06-4216-cv

United States Court of Appeals

for the

Second Circuit

MAHER ARAR,

Plaintiff-Appellant,

– v. –

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLACEMENT REPLY BRIEF FOR PLAINTIFF-APPELLANT FOR REHEARING *EN BANC*

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and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, UNITED STATES,

Defendants-Appellees.

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INTRODUCTION

Plaintiff/Appellant Maher Arar alleges that defendants conspired to subject him to torture and arbitrary detention, chose to transfer him to Syria for those purposes, and deliberately barred his access to court so that the judiciary could not interfere with their illegal plan. Because this case was resolved on a motion to dismiss, this Court must accept these allegations as true. The question posed by this appeal, then, is whether federal defendants can shield themselves from all accountability for such unconstitutional conduct simply by ensuring that their victim cannot get to court to invoke the judicial protections that Congress provided for him.

Defendants do not dispute that had they tortured Arar themselves, or delivered Arar to a private gang of thugs to have him tortured by them, this Court would have jurisdiction and a *Bivens* action would lie. Yet they maintain that because they undertook their conspiracy through the guise of immigration law and prevented Arar from reaching a court while in their custody, the Court now lacks jurisdiction even to consider their actions—and even if there were jurisdiction, no *Bivens* remedy is available. In short, they ask the Court to reward their lawlessness by excusing them at the threshold. Such a result would not only give a green light to torture, but would deeply erode the principles of separation of powers and checks and balances upon which our democracy rests.

Defendants' first argument is that the Immigration and Nationality Act ("INA") bars jurisdiction, because it requires that all claims arising from a removal decision be adjudicated either in a petition for review filed with the court of appeals, or in a petition for habeas corpus. They contend that those were Arar's exclusive remedies, and since he did not seek them, he cannot seek judicial review of defendants' actions now. As the district court properly ruled, those arguments fail for two reasons. First, defendants themselves precluded Arar from pursuing the very avenues that they now maintain are exclusive. And second, Arar's constitutional and statutory claims go far beyond review of a removal order, and therefore are not covered by the immigration provisions defendants cite.

Defendants' argument that *Bivens* relief is precluded by the INA fails for closely related reasons. This Court has made clear that statutory remedial schemes preclude *Bivens* relief only where Congress has deliberately chosen to deny damages for a particular wrong. Defendants point to no evidence that Congress, in enacting the INA, even considered whether an individual in Arar's situation should be able to sue for damages. Moreover, defendants do not argue, nor could they argue, that Congress deliberately foreclosed a damages action where federal officials conspired to prevent an alien from utilizing the review procedure that Congress did provide. Absent evidence of conscious choice on

Congress's part to deny relief under these circumstances, the INA is no bar to a *Bivens* action.

Defendants also assert that national security and foreign policy concerns preclude a *Bivens* claim here. But the courts routinely adjudicate constitutional cases with far more sweeping national security and foreign policy implications, as illustrated by the Supreme Court's recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). And Congress has already made clear that the courts are a proper venue for adjudicating claims involving both the risk of torture in foreign countries, and the fact of torture inflicted under color of foreign law. The fact that Arar seeks damages does not change the calculus in any way with respect to national security and foreign affairs. And as the Supreme Court stated in *Boumediene*, district courts have multiple tools to ensure that litigation is conducted with respect for legitimate claims of privilege or confidentiality.

Arar also seeks damages for defendants' interference with his access to court—a claim that presents none of the foreign policy and national security concerns that defendants invoke. There can be no foreign policy or national security justification for keeping an individual in U.S. custody from invoking the remedies that Congress has expressly provided for him, and defendants do not argue otherwise. Defendants' actions caused Arar to lose the opportunity to litigate his claim that his removal to Syria violated the Convention Against

Torture. As a result, that claim is irretrievably lost—and under Supreme Court jurisprudence, that warrants a constitutional remedy for the denial of access to court.

With respect to the Torture Victim Protection Act ("TVPA"), defendants argue that because they were exercising federal authority, they could not possibly have acted under color of foreign law, as the TVPA requires. But the case law is clear that a private individual who willfully participates in joint action with a state official does act under color of state law, and that federal officials should not be treated any differently from private parties in this respect. When defendants conspired with Syrians to have Arar tortured, they acted under color of both U.S. and Syrian law, and are liable under the TVPA.

Defendants do not dispute that while Arar was physically present in the United States, he was protected by due process, or that due process generally prohibits punitive conditions of confinement absent a criminal conviction. But they argue that due process contains a double standard, allowing physical abuse of aliens that would be unconstitutional if inflicted on a citizen. But no lesser standard applies to aliens than to citizens; it would be as unconstitutional to force unadmitted aliens to perform hard labor on a chain gang as it would be to force pre-trial citizen detainees to do so.

Defendants argue that they are entitled to qualified immunity. But just as no reasonable lawyer could have advised defendants that they could torture and arbitrarily detain Arar themselves, no reasonable lawyer could have advised them that they could send him abroad for that same unconstitutional purpose. Nor can there be any reasonable doubt that barring a detainee from invoking congressionally established judicial protection violates due process, that subjecting an individual to torture under color of foreign law violates the Torture Victim Protection Act, or that subjecting a detainee to cruel and punitive conditions of confinement without a legitimate penological purpose is unconstitutional. There is nothing "close" about the legality of the conduct alleged here, and defendants are therefore not entitled to a defense of qualified immunity.

Finally, Arar has stated a claim for declaratory relief. Although he did not seek review of his removal order as such in this action, because he lost that opportunity when defendants precluded him from filing a petition for review, he does argue that defendants entered the removal order for the impermissible purpose of rendering him to Syria to be tortured and arbitrarily detained. If he prevails on that constitutional claim, the court would have equitable discretion to declare his removal order null and void – and the ten-year bar on reentry that he continues to suffer would appropriately be lifted.

As this Court famously recognized in *Filártiga v. Peña-Irala*, in almost no other setting is accountability more important than with respect to torture. 630 F.2d 876, 890 (2d Cir. 1980). To dismiss Arar's case on the pleadings, when the Court must accept as true that an innocent man was the victim of a federal conspiracy to torture him and to keep him from the protection of the courts, would be to subvert the rule of law. Defendants have done all they can to keep Arar out of court. This Court should not sanction their lawlessness.

I. THE DISTRICT COURT CORRECTLY EXERCISED JURISDICTION OVER ARAR'S CLAIMS.

Arar's complaint alleges multiple violations of the Constitution and federal law stemming from a conspiracy to subject him to torture and arbitrary detention. Because these claims "arise under" federal law, the district court properly exercised jurisdiction under 28 U.S.C. § 1331. Defendants maintain, however, that because they exploited immigration authority to effectuate their conspiracy, Arar's only avenues for judicial review were a petition for review of his removal order, filed within sixty days of his removal, or a habeas corpus action filed before the entry of his removal order. Since he filed neither, they contend, this action must be dismissed, and no court can hold defendants accountable.

The district court properly rejected this argument for two reasons. First, defendants affirmatively obstructed Arar's ability to seek habeas corpus or to file a

petition for review. As the district court correctly noted, the immigration jurisdiction provisions were "intended to consolidate judicial review of immigration proceedings into one action in the court of appeals, not to eliminate judicial review altogether." SPA.45, *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 270 (E.D.N.Y. 2006) (quoting *INS v. St. Cyr*, 533 U.S. 289, 313 (2001)) (internal quotation marks omitted). These provisions are "of questionable relevance …[where] defendants by their actions essentially rendered meaningful review an impossibility." SPA.53-54, *Arar*, 414 F. Supp. 2d at 273.

Second, as the district court and Judge Sack both found, Arar does not seek review of his removal order, but to hold government officials accountable for deliberately subjecting him to torture and arbitrary detention. *Arar v. Ashcroft*, 532 F.3d 157, 200-1 (2d Cir. 2008) (Sack, J., dissenting). Those claims stand independently of the removal authority defendants happened to invoke to effect their unconstitutional plan. Indeed, even if defendants had not blocked him from going to court while detained in the U.S., Arar could not have sought the relief he seeks now.

A. **Federal Question Jurisdiction Exists Where, as Here, Defendants Affirmatively Obstructed Arar's Access to Any Other Avenues of Judicial Review.**

Defendants argue that Arar essentially missed his opportunity for judicial review by failing to file a petition for habeas corpus or a petition for review, and

that his failure to do so precludes any relief now. But it was defendants *themselves* who made it impossible for Arar to pursue these avenues. They denied his initial requests to see an attorney, and hastily scheduled an extraordinary late Sunday night "fear of torture" interview as soon as he had managed to see a lawyer. J.A.29, J.A.32. The only "notice" they provided to the lawyer was a message left on her office voicemail that same Sunday evening. *Id*. The next day, an INS official twice lied to Arar's lawyer about his whereabouts. J.A.33. Meanwhile, defendants secretly placed Arar on a federally chartered jet bound for Jordan, where he was subsequently handed over to the Syrians. J.A.33-34. Defendants served Arar with his removal order—the prerequisite to a petition for review—only as they were taking him to the plane.[1] Defendants *never* notified Arar's lawyer that he had been ordered removed to Syria. J.A.36. And Arar was held in Syria for almost a year, largely incommunicado, and under threat of further torture if he alerted authorities to his circumstances. J.A.18.

Under these conditions, Arar could not have filed a petition for habeas corpus or a petition for review. Before he was taken to the airport in the dead of night, he had not been served with a removal order. Before a removal order issued,

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[1] J.A.86; DEPT. OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA 30 (publicly released June 5, 2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_08-18_Jun08.pdf (last visited November 13, 2008) ("OIG Report").

a habeas petition would have been premature for failure to exhaust administrative remedies,[2] if indeed habeas jurisdiction would even have existed.[3] Defendants do not cite a single case holding that foreign nationals in immigration proceedings may file habeas corpus petitions to challenge the possibility that they might be removed before any order has issued.

Nor could Arar have sought relief once the removal order issued. Given defendants' highly unusual step of *simultaneously* serving and executing the removal order, there was literally no time for review before Arar was out of the country. As the district court found, "his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay." SPA.69 (referencing 66 n.12), *Arar*, 414 F. Supp. 2d at 280 (referencing 279 n.12). The DHS Inspector

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[2] *Beharry v. Ashcroft* 329 F.3d 51 (2d Cir. 2003) (dismissing habeas action regarding removal because alien failed to exhaust administrative remedies); *Theodoropoulous v. INS*, 358 F.3d 162, 170-73 (2d Cir. 2002) (same); *Duvall v. Elwood*, 336 F. 3d 228, 234 (3d Cir. 2003) (same). *Michael v. INS*, cited by defendants, confirms this rule, as it permitted review only because the alien had exhausted all administrative remedies, and "no other means of review [we]re available." 48 F.3d 657, 665 n.8 (2d Cir. 1995). *See Kyei v. INS*, 65 F.3d 279, 284 (2d Cir. 1995) (distinguishing *Michael* and holding that an alien may seek stay of deportation prior to deportation only after exhausting all administrative remedies).

[3] Defendants' argument that 8 U.S.C. § 1252(b)(9) restricts review of removal orders to petitions for review would presumably mean that a habeas petition would be barred where a petition for review could subsequently be filed. U.S./Ashcroft Br. at 26-27.

General reported that an INS attorney told him that "in other removal proceedings, there was always a period of time between the final determination of inadmissibility and the execution of the removal order."[4]

The district court also correctly found that once Arar was in Syria, a petition for review would have been futile; the court of appeals would have had no authority to order Syria to refrain from torturing or arbitrarily detaining Arar. SPA 40-41, *Arar*, 414 F. Supp. 2d at 267; *see also*, *Lindstrom v. Graber*, 203 F.3d 470, 474 (7th Cir. 2000) (Posner, J.) ("there is no legal basis for our ordering Norway to surrender Lindstrom back to us, since we have no jurisdiction over the warden of the Norwegian prison in which he's incarcerated").

