998, 1099 (9th Cir. 1985).

[122] Harlow v. Fitzgerald

8. Unreasonable use of force at arrest

The Fourth Amendment's prohibition of "the right of the people to be secure in their persons… against unreasonable seizures" protects against excessive force, entitling damage recovery.[123] Injuries are not an essential element of defendant's use of force in violation of plaintiffs' Fourth Amendment rights. Thus, plaintiffs are entitled to a verdict in their favor for their use of handcuffs during the arrest procedure and for the "perp walks."

Plaintiffs seek damages in two instances of unreasonable use of force, and, in an ongoing situation, when government agents use force more than once, each use of force must be judged as of the moment at which force was used.[124]

Aside from the unavailability of the qualified immunity in force cases (discussed below), there are other reasons that these matters cannot be adjudicated under Rule 12(b). The question of whether the force used in an arrest was reasonable is usually for the jury[125] under the cumulative "totality of the circumstances" test.[126] Objective considerations and not subjective intent bear upon the determination of whether the force used was excessive,[127] and considerations include the severity of the crime, whether plaintiffs posed an immediate threat to the safety of others, and whether the plaintiffs

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123 Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984).

124 Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991); Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992).

125 Ting v. U.S., 927 F.2d 1504, 1510 (9th Cir. 1991); Lowe v. City of Monrovia, 775 F.2d 998, 1099 (9th Cir. 1985); Wheeler v. Mental Health & Mental Retardation Authority, 752 F.2d 1063, 1069 (5th Cir. 1985).

126 Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987).

127 Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994).

were actively resisting arrest or attempting to evade arrest by flight.[128] Defendants cannot plead the existence of any such circumstances in this case, and Kinsley was reminded several times by a junior FBI agent that this use of force was unnecessary.

Also, law-enforcement guidelines are relevant to the analysis of constitutionally excessive force.[129]

The standards of decency in modern society simply do not permit the imposition of needless use of force.[130]

9. Subpoena of work product from publisher

The guidelines here too bear on objective knowledge and exceeding constitutional boundaries. Plaintiff has established a legitimate expectation of privacy in his journalistic work product seized from a producer. Not only did defendants' unlawfully invade plaintiff's Fourth Amendment[131] legitimate expectation of privacy in his ongoing movie work product, but defendants' squelched that means of publication. And here too competent police officers are required to know that their seizure of in-progress-work-product violated the PPA.

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128 Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

129 Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995).

130 Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).

131 United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

10. Subjective mischaracterization and defamatory statements in banner on web site

The FBI's web site's moving banner, identifying plaintiffs as "conspiracy theorists" is an adverse consequence for exercising their First Amendment rights. This is actionable[132] against the responsible government agents.[133] Again, the C.F.R. prohibited defendants from engaging in this conduct, and objective competence is the standard.[134]

A person's reputation and good name are among the liberty interests protected by the Due Process Clause of the Fifth Amendment from damage by public government action when coupled with resultant damages,[135] and the right to liberty includes the principle that a person acting under color of law may not abuse a person intentionally and without justification.[136] Defendants violated the Fifth Amendment's Due Process Clause by their arbitrary exercise of the powers of government for the purpose of oppression.[137] Defendants' characterization of plaintiff's as "conspiracy theorists" was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, and violated plaintiffs' substantive due process rights.[138]

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132 Jackson v. Gates, 775 F.2d 648, 653 (9th Cir 1992).

133 Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972).

134 Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

135 Paul v. Davis, 424 U.S. 693, 707-708, 96 S.Ct. 1155, 1163, 47 L.Ed.2d 405 (1976).

136 United States v. Gwaltney, 790 F.2d 1378, 1387 (9th Cir. 1986).

137 Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct 662, 665, 88 L.Ed. 662 (1986).

