

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: January 30, 2012 Decided: August 9, 2012)

5 Docket No. 11-61

6 -----
7 VITERBO LIRANZO, AKA VITERBO IGNACIO LIRANZO DICENT,

8 Plaintiff-Appellant,

9 - v -

10 UNITED STATES OF AMERICA,

11 Defendant-Appellee.

12 -----
13 Before: SACK, RAGGI, and CHIN, Circuit Judges.

14
15 Appeal by the plaintiff from a judgment of the United
16 States District Court for the Eastern District of New York
17 (Sandra J. Feuerstein, Judge) dismissing for lack of subject
18 matter jurisdiction the plaintiff's claims relating to his
19 mistaken detention as a removable resident alien. The district
20 court concluded that subject matter jurisdiction was lacking over
21 the plaintiff's Federal Tort Claims Act claims because there was
22 no private analogue to the immigration detention suffered by the
23 plaintiff, as required to find a waiver of the United States'
24 sovereign immunity under the Act. Because we conclude that there

1 is such an analogue, we vacate the judgment of the district court
2 in part and remand for further proceedings. We affirm the
3 district court's judgment insofar as it dismissed the plaintiff's
4 Fourth Amendment claim, which he does not challenge on appeal.

5 Affirmed in part, reversed in part, and remanded.

6 LAWRENCE K. KATZ, Katz & Kreinces LLP,
7 Mineola, NY, for Plaintiff-Appellant.

8 JAMES H. KNAPP (Margaret M. Kolbe,
9 Varuni Nelson, on the brief), Assistant
10 United States Attorneys, of counsel, for
11 Loretta E. Lynch, United States Attorney
12 for the Eastern District of New York,
13 Brooklyn, NY, for Defendant-Appellee.

14 SACK, Circuit Judge:

15 In March 2006, plaintiff Viterbo Liranzo, a United
16 States citizen, completed a term of incarceration in New York
17 State prison for felony possession of a controlled substance.
18 Before his release, United States Immigration and Customs
19 Enforcement ("ICE") erroneously identified him as a permanent
20 resident alien who had been convicted of a felony, which rendered
21 him subject to removal.¹ He was released to the custody of ICE

1

In 1996, Congress enacted the Illegal
Immigration Reform and Immigrant
Responsibility Act (IIRIRA), 110 Stat.
3009-546. . . .

. . . .
Before IIRIRA's passage, United States
immigration law established "two types of
proceedings in which aliens can be denied the
hospitality of the United States: deportation
hearings and exclusion hearings." Exclusion
hearings were held for certain aliens seeking

1 and transported to a detention center in Louisiana pending
2 removal. During removal proceedings in Louisiana, it was
3 discovered that Liranzo is a U.S. citizen, and he was therefore
4 released.

5 Thereafter, Liranzo brought the instant complaint in
6 the United States District Court for the Eastern District of New
7 York against the United States under the Federal Tort Claims Act
8 ("FTCA" or the "Act") alleging, inter alia, that federal
9 immigration officials had falsely arrested and imprisoned him.
10 Following some two years of discovery, the matter was set for
11 trial. But before trial began, the district court (Sandra J.
12 Feuerstein, Judge) granted the government's motion to dismiss the
13 case for lack of subject matter jurisdiction because, the court
14 concluded, there was no private analogue to the immigration
15 detention suffered by plaintiff, as required for the Act to have

entry to the United States, and deportation
hearings were held for certain aliens who had
already entered this country. . . .

. . . .
In IIRIRA, Congress abolished the distinction
between exclusion and deportation procedures
and created a uniform proceeding known as
"removal." See 8 U.S.C. §§ 1229, 1229a.

Vartelas v. Holder, 132 S. Ct. 1479, 1483-84 (2012) (citations
omitted). In this opinion we therefore use the term "removal"
instead of "deportation." We have not, however, changed the term
"deportation" in quotations of the district court or of either
party.

1 worked a waiver of the United States' sovereign immunity from
2 suit.

3 Inasmuch as we conclude that there is such an analogue,
4 we reverse and remand for further proceedings. We affirm the
5 district court's judgment insofar as it dismissed the plaintiff's
6 Fourth Amendment claim, which he does not challenge on appeal.

7 **BACKGROUND²**

8 Liranzo's Citizenship

9 Plaintiff Viterbo Liranzo was born on May 10, 1955, in
10 the Dominican Republic. He entered the United States as a lawful
11 permanent resident in 1965 when he was ten years old. On
12 February 24, 1972, pursuant to a Dominican divorce decree, the
13 plaintiff's mother, Augustina Dicient, was awarded custody of
14 Liranzo. On October 6, 1972, when Liranzo was sixteen years old,
15 his mother became a naturalized U.S. citizen. Because he was a
16 lawful permanent resident in his mother's custody when she was
17 naturalized, and he was younger than eighteen years old at the
18 time, Liranzo obtained derivative citizenship on that date under
19 the immigration laws then in force. See Immigration and
20 Nationality Act ("INA") § 321(a)(3), 8 U.S.C. § 1432(a)(3)

² The material facts relevant to the issue on appeal are not in dispute. The facts are drawn from the record in the district court, the parties' representations before this Court, and the parties' pre-trial statement of stipulated facts. See Am. Proposed Pre-Trial Order at 1-3, Liranzo v. United States, No. 08 Civ 2940 (SJF)(ARL) (E.D.N.Y. July 8, 2010), ECF No. 31.

1 (repealed 2000) (providing for derivative citizenship upon, inter
2 alia, the "naturalization of the parent having legal custody of
3 the child when there has been a legal separation of the
4 parents").

5 Derivative citizenship under section 321 of the INA was
6 "automatic; that is, when certain conditions exist[ed], a child
7 bec[ame] a U.S. citizen even though neither parent, nor the
8 child, ha[d] requested it." Lewis v. Gonzales, 481 F.3d 125, 131
9 (2d Cir. 2007) (per curiam). Nonetheless, under that regime, the
10 government did not issue a certificate of naturalization to
11 children who obtained derivative citizenship until such a
12 certificate was sought by the child or a parent.³ See 8 C.F.R. §
13 320.3. Thus, apparently because Liranzo did not know he had
14 become a citizen, he continued to renew his "resident alien card"
15 (or "green card") until the mid-1990s. Liranzo's last green card
16 was effective through June 10, 2006. As a result of the
17 renewals, at the time of the events in question, federal
18 immigration records erroneously listed Liranzo as a lawful
19 permanent resident rather than as a citizen.

³ After the events in question, on May 15, 2007, Liranzo obtained a certificate of citizenship. The government does not dispute that Liranzo obtained derivative citizenship on October 6, 1972.

1 Liranzo's New York State Conviction
2 and Subsequent Immigration Detention
3

4 In approximately September 2005, Liranzo was convicted
5 of criminal sale of a controlled substance in the fourth degree
6 in violation of New York Penal Law section 220.34 for selling
7 cocaine. He was incarcerated at the Nassau County Correctional
8 Center ("NCCC") in East Meadow, New York. His term of
9 incarceration was scheduled to end on or about March 17, 2006.

10 While Liranzo was serving his sentence, ICE agents
11 identified him as a resident alien convicted of a drug felony
12 through ICE's Criminal Alien Program.⁴ ICE issued an immigration
13 detainer to NCCC officials requesting that they release Liranzo
14 only into ICE's custody so that he could be removed from the
15 United States. See generally 8 C.F.R. § 287.7(a) (describing the
16 nature and purpose of immigration detainers). Because of the
17 detainer, Liranzo was held at the NCCC for approximately seven
18 days beyond his projected release date.