Congress could not have intended to permit immigration officials to subvert the entire scheme Congress devised for review of removal orders and thereby effectively eliminate all federal court review of administrative decisions and actions, including those giving rise to constitutional claims. *Cf. Demore v. Kim*, 538 U.S. 510, 534 (2003) ("Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (quoting *Webster v. Doe*,

[4] OIG Report at 29-30. The Report continues, "The attorney told us that he believed the decision to remove Arar to Syria had been made before the CAT assessment was performed." *Id.* The OIG also found that "the operations order to remove Arar was prepared, and the country clearances were requested" and sent "before the completion and serving of the I-148, before the CAT assessment was made, and before the assurances were provided to INS." *Id.* at 29.

486 U.S. 592, 603 (1988)).[5] Given the wholesale absence of evidence of congressional intent to preclude review of constitutional claims where, as here, government officials affirmatively obstruct a foreign national's ability to file a petition for review, defendants' arguments must fail. In any event, as discussed below, the jurisdictional provision on which defendants rely do not apply to Arar's claims.

B. Arar's Torture and Arbitrary Detention Claims Are Not Governed by the Immigration Jurisdiction Provisions Cited by Defendants.

The district court also properly found that the immigration jurisdiction provisions are inapplicable to Arar's claims that defendants conspired to subject him to torture and arbitrary detention. S.P.A.39-54, *Arar*, 414 F. Supp. 2d at 268-74. Arar seeks damages for unconscionable harms inflicted upon him through the joint action of defendants and Syrian officials. Those claims could not have been pursued on a petition for review, which is limited to reviewing the validity of the removal order. If defendants had not blocked his access to court, Arar would have pursued a CAT claim to attempt to bar his transfer to Syria. But he could not have sought the redress he seeks *now*, namely damages from federal officials who conspired before, during and after his removal to subject him to torture and

[5] *See also INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (same); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) ("clear and convincing evidence of congressional intent [is] required… before a statute will be construed to restrict access to judicial review") (internal citation omitted).

arbitrary detention. Accordingly, as we show below, and as the ACLU demonstrates in its amicus brief,[6] the INA provisions defendants invoke here are inapposite.

1. *8 U.S.C. §§ 1252(a)(2)(B)(ii) and (g).*

Defendants' most sweeping contention is that their decision to send Arar to Syria was discretionary, and therefore judicial review is barred by 8 U.S.C. § 1252(a)(2)(B)(ii), which precludes review of decisions committed to the Attorney General's discretion. *See* Replacement Brief for John Ashcroft, the Official Capacity Defendants-Appellees and the United States ("U.S./Ashcroft Br.") at 5, 28 n.11. This argument fails at the threshold. Statutes precluding review of exercises of discretion do not apply to legal challenges to unconstitutional action, because the government has no discretion to violate the Constitution. "[D]ecisions that violate the Constitution cannot be discretionary, so claims of constitutional violations are not barred by § 1252(a)(2)(B)." *Wong v. United States INS*, 373 F.3d 952, 962 (9th Cir. 2004) (internal citations omitted).[7]

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[6] Brief of *Amici Curiae* American Civil Liberties Union and New York Civil Liberties Union in Support of Plaintiff-Appellant at 7-13.

[7] *See also Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005) (holding that 1252(a)(2)(B)(i) does not bar review of legal questions); *Wong v. Warden, FCI Raybrook*, 171 F.3d 148,149 (2d Cir. 1999) ("judicial review exists over allegations of constitutional violations even when the agency decisions underlying the allegations are discretionary"); *Beslic v. I.N.S.*, 265 F.3d 568, 571 (7th Cir.

For the same reason, defendants' reliance on 8 U.S.C. § 1252(g) is also misplaced. The Supreme Court has interpreted that provision narrowly to apply only to "challenges to the Attorney General's exercise of prosecutorial discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 n.9 (1999). Because the government has no discretion to violate the Constitution by removing an alien for the purpose of subjecting him to torture and arbitrary detention, Arar does not challenge any "prosecutorial discretion."

2. *8 U.S.C. §1252(b)(9).*

Defendants also argue that 8 U.S.C. § 1252(b)(9) restricts judicial review of removal orders to a petition for review. The district court and Judge Sack correctly found this provision inapposite because Arar's claims are distinct from review of a removal order, and could not have been raised on a petition for review. SPA.46-48 *Arar*, 414 F. Supp. 2d at 270-71; *Arar*, 532 F.3d at 212 n.31 (Sack, J., dissenting).

8 U.S.C. §1252(b)(9) seeks to consolidate constitutional and statutory challenges arising from the removal process in a petition for review in the court of appeals. But Arar's torture and arbitrary detention claims stand irrespective of the removal order. As Judge Sack noted, they arise from an entire course of abusive

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2001) (finding that an INA provision barring appeals from discretionary decisions did not apply where petitioners raised a "substantial constitutional claim[]"); *cf. Webster v. Doe*, 486 U.S. at 603 (holding provision precluding judicial review of otherwise discretionary CIA employment decisions did not bar judicial review of *constitutional* claims).

conduct designed not to remove him but to incapacitate him and coerce information from him, beginning with his detention, including his coercive interrogation and brutal treatment, and continuing after his removal with U.S.-Syrian cooperation in his interrogation. *Arar*, 532 F.3d at 203 (Sack, J., dissenting). Moreover, Arar's principal injuries—the torture and arbitrary detention—occurred *after* removal. The fact that defendants exploited the immigration process in the course of violating Arar's rights does not mean that all subsequent statutory and constitutional claims are barred from judicial review. There is no evidence that Congress, in enacting § 1252(b)(9), sought to eliminate judicial review over claims that could not be heard on a petition for review. *Cf. St. Cyr*, 533 U.S. at 313 (§ 1252(b)(9) "does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)").

3. *FARRA and 8 U.S.C. § 1252(a)(4).*

Finally, defendants argue that Arar's challenge is barred by the Foreign Affairs and Restructuring Act (FARRA), [8] and 8 U.S.C. § 1252(a)(4).[9] Both

[8] Pub. L. 105-277, div. G, Title XXII, 112 Stat. 2682-82 (Oct. 21, 1998), codified at 8 U.S.C. § 1231, note. FARRA, § 2242(d), provides: "[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under [CAT] or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act."

provisions mandate that claims for violations of CAT or FARRA must be brought solely by petitions for review of removal orders. But Arar asserts no CAT or FARRA claim here, and seeks review of no determination made regarding FARRA policy, and therefore these provisions are inapplicable.[10]

In sum, the district court correctly determined that Arar's claims were properly heard under 28 U.S.C. § 1331, both because defendants themselves made it impossible for Arar to seek any other form of relief, and because the immigration provisions upon which defendants rely were intended to streamline review of removal orders, not to preclude review of claims that could not be heard on a petition for review.

C. *Munaf v. Geren* Does Not Bar Judicial Review of Arar's Claims.

Defendants argue that the Supreme Court's recent decision in *Munaf v. Geren*¸ 128 S. Ct. 2207 (2008), precludes judicial review of Arar's torture and arbitrary detention claims. But defendants ignore the war zone context in which

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[9] 8 U.S.C. §1252(a)(4), enacted in 2005, provides in relevant part that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture." Defendants have not shown that this provision was intended to apply retroactively to pending lawsuits.

[10] The CAT *is* relevant only to Arar's access to court claim, *see infra* Section III, because defendants blocked him from asserting a CAT claim on a petition for review at the only time when such review was available. That claim is now lost, and thereby serves as the foundation for his access to court claim.

Munaf arose, its very different rationale, and the Court's own language about the limits of its holding.

Munaf involved two U.S. citizens who had traveled voluntarily to Iraq, and were alleged to have committed serious crimes there. They sought habeas corpus relief to preclude U.S. authorities detaining them in Iraq from transferring them to Iraqi authorities for criminal trial. In recognition of Iraq's sovereign right to prosecute crimes committed in its territory, the Court held that "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Munaf*, 128 S. Ct. at 2223. The Court stressed that this principle applies with special force where "the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government refers to as an active theater of combat." *Id.* at 2224 (internal citation omitted).

The *Munaf* petitioners sought an exception to this rule because they claimed that their transfer to Iraqi authorities was likely to result in torture, but the Court held that "*in the present context* that claim is to be addressed by the political branches, not the judiciary." *Id.* at 2225 (emphasis added). The Court reasoned that because the general rule against habeas relief was predicated on respect for another country's sovereign right to prosecute, exceptions were a matter of foreign policy, not a legal question. *Id.* at 2227-28. Significantly, the Court expressly

reserved judgment on the "extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," noted that petitioners had not asserted a FARRA claim, and left open the possibility that petitioners could pursue such a claim on remand. *Id.* at 2226 and n.6.

Defendants' attempt to expand this narrow decision into a sweeping proposition that courts cannot "re-examine and second-guess the CAT determination made by Executive Branch officials in consultation with their foreign counterparts," U.S./Ashcroft Br. at 31, flies in the face of established practice of judicial review of CAT claims, and reflects a fundamental misunderstanding of the decision's context and core rationale. *Munaf* arose in a war zone; Arar's claims arose in New York. *Munaf*'s rationale rests explicitly on the sovereign right of a foreign nation to prosecute crimes committed in its territory, an interest not even arguably at issue here. Indeed, Syrian authorities had not even heard of Arar until the U.S. brought him to their attention. J.A.97. And Arar's claims present an even more extreme case than the one reserved in *Munaf* itself; he alleges that defendants sent him to Syria not simply *knowing* that he faced a risk of torture there, but *for the purpose of* having him tortured and arbitrarily detained.

Defendants' reading of *Munaf* would totally preclude the judicial function of reviewing CAT claims on petitions for review, because *every* petition for review

raising a CAT claim involves judicial re-examination of an executive official's determination that an individual does *not* face a risk of torture. Arar's Opening Brief ("AOB") at 37-38.[11] Properly understood, *Munaf*, which rests on the sovereign's right to prosecute domestic crimes, does not call that longstanding (and continuing) practice into question. This case is justiciable.

II. ARAR'S ALLEGATIONS THAT DEFENDANTS CONSPIRED TO SUBJECT HIM TO TORTURE AND ARBITRARY DETENTION STATE CLAIMS FOR RELIEF UNDER *BIVENS.*

Arar seeks damages under *Bivens* for defendants' conspiracy to subject him to torture and arbitrary detention. Defendants object that the Court should not extend *Bivens* relief to this "new context," in light of the immigration review provisions discussed above and the national security and foreign policy implications that Arar's claims assertedly present. U.S./Ashcroft Br. at 36;

[11] Defendants suggest that CAT claims heard on a petition for review are distinct because they generally do not involve executive communications with foreign officials. U.S./Ashcroft Br. 34-35. They point to immigration regulations providing that where the government seeks assurances, neither an immigration judge nor the Board of Immigration Review may review the CAT claim. *Id.* at 35. But the regulations govern only the decisionmaking process *within* the executive branch. Defendants do not dispute that *courts* on a petition for review may always review an alien's claim that his removal is barred by the CAT because he faces a risk of torture. 8 U.S.C. § 1252(a)(4). There is no exception for cases where the government has sought to eliminate the risk by obtaining assurances. *See, e.g.*, *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008) (finding Khouzam had a right under CAT and the Due Process clause to challenge diplomatic assurances that Egypt would not torture him), *appeal docketed*, No. 08-01094 (3d Cir. Jan. 10, 2008).

Replacement Brief for Defendant-Appellee Larry D. Thompson ("Thompson Br.") at 22. But as Judge Sack correctly noted, Arar seeks no *extension* of *Bivens* here. *Arar*, 532 F.3d at 209 (Sack, J., dissenting). Rather, it is defendants who seek to establish an *exception* to the long-established rule that damages are available when federal officials inflict unconstitutional abuse on individuals in their custody. In effect, defendants argue that because they used immigration authority to impose the abuse, and outsourced some of it to a foreign country, a detainee abused in their custody should obtain no relief.