138 Sierra Lake Reserve v. Rocklin, 938 F.2d 951, 957 (9th Cir 1991).

Moreover, it is within the jury's province to determine whether the complained of actions against plaintiffs were taken based on their exercise of their constitutional rights,[139] and, if so, any qualified immunity argument fails.[140] Thus, defendants' qualified immunity argument, even if it were meritorious, is another issue which can only be decided at trial or possibly on summary judgment under Rule 56, but not by defendants' motion to dismiss under Rule 12 (b).

In sum, a person's reputation and good name are among the liberty interests protected by the Due Process Clause of the Fifth Amendment from damage by public government action,[141] and this too is a question of fact.

11. False allegations and impermissible statements in press release

Defendants' press release defamed plaintiff by reporting that he "misrepresented the results of those [his] test results." As set forth above, *Actionable Conduct*, this statement is false.

Here too defendants' damaged plaintiffs' reputation and good name transgressing the liberty interests protected by the Due Process Clause of the Fifth Amendment from damage by public government action,[142] resulting in the inability of plaintiff to gainfully pursue his journalistic endeavors. And the press release transgressed plaintiffs' right to be free of individuals' abusing plaintiffs intentionally and without justification under

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139 Lowe v. City of Monrovia 775 F.2d 998, 1099 (9th Cir. 1985).

140 Wheeler v. Mental Health & Mental Retardation Authority, 752 F.2d 1063, 1069 (5th Cir. 1985).

141 Paul v. Davis, 424 U.S. 693, 707-708, 96 S.Ct. 1155, 1163, 47 L.Ed.2d 405 (1976).

142 Paul v. Davis, 424 U.S. 693, 707-708, 96 S.Ct. 1155, 1163, 47 L.Ed.2d 405 (1976).

color of law.[143] Here too the defendants flouted C.F.R.'s admonitions, by making subjective statements.

And again, it is for the jury to determine whether this conduct was taken based on exercise of constitutional rights,[144] which nullifies defendants' qualified immunity defense.[145] Thus, even if defendants' arguments were meritorious, they cannot be resolved by their motion to dismiss.

12. FBI's false statements demanding that TWA terminate Elizabeth Sanders on pain of TWA's being excluded from the official Flight 800 Probe

The following three-part test must be met to find that an employee was acted against negatively in retaliation for the exercise of First Amendment rights: (1) the plaintiff must show the relevant conduct was constitutionally protected; (2) the plaintiff must show that the conduct was a "substantial" or "motivating" factor in the decision to act against plaintiff – if the plaintiff meets this burden, then (3) the defendant must show by a preponderance of evidence that the same decision as to plaintiff's employment would have been reached even in the absence of the protected conduct.[146] Defendants come nowhere close to overcoming this test.

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143 United States v. Gwaltney, 790 F.2d 1378, 1387 (9th Cir. 1986).

144 Lowe v. City of Monrovia 775 F.2d 998, 1099 (9th Cir. 1985).

145 Wheeler v. Mental Health & Mental Retardation Authority, 752 F.2d 1063, 1069 (5th Cir. 1985).

146 Hansen v. White, 947 F.2d 1378 (9th Cir. 1991).

And here too it is within the jury's province to determine whether the complained of actions against plaintiffs were taken based on their exercise of their constitutional rights.[147]

A person's reputation and good name are among the liberty interests protected by the Due Process Clause of the Fifth Amendment from damage by public government action.[148] The purpose behind the Bill of Rights and the First Amendment in particular is to protect unpopular individuals from retaliation – at the hand of an intolerant society. The right to liberty includes the principle that a person acting under color of law may not abuse a person intentionally and without justification.[149]

13. Material false statements in affidavit in support of arrest warrant

Would the magistrate have issued the warrant had defendants accurately identified plaintiff as an investigative journalist, subject to the protections of the PPA? Even if defendants pass this test, defendants publicized the affidavit, it too contains both material and immaterial false statements, both of which were included in defendants' press release.