⁴ Pursuant to the Criminal Alien Program, ICE attempts to identify removable "aliens who are incarcerated within federal, state and local prisons and jails" so that it can "process[] the alien expeditiously and secur[e] a final order of removal for an incarcerated alien[, ideally] before the alien is released to ICE custody." Criminal Alien Program, ICE, <http://www.ice.gov/criminal-alien-program/> (last visited July 18, 2012). By identifying removable incarcerated aliens before their release from prison, ICE endeavors to "decrease[] or eliminate[] the time spent in ICE custody [prior to the alien's removal] and reduce[] the overall cost to the federal government." Id.

1 According to Liranzo, he was interviewed by an ICE
2 representative at the prison. Liranzo asserts that he told the
3 ICE representative that he, Liranzo, was a United States Citizen.
4 Liranzo also alleges that his sister spoke to another ICE
5 representative and provided the representative with Liranzo's
6 mother's naturalization papers.

7 On or about March 24, 2006, ICE took Liranzo into
8 custody. ICE also served him with a Notice to Appear for removal
9 proceedings, charging him as a removable alien who had committed
10 an aggravated felony. He was first held in an ICE detention
11 facility in Manhattan for some 23 hours, then taken to a facility
12 in Freehold, New Jersey, where he was held for another seven
13 days. Thereafter, he was transported to the Federal Detention
14 Center at Oakdale, Louisiana.

15 Liranzo's removal proceedings, during which he was
16 represented by counsel, began in Oakdale. On May 3, 2006, the
17 proceedings were adjourned to allow Liranzo's attorney to gather
18 documents for the purpose of substantiating Liranzo's claim to
19 citizenship. On or about May 21, 2006, his attorney filed a
20 motion to terminate the proceedings supported by Liranzo's birth
21 certificate and his mother's naturalization certificate and
22 divorce decree.

23 Thereafter, government officials investigated the
24 validity of Liranzo's mother's divorce decree and her award of

1 custody of Liranzo to determine whether he would have met the
2 applicable requirements for derivative citizenship. These issues
3 were determined in Liranzo's favor on or about June 21, 2006.

4 On June 30, 2006, ICE released Liranzo. He was taken
5 to a bus terminal in Louisiana, where he arranged for his own
6 transportation back to New York City. With ICE's consent,
7 removal proceedings were formally terminated on or about July 20,
8 2006.

9 District Court Proceedings

10 After exhausting his administrative remedies by filing
11 a claim with the Department of Homeland Security, Liranzo filed
12 the instant complaint in the United States District Court for the
13 Eastern District of New York against the United States on July
14 18, 2008. He sought five million dollars in damages for "false
15 arrest and imprisonment" and other torts allegedly committed by
16 government officials in connection with his immigration
17 detention. On February 6, 2009, the United States answered the
18 complaint, elliptically asserting as one of its defenses that
19 Liranzo's claims were "subject to, and limited by," the FTCA.
20 Am. Answer at 4, Liranzo v. United States, No. 08 Civ. 2940
21 (SJF)(ARL) (E.D.N.Y. Feb. 6, 2009), ECF No. 9. After nearly two
22 years of discovery, a bench trial was scheduled to begin on

1 December 13, 2010.⁵ No motion to dismiss was made, and no
2 motions for summary judgment were made by either party.

3 Federal Rule of Civil Procedure 12(h)(3) provides that
4 "[i]f the court determines at any time that it lacks
5 subject-matter jurisdiction, the court must dismiss the action."
6 FED. R. CIV. P. 12(h)(3); see also Weinstein v. Iran, 609 F.3d 43,
7 47 (2d Cir. 2010) ("[S]ubject matter jurisdiction may be raised
8 at any point"), cert. denied, --- S. Ct. ----, No. 10-
9 947, 2012 WL 2368690, 2012 U.S. LEXIS 4760 (June 25, 2012). On
10 December 8, 2010, just five days before the scheduled start of
11 the bench trial, the government submitted a letter motion seeking
12 dismissal of the complaint for lack of subject matter
13 jurisdiction. The government premised its motion on the
14 defendant's sovereign immunity from suit based on the limited
15 nature of the FTCA's waiver of that sovereign immunity. See Wake
16 v. United States, 89 F.3d 53, 57 (2d Cir. 1996) ("Absent a
17 waiver, sovereign immunity shields the federal Government and its
18 agencies from suit. Thus, sovereign immunity is jurisdictional
19 in nature.") (ellipsis, brackets, and internal quotation marks
20 omitted). The waiver extends only to claims for which a private
21 analogue exists -- that is, the waiver extends only to claims
22 that could be brought against a "private individual under like

⁵ With exceptions not relevant here, jury trials are not available to plaintiffs bringing claims against the United States under the FTCA. See 28 U.S.C. § 2402.

1 circumstances," 28 U.S.C. § 2674 -- permitting the government to
2 be held liable only "under circumstances where the United States,
3 if a private person, would be liable to the claimant in
4 accordance with the law of the place where the act or omission
5 occurred," id. § 1346(b)(1).

6 The government's "chief legal argument" was that there
7 was no private analogue to immigration detentions because
8 "citizenship determinations and immigration matters are federal
9 functions reserved to the federal government, and, . . . because
10 a private individual cannot engage in such determinations, the
11 United States has not waived sovereign immunity on claims related
12 thereto." Def.'s Reply Letter Br. at 1, Liranzo v. United
13 States, No. 08 Civ. 2940 (SJF)(ARL) (E.D.N.Y. Dec. 14, 2010), ECF
14 No. 38 ("Def.'s Reply Letter Br.") (emphasis in original).

15 Although the government acknowledged that the FTCA
16 explicitly permits claims for false imprisonment to be brought
17 against the United States based on the acts of federal law
18 enforcement agents, see 28 U.S.C. § 2680(h) (waiving sovereign
19 immunity for claims against "investigative or law enforcement
20 officers of the United States Government . . . arising . . . out
21 of assault, battery, false imprisonment, false arrest, abuse of
22 process, or malicious prosecution"), the government urged the
23 district court to "look beyond the labels attached by Plaintiff
24 to his claims." Def.'s Letter Br. at 3, Liranzo v. United

1 States, No. 08 Civ. 2940 (SJF)(ARL) (E.D.N.Y. Dec. 8, 2010), ECF
2 No. 35 ("Def.'s Letter Br."). According to the government,
3 despite the label, Liranzo's claims "arise[] from the ICE agents'
4 alleged negligent/erroneous citizenship determination of
5 Plaintiff and their resultant attempts to apply federal
6 immigration statutes to effectuate his deportation." Id.
7 Further, the government asserts, Liranzo "attempt[ed] to cloth[e]
8 'federal function tort claims' (over which the United States has
9 not waived sovereign immunity) in 'law enforcement intentional
10 tort' garb (over which the United States has waived sovereign
11 immunity)." Def.'s Reply Letter Br. at 2.

12 Liranzo responded that "[h]ad a private individual held
13 plaintiff prisoner for 105 days, New York would allow plaintiff
14 to recover." Pl.'s Letter Br. at 1-2, Liranzo v. United States,
15 No. 08 Civ. 2940 (SJF)(ARL) (E.D.N.Y. Dec. 9, 2010), ECF No. 36.
16 Therefore, Liranzo argued, a private analogue to the claims
17 asserted in the complaint existed.

18 By memorandum and order dated December 15, 2010, the
19 district court dismissed the action for lack of subject matter
20 jurisdiction pursuant to Rule 12(h)(3). It reasoned that
21 "[i]mmigration and detention pending deportation are governed
22 exclusively by federal law and therefore have no private
23 analogue." Mem. & Order at 9, Liranzo v. United States, No. 08
24 Civ. 2940 (SJF)(ARL) (E.D.N.Y. Dec. 15, 2010), ECF. No. 41 ("Mem.