Defendants do not dispute that had they tortured and arbitrarily detained Arar themselves at JFK Airport, a *Bivens* claim would lie. *Bivens* relief has long been available for claims that federal officials have abused persons in their custody.[12] Similarly, had defendants detained Arar and then delivered him to a gang in Queens to have them torture and arbitrarily detain him, a *Bivens* remedy would also indisputably lie. *Cf. Dwares v. City of New York*, 985 F.2d 94 (2d Cir.

[12] *See, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (recognizing *Bivens* action by mother of deceased prisoner alleging that prison's failure to provide competent medical treatment violated the Eighth Amendment); *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (allowing *Bivens* action to proceed for abuse of foreign national while detained in federal custody), *cert. granted on other grounds*, 2008 U.S. LEXIS 4906 (June 16, 2008); *Tellier v. Scott*, 280 F.3d 69 (2d Cir. 2000) (allowing *Bivens* action to proceed for due process violations in connection with assigning inmate to a maximum security housing unit in federal prison); *Hernandez v. Lattimore*, 612 F.2d 61 (2d Cir. 1979) (recognizing *Bivens* claim for excessive force used against a prisoner).

1993); *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005).[13] The happenstance that defendants relied in part on the guise of immigration authority to effect the very same abuse, and delivered Arar to Syria rather than Queens to have him tortured and arbitrarily detained, does not make this case an inappropriate vehicle for *Bivens* relief.

A. Defendants Have Not Demonstrated That Congress's Failure to Provide Damages Relief for Federal Conspiracies to Torture and Arbitrarily Detain Was Deliberate and Intentional.

Defendants argue that the immigration review provisions constitute a comprehensive remedial scheme warranting preclusion of a *Bivens* claim. As shown above, however, the immigration provisions defendants cite are inapplicable here, both because they do not encompass Arar's claims, and because defendants obstructed Arar's ability to invoke them while he was in their custody. Defendants cite no evidence to establish that Congress deliberately chose to immunize federal conspiracies to torture or arbitrarily detain from damages liability in these (or indeed any) circumstances, and in the absence of such evidence, a *Bivens* remedy

[13] Defendants suggest that Arar has "abandoned" his reliance on case law holding that government officials are liable under the "state-created danger" doctrine when they place a person in their custody in danger of harm by another. U.S./Ashcroft Br. at 54 n.21. Arar does not abandon that contention, but it is important to note that his claim is a far stronger one—it is not that defendants' actions merely increased the *risk* that he would suffer harm from another, but that defendants *intentionally* subjected Arar to torture and arbitrary detention by another. That allegation goes far beyond the "state-created danger" doctrine.

is not precluded. *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Dotson v. Griesa*, 398 F.3d 156 (2d Cir. 2005).

The mere existence of a complementary statutory remedial scheme does not necessarily bar a *Bivens* claim. In *Davis v. Passman*, 442 U.S. 228 (1979), for example, the Court recognized a *Bivens* action for employment discrimination claims by congressional employees. Even though Congress had legislated in the field by enacting Title VII, and had exempted congressional employees, the Court found that Congress had not intended to foreclose a constitutional damages remedy. *Id.* at 247. Similarly, in *Carlson v. Green*, 446 U.S. 14, 19-23 (1980),, the Court found that Congress's provision of remedies under the Federal Tort Claims Act did not preclude a damages action under *Bivens*. And in *Wilkie v. Robbins*, 127 S. Ct. 2588, 2600 (2007), the Court held that a number of statutes that gave petitioner a remedy for "virtually all of his complaints" nonetheless did not support the conclusion that "Congress expected the judiciary to stay its *Bivens* hand."[14]

For a remedial scheme to bar a *Bivens* remedy, it must be comprehensive in nature, and Congress's failure to provide a damages remedy for a particular wrong must be deliberate, "not inadvertent." *Schweiker v. Chilicky*, 487 U.S. at 423.

[14] The Court accordingly proceeded to a common-law balancing inquiry, ultimately declining to recognize a *Bivens* claim because the cause of action was too ill-defined and unbounded, *not* because Congress had precluded it. *Id.* at 2604.

Thus, *every time* this Court has ruled that a comprehensive remedial scheme has precluded *Bivens* relief, it has found that Congress's failure to provide damages was a conscious choice, not an oversight. In *Dotson v. Griesa*, 398 F.3d at 167-76, discussed in AOB at 26-27, the Court examined in detail the history of the Civil Service Reform Act before determining that Congress deliberately and consciously sought to deny a damages remedy to judicial employees.

Similarly, in *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 111-13 (2d Cir. 2005), this Court examined the text and legislative history of the Internal Revenue Code, including evidence that Congress had considered and rejected damages remedies for illegal tax assessments, before concluding that "the failure of Congress to include a damages action for tax assessment activities was not inadvertent." *Id*. at 112. In *Sugrue v. Derwinski*, 26 F.3d 8, 12-13 (2d Cir. 1994), this Court similarly denied a *Bivens* claim only after finding that "Congress's failure to create a remedy against individual employees of the VA was not an oversight," *id.* at 12, but reflected the fact that "Congress has chosen not to [provide such relief]." *Id.* at 13; *see also Spagnola v. Mathis*, 859 F.2d 223, 227-28 (D.C. Cir. 1988) (requiring showing that Congress's failure to provide damages was "not inadvertent").

Defendants cannot meet this standard. They cite no evidence that in enacting the INA, Congress deliberately chose to deny damages for federal

conspiracies to torture and arbitrarily detain. Defendants point to statutory language underscoring Congress's desire to consolidate judicial review of removal orders in a petition for review. U.S./Ashcroft Br. at 39-40; Thompson Br. at 24-26. But as noted above, those provisions do not encompass the claims Arar raises here, and certainly do not suggest any deliberate decision to preclude damages actions for constitutional violations under these circumstances.[15]

In fact, the evidence runs in the other direction entirely. Courts have recognized *Bivens* actions against immigration officials for constitutional violations for years, *see cases cited in* ACLU Amicus Br. at 17-18 and 27 n. 14. Yet Congress has *never* expressed even the slightest criticism of such actions, much less sought by statute to preempt them. *Cf. Krueger v. Lyng,* 927 F.2d 1050, 1057 (8th Cir. 1991) (where it "seems plain … that Congress never has given a moment's thought to the question of what sort of remedies should be available" for a particular injury, "Congress's failure to provide a remedy for constitutional wrongs suffered … has been inadvertent" and the plaintiff "may proceed with his *Bivens* action"); *Turkmen v. Ashcroft*, No. CIV. 02-2307, 2006 WL 1662663 at

[15] Indeed, as the ACLU amicus brief points out, the INA is not a "remedial" scheme at all in the sense the Supreme Court has used that term in reviewing statutes like the Civil Service Reform Act or the Social Security Act. Instead, it regulates the admission and removal of foreign nationals, and contains, as it constitutionally must, judicial review. ACLU Amicus Br. at 26-29. The INA simply does not address the question of remedies for constitutional injuries inflicted in the course of immigration enforcement. Nor is there any indication from the legislative history that Congress even considered the question.

*29, 2006 U.S. Dist. LEXIS 39170 at *91 (E.D.N.Y. June 14, 2006), *appeal docketed*, No. 06-3745 (2d Cir. Aug. 10, 2006) ("no evidence that the Congress gave thought to what remedies should be available" when immigration officials commit constitutional violations in administering the statutory scheme).

As Arar showed in his opening brief, AOB at 29-33, a *Bivens* remedy is particularly apt here because defendants made it impossible for Arar to file a petition for review when it might have made a difference.[16] Congress's intent was clearly to provide a judicial check on removals to a country where the alien faced a risk of torture; there is no evidence that it sought to eliminate all judicial oversight where the Executive's own misconduct precluded the review provided by statute. Absent such evidence, there is no "convincing reason" to preclude a *Bivens* action. *Wilkie v. Robbins*, 127 S. Ct. at 2598.

[16] Defendants cite *Stuto v. Fleishman*, 164 F.3d. 820(2d Cir. 1999), to argue that where plaintiff is not "wholly foreclosed" from filing an action under the procedures established by Congress, *Bivens* relief is barred. U.S./Ashcroft Br. at 41. In fact, *Stuto* strongly supports Arar's position here, because the Court recognized the validity of the cases cited by Arar in his opening brief, AOB at 30-32, holding that even a comprehensive congressional remedial scheme will not bar a remedy when the defendants affirmatively precluded that remedy. *Id.* at 826 (discussing *Rauccio v. Frank*, 750 F. Supp. 566 (D. Conn. 1990), and *Grichenko v. U.S. Postal Service*, 524 F. Supp. 672 (E.D.N.Y. 1981)). Stuto himself, however, had two undisputed alternative forms of obtaining full relief available to him, which he voluntarily opted not to use. Here, by contrast, defendants obstructed Arar's ability to access any remedy at all.

On the contrary, there are convincing reasons to recognize a *Bivens* remedy here: namely, to reinforce the system of checks and balances that defendants have subverted, *see* Amicus Brief of Norman Dorsen et al.,[17] to hold defendants accountable for conscience-shocking abuse, *see* Amicus Brief For the Redress Trust,[18] and to provide a remedy for Arar, for whom "it is damages or nothing." *Bivens*, 403 U.S. at 410.

B. That Arar's Torture and Arbitrary Detention Claims May Implicate Foreign Policy or National Security Does Not Preclude Recognition of a *Bivens* Action Here.

Defendants also maintain that Arar's suit raises foreign affairs and national security concerns that should be treated as "special factors" counseling against recognition of a *Bivens* action. But as Arar demonstrated in his opening brief, AOB at 34-37, and as the Replacement Amici Briefs of Law Professors and Retired Federal Judges develop in further detail,[19] federal courts have frequently reviewed constitutional challenges with foreign policy and national security

[17] Brief of Norman Dorsen, Helen Hershkoff, Frank Michelman, Burt Neuborne, and David L. Shapiro as *Amici Curiae* In Support of Appellant ("Amicus Br. of Norman Dorsen et al.").

[18] Brief For The Redress Trust As *Amicus Curiae* in Support of Plaintiff-Appellant Urging Reversal.

[19] Replacement Brief for Amici Curiae Law Professors In Support of Maher Arar, at 16-20; Replacement Brief of Retired Federal Judges as Amici Curiae in Support of Plaintiff-Appellant and Urging Reversal for Rehearing En Banc, at 8-20.

implications. Indeed, the Supreme Court itself has done so repeatedly since the September 11, 2001 attacks—even where Congress has expressly repealed the Court's jurisdiction to do so. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

Defendants argue that resolution of Arar's claim would require impermissible judicial inquiry into such matters as defendants' decision to send Arar to Syria rather than Canada. *See* U.S./Ashcroft Br. at 45-46.

This argument ignores the fact that Congress expressly provided for judicial review of such issues. Courts of appeals hearing petitions for review routinely consider claims that a foreign national will be tortured if removed to the country that government officials have selected, in situations where our government has determined that no such risk exists. Had defendants not obstructed Arar's ability to file a petition challenging his order of removal, this Court would have conducted an inquiry into Syria's conduct that would have been strikingly similar to that which defendants now claim is too sensitive for courts to consider.[20] And if these issues would have been appropriate for judicial resolution on a petition for review, there is no reason, from a national security or foreign relations perspective, why they would be inappropriate for judicial review in adjudicating a damages claim.

[20] *See, e.g., Mironescu v. Costner*, 480 F.3d 664, 672-73 (4th Cir. 2007) (neither foreign policy implications nor sensitive confidential communications with other nations bar judicial consideration of a habeas action questioning whether extradition to another country would violate CAT).

An award of damages after the fact will generally be far *less* intrusive on official initiatives than an injunction barring the government from taking action in the first place.

Defendants raise the specter of the need to evaluate certain confidential "assurances" that defendants may have obtained from Syria, and suggest that this warrants precluding a *Bivens* action at the threshold.[21] But courts have multiple tools for addressing such concerns in the course of litigation, and it would be unwarranted to bar the suit at the door on the speculation that its litigation may involve confidential information. Much about the Arar case has been made public already, by official U.S. and Canadian investigations, and more still is likely to be disclosed in the future. It would be entirely premature to close the courthouse door at the threshold where the legitimacy of asserted privileges may be fully addressed down the road.