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147 Lowe v. City of Monrovia, 775 F.2d 998, 1099 (9th Cir. 1985); Wheeler v. Mental Health & Mental Retardation Authority, 752 F.2d 1063, 1069 (5th Cir. 1985).

148 Paul v. Davis, 424 U.S. 693, 707-708, 96 S.Ct. 1155, 1163, 47 L.Ed.2d 405 (1976) .

149 United States v. Gwaltney, 790 F.2d 1378, 1387 (9th Cir. 1986).

V. Defendants are not entitled to qualified immunity

A. Qualified immunity is unavailable under the PPA

42 U.S. C. § 2000aa-6(c) ***Official immunity***.

> The United States… may not assert… the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct…

B. Qualified immunity is unavailable in this case for plaintiffs' Bivens claims

Defendants cite this Circuit's 1988 decision in Doe v. Stephens.[150] That case states:

> The Supreme Court has recently held that this "discretionary function "exclusion "applies only to conduct that involves the permissible exercise of policy judgment" and does not bar claims based upon a governmental departure from clear regulatory standards. See Berkovitz v. United States, 108 S. Ct 1954, 100 L.Ed.2d 531 (1988).

As set forth above (*IV. Plaintiffs state a cause of action for Bivens-type claims*), each of the sixteen sets of facts alleged inculpates defendants in constitutional violations, all but a few were which were transgressions of published, mandatory guidelines. And as set forth above, guidelines bear on qualified immunity's "objectively reasonable" standard, and non-actionable guideline violations may be considered as evidence of whether constitutional violations in fact occurred.

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[150] 851 F.2d 1457, 1463-64 (1988).

All warrantless searches as occurred here are prohibited by the FBI's own handbook[151] and the PPA.[152] The "perp walks," which involved unreasonable use of force and unreasonable invasion of privacy, are prohibited by DOJ guidelines.[153] (Excessive force may never be used, and a conclusion that there was excessive force is determinative of the entire force claim because there can be no qualified immunity in

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[151] *Legal Handbook for Special Agents*, Section 4-54.2: "It is the policy of the FBI to obtain a search warrant before conducting a search for evidence."

Id. Section 50-11.1, *Limitations on Search Authority*: Work product specifically includes "scripts" and "drafts."

Id. Section 5-11.2 reiterating the PPA's prohibition of seizing work product, including where the alleged criminal conduct is a "possessory offense" – receipt or possession of materials.

Id. Section 5-6, Abandoned Property: "Agents should enter and search abandoned property only where it is impractical to obtain a search warrant." See also id., Section 4-54.2: "It is the policy of the FBI to obtain a search warrant before conducting a search for evidence."

[152] 42 U.S. C. § 2000aa. Search and seizure by government officers and employees in connection with investigation or prosecution of any offense. (a) *Work product materials*.

> Notwithstanding any other law, is shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public… [and] a government officer or employee may not search for or seize such materials… if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of [work product]

[153] Justice Department press guidelines, 28 CFR, 50.2, (4)(b)(7) *Guidelines to criminal actions:*

> [P]ersonnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person held or transported in Federal custody.

force cases because, logically, force found to be unreasonable may not, at the same time, also be objectively reasonable.[154])

The threatening of the indictment for refusal to divulge privileged information was done to circumvent New York's "Shield Law,"[155] and defendants violated their own handbook when making the threat.[156] Defendants' subpoenaing of telephone records and work product from a publisher violated the C.F.R.[157] and the FBI's Handbook.[158] Defendants' calling plaintiffs "conspiracy theorists" on their web site banner violated the C.F.R.,[159] as did their false allegations and impermissible statements in their press release and false statements in affidavit in support of arrest warrant,[160] which the defendants also publicized.

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154 See, e.g., Hopkins v. Andaya, 958 F.2d 881, 885 n. 4 (9th Cir. 1992); Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991); Street v. Parnum, 929 F.2d 537, 540 (10th Cir. 1991).