1 & Order"). It also read this Court's precedents, including Caban
2 v. United States, 671 F.2d 1230 (2d Cir. 1982) ("Caban I"), and
3 Caban v. United States, 728 F.2d 68 (2d Cir. 1984) ("Caban II"),
4 as indicating that for FTCA purposes, there is no private
5 analogue for federal immigration detentions. It concluded that,
6 "[a]s plaintiff's intentional tort claims are based upon the
7 detention of plaintiff pending deportation proceedings and the
8 process the immigration agents used to determine his citizenship
9 status, plaintiff has not established that a comparable cause of
10 action would exist against a private individual pursuant to New
11 York State law." Mem. & Order at 10.

12 Liranzo appealed from the judgment of dismissal.

13 **DISCUSSION**

14 When reviewing the dismissal of a complaint for lack of
15 subject matter jurisdiction, we review factual findings for clear
16 error and legal conclusions de novo, accepting all material facts
17 alleged in the complaint as true and drawing all reasonable
18 inferences in the plaintiff's favor. Morrison v. Nat'l Austl.
19 Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008), aff'd on other
20 grounds, 130 S. Ct. 2869 (2010). "The plaintiff bears the burden
21 of proving subject matter jurisdiction by a preponderance of the
22 evidence." Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d
23 635, 638 (2d Cir. 2005). The United States' waiver of immunity
24 under the FTCA "is to be strictly construed in favor of the

1 government." Long Island Radio Co. v. NLRB, 841 F.2d 474, 477
2 (2d Cir. 1988).

3 **I. The FTCA's Private Analogue Requirement**

4 "The United States, as sovereign, is immune from suit
5 save as it consents to be sued . . . , and the terms of its
6 consent to be sued in any court define that court's jurisdiction
7 to entertain the suit.'" United States v. Mitchell, 445 U.S.
8 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584,
9 586 (1941)) (brackets omitted).⁶ In 1946, Congress enacted the
10 Federal Tort Claims Act, which "constitutes a limited waiver by
11 the United States of its sovereign immunity and allows for a tort
12 suit against the United States under specified circumstances."⁷

⁶ The United States' sovereign immunity from suit is ultimately derived from English common law. "While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown." Feres v. United States, 340 U.S. 135, 139 (1950) (footnote omitted).

⁷ Prior to the passage of the FTCA in 1946, if a private individual was injured by a federal employee, he could only seek relief from the federal government by petitioning Congress to pass a "private bill" compensating him for his injuries.

Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as Government activity increased. The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to [the passage of

1 Hamm v. United States, 483 F.3d 135, 137 (2d Cir. 2007)
2 (quotation marks omitted). The FTCA provides jurisdiction in the
3 federal courts and waives the sovereign immunity of the United
4 States for

5 claims against the United States, for money
6 damages . . . for . . . injury or loss of
7 property, or personal injury or death caused
8 by the negligent or wrongful act or omission
9 of any employee of the Government while
10 acting within the scope of his office or
11 employment, under circumstances where the
12 United States, if a private person, would be
13 liable to the claimant in accordance with the
14 law of the place where the act or omission
15 occurred.
16

17 28 U.S.C. § 1346(b)(1); see also 28 U.S.C. § 2674 ("The United
18 States shall be liable, respecting the provisions of this title
19 relating to tort claims, in the same manner and to the same
20 extent as a private individual under like circumstances.").

21 As originally enacted, the FTCA barred all suits
22 against the government "arising out of . . . false
23 imprisonment[and] false arrest." 28 U.S.C. § 2680(h) (1970).

24 But in 1974, Congress enacted amendments to the FTCA principally

the FTCA in 1946, in which the
government] . . . waived immunity and
transferred the burden of examining tort
claims to the courts.

Feres, 340 U.S. at 140; see also Erwin Chemerinsky, FEDERAL
JURISDICTION 663 (6th ed. 2012). The FTCA put an end to the
"notoriously clumsy" "private bill device." Dalehite v. United
States, 346 U.S. 15, 24-25 (1953), abrogation recognized by
Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957).

1 in response to abuses committed by federal law enforcement
2 officers in connection with "no-knock" drug raids in
3 Collinsville, Illinois, in which officers raided the wrong
4 families' homes. See generally Stanton R. Gallegos, Note, Are
5 Police People Too? An Examination of the Federal Tort Claims
6 Act's "Private Person" Standard as it Applies to Federal Law
7 Enforcement Activities, 76 BROOK. L. REV. 775, 780-82 (2011).

8 Under the 1974 amendments, the FTCA explicitly waives sovereign
9 immunity "with regard to acts or omissions of investigative or
10 law enforcement officers of the United States,"⁸ for "any claim
11 arising . . . out of assault, battery, false imprisonment, false
12 arrest, abuse of process, or malicious prosecution."⁹ 28 U.S.C.
13 § 2680(h).

14 By waiving sovereign immunity "under circumstances
15 where the United States, if a private person, would be liable to
16 the claimant in accordance with the law of the place where the
17 act or omission occurred," id. § 1346(b)(1), the FTCA directs
18 courts to consult state law to determine whether the government

⁸ "'[I]nvestigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h).

⁹ The FTCA's jurisdictional provision, 28 U.S.C. § 1346(b), as well as the FTCA's procedural provisions, which include the private analogue requirement set forth in 28 U.S.C § 2674, "apply" to the 1974 amendments' waiver of sovereign immunity for the enumerated intentional torts. See 28 U.S.C. § 2680(h).

1 is liable for the torts of its employees. See FDIC v. Meyer, 510
2 U.S. 471, 478 (1994) ("[The] law of the State [is] the source of
3 substantive liability under the FTCA."); Feres, 340 U.S. at 142
4 ("This provision recognizes and assimilates into federal law the
5 rules of substantive law of the several states"). The
6 FTCA does not waive sovereign immunity for claims based solely on
7 alleged violations of federal law. Meyer, 510 U.S. at 478.

8 "[T]he Act requires a court to look to the state-law
9 liability of private entities, not to that of public entities,
10 when assessing the Government's liability under the FTCA [even]
11 in the performance of activities which private persons do not
12 perform." United States v. Olson, 546 U.S. 43, 46 (2005)
13 (internal quotation marks omitted). It does not waive sovereign
14 immunity for claims against the government based on governmental
15 "action of the type that private persons could not engage in and
16 hence could not be liable for under local law." Chen v. United
17 States, 854 F.2d 622, 626 (2d Cir. 1988) (internal quotation
18 marks omitted).

19 The path of the case law on the FTCA's private analogue
20 requirement is long, winding, and sparsely marked. We therefore
21 think a rehearsal of the history of that case law may be helpful.

22 A. The Supreme Court's Private Analogue Jurisprudence

23 In Feres, one of the Supreme Court's early FTCA cases,
24 the Court considered the private analogue requirement as applied

1 to servicemen injured in active duty "due to negligence of others
2 in the armed forces." 340 U.S. at 138. In the consolidated
3 cases comprising Feres, one plaintiff was killed in an army
4 barracks fire, one plaintiff had a towel left in his abdomen
5 following surgery performed by an Army doctor, and another
6 plaintiff died following surgery performed by Army surgeons, all
7 allegedly resulting from negligence of Army personnel. Id. at
8 136-37. All three (or their respective estates) sought damages
9 under the FTCA. Id.

10 In considering whether the FTCA waived the United
11 States' sovereign immunity for the plaintiffs' claims, the Court
12 conceded that "[i]n the usual civilian doctor and patient
13 relationship, there is of course a liability for malpractice.
14 And a landlord would undoubtedly be held liable if an injury
15 occurred to a tenant as the result of a negligently maintained
16 heating plant." Id. at 142. But the Court reasoned that such
17 analogies are sound only if one "consider[s] relevant only a part
18 of the circumstances and ignore[s] the status of both the wronged
19 and the wrongdoer." Id. Under the FTCA, "the liability assumed
20 by the Government . . . is that created by 'all the
21 circumstances,' not that which a few of the circumstances might
22 create." Id.

23 The Feres Court concluded that "there [was no]
24 liability 'under like circumstances,' for no private individual

1 has power to conscript or mobilize a private army with such
2 authorities over persons as the Government vests in echelons of
3 command." Id. at 141-42.