Defendants cite *Jama v. Immigration and Customs Enforcement* for the proposition that "removal decisions, including the selection of a removal alien's destination, may implicate our relations with foreign powers." 543 U.S. 335, 348

[21] Whether defendants obtained assurances, what those assurances were, and whether those assurances were reliable is not pleaded in the complaint, and cannot form the basis for a motion to dismiss. The DHS Inspector General has since reported that after the INS determined that Arar was likely to be tortured in Syria, "assurances" of some kind were obtained. But the OIG also found that the assurances were "ambiguous" in nature, that their validity was not examined, and that they were not obtained through the State Department, as is customary. OIG Report at 5, 22, 36.

(2005) (internal quotation marks omitted); U.S./Ashcroft Br. at 43-46. That may be true, but Congress has nonetheless said that removal decisions are reviewable, despite those implications. In particular, Congress has authorized judicial review of claims that an alien's removal might subject him to torture. And Congress created no exceptions for cases that might prove embarrassing to other nations or the United States—for in the context of torture claims such an exception would likely swallow the rule.

The Supreme Court has *never* identified "national security" or "foreign affairs" as special factors counseling hesitation under *Bivens.*[22] The only lower court cases that have rejected *Bivens* claims based on such "special factors" are essentially findings of nonjusticiability in contexts very different from that presented here. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 207 (D.C. Cir. 1988) (refusing to exercise control over military officers); AOB at 37. Unlike in *Sanchez-Espinoza,* Congress has both prohibited the underlying executive conduct and expressly provided for judicial review of that conduct. In such a circumstance, the Executive acts at its lowest ebb of power, and judicial deference is inappropriate. *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 637-38 (1952)

[22] *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983), in which the Court held that military personnel could not seek *Bivens* relief for service-related injuries, were predicated not on vague concerns about national security or foreign relations, but on the specific determination that such suits would impermissibly interfere with "the unique disciplinary structure of the military establishment." *Chappell*, 462 U.S. at 304; *Stanley*, 483 U.S. at 683.

(Jackson, J., concurring). Where executive officials act in disregard of express congressional mandates, judicial review is necessary to enforce separation of powers and ensure that executive officials are not above the law. *See* Amicus Br. of Dorsen et al.

Thompson broadly claims that because the Constitution assigns "the entire control of" foreign affairs to the political branches, "'the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry.'" *Id.* at 28-29 (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972)). But here, the political branches have enacted a statute that prohibits the conduct defendants engaged in and expressly provided for a judicial role. In holding those officials accountable, this Court would not be usurping the political branches' control of foreign policy, but simply ensuring that the mandates required by law and the Constitution are not evaded. That is not just the judiciary's prerogative, but its *duty.*

III. ARAR HAS STATED A *BIVENS* CLAIM FOR DENIAL OF ACCESS TO COURT.

Arar also asserts an independent *Bivens* claim for defendants' denial of his access to court. As argued in the Amicus Br. of Norman Dorsen, et al., this claim avoids all of the concerns regarding confidential information and may provide a vehicle for redress of his torture and arbitrary detention injuries as well, which he

could have avoided had defendants not denied his access to court. Defendants assert four arguments for why Arar's access to court claim was properly dismissed. None is persuasive, and therefore the claim should be revived.

First, defendants maintain that Arar was not actually prevented by defendants from challenging his removal to Syria as violative of CAT because: (1) he had an attorney working on his behalf who could inquire about Arar's whereabouts as well as the status of the INS proceedings; (2) he could have filed a habeas petition before receiving a final order of removal to block a potential removal to Syria; and (3) he could have filed a petition for review in this Court after his removal. Each of these assertions is preposterous.

It is true that Arar was ultimately allowed to see an attorney—two days before he was removed. But as soon as he did so, defendants hastily scheduled a highly unusual fear of torture interview late on a Sunday night, "notified" the attorney in a way calculated to ensure that she would not be present, lied to her the next day about Arar's whereabouts, and never served her with the final removal order, which was served on Arar himself only as he was being taken to the plane that would fly him out of the country. J.A.29, 32.

As noted above, any habeas petition that Arar's attorney might have tried to file over the weekend would have been dismissed as premature, as no final order of removal had been entered. And once Arar was removed to Syria, a petition for

review would have been futile, as the court of appeals would have no authority over the Syrian officials then detaining and torturing Arar in Syria. *See* Section I.A, *supra*.

Second, defendants reiterate the panel majority's holding that *Christopher v. Harbury*, 536 U.S. 403 (2002), required Arar to specifically plead in his complaint the underlying claim that was lost due to defendants' obstruction. But as pointed out in Arar's opening brief, *Harbury* did not purport to impose a heightened pleading standard. AOB at 42-43. Arar's lost underlying claim was evident from his allegations, as the district court itself explicitly acknowledged: "In this case, Arar alleges that he was intentionally deprived of the opportunity to obtain adequate review over his CAT claim." *Arar*, 414 F. Supp. 2d at 269. Nothing more is required under *Harbury.*

The district court nonetheless dismissed Arar's access to court claim, reasoning that: (1) Arar was not specifically challenging his removal as such, and therefore his denial of access claim must concern more than his removal (or rendition) and (2) since Arar had no *Bivens* claim for his deportation to and torture in Syria, he had no "separate and distinct right to seek judicial relief" against defendants, as the district court understood *Harbury* to require. *Arar*, 414 F. Supp. 2d at 285-86. The court was wrong as a matter of law in both respects. That Arar cannot *now* seek review of his removal order as such in this action actually

supports his access to court claim, which need only show that he has lost the opportunity to challenge his removal under CAT/FARRA. Similarly, irrespective of whether Arar has another *Bivens* remedy now against defendants for his torture and arbitrary detention, he clearly did have a CAT/FARRA remedy back in 2002, which he irretrievably lost when defendants obstructed his opportunity to seek the review Congress provided. The district court therefore improperly dismissed Arar's access to court claim, and given the court's erroneous interpretation of the law, there would have been no point in repleading it.

Third, defendants broadly claim that Arar's underlying CAT/FARRA claim could not have succeeded, because courts cannot second guess the decision of the political branches on the likelihood of torture abroad where that determination turns in part upon communications with foreign officials. But the law recognizes no such exception to the general rule that courts can—and frequently do—override executive branch determinations that an alien does not face a risk of torture. Defendants' argument has been rejected thus far by the only court to which it has been presented. *See Khouzam*, 529 F. Supp. 2d 543 (finding Khouzam could challenge diplomatic assurances regarding torture).

Finally, Thompson claims that Arar could not be denied a constitutional right of access to court unless he had a clearly recognized *constitutional* right to challenge his removal. But Thompson fundamentally misunderstands an access to

court claim. Arar clearly had a *statutory* right to pursue his CAT claim, and it was defendants' obstruction and denial of that statutory right that gives rise to a denial of Arar's constitutional right of access to court. The Constitution is violated when government officials affirmatively obstruct a detainee's opportunity to seek judicial relief, whether the claim they lost is based on the Constitution, statute, or common law.[23]

IV. DEFENDANTS VIOLATED THE TVPA BY SUBJECTING ARAR TO TORTURE UNDER COLOR OF SYRIAN LAW.

In Arar's opening brief, he established that the district court and the panel erred in failing to recognize that under binding "color of law" jurisprudence, Arar's allegations that defendants conspired with Syrian officials to have Arar tortured in Syria establish that they acted under color of Syrian law, as the TVPA requires. AOB at 44-49; Torture Victim Protection Act ("TVPA"), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). In their briefs, defendants do not dispute that allegations of conspiracy are sufficient to constitute action "under color of law" under 42 U.S.C. § 1983 case law, but argue: (1) that a different standard should apply to federal officials alleged to have acted together with foreign officials; (2)

[23] *Harbury v. Deutch*, 233 F.3d 596, 607-08 (D.C. Cir. 2000), *rev'd on other grounds* 44 Fed. Appx. 522 (D.C. Cir. 2002); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261(7th Cir. 1984); *Barrett v. United States*, 798 F.2d 565, 576-77 (2d Cir. 1986) all found access of court claims viable for depriving an individual of common law tort claims or statutory claims.

that the TVPA does not support the imposition of "secondary liability" for those who facilitate torture; and (3) that Arar's allegations of torture do not implicate them because he was not in their "custody or control" when the torture was actually inflicted.

None of these arguments finds precedential support or is a plausible reading of the statute. Under defendants' first argument, a federal official exercising federal authority literally *cannot* act under color of another sovereign's law. Defendants' argument is predicated on the mistaken assumption that an official can act under color of only one sovereign's authority. But defendants advance no reason why a conspiracy between federal and Syrian officials does not produce action under color of *both* sovereign's laws. Just as a conspiracy between state and federal actors might produce action under color of state and federal law, so the conspiracy here produced action under color of both Syrian and U.S. law.

Defendants' contention that the TVPA does not support "secondary liability" for those who facilitate torture has been rejected by every court to consider the question. And defendants' "custody or control" argument misreads that provision, which seeks to define the actionable conduct, not the scope of individuals potentially liable for that conduct.

A. Federal Defendants Acted Under Color of Foreign Law by Willfully Participating in Joint Action with Syrian Officials.

Arar's opening brief established that defendants' "willful participation in joint action" with Syrian officials is sufficient to establish that defendants acted under color of Syrian law. This conclusion follows from three propositions: (1) the TVPA "color of law" inquiry is governed by § 1983 color of law jurisprudence;[24] (2) a conspiracy between private and state actors satisfies the § 1983 "color of law" requirement, even when the private party does not act under the control or influence of state officials;[25] and (3) for purposes of "color of law" jurisprudence, there is no reason to treat federal officials who conspire with state officials to violate an individual's rights any differently than private parties who do so. *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969).

Defendants nonetheless insist that because they acted as U.S. officials, they must have acted under color of U.S. law, and cannot have acted under color of Syrian law. U.S./Ashcroft Br. at 75-77; Thompson Br. at 57-58; Brief for Defendant-Appellee Robert S. Mueller III ("Mueller Br.") at 15. This view of the "under color of law" inquiry must lead to an either/or result that federal officials

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[24] *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995); H.R. Rep. No. 102-367, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87; S. Rep. No. 102-249, 1991 WL 258662 (Leg. History), at *8 (1991).

[25] *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 27 (1980); AOB at 44-49; *see also,* Brief for *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Plaintiff-Appellant upon Rehearing *En Banc* ("NAACP LDF Amicus").

exercising federal authority could *never* be responsible for torture inflicted under color of foreign law, even if they were in the room with the foreign torturers orchestrating the techniques. This argument cannot be squared with *Kletschka*, which insisted that there is no reason to treat federal officials differently from private parties for "color of law" purposes where they conspire with state officials, and held that federal officials acted under color of state law even where their conduct was made possible by virtue of their federal government positions. 411 F.2d at 449.[26]

Defendants offer no reason why a federal official cannot be found to be acting under color of two sovereigns' laws when he cooperates with another sovereign to inflict torture.[27] Thus, while Defendant Thompson acted under

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[26] Defendants rely on Ninth Circuit dicta that "if" federal and state officials in that case had acted jointly it was under color of federal, not state law. *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995). U.S./Ashcroft Br. at 79; Thompson Br. at 62; Mueller Br. at 18-19. But *Billings* found that federal and state officials had *not* "acted jointly," as there was no conspiracy alleged. 57 F.3d at 801. Unlike here, there was no allegation that federal officials delivered plaintiff to state officials to effectuate an unlawful act, nor of any other dealings between the officials. *Id.*

[27] Defendants Ziglar and Thompson quote President George H.W. Bush's statement expressing his belief that Congress did not intend that the TVPA "should apply to United States Armed Forces or law enforcement operations." Brief for Defendant-Appellee James W. Ziglar ("Ziglar Br.") at 20; Thompson Br. at 59, n.10. This Court has expressed "doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent[.]" *United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989). There is even more reason for

federal authority when he overrode Arar's choice to be sent to Canada, that does not mean that he did not *also* act under color of Syrian law by participating in a plan with Syrian officials to have Arar tortured and detained in Syria.[28]

The TVPA's "color of law" requirement "was intended to 'make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Kadic*, 70 F.3d at 245 (quoting H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87). Yet defendants would transform what is no more than a foreign "state action" requirement into a free pass for U.S. officials to conspire with foreign officials to torture with impunity.[29]

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doubt about the weight to be accorded a signing statement when it is a self-serving assertion about executive immunity from legal accountability.