155 N.Y. Civ. Rights Law § 79-h(b) (protects journalists from contempt charges for refusing to disclose a journalistic source).

156 *Legal Handbook for Special Agents*, Section 7-14*: Tape recording of interviews*, (required that the videotape be treated as evidence and that documentation of chain-of-custody be maintained.)

Id., Section 7-5*: Interview of subject by US Attorney*, (requiring that Kinsley generate an FD-302 report of interview with plaintiff, Caproni and Campbell) (no interview notes, corresponding 302, or videotape produced to plaintiffs at criminal proceedings.)

157 28 C.F.R. 50.10 (2000), *Attorney General's Policy with regard to the issuance of subpoenas to members of the news media.*

158 *Legal Handbook for Special Agents*, Section 50-11.1, *Limitations on Search Authority*: Work product specifically includes "scripts" and "drafts."

159 28 CFR 50.2(3): "[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations."

160 Id.

VI. None of plaintiff's claims are barred under *collateral estoppel* or Heck v. Humphrey

49 U. S. C. § 1155(b) provides:

> A person that knowingly and without authority removes, conceals, or withholds a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident, shall be fined under title 18, imprisoned for not more than 10 years, or both.

On April 13, 1999, in the United States District Court, Eastern District New York in Uniondale, the Honorable Judge Seybert instructed the jury in plaintiffs' criminal trial:

> Neither defendant is charged in the indictment with having committed this offense personally. Rather, each is charged with having conspired to commit the offense and with having aided and abetted its commission. However, before discussing with you the conspiracy in the aiding and abetting charges as to what constitutes a violation of Section 1155(b) of Title 49, the government must prove four elements of a crime beyond a reasonable doubt.
>
> > First that on or about the time charged in the indictment, a person knowingly and intentionally removed, concealed or withheld part of a civil aircraft or property on a civil aircraft;
> >
> > Second, that the part of the property removed, concealed or withheld was part of or property on a civil aircraft;
> >
> > Third, that the person who removed, concealed or withheld the part of the property did not have the authority to do so; and;
> >
> > Fourth, that the person who removed, concealed or withheld the part or property knew that he did not have authority to do so.

Thus, plaintiffs' convictions of these elements are the issues precluded in this action, as well as the governments' decision to prosecute plaintiffs.[161] The first sentence above under *B. Background & Summary* (at 5) is:

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[161] In reviewing the convictions, the Second Circuit held that constitutional protections recognized by that circuit protecting journalists from being compelled to reveal their sources did not reach prosecutors' actions in using their discretion only of whom to prosecute. U.S. V. Sanders, 211 F.3d 711, 719 (2nd Cir. 2000).

> Because neither of plaintiffs' convictions nor sentences (probation) can be within the scope of this suit, they do not seek damages for their convictions of 49 U.S.C. §1155(b), receiving material from a crash scene.

Defendant's preclusion argument, at 21, 22:

> The Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994), bars plaintiffs' damage claims as impermissible collateral attacks on their convictions because they have not previously overturned their criminal convictions on appeal nor articulated any actual, compensable injury arising from their claims apart from their convictions. As the D.C. Circuit observed in interpreting the scope of Heck, "[b]ecause [plaintiffs were] found guilty and because the verdicts have not been set aside, [they] cannot recover damages for the actions of those who allegedly brought about [their] conviction." Williams v. Hill, 74 F.3d 1339, 1341 (D.C. Cir. 1996).
>
> The district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

That is correct, so there is no malicious prosecution count. But defendants' theory is that plaintiff's entire complaint is one big malicious prosecution claim, which is barred. Under that theory, defendants could have physically beaten plaintiffs in violation of the Fourth Amendment, and redress would be barred. The unavailability of a malicious prosecution claim has no effect on plaintiffs' PPA and Bivens complaint, as Heck makes perfectly clear. That case, where a Section 1983 plaintiff sued prosecutors and police alleging that his *conviction* violated his constitutional rights, the Supreme Court held it an impermissible collateral attack because he "challenged the legality of his conviction." Heck at 477.