4 The relationship between the Government and
5 members of its armed forces is 'distinctively
6 federal in character' To whatever
7 extent state law may apply to govern the
8 relations between soldiers or others in the
9 armed forces and persons outside them or
10 nonfederal governmental agencies, the scope,
11 nature, legal incidents and consequence of
12 the relation between persons in service and
13 the Government are fundamentally derived from
14 federal sources and governed by federal
15 authority.

16 Id. at 143-44. Thus, because "the relationship of military
17 personnel to the Government has been governed exclusively by
18 federal law," id. at 146, "the Government is not liable under the
19 Federal Tort Claims Act for injuries to servicemen where the
20 injuries arise out of or are in the course of activity incident
21 to service," id.

22 But just five years later, the Court adopted a broader
23 view of the private analogue requirement, albeit in a non-
24 military context. In Indian Towing Co. v. United States, 350
25 U.S. 61 (1955), the plaintiff's tug boat went aground after the
26 battery in a lighthouse operated by the Coast Guard ran out of
27 power. Id. at 62. Indian Towing brought a negligence claim
28 against the Coast Guard under the FTCA based on the failure of
29 its employees to maintain the lighthouse in working order. Id.
30 at 61-62. The government argued that the private analogue

1 requirement "must be read as excluding liability in the
2 performance of activities which private persons do not
3 perform[,] . . . [i.e.,] 'uniquely governmental functions.'" Id.
4 at 64. Because only the Coast Guard operated lighthouses, the
5 government argued that this function was uniquely governmental,
6 and that no private analogue existed. Id.

7 The Court rejected the government's proposed test for
8 liability on the ground that "all Government activity is
9 inescapably 'uniquely governmental' in that it is performed by
10 the Government." Id. at 67. Conversely, "it is hard to think of
11 any governmental activity on the 'operational level,' our present
12 concern, which is 'uniquely governmental,' in the sense that its
13 kind has not at one time or another been, or could not
14 conceivably be, privately performed." Id. at 68.

15 The Court also observed that the statutory phrase
16 "under like circumstances" does not mean "under the same
17 circumstances." Id. at 64 (emphases added). The fact that there
18 were no private lighthouses in operation at the time did not mean
19 that there was no private analogue.

20 [I]f the United States were to permit the
21 operation of private lighthouses -- not at
22 all inconceivable -- the Government's basis
23 of differentiation would be gone and the
24 negligence charged in this case would be
25 actionable. Yet there would be no change in
26 the character of the Government's activity[,]
27 . . . and [it is unlikely that Congress
28 would] predicat[e] liability on such a

1 completely fortuitous circumstance -- the
2 presence of identical private activity.

3 Id. at 66-67.

4 The Court concluded that the relevant private analogue
5 at issue was the duty imposed on the private "good Samaritan":
6 "[O]ne who undertakes to warn the public of danger and thereby
7 induces reliance must perform his 'good Samaritan' task in a
8 careful manner." Id. at 64-65. "The Coast Guard need not
9 undertake the lighthouse service. But once it exercised its
10 discretion to operate [the] light . . . and engendered reliance
11 on the guidance afforded by the light, it was obligated to use
12 due care to make certain that the light was kept in good working
13 order" Id. at 69. Because of the existence of this
14 private analogue, "[i]f the Coast Guard failed in its duty and
15 damage was thereby caused to petitioners, the United States is
16 liable under the Tort Claims Act." Id.

17 Rayonier Inc. v. United States, 352 U.S. 315 (1957)
18 signaled a further narrowing of the Court's view of Feres's
19 reasoning. There, the plaintiffs alleged that their property was
20 damaged by the United States Forest Service's negligent failure
21 to control a forest fire. Id. at 315-16. The government argued
22 that there was no private analogue because "neither the common
23 law nor the law of [the State of] Washington imposes liability on
24 municipal or other local governments for the negligence of their
25 agents acting in the 'uniquely governmental' capacity of public

1 firemen." Id. at 318-19. The Court rejected the government's
2 argument because the relevant consideration is whether state law
3 would impose liability on a "private person" rather than on a
4 "municipal corporation or other public body" for "similar
5 negligence" as allegedly committed by the government in the case
6 at hand. Id. at 319. In doing so, the Court disapproved of
7 Dalehite v. United States, 346 U.S. 15, 43-44 (1953), which had
8 relied on Feres and the common law "immunity of . . . public
9 bodies for injuries due to fighting fire" to conclude that there
10 was no private analogue to the Coast Guard's firefighting
11 efforts, id. at 44. See Rayonier, 352 U.S. at 319. The Court
12 remanded for consideration of whether state law would hold a
13 private person fighting a fire in similar circumstances liable.
14 Id. at 320-21.

15 In United States v. Muniz, 374 U.S. 150 (1963), the
16 Supreme Court continued to constrict the reach of the rationales
17 relied upon in Feres. There, the Court considered whether suit
18 could be brought under the FTCA for "personal injuries sustained
19 during confinement in a federal prison, by reason of the
20 negligence of a government employee." Id. at 150. The
21 government argued that Feres defeated a private analogy, because,
22 among other things, "the relationship between the federal
23 prisoner and his custodians" is "uniquely federal in character."
24 Br. for United States, United States v. Muniz, 374 U.S. 150

1 (1963), 1963 WL 105602 at *19. A unanimous Court (Justice White
2 not participating) rejected the government's reliance on Feres.
3 The Court reasoned that "[i]n the last analysis, Feres seems best
4 explained by the peculiar and special relationship of the soldier
5 to his superiors, the effects of the maintenance of such suits on
6 discipline, and the extreme results that might obtain if suits
7 under the Tort Claims Act were allowed for negligent orders given
8 or negligent acts committed in the course of military duty." Id.
9 at 162 (quotation marks and ellipsis omitted). It concluded
10 that, in the context of the federal prison system, "an analogous
11 form of liability exists. A number of States have allowed
12 prisoners to recover from their jailers [and from the States] for
13 negligently caused injuries."¹⁰ Id. at 159-60.

14 Most recently, in a brief unanimous opinion in United
15 States v. Olson, 546 U.S. 43 (2005), the Court reaffirmed the
16 principles recognized in Indian Towing and its progeny. The
17 Court vacated a Ninth Circuit decision in which that court (1)
18 had found "no private-sector analogue for mine inspections," the
19 federal activity about which suit had been brought, id. at 45

¹⁰ The Muniz Court's decision to look to the liability of jailors and the States that employ them seems to be a departure, or at least a change in emphasis in a new factual context, from Indian Towing's and Rayonier's admonition to examine the liability of private individuals under state law when deciding if a private analogue exists, rather than the state law liability of governmental entities. See also infra section II.B (discussing potential analogies to law enforcement and citizen's arrests).

1 (internal quotation marks omitted), but (2) had concluded that
2 because "unique governmental functions" were at issue and
3 relevant state law imposed liability on "state and municipal
4 entities" under the circumstances, the FTCA waived sovereign
5 immunity, id. (internal quotation marks omitted). The Supreme
6 Court concluded that under its jurisprudence, whether state law
7 imposed such liability on state and municipal entities was
8 irrelevant to the sovereign immunity waiver, id. at 45-46, and
9 that there was indeed a relevant private analogy to the liability
10 of "private persons who conduct safety inspections," id. at 47.
11 The Court remanded the case with instructions to "the lower
12 courts [to] decide . . . in the first instance" "precisely which
13 [State] law doctrine applie[d]." Id. at 48.

14 B. This Court's Private Analogue
15 Jurisprudence in Non-immigration Cases

16 This Court has had several occasions on which to
17 consider the FTCA's private analogue requirement. In a trilogy
18 of cases decided in the 1980s, we confronted circumstances we
19 concluded were governed exclusively by federal law, were without
20 private analogue, and with respect to which sovereign immunity
21 had therefore not been waived by the FTCA.