[28] Defendant Thompson incorrectly claims that Arar relies on color-of-law tests that the Supreme Court has disapproved. Thompson Br. at 63. The "willful participation in joint action" test on which Arar relies is distinct from the "close nexus" test regarding state regulation of private activity that was employed in *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999), and the "symbiotic relationship" test involving interdependence with private entities employed in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

[29] Defendant Thompson argues that *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005) did not address whether the corporate defendants acted under color of Guatemalan law. Thompson Br. at 61, n.11. In fact, *Aldana* found that the TVPA requires state action, cited the TVPA's color of law requirement, 416 F.3d at 1247 (citing TVPA, §2(a)), and found state action because a

Defendants argue that § 1983 "color of law" jurisprudence ought not apply in the foreign, "international," or "multinational" context. Mueller Br. at 17, Thompson Br. at 60. But Congress and this Court have expressly said otherwise, directing courts to apply § 1983 "color of law" jurisprudence to an inevitably foreign setting. Moreover, defendants offer no persuasive reason why holding federal officials responsible for participating in torture with foreign officials should be any different from holding federal officials responsible for participating in civil rights abuses with state officials. Congress carefully drafted the TVPA to impose liability on all individuals who subject others to torture under color of law of a foreign nation, and did not exempt United States officials. Private individuals and federal officials can be held liable under § 1983 when they conspire with state officials to violate the Constitution; so too should both private individuals and federal officials be liable under the TVPA when they conspire with foreign state officials to torture people.

Defendant Thompson claims that no court has countenanced that a U.S. official could act under color of law of a foreign nation under the TVPA. Thompson Br. at 57-58. But the court in *Gonzalez-Vera v. Kissinger* did so. It rejected Henry Kissinger's argument that as a U.S. official he could not have acted under color of law of a foreign nation. No. 02-cv-02240, 2004 WL 5584378 at *8,

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Guatemalan mayor was actively involved in the actions of the private security force that in turn acted at the behest of defendants. *Id.* at 1249.

2004 U.S. Dist. LEXIS 30256, at *28 (D.D.C. Sept. 17, 2004), *aff'd on other grounds*, 449 F.3d 1260 (D.C. Cir. 2006). Instead, applying standard "color of law" principles, it found that Kissinger did not act under color of Chilean law "because he was neither a higher official who authorized and directed acts of torture or extrajudicial killing nor an individual who acted in concert with a foreign state to commit such acts." *Id.* at WL*8, LEXIS*31. *Gonzalez-Vera* dismissed the TVPA claim because the complaint did not allege that Kissinger was a "willful participant in joint action with the state or its agents." *Id.* at WL*9, LEXIS*34 (internal quotations omitted). Here, Arar has alleged precisely that.

Ignoring *Gonzalez-Vera*, defendants rely on another district court decision, *Harbury v. Hayden*, 444 F. Supp. 2d 19 (D.D.C. 2006), *aff'd on other grounds*, 522 F.3d 413 (D.C. Cir. 2008). Thompson Br. at 57-58; Mueller Br. at 15-18. *Hayden*, however, failed to apply the § 1983 principle that non-state actors who willfully participate in joint action with state officials act under color of state law. *See, e.g.*, *Sparks*, 449 U.S. at 27; AOB at 44-49; NAACP LDF Amicus. *Hayden* erroneously found that federal officials who conspire with state officials must *separately* misuse "power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 444 F. Supp. 2d at 43

(quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).[30] As explained in our opening brief, and left unrefuted by defendants, the "color of law" test does not require a showing of anything more than conspiracy with state officials to act under color of state law.[31] AOB at 46.

Finally, defendants suggest that exposing federal officials to liability for facilitating torture committed under color of foreign law would have negative foreign policy consequences and might open a floodgate of litigation. But if federal courts can hold foreign officials accountable, surely they should be able to hold *their own* officials accountable. And the concern that a floodgate would be opened if "every federal employee working abroad" could be subject to liability

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[30] This Court has acknowledged that *West* did not supplant the willful participation in joint action test. *See Annunziato v. The Gan, Inc.*, 744 F.2d 244, 250 (2d Cir. 1984) ("Acting under color of state law is defined as the 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' To act under 'color of' state law for § 1983 purposes does not require that the defendant be an officer of the state. Private parties may incur liability for their conduct when the individual actor is 'a willful participant in joint activity with the State or its agents.'") (Internal citations omitted).

[31] Defendants also rely on one sentence of dictum in *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005). Thompson Br. at 58; U.S./Ashcroft Br. at 76; Mueller Br. at 15-16. *Schneider*, without even mentioning § 1983 or undertaking any analysis, opined that Kissinger must have acted pursuant to U.S. law because he was carrying out the President's orders. 310 F. Supp. 2d at 267. The court first found plaintiffs' claims presented nonjusticiable political questions. *Id.* at 262. The subsequent TVPA dictum is inconsistent with both *Kadic*, which directs courts to look to § 1983, and *Kletschka*, which found that federal officials who use their federal authority to conspire with state officials act under color of state law.

would only be well-founded if federal officials routinely conspired with foreign officials to torture individuals. U.S./Ashcroft Br. at 78. In any event, it is an argument that should be addressed to Congress, not this Court. In enacting the TVPA, the political branches clearly entrusted the resolution of claims of torture under color of foreign law to the judiciary, including claims against individuals who conspire with foreign officials to subject others to torture. Federal officials can be held liable under the TVPA only when they act "together with state officials or with significant state aid." *Kadic,* 70 F.3d at 245. Concern about opening the floodgates is hardly warranted.

B. The TVPA Imposes Liability on Those Who Subject Individuals to Torture By Conspiring With Others.

As the district court correctly found, defendants' argument that conspirators (and aiders and abettors) cannot be held liable under the TVPA has been rejected by "every court" to decide it. SPA.24.[32] The fact that defendants "subjected" Arar

[32] *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (holding that "TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation"); *Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996) (finding liability attaches under the TVPA to those "who authorized, tolerated or knowingly ignored those acts is liable" without distinction); *Wiwa v. Royal Dutch Petroleum Co*., No. 96-cv-8386, 2002 WL 319887 at **15-16, 2002 U.S. Dist. LEXIS 3293 at *48 (S.D.N.Y. Feb. 28, 2002) (holding that the TVPA includes liability for those who cause the victim to undergo torture, specifically including those who aid, abet, and conspire to torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) (holding that liability under the TVPA includes those who aid and abet torture).

to torture by conspiring with the Syrians rather than by holding Arar down while the Syrians beat him with electrical cables does not immunize them from liability.[33] The TVPA holds liable those who "subject" an individual to torture. TVPA, § 2(a)(1). "Subject" "means to cause someone 'to undergo the action of something specified; to expose . . . to make liable or vulnerable.'" *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-cv-8386, 2002 WL 319887 at *15-16, 2002 U.S. Dist. LEXIS 3293 at *50 (S.D.N.Y. Feb. 28, 2002) (quoting Random House Webster's College Dictionary (1999)). Accordingly, "individuals who 'cause someone to undergo' torture or extrajudicial killing, as well as those who actually carry out the deed, could be held liable under the TVPA." *Id.* *See also* Amicus Center for International Human Rights of Northwestern University School of Law ("Northwestern Amicus") at 6.[34]

[33] Contrary to defendants' assertion (U.S./Ashcroft Br. at 80), Arar does not argue that the Court should imply some secondary liability not found in the terms of the statute itself. Rather, he argues that the TVPA itself makes liable anyone who "subjects" another to torture under color of foreign law, and that the term "subjects" includes those who conspire to torture or aid or abet torture.

[34] Without authority for doing so, Mueller argues that this Court should look not to unanimous TVPA precedent, but to Ninth Circuit § 1983 jurisprudence interpreting the common word "subjects." Mueller Br. at 23 (citing *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). Even if that standard did apply, which it does not, Arar has sufficiently alleged that each defendant did "an affirmative act, participate[d] in another's affirmative acts, or omit[ted] to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (citation omitted).

Defendants argue that the reasoning of *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), which construed § 10(b) of the Securities Exchange Act of 1934, precludes "secondary liability" under the TVPA. U.S./Ashcroft Br. at 80-83; Mueller Br. at 20-22. Here, too, courts to consider this argument have rejected *Central Bank's* application in the TVPA context.[35] As the district court properly held, *Central Bank* does not "require an unequivocal congressional mandate before allowing a claim for secondary liability. Rather, the case holds that the scope of liability must be based on a fair reading of statutory text." SPA.25.

Central Bank found that the implied § 10(b) cause of action could not be extended "beyond the scope of conduct prohibited by the statutory text," so aiding and abetting that was not itself manipulative or deceptive did not violate the statute. 511 U.S. at 177. Courts applying *Central Bank* have confirmed that the test is not whether the words aiding and abetting or conspiracy appear in a statute, but whether the statute makes the alleged conduct a basis for liability. *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1019-21 (7th Cir. 2002) (finding *Central*

[35] *See, e.g., Wiwa,* 2002 U.S. Dist. LEXIS 3293 at **51-52; *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172-1174 (C.D. Cal. 2005), *appeal docketed*, No. 05-56175, 05-56178, 05-56056 (9th Cir. Aug. 8, 2005). This Court has rejected the argument that *Central Bank* precludes aiding and abetting liability under the Alien Tort Claims Act (ATCA). *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *id.* at 282 (Katzmann, J., concurring); *id.* at 288, n. 5 (Hall, J., concurring).

Bank did not preclude secondary liability under the Anti-Terrorism Act of 1990 (ATA) because the prohibited activities—those that "involve" violent or dangerous criminal acts—subsume acts that aid and abet such activity); *see also Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (finding aiding and abetting and conspiracy liability under the ATA). Here, by imposing liability for "subjecting" someone to torture, the TVPA text covers conspiring to torture or aiding and abetting torture. The legislative history explicitly confirms Congress's intent to reach those who "ordered, abetted, or assisted in the torture." S. Rep. No. 102-249, 1991 WL 258662, at *8.[36] *See also*, Northwestern Amicus, at 5-12. By contrast, nothing in § 10(b)'s legislative history indicated any intent to impose aiding and abetting liability. *Central Bank*, 291 F.3d at 184.