Only one of the sixteen sets of facts could even arguably be barred by Heck, number 5, "Threatening indictment for refusal to divulge privileged information."

Heck at 485:

> But if the district Court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed…
>
> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in… conviction.

Heck does not help defendants; except arguably, for defendants' threatening plaintiffs with indictment for refusal to divulge privileged information, and plaintiff believes that even that claim is not barred under Heck.[162]

Plaintiff's here clearly "claim… injury apart from the fact of [their] conviction[s]."[163]

Nor does defendants' reliance on this Circuit's 1988 decision on Spagnola v. Mathis,[164] (Motion n. 20 at 36) help defendants, as that case is clearly inapplicable here. In Spagnola (at 224), the court held that plaintiffs could not seek "Bivens remedies to litigants challenging federal personnel actions for whom Congress has declined to provide full administrative remedies subject to judicial review under the Civil Service Reform Act… We now decide… that 'special factors counsel' against the creation of

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162 Plaintiffs' complaint does allege ¶¶ 237-38:

> From its inception, the government's targeting of plaintiffs James and Elizabeth Sanders by threat of prosecution, subsequent prosecution, acts committed in preparation of and during that prosecution, and dissemination of false and misleading facts during that prosecution, were in violation of the First ...Amendment[] to the United States Constitution.

Plaintiffs believe this is true, but recognize that damages from the prosecution itself is barred.

163 Williams v. Hill, 74 F.3d 1340 24 (D.D.C.).

164 859 F.2d 224.

Bivens remedies in these circumstances." Defendants' quote (motion at 33) the following language from Spagnola (228-29):

> If the comprehensiveness of a statutory scheme cannot be gainsaid and it appears that congressional inaction in providing for damages remedies has not been inadvertent, courts should defer to Congress' judgment with regard to the creation of supplemental Bivens remedies.

Defendants argue (id.) that the courts should not create a supplemental Bivens-type remedy to fill in holes that Congress determined should be left unfilled. While this may be a correct statement of the law, it has no applicability to the PPA. See Senate Report No. 96-874, (Pub. L. No. 96-440, (94 Stat. 1879)) p. 3961:

> The subsection provides that the remedy against a government unit which is provided by subsection (a)(1) is exclusive of any action against the offending officer for the same violation of the Act. However, this section does not preclude the plaintiff from bringing a claim for wrongful acts other than a violation of the statute which occur in the same course of events. Thus, even though the government unit is liable for damages for a violation of this statute, **the plaintiff could, for example, proceed against the officer for** trespass, destruction of property, or a **violation of civil rights.**
> (emphasis supplied)

Thus, as defendants point out, this Court "should defer to Congress' judgment with regard to the creation of supplemental Bivens remedies." Spagnola at 228-29.

Conclusion

The law is clear:

> [T]he factual allegations of the complaint must be taken as true, and any ambiguities or doubts concerning the sufficiency must be resolved in favor of the pleader. In particular, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief."[165]

[165] Doe v. US Department of Justice, 753 F.2d 1092, (U.S.App.D.C. 1984) (citations omitted).

For the foregoing reasons, plaintiffs oppose any dismissal and join in defendants' motion to transfer venue to New York.

Respectfully submitted,

Mark Lane
Bar # 445988
Attorney for Plaintiffs
105 Second Street, NE
Washington, DC 20002
(202) 547-6700

John H. Clarke
Bar # 388599
Attorney for Plaintiffs
1730 K Street, NW
Suite 304
Washington, DC 20006
(202) 332-3030

Certificate of Service

I hereby certify and affirm that on July 2, 2001, the foregoing was served by first class mail to:

G. Michael Harvey, Esquire
Assistant United States Attorney
555 Fourth Street, NW
Room 10-108
Washington, D.C. 20001

John H. Clarke