22 In C.P. Chemical Co. v. United States, 810 F.2d 34 (2d
23 Cir. 1987), a producer of formaldehyde-based foam insulation
24 brought suit against the federal government after the Consumer
25 Product Safety Commission announced a ban on the insulation,

1 alleging that the Commission was "gross[ly] neglig[en]t" in
2 failing to follow proper rulemaking procedures and disseminating
3 false information about the banned insulation. Id. at 35-36.
4 The Court began by reviewing the legislative history of the FTCA,
5 which expressed a clear desire that the "constitutionality of
6 legislation, or the legality of a rule or regulation, should
7 [not] be tested through the medium of a damage suit for tort."
8 Id. at 37 (quoting H.R. REP. NO. 79-1287, at 6 (1945)). The court
9 reasoned that "quasi-legislative or quasi-adjudicative action by
10 an agency of the federal government is action of the type that
11 private persons could not engage in and hence could not be liable
12 for under local law." Id. at 37-38 (quoting Jayvee Brand v.
13 United States, 721 F.2d 385, 390 (D.C. Cir. 1983)) (quotation
14 marks and brackets omitted). Because there was "simply no
15 comparable rulemaking activity in private life," we decided that
16 "[t]he Commission's conduct clearly was a quasi-legislative
17 activity for which we find no private counterpart." Id. at 38.

18 In Chen, a printing company brought FTCA claims against
19 the government based on the General Services Administration's
20 attempt to suspend and debar the company as a federal contractor.
21 854 F.2d at 623. Most of the plaintiff's claims were "grounded
22 in alleged negligent and willful violations of federal
23 procurement regulations, specifically, those requiring that a
24 contractor receive notice and a hearing prior to any suspension."

1 Id. at 626. We concluded that "violation of the government's
2 duties under federal procurement regulations 'is action of the
3 type that private persons could not engage in and hence could not
4 be liable for under local law.'" Id. at 626 (quoting Jayvee
5 Brand, 721 F.2d at 390). We contrasted Chen's claims with those
6 in Birnbaum v. United States, 588 F.2d 319, 326 (2d Cir. 1978),
7 in which we observed that the "opening and reading of sealed mail
8 by [the Central Intelligence Agency], just as if by [a] private
9 party, violates [the] common-law right of privacy."¹¹ Chen, 854
10 F.2d at 626. We also rejected Chen's proposed private analogue,
11 "wrongful sanctions by private associations against individual
12 members," id., because no such tort liability existed under New
13 York law. Id. at 626-27.

14 And in Akutowicz v. United States, 859 F.2d 1122 (2d
15 Cir. 1988), the plaintiff brought claims against the government
16 when the State Department decided that he had relinquished his
17 United States citizenship after obtaining French citizenship.
18 Id. at 1123-25. We noted that "the FTCA does not extend to
19 conduct governed exclusively by federal law, or to conduct of a
20 governmental nature or function, that has no analogous liability

¹¹ Though Birnbaum predicted that the New York Court of Appeals would recognize a common law right of privacy, we subsequently acknowledged that our prophesy had been incorrect, and found a failure to state a claim under the "same fact pattern" in Hurwitz v. United States, 884 F.2d 684, 685 (2d Cir. 1989), cert. denied, 493 U.S. 1056 (1990).

1 in the law of torts." Id. at 1125 (quotation marks and citations
2 omitted). We decided that although "the FTCA imposes liability
3 upon the government to the same extent, and in the same manner,
4 as a private individual under 'like,' not identical,
5 circumstances," id. at 1125, "the withdrawal of a person's
6 citizenship constitutes a quasi-adjudicative action for which no
7 private analog exists." Id. at 1126. "[N]o private citizen is
8 empowered to certify the loss of American nationality." Id. at
9 1125. Nor were we willing to "analogize the relationship between
10 the government and its citizens with that between a private
11 association and its individual members," because no "cause of
12 action in tort for alleged misconduct by the association [in
13 improperly expelling one of its members]" existed under state
14 law. Id. at 1126 (quoting Chen, 854 F.2d at 627) (emphasis and
15 quotation marks omitted).

16 C. This Court's Treatment of FTCA
17 Claims Based on Immigration Detentions

18 In 1982 and 1984, respectively, we addressed FTCA
19 claims more similar to those at issue on this appeal -- claims
20 based on an allegedly erroneous immigration detention. In Caban
21 I and II, the plaintiff was stopped at John F. Kennedy
22 International Airport upon arrival from the Dominican Republic.
23 Caban I, 671 F.2d at 1230. Illiterate, he was unable to provide
24 documentation to substantiate his claims of United States
25 citizenship, and his answers to the INS officers' questions

1 regarding his past and citizenship status raised their suspicion
2 (e.g., he denied knowing his own birthdate). Caban II, 728 F.2d
3 at 70. INS agents detained him for six days, after which they
4 determined that he was indeed a citizen. Id. Caban brought
5 claims against the United States for false arrest under the FTCA.

6 In Caban I, this Court concluded that the FTCA's
7 "discretionary function" exception -- which bars FTCA claims
8 "based upon the exercise or performance or the failure to
9 exercise or perform a discretionary function or duty," 28 U.S.C.
10 § 2680(a) -- did not apply to the INS officers' decision to
11 arrest and detain Caban because the decision did not involve the
12 "weighing of important policy choices to which discretion is
13 essential." Caban II, 728 F.2d at 70 (describing Caban I). The
14 court remanded for further proceedings, a bench trial was held,
15 and the district court determined that the complaint should be
16 dismissed because the arrest was privileged under the federal
17 standards applicable to immigration officers, a standard
18 incorporated into New York law through its requirement that a
19 plaintiff suing a private individual for false imprisonment
20 establish that his confinement was "not . . . privileged." Id.
21 at 70-71 (internal quotation marks omitted).¹²

¹² See infra section II.B (discussing the circumstances in which an arrest can be privileged under New York law).

1 In Caban II, we affirmed the judgment of the district
2 court in favor of the government, after trial on remand from
3 Caban I. Id. at 75. We first noted that "INS agents are
4 'investigative or law enforcement officers' within the meaning of
5 [28 U.S.C. § 2680(h)]," the provisions of which waives sovereign
6 immunity for, inter alia, false arrest and imprisonment claims
7 against federal "investigative or law enforcement officers." 728
8 F.2d at 72. We then observed that "the reference in § 1346(b)[,
9 the central waiver of immunity provision of the FTCA,] to '[t]he
10 law of the place' means the 'whole law' of the state where the
11 incident took place" -- in that case, the State of New York --
12 including any federal law that state law incorporated. Id.
13 (brackets and some quotation marks omitted). "New York state
14 courts would look to federal principles in determining the
15 standard by which INS officials' detention of a would-be entrant
16 are to be judged." Id. at 73. Because "a person seeking entry
17 into the United States has substantially less right to avoid
18 detention than does a person already lawfully within the United
19 States," id., "far less than [the] probable cause" that is
20 ordinarily required to detain a person will suffice to render the
21 detention privileged under the New York law of false
22 imprisonment, which incorporates federal standards, id.¹³

¹³ We use the terms "false arrest" and "false imprisonment" interchangeably. Under New York law, "the tort of false arrest is synonymous with that of false imprisonment." Posr v. Doherty,

1 We nonetheless recognized that the FTCA "speaks in
2 terms of the liability, under state law, of 'a private person.'" Id.
3 Id. at 73. While "[a]n authorized government agent would be
4 privileged . . . to act to protect national borders, . . . it is
5 questionable . . . whether New York would extend that privilege
6 to a private person," id., the issue that was before us under
7 section 1346(b).