Defendant Mueller argues that the absence of a cause of action for damages under FARRA sheds light on whether Congress intended to create a remedy under the TVPA in situations like Arar's. Mueller Br. at 25-26. FARRA was enacted in 1998, long after the TVPA's enactment in 1992. As this Court has reasoned, the "legislative decision not to create a new private remedy does not imply that a

[36] Defendants argue that the Court should disregard this statement of Congressional intent in the Senate Report, because the shorter House Report does not contain this language, and it was the House Bill that was passed. U.S./Ashcroft Br. at 82; Mueller Br. at 27. But the relevant statutory language—that an individual who "subjects" an individual to torture shall be liable—was substantively identical in the Senate Bill and the House Bill. *Compare* H.R. Rep. No. 102-367 *as reprinted in* 1992 U.S.C.C.A.N. 84, 84, *with* S. Rep. No. 102-249, 1991 WL 258662, at *3-4.

private remedy is not already available under" an existing statute. *Kadic*, 70 F.3d at 242. And the fact that Congress did not recognize a private cause of action for erroneous risk determinations under the CAT does not in any way indicate that Congress intended to immunize from liability those who subject others to torture under color of foreign law.[37]

C. Arar's Torture Allegations Satisfy the TVPA's "Custody or Physical Control" Requirement.

Defendants lastly argue that they cannot be liable under the TVPA because they did not have "custody or physical control" of Arar. Mueller Br. at 29-32; Thompson Br. at 64-65. The TVPA, however, does not require that all defendants had custody or physical control over the torture victim in order to be held liable, but only that the "offender," *i.e.*, the torturer, did. TVPA, § 3(b)(1). The TVPA's requirement that torture be "directed against an individual in the offender's custody or physical control" is located in the definition of torture, and concerns whether an act of "torture" occurred, not who can be liable. TVPA, § 3(b)(1). Instead, the

[37] A similar defect infects Mueller's related argument that the absence of a civil cause of action under the criminal torture statute means that Congress could not have intended the TVPA to provide damages for conspiracy to torture. Mueller Br. at 24-25. The criminal torture statute was passed in 1994, two years after the TVPA was enacted, so cannot indicate Congressional intent regarding the TVPA. It is more likely that given the TVPA, creating another civil cause of action was considered unnecessary.

statute extends liability not just to the torturer himself, but to anyone who "subjects" an individual to torture. TVPA, § 2(b)(1).[38]

Arar alleges precisely the custody or control contemplated by the TVPA—he was subjected to torture while held in custody by Syrian officials acting in concert with defendants.[39] Defendants cannot avoid liability under the TVPA by delivering someone in their custody and control to the custody of others for the purpose of torture.[40]

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[38] Without this requirement in the definition of torture, plaintiffs could bring torture claims for the infliction of pain and suffering even if they were never in anyone's custody or control. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 112 (E.D.N.Y. 2005), *aff'd on other grounds,* 517 F.3d 104 (2d Cir. 2008) (finding plaintiffs were not subject to torture under the TVPA because they were not in the custody or physical control of the corporate defendants who manufactured Agent Orange, nor of the United States, which sprayed it from aircraft).

[39] The custody or control requirement originated as a U.S. understanding to its ratification of CAT, and was "intended to clarify the point that the convention does not apply to situations *before* custody is obtained, but rather comes into play when an individual has been subjected to the custody or control of a government official or agent acting on the official's behalf." *Convention Against Torture: Hearing before the Senate Comm. on Foreign Relations*, 101st Cong. 13, 17 (1990) (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice) (emphasis added).

[40] Even if Arar were required to have been in defendants' custody or control, rather than his torturers, his allegations (*see, e.g.*, SPA.27; J.A.97) that he was held by foreign officials at the behest of defendants would be sufficient. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 49 (D.D.C. 2004) (finding no basis in the habeas statute to deny jurisdiction "merely because the executive is allegedly working through the intermediary of a foreign ally," and holding that petitioner met the "in custody" requirement by alleging he was held in Saudi Arabia at the behest or

V. ARAR HAS STATED A CLAIM FOR RELIEF UNDER BIVENS BASED ON HIS ABUSIVE MISTREATMENT WHILE DETAINED IN THE UNITED STATES.

Defendants argue that Arar's allegations of abuse while detained in the United States fail to state a clearly established violation of due process, and were therefore properly dismissed. Arar was held in the highest security administrative segregation unit, coercively interrogated, and shackled and strip-searched. These conditions were unrelated to legitimate penological interests, and were therefore punitive, and violate his clearly established substantive due process rights.

In *Iqbal v. Hasty*, this Court held that a pre-trial detainee's allegations of abuse similar to that alleged by Arar stated a due process claim. 490 F.3d 143 (2d Cir. 2007), *cert. granted on other grounds sub nom., Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008).[41] Defendants argue that because Arar is an unadmitted alien, unlike Iqbal, due process protected him only from "gross physical abuse." This standard

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direction of U.S. government officials). *See also* Northwestern Amicus at 12-14 (the TVPA's custody or physical control requirement can be met by constructive custody).

[41] Defendant Mueller argues that the plaintiff in *Iqbal* alleged more severe physical injury. Mueller Br. at 43. But the specific incidents of physical abuse Mueller cites were alleged in *Turkmen v. Ashcroft* and *Elmaghraby v. Ashcroft* when those cases were in district court, and involved plaintiffs other than Iqbal. They were *not* part of this Court's consideration of Iqbal's separate conditions of confinement claim on appeal. *Iqbal*, 490 F.3d at 168-69.

has never been applied in this Circuit and finds no support in settled due process law.

Defendants' advocacy of two levels of substantive due process protections for excludable and deportable aliens cannot be squared with numerous decisions that have declined to apply different constitutional standards to excludable and deportable aliens. *Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2003) (entry fiction does not deprive alien of equal protection rights under Fifth Amendment); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006) (entry fiction has no impact on an excludable alien's excessive force claims); *Tungwarara v. United States*, 400 F. Supp. 2d 1213, 1220 (N.D. Cal. 2005) (excludable alien has a Fourth Amendment protection from suspicionless strip searches); *see also Ngo v. Immigration and Naturalization Service*, 192 F.3d 390, 396 (3rd Cir. 1999) (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (unadmitted aliens protected by substantive due process)); *Matthews v. Diaz*, 426 U.S. 67, 75 n.7 (1976) ("even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of the due process clause]").[42]

[42] Defendants invoke the entry fiction, which provides that unadmitted aliens at the border are not entitled to due process with respect to the procedures employed to determine their admissibility. *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953). But the rationale for that result is that entry is a discretionary privilege, and the denial of such a privilege does not trigger due process, regardless of whether the person affected is a citizen or noncitizen. The entry fiction is "a fairly narrow doctrine that primarily determines the *procedures* that the executive branch

Defendants rely on *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), in which the Fifth Circuit used the phrase "gross physical abuse" in describing a challenge to severe mistreatment of Jamaican stowaways by the New Orleans Harbor Police.[43] Defendants in that case sought qualified immunity by arguing that under the "entry fiction doctrine," unadmitted aliens have "virtually no constitutional rights," *id.* at 1372, much as defendants argue here. Mueller Br. at 40-41; Thompson Br. at 48. The *Lynch* court rejected that argument, holding that the entry doctrine "does not limit the right of excludable aliens detained within the

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must follow before turning an immigrant away." *Wong*, 373 F.3d at 973. *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997), similarly addresses only procedures for admission. *Zadvydas v. Davis*, 533 U.S. 678 (2001), addressed only deportable aliens, not excludable aliens.

Boumediene v. Bush, 128 S. Ct. 2229 (2008), calls into question the continued validity of the entry fiction. *Bayo v. Chertoff*, 535 F.3d 749 (7th Cir. 2008). *Boumediene* held that the Constitution applies to aliens technically outside the United States, but under its exclusive control. 128 S. Ct. at 2259. While Arar had not been *admitted to* the United States for the purposes of immigration law, he was certainly *present* here, and JFK and MDC, even more so than Guantanamo Bay, are indisputably areas within the United States' exclusive control.

[43] While several courts have quoted the phrase "gross physical abuse" from Lynch, the language was merely a description of those plaintiffs' allegations, and has no operative meaning. *Correa v. Thornburgh* does not dictate otherwise, as that case did not involve a substantive due process challenge to conditions of confinement or abuse, but rather an excludable alien's challenge to her exclusion order. 901 F.2d 1166, 1168 (2d Cir. 1990). *Lynch* itself did not require allegations of "severe physical injury," but only of injury serious enough to constitute deprivation of a constitutionally protected liberty interest. 810 F.2d at 1376 (holding stowaway's allegations of emotional or mental injury resulting from beatings and harsh treatment sufficient to allow discovery). Arar has alleged equally significant injury. *See* J.A.36.

United States territory to humane treatment." *Lynch*, 810 F.2d at 1373-75. While *Lynch* used the term "gross physical abuse" to describe the plaintiffs' allegations, it did not purport to establish a lower level of substantive due process protection for unadmitted aliens in detention.

Contrary to defendants' contention, the right recognized in *Lynch* is not a "second-class" form of due process protection, but is fully consistent with well-settled interpretation of the due process clause forbidding the imposition of "punishment" without an adjudication of guilt. *See Bell v. Wolfish* 441 U.S. 520 (1979) (punishment of pre-trial detainee); *Ingraham v. Wright*, 430 U.S. 651, 671-672 n. 40, 674 (1977) (corporal punishment of student); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167, 186 (1963) (punishment of draft evasion by stripping citizenship); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (punishment of alien with hard labor). Accordingly, if defendants' treatment of Arar constitutes punishment, it constitutes "inhumane treatment" and violates due process.

The Supreme Court distinguishes between "punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Wolfish*, 441 U.S. at 537 (citations omitted). Whether the government is detaining aliens pending removal or citizens pending a criminal trail, its legitimate penological interests "stem from the need to manage the facility

in which the individual is detained." *Bell*, 441 U.S. at 540. Harsh conditions unrelated to those penological interests constitute punishment and violate due process.

Arar's treatment while detained in the United States was unrelated to any legitimate penological interests. *See* J.A.29-34; OIG Report at 15 ("Arar was held in the most restrictive type of S[pecial] H[ousing] U[nit]—an Administrative Maximum SHU," uncommon "in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal SHU are usually sufficient for correcting inmate behavior and addressing security concerns."). Arar alleges that he was held in this manner not based on the security needs of the institution, but to soften him up for coercive interrogation wholly unrelated to jail security, and impermissible under *Bell v. Wolfish*.[44]

Defendants do not seek to justify Arar's conditions on grounds of penological security concerns, but instead maintain that facilitating Arar's coercive interrogation was a "legitimate goal" and thus not punishment. U.S./Ashcroft Br. at 72. That argument—for which defendants cite no authority—plainly proves too

[44] The panel majority cited *Wolfish* for the proposition that the "incidental" conditions of Arar's detention, including shackling, strip search, and delay in provision of food and sleeping facilities, do not rise to the level of constitutional violations. *Arar*, 532 F.3d at 190. But the dormitory style conditions at issue in *Wolfish*, 441 U.S. at 525, are a far cry from the maximum security solitary confinement to which Arar was subjected, as this Court itself recognized in *Iqbal*, 490 F.3d at 168-69.

much. If utilizing harsh conditions to soften a detainee up for coercive interrogation is not "punishment" because the goal is uncovering information, then nothing done to a detainee in the name of interrogation would violate due process—including torture.

VI. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants argue that aliens outside the United States have no clearly established Fifth Amendment rights, and therefore that they are entitled to qualified immunity for Arar's detention and torture in Syria.[45] Arar's Fifth Amendment claim does not, however, require this Court to decide whether aliens abroad have constitutional rights. Arar was in defendant's custody in the United States, and the Fifth Amendment clearly prohibits federal officials from torturing an unadmitted alien detained in the United States, as even defendants concede. *Lynch v. Cannatella*, 810 F.2d 1363, 1372-75 (5th Cir. 1987); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990); *Amanullah v. Nelson*, 811

[45] This argument by its terms does not apply to Arar's claims that defendants violated his due process rights by obstructing his access to court and subjecting him to abusive prison conditions that served no legitimate purpose. There can be no doubt that barring an alien from seeking congressionally mandated judicial review and subjecting him to punitive confinement without a criminal trial are unconstitutional. It has long been clear that an "unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively". *Barrett, supra,* 798 F.2d at 575.

F.2d 1, 9 (1st Cir. 1987). *See* U.S./Ashcroft Br. at 70-71, Thompson Br. at 48. No reasonable official could claim that he could have avoided this constitutional mandate by handing Arar over to a private gang to torture him. *Cf.*, *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993). Nor could this fundamental constitutional prohibition be evaded by defendants deliberately transporting Arar to a foreign country to be tortured there. Indeed, defendants' argument would have permitted them to transfer Arar abroad and torture him themselves. Fundamental constitutional protections do not permit such evasion or manipulation. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (scope of fundamental constitutional provision "must not be subject to manipulation by those whose power it is designed to restrain").