8 We reasoned, however, that even if a private person
9 would be held liable under New York State law, the FTCA only
10 provides for liability "in the same manner and to the same extent
11 as a private individual under like circumstances." 28 U.S.C.
12 § 2674. We then cited Feres for the proposition that "[t]he
13 'like circumstances' language in [section] 2674 means that 'the
14 liability assumed by the Government . . . is that created by 'all
15 the circumstances,' not that which a few of the circumstances
16 might create.'" Id. at 73-74 (quoting Feres, 340 U.S. at 142).

17 [Immigration officers are accorded a special
18 status by law which requires them to detain
19 persons in situations also outlined by law.
20 These circumstances are far different from
21 those in which a person who is either thought
22 to have committed a crime or thought to be an
23 alien is detained by a private individual.

24 Id. at 74 (citing Feres, 340 U.S. at 141-42).
25

944 F.2d 91, 96 (2d Cir. 1991); see also infra note 17
(discussing potentially applicable state law).

1 We concluded that the "interplay among" the "like
2 circumstances" language in section 2647, "the government's
3 privilege to protect the border, and New York's recognition that
4 a privileged detention does not result in liability for false
5 imprisonment" required that "[t]he liability of the
6 government . . . be assessed in light of the liability New York
7 would impose upon one having a privilege to detain a would-be
8 entrant who did not satisfactorily establish his right to enter,"
9 that is, in "conformance with the federal standards regarding
10 treatment of applicants for entry to the United States." Id. at
11 74 (quotation marks omitted). We therefore affirmed the district
12 court's ruling that under New York law, the government employees
13 who detained Caban had a "privilege to detain" him under the
14 circumstances at bar, and therefore their employer, the United
15 States, would not be liable for false imprisonment for the
16 privileged behavior. Id. at 74-75.

17 Judge Cardamone, concurring in the judgment, questioned
18 the majority's reasoning. Although he agreed that federal
19 standards applicable to immigration officers should be used to
20 assess liability, he noted the potential for confusion created by
21 the majority's citation to the "like circumstances" language of
22 section 2674 and Feres. Id. at 76 (Cardamone, J., concurring in
23 the judgment). Judge Cardamone thought the majority's reliance
24 on Feres was "ill-advised" because "[t]he Feres doctrine plainly

1 does not deal with substantive tort law principles" such as were
2 at issue in Caban II, "but is concerned solely with . . . [the]
3 threshold jurisdictional question" of whether a private analogue
4 exists. Id.

5 **II. Analysis**

6 A. The Meaning of Caban II

7 Before the district court, Liranzo relied on Caban II
8 for the proposition that the United States waives its sovereign
9 immunity for FTCA claims arising from immigration detentions.
10 The district court disagreed, deciding that "Caban II does not
11 require an examination of every challenged deportation proceeding
12 to determine whether a plaintiffs claim has a private analogue.
13 Where, as here, the conduct challenged by the plaintiff is
14 exclusively governed by federal law, the FTCA does not waive
15 sovereign immunity." Mem. & Order at 10. The district court
16 relied on Caban II's statement that immigration officers are
17 "accorded a special status" "unlike any in which a private
18 individual could be involved," id. at 9 (quoting Caban II, 728
19 F.2d at 74; internal quotation marks omitted), to find the
20 absence of a private analogue and subject matter jurisdiction
21 over Liranzo's claims.

22 The reasoning in Caban II is complex. Perhaps as a
23 result, courts have diverged in their reading of the case. Some,
24 such as the district court in this case, view Caban II as

1 authority for the proposition that the United States has not
2 waived sovereign immunity for immigration detention claims
3 because there is no relevant private analogue.¹⁴ This may arise
4 from the Caban II majority's citation to Feres, a case
5 considering only whether a private analogue existed, as authority
6 for judging federal immigration officers' conduct under a federal
7 rather than state standard. But other courts have -- in our view
8 correctly -- read Caban II as a case about the substantive
9 standard by which immigration officers' acts are to be judged --
10 not about the presence or absence of a private analogue.¹⁵ The

¹⁴ See also Doe v. United States, 58 F.3d 494, 502 (9th Cir. 1995) (construing Caban II as holding that "immigration officers have materially different duties than do private citizens, and therefore no FTCA liability exists, even if a private person could be liable for wrongfully detaining plaintiff"); Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538, 543 (9th Cir. 1987) (same), superseded by statute on other grounds as stated in Senior Unsecured Creditors' Comm. of First RepublicBank Corp. v. FDIC, 749 F.Supp. 758, 773 (N.D. Tex. 1990); Lippman v. City of Miami, 622 F. Supp. 2d 1337, 1341 (S.D. Fla. 2008) (same); Schalliol v. Fare, 206 F. Supp. 2d 689, 695 n.24 (E.D. Pa. 2002) (same).

¹⁵ See Rhoden v. United States, 55 F.3d 428, 431 (9th Cir. 1995) (per curiam); Munyua v. United States, No. 03 Civ. 04538 (EDL), 2005 WL 43960, at *4, 2005 U.S. Dist. LEXIS 11499, at *12-*13 (N.D. Cal. Jan. 10, 2005) ("[T]he Caban case does not support the sweeping conclusion that there is no jurisdiction under the FTCA here"); Nguyen v. United States, No. 00 Civ. 528-R, 2001 WL 637573, at *8-*9, 2001 U.S. Dist. LEXIS 7512, at *26-*28 (N.D. Tex. June 5, 2001) ("Caban indicates that a lawful detention can become unlawful at the point at which the INS's decision to continue the detention is no longer reasonable."), aff'd on other grounds, 65 F. App'x 509 (5th Cir. 2003); Tovar v. United States, No. 98 Civ. 1682, 2000 WL 425170, at *7, 2000 U.S. Dist. LEXIS 5044, at *23-*24 (N.D. Tex. Apr. 18, 2000) (Caban II applied a federal standard to the merits of Caban's claim), aff'd, 244 F.3d 135 (5th Cir. 2000) (unpublished table decision);

1 Caban II court never even considered the FTCA's private analogue
2 requirement, as that issue was simply not before it on appeal.

3 If indeed the Caban II court had found the absence of a
4 private analogue to immigration detentions, its inquiry would
5 have been at an end because there would have been no waiver of
6 sovereign immunity, and thus no subject matter jurisdiction over
7 Caban's FTCA claims. Instead, the Caban II court considered the
8 substantive standards under which the immigration officials'
9 conduct was to be judged -- an inquiry that would only be
10 necessary, at least in a case in Caban II's posture, if a private
11 analogue existed. See, e.g., Feres, 340 U.S. at 143-44, 146
12 (finding that no private analogue existed, and refraining from

Garza v. United States, 881 F. Supp. 1103, 1106 (S.D. Tex. 1995)
(describing Caban II as concluding that the "INS officer's
detention of [Caban, who was] entering country[, was] privileged
under New York law"); Gallegos v. Haggerty, 689 F. Supp. 93, 105
(N.D.N.Y. 1988) (denying the government's motion for summary
judgment on the merits of plaintiffs' FTCA claim); Saldana v.
United States, No. L-83-46, 1985 WL 5997, at *4 n.2, 1985 U.S.
Dist. LEXIS 14091, at *14 n.2 (S.D. Tex. Nov. 7, 1985) ("This
Court prefers the conceptual approach in the concurring opinion
of Judge Cardamone in Caban [to the question of what standard to
apply to the merits of FTCA claims related to immigration
detentions] rather than that in the majority opinion of Judge
[Kearse], but the result is the same under either approach.").

Another judge of the Eastern District of New York has
explicitly disagreed with the district court's reading of Caban
II here. Nakamura v. United States, No. 10 Civ. 2797 (FB)(RML),
2012 WL 1605055, at *3, 2012 U.S. Dist. LEXIS 64630, at *8
(E.D.N.Y. May 8, 2012) ("Contrary to the outcome of Liranzo and
defendant's arguments, Caban II does not stand for the sweeping
proposition that the actions of immigration agents in detaining a
person never have a private analogue, and that sovereign immunity
is never waived in such cases.").

1 considering the standard to be applied on the merits); see also
2 id. at 141 (stating that generally, "[j]urisdiction is necessary
3 to deny a claim on its merits as matter of law as much as to
4 adjudge that liability exists"). We therefore do not read Caban
5 II as did the district court to indicate that there is no private
6 analogue to immigration detentions.

7 Moreover, the Caban II Court endorsed the district
8 court's statement in the case before it that "the United States
9 [is] not liable to Caban if the INS agents acted in conformance
10 with the federal standards regarding treatment of applicants for
11 entry to the United States." Caban II, 728 F.2d at 74 (emphasis
12 added; quotation marks omitted). That language apparently
13 contemplates a consideration of the facts of a particular
14 immigration detention FTCA claim on the merits, i.e., based on
15 the particulars of the "INS agents['] act[ions]."¹⁶ Id.

¹⁶ Although other courts may have also interpreted Caban II as concerning the FTCA's private analogue requirement, the district court's reliance on Caban II to find a lack of subject matter jurisdiction over an FTCA claim based on an immigration detention is, as far as we can determine, unique. Cf. Munyua, 2005 WL 43960, at *4, 2005 U.S. Dist. LEXIS 11499, at *11 ("Defendant has cited no case, and the Court has found none, adopting such a sweeping exemption under the FTCA for conduct by immigration officers like that alleged in this case. To the contrary, courts have exercised jurisdiction over cases brought under the FTCA involving misconduct by immigration officers at the border.").

1 B. Whether a Private Analogue Exists in This Case

2 The district court concluded that "[i]mmigration and
3 detention pending deportation are governed exclusively by federal
4 law and therefore have no private analogue." Mem. & Order at 10.
5 Because Liranzo's "intentional tort claims [were] based upon the
6 detention of plaintiff pending deportation proceedings and the
7 process the immigration agents used to determine his citizenship
8 status," the district court found that he had "not established
9 that a comparable cause of action would exist against a private
10 individual pursuant to New York State law." Id. Citing Feres,
11 the government similarly argues that "[r]emoval, and the
12 regulation thereof, are federal functions -- in which private
13 citizens cannot engage -- that are exclusively reserved to [the
14 Department of Homeland Security]." Def.'s Br. 16 (emphasis in
15 original).

16 To say that the challenged action is one that only the
17 federal government does in fact perform does not necessarily mean
18 that no private analogue exists. Lighthouses, such as the one
19 that was the subject of Indian Towing, were at least at the time
20 operated only by the government. It was a function that "private
21 persons d[id] not perform." 350 U.S. at 64 (quotation marks
22 omitted). But "the presence of identical private activity" was
23 not required to find a private analogue, because the FTCA's
24 statutory phrase "under like circumstances" does not mean "under

1 the same circumstances." Id. at 64, 67 (emphases added). Under
2 Olson, we are "require[d] . . . to look further afield" for a
3 private analogue when the government in fact is the only entity
4 that performs the actions complained of. Olson, 546 U.S. at 46.

5 Similarly, the fact that immigration detentions are
6 "uniquely governmental" does not mean they have no private
7 analogue for present purposes. "[A]ll Government activity is
8 inescapably 'uniquely governmental' in that it is performed by
9 the Government." Indian Towing, 350 U.S. at 67. This
10 consideration led the Indian Towing Court to reject a
11 construction of the Act under which "there would be no liability
12 for negligent performance of 'uniquely governmental functions,'" id.
13 at 64, as such an "exception" to the FTCA's waiver of
14 sovereign immunity would threaten to swallow the waiver entirely.

15 The Supreme Court has provided us with examples of how
16 to heed its admonition to "look further afield," Olson, 546 U.S.
17 at 46, for a private analogue. In Indian Towing and Olson, the
18 proper analogy was that "[p]rivate individuals, who do not
19 operate lighthouses [or inspect mines], nonetheless may create a
20 relationship with third parties that is similar to the
21 relationship between a lighthouse operator and a ship dependent
22 on the lighthouse's beacon[, or a mine inspector and a miner
23 dependent on the inspector faithfully carrying out his duty]."
24 Id. at 47.

1 Here, the proper analogy seems to us be a person who,
2 entirely in his or her private capacity, places someone under
3 arrest for an alleged violation of the law -- a so-called
4 "citizen's arrest." Such a person may not execute an arrest
5 absent a legal privilege to do so. To successfully establish a
6 claim for false arrest and imprisonment under New York law,¹⁷ a
7 plaintiff must therefore prove that "(1) the defendant intended
8 to confine [the plaintiff], (2) the plaintiff was conscious of
9 the confinement, (3) the plaintiff did not consent to the
10 confinement and (4) the confinement was not otherwise
11 privileged." Caban II, 728 F.2d at 71 (quoting Broughton v.
12 State, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87, 93, 335 N.E.2d 310,
13 314, cert. denied, 423 U.S. 929 (1975)) (emphasis added); accord
14 Posr v. Doherty, 944 F.2d 91, 97 (2d Cir. 1991). And under Caban
15 II, whether the ICE agents' actions here were "otherwise
16 privileged" is determined by consulting federal privileges

¹⁷ For the purposes of this discussion, we assume New York law applies because the initial arrest and detention occurred in New York. We express no opinion as to whether Louisiana law might apply to some portion of Liranzo's claims based on the time he was confined in Louisiana.

1 applicable to federal immigration officers.¹⁸ Caban II, 728 F.2d
2 at 71.

3 There is some suggestion in the case law that the
4 proper analogy may be to state law enforcement conducted by
5 police officers instead of a citizen's arrest. In Muniz, the
6 Court endorsed a private analogy to the liability of states and
7 state jailors. Muniz, 374 U.S. at 159-60. And at least one

¹⁸ Following the Supreme Court's statement in Olson that "a court [must] look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA," 546 U.S. at 46, the Court of Appeals for the Ninth Circuit considered whether cases envisioning the application of federal privileges in FTCA suits, such as Caban II, survive Olson. In Tekle v. United States, 511 F.3d 839 (9th Cir. 2007), a case without a majority opinion as to the FTCA issue, see id. at 850 n.7, Judge Tashima read Olson to require the court to hold the IRS officers at issue to the same standards as a private person executing a citizen's arrest. Id. at 850-54. In doing so, Judge Tashima called into question a line of Ninth Circuit cases relying on Caban II -- including Arnsberg v. United States, 757 F.2d 971, 978-79 (9th Cir. 1985) and Rhoden, 55 F.3d at 430-31. Tekle, 511 F.3d at 850-54. Judge Fisher, on the other hand, refused to read Olson "to support the conclusion that law enforcement privileges should not be recognized in FTCA suits, and that federal officers are left only with those privileges available to private citizens" because "Olson did not involve such privileges, and . . . the FTCA's text does not clearly foreclose their availability." Id. at 857 (Fisher, J., concurring). Judge Kleinfeld would have found that the FTCA claim was not preserved for appeal, but if it was, he would have joined Judge Fisher's concurrence. Id. at 861-62 (Kleinfeld, J., concurring).

This case does not require us to reach the issue of what effect, if any, Olson has on the continuing viability of Caban II, because the district court dismissed the case for lack of a private analogue and did not reach the merits. Thus, the district court did not have the occasion to opine on the substantive standards applicable to the ICE agents' conduct here, and we need not reach the issue now. Caban II remains the law of this Circuit.

1 court, the Northern District of California, has found the analogy
2 to law enforcement persuasive in the context of an FTCA claim
3 based on an immigration detention. See Munyua, 2005 WL 43960, at
4 *4, 2005 U.S. Dist. LEXIS 11499, at *12 ("The fact that the
5 challenged activities took place at the border does not negate
6 the analogy to law enforcement"). But in Olson, the
7 Court instructed that "a court [must] look to the state-law
8 liability of private entities, not to that of public entities,
9 when assessing the Government's liability under the FTCA"
10 546 U.S. at 46 (emphasis added).