Not one of the cases cited by defendants involved an alien in physical custody in the United States transported by United States officials outside of the country in order to harm him. *See* U.S./Ashcroft Br. at 50-52; Thompson Br. at 37-38. Indeed, In *Harbury v. Deutch*, 233 F.3d 596, 603-04 (D.C. Cir. 2000), relied on by Thompson, the D.C. Circuit explicitly distinguished the rights of aliens detained in the United States from those aliens who were never "physically" present in the United States. The crux of Arar's claim is not that *defendants* were in the United States when they conspired to torture Arar, as was the allegation in

Harbury, but that Arar himself was in defendants' custody in the United States when they undertook to subject him to torture and arbitrary detention.

Defendants' effort to obfuscate this fact is perhaps best demonstrated by their reliance on *Munaf v. Geren*, 128 S. Ct. 2207 (2008), for the proposition that "it is an open question whether substantive due process bars the government from sending its own people to torture." U.S./Ashcroft Br. at 55, Thompson Br. at 46-47 (internal quotations omitted). As noted above, *Munaf* involved entirely different circumstances, and has no bearing here. *See* sec. I.C, *supra*. There can be no doubt that the Fifth Amendment prohibited the Executive from transferring a person detained, a) *not* overseas but in Brooklyn, New York, b) to a country in which he is *not* subject to any criminal indictment, and c) where the government not only knows that he faces a *risk* of torture and arbitrary detention, but deliberately *intends* that very result. The government has cited no case that plausibly supports the proposition that either an alien or a citizen could be transferred abroad under the circumstances alleged here.

Defendants argue that the absence of any case law specifically holding that government officials violate the Fifth Amendment when they transfer an alien abroad for the purpose of subjecting him to torture entitles them to qualified immunity. U.S./Ashcroft Br. at 54, 57 (citing *Brosseau v. Haugen*, 543 U.S. 194 (2004)). But a constitutional right can be clearly established even where there are

no prior cases with "fundamentally similar" or "materially similar facts." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).[46] Where the violation is "obvious," there need not be a body of relevant case law. *Brosseau*, 543 U.S. at 199. Here, the "general constitutional rule" that even unadmitted aliens held in the United States are protected by the Fifth Amendment from torture applies "with *obvious* clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Hope*, 536 U.S at 741, quoting *United States v. Lanier*, 520 U.S. at 270-71.

No reasonable official could have possibly believed that it was constitutional to transfer Arar from New York to Syria for the purpose of torturing and arbitrarily detaining him.[47] That there has never been a case in which U.S. officials have been

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[46] *United States v. Lanier*, 520 U.S. 259, 270-71 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Papineau v. Parmle*, 465 F.3d 46, 57 (2d Cir. 2006); *Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d Cir. 2001).

[47] Defendants are incorrect when they argue that the facts that torture is universally condemned, that federal law makes torturing someone abroad a crime, and that the CAT and U.S. law forbid sending someone to a country likely to torture him are irrelevant to the qualified immunity inquiry. While statutory or international violations do not dispositively answer the question of whether the Fifth Amendment prohibits certain conduct, those facts are highly relevant to the question whether defendants had "fair warning" that their conduct "shocks the conscience" and violates the Constitution. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. at 743-44 (defendants' own regulation suggests that defendants were "fully aware of the wrongful character of their conduct"). That torture is universally condemned should have given defendants fair warning that Arar "was treated in a way antithetical to human dignity" and with "obvious cruelty," *id.* at 745, and that therefore his due process rights were violated.

accused of such extreme action doesn't mean that any reasonable official would not know it violated the Constitution. *See Lanier,* 520 U.S. at 271 (although there "has never been a . . . section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.) As the Fifth Circuit noted in 1987 in rejecting a similar claim for qualified immunity, it should "not require a court ruling for a state official to know that even an excludable alien may not be denied the fundamental liberty interest to be free of gross physical abuse…" *Lynch*, 810 F.2d at 1375.

VII. ARAR'S COMPLAINT ADEQUATELY ALLEGES PERSONAL INVOLVEMENT OF EACH DEFENDANT, AND THAT INVOLVEMENT GIVES RISE TO PERSONAL JURISDICTION.

All individual defendants argue that Arar has failed to plead sufficient facts regarding their own personal involvement to support liability, and defendants Ashcroft, Mueller, and Ziglar argue further that Arar's allegations are insufficient to establish personal jurisdiction over them in New York. In fact, Arar has alleged that each defendant was personally involved in a conspiracy to subject him to torture and arbitrary detention, to deny his access to the courts, and to subject him to punitive abuse in U.S. custody. These allegations are more than sufficient to establish personal involvement and personal jurisdiction at the pleading stage,

particularly in light of the fact that the details regarding defendants' respective roles are in defendants' control, and can only be fully developed through discovery. Moreover, facts that have come to light since Arar's complaint underscore the direct involvement of each defendant in Arar's treatment.[48]

Arar's theory of liability is based on defendants' direct involvement in the conspiracy alleged. Contrary to defendants' assertions, Arar does not rely solely on supervisory responsibility based on "mere linkage" in the chain of command. *See, e.g.* U.S./Ashcroft Br. at 46-47. This Court has found allegations similar to that which Arar pleads to be sufficient to withstand a motion to dismiss. *McKenna v. Wright*, 386 F.3d 432, 437-48 (2d Cir. 2004).

[48] Many of these facts came to light through the OIG Report, issued in June 2008. That Report, which only assessed the actions of immigration officials, largely confirms Arar's allegations, and contains information that was not available to Arar when he filed his initial complaint, but is now a matter of public record. The OIG's investigation was based largely on interviews with government officials and review of government documents. OIG Report at 1. The Court is free to take judicial notice of such information, and if the Court considers the original allegations insufficient, it should permit Arar to amend his complaint based on these facts, which were all in defendants' exclusive possession at the time the district court disposed of the case, but have now come to light. Defendants also rely on various aspects of the OIG Report, *see, e.g.*, Thompson Br. at 6, 32; U.S./Ashcroft Br. at 65. But while the OIG report buttresses Arar's allegations, defendants cannot rely on facts stated therein, both because this appeal arises on a motion to dismiss, and because the report is principally based on interviews with government officials, at most tells only one side of the story, and has not been subjected to adversarial testing.

A. Arar's Allegations Establish Personal Involvement by All Defendants.

Each defendant is alleged to have been personally involved in the conspiracy at the heart of this case. Then-District Director for the New York District, Edward J. McElroy ensured that Arar's attorney did not have advance notice of Arar's fear-of-torture interview by personally leaving a voice mail at her office on the Sunday evening of the interview.[49] The very fact that the interview was scheduled for a Sunday evening, and that the District Director himself personally made this call, underscores the extent to which this unusual case involved the personal participation of supervisory officials who are not generally in the business of personally providing notice to aliens in removal proceedings.

Defendant Scott Blackman, then-Regional Director of the Eastern Regional Office of the INS, personally determined that Arar was inadmissible and signed the final removal order, which was then served on Arar in a manner designed to foreclose any possibility of seeking judicial protection from defendants' illegal

[49] J.A.32. McElroy argues that this act is insufficient to implicate him in the conspiracy alleged. McElroy Supplemental Letter Br. at 2. But it is evidence of direct participation in the joint scheme to schedule the hearing at such an unusual time and at such late notice to ensure that Arar's attorney could not interfere with defendants' illegal plan by seeking judicial protection. In addition, McElroy supervised INS officials who were extensively involved in, among other things, interrogating Arar and lying to Arar's attorney about his whereabouts. J.A.29-33.

conspiracy to send him to Syria for arbitrary detention and torture.[50] J.A.86, J.A.93.

Then-INS Commissioner Ziglar personally determined that Arar's removal to Syria was consistent with CAT. J.A.24-25, J.A.86.[51] In addition to making the final determination that Arar's removal to Syria was consistent with CAT, as stated in the Final Notice of Inadmissibility (J.A.86), Ziglar oversaw INS officials who questioned Arar during his detention in the U.S. and asked Arar to "volunteer" to be sent to Syria.[52] J.A. 30. Ziglar's claim that he was not personally involved, a claim he did even not make in his original motion to dismiss, is frivolous.

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[50] According to the OIG Report, after Blackman was contacted by INS Headquarters, he directed INS inspectors to cancel Arar's original withdrawal of application and planned return to Switzerland (where he flew in from), and to "offer" Arar a new opportunity to withdraw if he agreed to return to Syria—that "offer" was made on September 27, 2002. OIG Report at 11; *see also*, J.A.30. On October 4, Blackman personally asked Arar to designate the country he wanted to be removed to, and Arar chose Canada. OIG Report at 20; *see also*, J.A.31-32. On October 7, Blackman "signed the I-148 that ordered Arar's removal." OIG Report at 30.

[51] The Final Notice of Inadmissibility at J.A.86 states that the INS Commissioner "has determined that your removal to Syria would be consistent with Article 3 of" CAT. Ziglar also personally attended meetings about Arar on September 26, 2002 (the day Arar arrived at JFK), October 3, October 4, and apparently October 5, 2002. OIG Report at 11, 20. On October 7, Ziglar "signed the memorandum that authorized Arar's removal to Syria." OIG Report at 30. The OIG found that Ziglar was one of the "principal decision-makers involved in the Arar case." OIG Report at 38.

[52] In addition, unlike the usual removal case, Arar's case was managed and orchestrated directly from Washington, DC, so much so that the officers in New

Larry Thompson, then-Deputy Attorney General, personally made the decision to reject Arar's designation of Canada as the country he wanted to go to, thereby paving the way for him to be sent to Syria rather than Canada—a decision at the heart of the conspiracy. J.A.24. In addition, according to the OIG Report, attorneys from the Office of the Deputy Attorney General were directly involved in determining Arar's fate, including participating in meetings with Ziglar about Arar, and reviewing questions asked to Arar about his fear of being tortured. OIG Report at 20, 25.

Defendant John Ashcroft, then-Attorney General, was also directly involved. As Attorney General, Ashcroft oversaw both the removal process and the search for suspected Al Qaeda members. Ashcroft was involved in decisions regarding the practice of rendition that Arar was subject to, as well as decisions to disregard Arar's request to be sent to Syria and his interrogation and treatment, both in the U.S. and, after his transfer to Syria. A calendar entry obtained through a FOIA request indicates that Ashcroft was a required attendee at a meeting to discuss Arar's case on October 4, 2002, just four days before Arar was sent to Syria.[53]

York conducting his fear-of-torture interview stopped regularly to call Washington for further direction. J.A.32; *see also,* OIG Report at 26.

[53] In response to a 2003 FOIA request to DOJ seeking records discussing Maher Arar, one of the documents recently received was a printout of an electronic calendar entry for an Oct. 4, 2002 meeting in the Attorney General's office, listing as required attendees Defendants Ashcroft and Thompson, both of their chiefs of

FBI Director Robert Mueller supervised FBI agents interrogating Arar in New York. In his capacity as FBI Director, he was responsible for the government's practice of sending suspects to countries like Syria for interrogation under torture, along with Ashcroft. And his office would have been responsible for communicating a dossier on Arar to Syria and obtaining from them the answers the Syrians tortured out of him.[54] J.A.29-30, 34.

In considering Arar's allegations, moreover, it is important to bear in mind that the complaint here alleges no run-of-the-mill low-level abuse. Arar's detention and removal were orchestrated by Washington, and occurred at a time when Ashcroft and Mueller's first priority was on finding Al Qaeda suspects in the United States. Furthermore, Arar's detention and removal were pursuant to a policy of sending suspects to countries like Syria for the express purpose of having

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staff, and other very high-level DOJ officials, including FBI officials. The acronym "Otus, Ag" is believed to be the Attorney General of the United States. The document has herewith been lodged with the Court.

[54] The Canadian Commission Report details FBI involvement's here, including in the investigation through which Arar was identified, and communications between the FBI and Canada while Arar was in the United States. *See* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT ON THE EVENTS RELATING TO MAHER ARAR (2006) ("Canadian Commission Report"), *see, e.g.*, ANALYSIS AND RECOMMENDATIONS at 118, 139-162; FACTUAL BACKGROUND, VOL. I at 78-93; 149-178. The OIG Report notes that FBI officials were dispatched to JFK to interview Arar even before he arrived at JFK, questioned Arar, and participated in drafting the classified addendum to Arar's final notice of inadmissibility. OIG Report at 6, 15. As noted above at fn. 53, high-level FBI officials participated in an October 4, 2002 meeting regarding Arar.

them coercively interrogated and, according to defendants, required communications with both Canadian and Syrian officials. The notion that Ashcroft and Mueller were not involved in decisions about such a high-profile case involving someone they apparently considered an Al Qaeda member held in the U.S. is entirely implausible.

In short, each defendant played a critical role in the conspiracy to detain, interrogate, and transfer Arar to Syria for the purpose of subjecting him to arbitrary detention and torture. The Complaint plainly alleges that defendants agreed among themselves and Syrian officials to deliver Arar to Syria to be interrogated under torture. J.A.38-39. Defendants were each fully aware of the policy of state-sponsored torture in Syria, and knowingly sent Arar there to subject him to such treatment. J.A.39. Defendants provided their Syrian counterparts with a dossier on Arar, and suggested matters to be covered during his interrogation. J.A.34-35. They then received from the Syrian security officers all information coerced from Arar while he was interrogated and tortured. J.A.35. The then-Syrian Ambassador to the United States said that "Syrian intelligence had never heard of Arar before the U.S. government asked Syria to take him," and reported that Syrian intelligence shared its reports with the U.S. J.A.97. And all of these actions were pursuant to an extraordinary rendition practice of sending suspects to foreign countries to be interrogated under torture. J.A.75 (quoting government official stating that "[w]e

don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.").

B. The Federal Rules Do Not Impose a Heightened Pleading Standard.

Arar's allegations clearly satisfy the applicable pleading standards. Defendants' call for greater particulars of their personal involvement, *see*, *e.g.* U.S./Ashcroft Br. at 60, Mueller Supplemental Br. at 1-9, McElroy Supplemental Letter Br. at 3, are inconsistent with the plausible pleading standards on a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Iqbal*, 490 F.3d 143 at 157-58 (interpreting *Twombly* to require a flexible "plausibility standard"); *Boykin v. Keycorp*, 521 F.3d 202 (2d Cir. 2008) (concluding that plaintiff's allegations, taken as true, indicated a possibility of discrimination and explaining that Rule 8(a) is sufficiently satisfied if the allegations pled give defendant notice of plaintiff's claim and the grounds upon which it rests); *Umland v. Planco Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008) (recognizing the "new contours" espoused in *Twombly* but nonetheless referring to the pre-*Twombly* pleading standard of determining "whether a reasonable reading indicates that relief may be warranted"); *Mazzaro de Abreu v. Bank of Am. Corp.*, 2008 U.S. Dist. LEXIS 59218 at *12 (S.D.N.Y. Aug. 6, 2008) (explaining that plaintiffs' complaint must raise "enough fact to raise a reasonable expectation that discovery will reveal evidence" to support the allegations) (quoting *Twombly* at 1965).

Plaintiffs are not required to include detailed facts regarding personal involvement in their pleadings. *See Jean-Laurent v. Wilkerson*, 438 F. Supp. 2d 318, 325 (S.D.N.Y. 2006) ("To survive a motion to dismiss, a § 1983 complaint need only allege that the supervisor was personally involved in the constitutional deprivation and need not plead detailed facts about the involvement."). Requiring a plaintiff to plead detailed facts regarding personal involvement "would amount to a heightened pleading standard and is unwarranted" under Federal Rule of Civil Procedure 8(a)(2). *Locicero v. O'Connell*, 419 F. Supp. 2d 521, 526 (S.D.N.Y. 2006) (citing *Phelps v. Kapnoloas*, 308 F.3d 180, 186 (2d Cir. 2002)); *Perez v. Westchester County Dep't of Corr.*, 2007 U.S. Dist. LEXIS 32638 at *16 (S.D.N.Y. Apr. 30, 2007) ("plaintiff[] [is] not required to plead detailed facts in addition to and in support of [his] particular allegations of personal involvement").

Moreover, this Court has recognized that "information that is particularly within [defendants'] knowledge and control" may be pled "upon information and belief." *Boykin*, 521 F.3d at 215 (finding plaintiff's identification of particular events giving rise to her claim to be sufficient, especially where the details were within defendants' knowledge and control) (*citing* Miller, Federal Practice and Procedure § 1224 (3d ed. 2004) ("Pleading on information and belief is a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff")); *Boykin*, 521 F.3d at 215

("'allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge'") (internal citation omitted).

It is especially implausible that Arar could have been sent to Syria without Ashcroft and Mueller's direct supervision and involvement—and the facts now available confirm that they were involved. The facts regarding the full extent of defendants' involvement, of course, remain within defendants' knowledge and control. Plaintiff has alleged more than enough to survive a motion to dismiss.

C. Arar Has Also Adequately Alleged Supervisory Responsibility.

While Arar has alleged direct personal involvement by each defendant in the practice and conduct that led to Arar's injuries, the fact that each defendant was also a supervisor strengthens his case. Personal involvement of a supervisory official may be established by allegations that defendant "participated directly" in the violation, "failed to remedy the wrong" after being informed of it, created or allowed a policy or custom under which the practice occurred, was "grossly negligent in supervising subordinates," or "exhibited deliberate indifference…by failing to act on information indicating that unconstitutional acts were occurring." *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir. 1995).

There is no requirement that a supervisor "participated personally" in the tortious acts to be held liable under *Bivens.* *Colon* makes clear that superiors can be held liable for their acts or omissions in relation to ensuring their subordinates

act in a lawful manner, requiring superiors to take steps to prevent violations or punish the perpetrators thereof.[55] Defendants not only directly participated in denying Arar his access to court and in sending him to Syria to be tortured and arbitrarily detained, but also created the policy under which it happened, and subsequently failed to remedy the wrong done to Arar.

D. The Court Has Personal Jurisdiction over Defendants

Defendants Mueller, Ashcroft and Ziglar argue that the district court lacked personal jurisdiction over claims against them in their personal capacities. U.S./Ashcroft Br. at 63; Mueller Br. at 12-14; and Ziglar Br. at 13-15. Based on each person's involvement in their plan to deprive Arar of his constitutional rights and subject him to torture—a plan that was set in motion and carried out while he was in defendants' custody in New York—these argument are unavailing. The remaining defendants do not contest the exercise of jurisdiction over them.

[55] *Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2008), cited by defendants, is plainly distinguishable. *See, e.g.*, U.S./Ashcroft Br. at 62, 67. There, plaintiff alleged that the EPA Director knowingly made false statements in a press release that was prepared for her by her subordinates. The court refused to find that Whitman knew or should have known the same information—the minutiae that formed the basis for the press release—that employees within her agency knew. In this case, by contrast, plaintiffs have alleged that each defendant affirmatively knew about Arar's detention, was directly involved in decisions to send him to Syria for an illicit purpose, and took concrete actions in furtherance of that plan.

1. *Defendant Ziglar Waived the Defense of Lack of Personal Jurisdiction.*

As a preliminary matter, Defendant Ziglar has waived the defense of personal jurisdiction at this stage. He did not invoke lack of personal jurisdiction as a basis for dismissal when he moved to dismiss this action in 2004, limiting his motion for dismissal to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). J.A.112-113 Accordingly, he has waived any defense of lack of personal jurisdiction. Fed. R. Civ. P. (g) and (h)(1); *see also, Indymac Mortgage Holdings, Inc. v. Reyad*, 167 F. Supp. 2d 222, 232 (D. Conn. 2001); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998) ("personal jurisdiction is a due process right that may be waived either explicitly or implicitly"); Wright and Miller § 1391 (2004).

2. *New York's Long-Arm Statute Provides Personal Jurisdiction over Non-Domiciliary Defendants.*

Mueller, Ashcroft, and Ziglar argue that they cannot be sued in New York for Arar's injuries because they are not domiciled in New York. Under New York's long-arm statute, however, jurisdiction is proper where a non-domiciliary defendant purposefully directs activity toward the state of New York and the plaintiff's cause of action arises from that purposeful activity. N.Y.C.P.L.R. § 302(a)(1) (2006). Section 302(a)(1) is a "single act" statute: "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were

purposeful" and the cause of action arises out of the activity. *Kreutter v. McFadden Oil Corp*., 71 N.Y.2d 460, 467 (N.Y. 1988); *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005).

Arar has sufficiently alleged that defendants purposefully acted in New York by having Arar stopped, detained and interrogated in New York and then ensuring his transfer from New York to Syria. Defendants effected these acts either personally, or by directing their subordinates, including immigration officers and FBI agents. All the claims raised by Arar arise directly out of defendants' activities. *See, e.g*., J.A.28-35.

Personal jurisdiction over defendants also attaches under N.Y.C.P.L.R. § 302(a)(2), as defendants conspired to subject Arar to torts committed in New York. *See, e.g. Best Cellars Inc. v. Grape Finds at Dupont, Inc*., 90 F. Supp. 2d 431, 445 (S.D.N.Y. 2000) ("Acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under C.P.L.R. 302(a)(2).").[56] In this case, Arar has sufficiently pled a conspiracy involving all defendants. *See* J.A.21, 23-26, and 28-38. Arar need only make a *prima facie* showing that personal jurisdiction exists as there has been no evidentiary hearing; his jurisdictional allegations must be construed

[56] *See also Reeves v. Phillips,* 388 N.Y.S.2d 294, 296 (N.Y. App. Div. 1976) (New York Activities of a co-conspirator can be imputed to an out-of-state tortfeasor for jurisdictional purposes).

"liberally" and uncontroverted factual allegations "take[n] as true." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994).[57]

VIII. ARAR HAS STANDING TO SEEK DECLARATORY RELIEF.

Defendants do not dispute that Arar is suffering an ongoing injury as a result of the removal order issued against him; the existence of that removal order bars him from re-entering the United States for ten years. But defendants argue that because Arar does not (and indeed, could not) seek review of the removal order or challenge the determination of inadmissibility in this action, the Court has no authority to declare that the removal order is null and void, even if it concludes in the course of adjudicating Arar's separate constitutional challenges that the order was in fact entered for the unconstitutional purpose of subjecting him to torture and arbitrary detention.

It is true that Arar does not seek review of the removal order and determination of inadmissibility as such in this proceeding—not because of a "tactical decision," as defendants suggest, U.S./Ashcroft Br. at 86—but because he believed (as defendants maintain) that he could not do so except via a petition for review, and defendants barred him for pursuing that route. As a factual matter, he

[57] At a minimum, given that the details regarding defendants' involvement are in their knowledge and control, Arar should be permitted discovery if personal jurisdiction is questioned. *See, Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 988-89 (S.D.N.Y. 1992).

has from the outset denied that he is a member of Al Qaeda, and the Canadian authorities, who provided the information that triggered defendants' interest in Arar in the first place, have admitted that they provided false information and that there is no evidence linking Arar to terrorism or any offense whatsoever.[58]

The critical point for purposes of Arar's request for declaratory relief, however, is that if the Court finds that the removal order was entered for an unconstitutional purpose, it would be appropriate, as one form of remedy, to declare the order null and void. The federal courts' equitable discretion in ordering remedies for constitutional violations is broad. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) (*quoting Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). Defendants have advanced no authority supporting the proposition that a federal court that finds a conspiracy to torture was effected through the issuance of a removal order lacks the authority to declare that order null and void.

[58] Canadian Commission Report, ANALYSIS AND RECOMMENDATIONS at 24, 59, 140.

CONCLUSION

For the above reasons, the Court should vacate the District Court's Order and remand for further proceedings.

Date: New York, New York
November 14, 2008

Respectfully submitted,

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CERTIFICATE REGARDING F.R.A.P. 32(a)(7) COMPLIANCE

I, Maria C. LaHood, hereby certify that the foregoing Replacement Reply Brief for Rehearing *En Banc* contains 18, 396 words (including footnotes) according to the word count of the word processing system used to prepare it. I file herewith a Motion for Leave to File an Oversize Consolidated Reply Brief and Declaration in Support thereof, seeking leave to file a Reply that does not exceed 20,000 words.

_____

Maria C. LaHood