11 Regardless of this ambiguity, in the context of this
12 case, the distinction between analogizing to a citizen's arrest
13 and an officer's arrest is of little moment -- in both cases, the
14 defendant will be liable for false arrest under New York law if
15 the arrest is not privileged. See, e.g., Downs v. Town of
16 Guilderland, 70 A.D.3d 1228, 1232, 897 N.Y.S.2d 264, 268 (3d
17 Dep't 2010) (police officer's arrest privileged for purposes of
18 false arrest claim if officer possessed probable cause to justify
19 arrest), appeal dismissed, 15 N.Y.3d 742, 933 N.E.2d 203, 906
20 N.Y.S.2d 804 (2010); White v. Albany Med. Ctr. Hosp., 151 A.D.2d
21 859, 860, 542 N.Y.S.2d 834, 835 (3d Dep't 1989) ("In New York, a
22 private citizen who makes an arrest does so at his peril; if the
23 person arrested did not in fact commit the crime for which he is
24 arrested, the person who arrests him is liable [for false arrest]

1 even if he acts in good faith or has probable cause to make an
2 arrest."). Therefore, either analogue would suffice for present
3 purposes.

4 The fact that New York law applies different
5 substantive standards to citizens' and officers' arrests, see
6 generally 59 N.Y. JUR. 2D FALSE IMPRISONMENT § 37, is also of no
7 significance for present purposes because, under Caban II --
8 which provides the law of this Circuit -- immigration detentions
9 executed by federal immigration officers are judged under federal
10 standards (subject to the considerations discussed supra note
11 18).

12 Our conclusion that there is a private analogue to the
13 government behavior at issue here receives further support from
14 the fact that the FTCA explicitly waives sovereign immunity for
15 "any claim" based on the "acts or omissions of investigative or
16 law enforcement officers" "arising . . . out of . . . false
17 imprisonment [and] false arrest." 28 U.S.C. § 2680(h) (emphasis
18 added). The plain language of the statute suggests that the
19 United States has indeed waived its sovereign immunity from suit
20 as to Liranzo's "claim," which "aris[es] . . . out of . . . false
21 imprisonment [and] false arrest." Id. In light of the
22 considerations discussed above, the government's suggestion that
23 we disregard the "false imprisonment" label Liranzo has affixed
24 to his claim so as to find it not to be encompassed by this

1 explicit statutory language is unpersuasive. See Def.'s Letter
2 Br. at 3.

3 Akutowicz is not to the contrary. The district court
4 in this case relied on Akutowicz's reasoning that "the withdrawal
5 of a person's citizenship constitutes a quasi-adjudicative action
6 for which no private analog exists," because "no private citizen
7 is empowered to certify the loss of American nationality," 859
8 F.2d at 1125-26. See Mem. & Order at 9-10. But in Akutowicz,
9 there was no detention. The only action complained of was the
10 removal of the plaintiff's citizenship. Citizenship is a legal
11 status, which only the federal government is capable of altering.
12 A private individual cannot, without subsequent government
13 action, cause injury to another's citizenship. But a private
14 person is of course capable of falsely arresting another. See
15 generally Caban II, 728 F.2d at 71 (quoting Broughton, 37 N.Y.2d
16 at 456, 373 N.Y.S.2d at 93, 335 N.E.2d at 314)(setting out the
17 elements of a false arrest claim).

18 As for the government's argument that immigration
19 detentions are quintessentially federal and therefore no private
20 analogue exists per Feres and its progeny, see Def.'s Br. 14, 16,
21 although the "[p]ower to regulate immigration is unquestionably
22 exclusively a federal power," DeCanas v. Bica, 424 U.S. 351, 354
23 (1976), superseded by statute on other grounds as stated in
24 Chamber of Commerce of United States v. Whiting, 131 S. Ct. 1968,

1 1974-75 (2011), it is not clear that immigration detentions are
2 necessarily and exclusively federal acts. For instance, under
3 current federal immigration law, "State and local law enforcement
4 officials" may be empowered (consistent with state law) to
5 "arrest and detain" aliens in certain circumstances. See 8
6 U.S.C. § 1252c(a); 8 U.S.C. § 1103(a)(10); Arizona v. United
7 States, 132 S. Ct. 2492, 2506 (2012) (describing limited federal
8 statutory authorization for state immigration detentions).

9 The fact that a complained of action occurs in a
10 quintessentially federal context, moreover, does not necessarily
11 mean that no private analogue exists. While the federal military
12 is undoubtedly quintessentially federal, so is the federal prison
13 system. The Supreme Court nonetheless, in Muniz, refused to
14 extend Feres to the latter context. See Muniz, 374 U.S. at 162.
15 In distinguishing Feres, the Muniz Court minimized Feres's
16 reliance on the fact that the military is quintessentially
17 federal. Id. It reasoned that "[i]n the last analysis, Feres
18 seems best explained by the peculiar and special relationship of
19 the soldier to his superiors, the effects of the maintenance of
20 such suits on discipline, and the extreme results that might
21 obtain if suits under the Tort Claims Act were allowed for
22 negligent orders given or negligent acts committed in the course

1 of military duty."¹⁹ Id. (quotation marks and ellipsis omitted).
2 These considerations are not present in the non-military context.
3 The case before us is thus more closely akin to Muniz than Feres.
4 In sum, it does not follow from the fact that immigration is a
5 quintessentially federal function that immigration detention is
6 without a private non-federal officer analogue. Even for alleged
7 torts occurring in quintessentially federal contexts, the
8 question remains whether analogous private liability exists under
9 state law -- and here, we conclude that it does.

10 For these reasons, we conclude that the district court
11 erred in finding that there was no private analogue to Liranzo's
12 claims. We express no view, however, as to Liranzo's argument
13 that he is entitled to a trial on the merits on remand. See
14 Pl.'s Br. 9, 14. We leave it to the district court to consider
15 whether, under the circumstances of this case, his action is

¹⁹ One commentator has construed the post-Feres case law as having abandoned reliance on the original rationales articulated in Feres, and as having replaced them with new rationales for the "Feres doctrine" barring FTCA claims by active servicemen and - women. See CHEMERINSKY, supra, at 674-75 ("Interestingly, the Court's explanation [for the Feres doctrine] has shifted over time. Originally, in Feres, the Court emphasized that the government could be held liable under the [FTCA] only for activities that also are undertaken by private entities But . . . the Supreme Court expressly discarded this limitation on recovery under the act [in Indian Towing and Rayonier], permitting suits even for activities done solely by the federal government. . . . Subsequent to the Feres decision, the Court began emphasizing a different rationale for precluding recovery for injuries received incident to military service: the need to preserve military discipline.").

1 subject to dismissal on the merits on motion to dismiss or for
2 summary judgment.

3 C. Liranzo's Fourth Amendment Claim

4 Liranzo has not raised any argument against the
5 district court's dismissal of his separate Fourth Amendment
6 claim. See Mem. & Order at 11. We therefore affirm the district
7 court's ruling in this respect. See Universal Church v. Geltzer,
8 463 F.3d 218, 229 (2d Cir. 2006) ("Generally[,] claims not raised
9 on appeal are deemed abandoned, at least when it is the appellant
10 who fails to do so.").

11 **CONCLUSION**

12 For the foregoing reasons, we affirm as to the district
13 court's dismissal of Liranzo's Fourth Amendment claim. We vacate
14 the district court's judgment insofar as it found an absence of
15 subject matter jurisdiction over Liranzo's FTCA claims and remand
16 for further proceedings in the district court. Because the
17 district court did not have the occasion to consider which
18 standard applies on the merits, the district court should
19 consider in the first instance on remand which federal standards
20 govern the determination of whether the government official's
21 actions here were privileged.