06-4216-cv

In the

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,

(For continuation of caption see inside cover)

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

REPLACEMENT BRIEF OF RETIRED FEDERAL JUDGES AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL FOR REHEARING EN BANC

(*See inside cover for list of amici curiae*)

Aziz Huq
Brennan Center for Justice at
NYU School of Law
161 Avenue of the Americas 12th Floor
New York, New York 10013
(212) 992-8632

Sidney S. Rosdeitcher,
Counsel of Record
Paul, Weiss, Rifkind,
Wharton & Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

EDWARD J. McELROY, formerly District Director of Immigration 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.

AMICI CURIAE

The Honorable John J. Gibbons

The Honorable Shirley M. Hufstedler

The Honorable Nathaniel R. Jones

The Honorable Timothy K. Lewis

The Honorable H. Lee Sarokin

The Honorable William S. Sessions

The Honorable Patricia M. Wald

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INTEREST OF THE AMICI[1]

Amici are retired federal judges who share a deep respect for the system of separation of powers and checks and balances that is central to our constitutional democracy. Based on their combined decades of experience on the federal bench, amici have a particular interest in the preservation of the historic role of the judiciary in that constitutional system as the protector of rights guaranteed by the Constitution.

Amici curiae are:

- The Honorable John J. Gibbons, who served as a judge on the U.S. Court of Appeals for the Third Circuit from 1969 to 1987, and as chief judge of the court from 1987 to 1990.
- The Honorable Shirley M. Hufstedler, who served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979.
- The Honorable Nathaniel R. Jones, who served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.
- The Honorable Timothy K. Lewis, who served as a judge on the United States District Court for the Western District of Pennsylvania from 1991 to 1992, and as a judge on the United States Court of Appeals for the Third Circuit from 1992 to 1999.
- The Honorable H. Lee Sarokin, who served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and as a judge on the United States Court of Appeals for the Third Circuit from 1994 to 1996.
- The Honorable William S. Sessions, who served as a judge on the United States District Court for the Western District of Texas from 1974 to 1980, and as chief judge of the court from 1980 to 1987.

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[1] All parties have consented to the filing of this brief amici curiae.

- The Honorable Patricia M. Wald, who served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and as chief judge of the court from 1986 to 1991.

SUMMARY OF THE ARGUMENT

Amici submit this brief in support of Appellant Maher Arar and urge the en banc court to reverse the district court judgment, insofar as it dismissed Arar's claims under *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages for violation of his constitutional right to be protected from torture.

Amici address the failure of the district court, and the majority of a panel of this Court ("panel majority"), to recognize the judiciary's paramount role in acting as a check against Executive Branch violations of fundamental individual rights guaranteed by the Constitution and the judicial obligation to fashion remedies to vindicate those rights. The *Bivens* doctrine provides a damages remedy against federal officials who violate those rights, especially when no other remedies provide redress for the constitutional violation and absent a damages remedy the victim's constitutional rights would be illusory.

Both Judge Sack's dissent from the panel decision and the Appellant's brief persuasively show that Arar had no other remedy, aside from damages, to vindicate his constitutional right to be protected from torture and arbitrary detention. *Arar v. Ashcroft*, 532 F.3d 157, 211-12 (2d Cir. 2008) (Sack, J., dissenting); App. Br. at 29-33. The district court also acknowledged that Arar had no other remedy. 414 F. Supp. 2d 250, 280-81 (E.D.N.Y. 2006). Amici, therefore, focus on the district court's and panel majority's conclusion that, notwithstanding

the absence of any other remedy, national security and foreign affairs concerns are special factors counseling against a *Bivens* remedy.

Amici show that this conclusion is contrary to long-established precedent that neither national security nor foreign affairs concerns negate the judiciary's constitutional role as a check upon unconstitutional executive conduct. Even in circumstances implicating national security policies or foreign affairs, the Supreme Court has emphasized that the denial of any judicial remedy for a violation of constitutional rights would raise serious constitutional questions and therefore such a denial may not be inferred in the absence of a clear statement by Congress. Congress has made no statement, let alone a clear one, denying a *Bivens* remedy in the circumstances here, in which government officials allegedly prevented Arar from availing himself of any administrative and judicial remedies that may have enabled him to block their decision to send him to Syria, a country notorious for its use of torture.

In this case, the dismissal of Arar's *Bivens* claims, without affording Arar any opportunity to prove his grave and disturbing allegations of U.S. government complicity in his torture by Syrian authorities, we respectfully submit, would be an abdication of the role assigned the judiciary by the Constitution and a failure to vindicate "the Rule of Law that prevails in this jurisdiction." *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

ARGUMENT

I.

THE JUDICIAL BRANCH IS ASSIGNED THE TASK OF PROVIDING A CHECK ON UNCONSTITUTIONAL OR UNLAWFUL EXECUTIVE CONDUCT AND ENFORCING FEDERALLY PROTECTED INDIVIDUAL RIGHTS

In establishing our constitutional structure, the Founders understood that power ought not to be allowed to concentrate unchecked in one branch of government:

> Basic to the constitutional structure established by the Framers was their recognition that "[the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.

N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982) (quoting *The Federalist No. 47*, at 300 (James Madison) (H. Lodge ed., 1888)). As a result, the Framers created a system of checks and balances to serve as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *N. Pipeline*, 458 U.S. at 57-58 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

In our constitutional system, the judicial branch has the ultimate obligation of enforcing the Constitution and redressing unconstitutional abuses of power by the executive or legislative branches. Presenting the Bill of Rights to Congress, James Madison explained:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 *Annals of Cong.* 439 (Joseph Gales ed., 1834). The Framers expected the judiciary to "guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves . . . ." *The Federalist No. 78*, at 440 (Alexander Hamilton) (Isaac Kramnick ed., 1987). The judiciary has performed this function throughout our history. In Point II *infra* pp. 9-20, we show in detail that federal courts have exercised this authority even in times of war and crises and in circumstances where our nation's security and foreign relations were imperiled.

In carrying out its responsibility to enforce constitutional rights against executive abuses, the judiciary necessarily has the power to devise effective remedies. This principle was eloquently enunciated early in our nation's history by Chief Justice Marshall in *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high

> appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).

Following Chief Justice Marshall's lead, the Court has repeatedly underscored the federal courts' authority to craft remedies, including damages, adequate to redress violations of constitutional rights. *See Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief" (citations omitted)).

The judiciary's role in enforcing constitutional rights is so fundamental that serious constitutional issues would arise were Congress to deny *any* federal judicial forum for vindication of such rights. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). In *Webster*, the Court held that a statute, although granting the Director of the Central Intelligence Agency ("CIA") authority "in his discretion" to terminate CIA employees whenever he deemed it advisable for national security, could not be construed to bar judicial review of an employee's claim that he was terminated for reasons that violated the Constitution. The Court

explained:

> We [have] emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

Id. (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)); *accord Demore v. Kim*, 538 U.S. 510, 517 (2003); *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993).[2]

The central role assigned to the judiciary to assure redress for constitutional violations is the basis for the *Bivens* damage remedy. As Justice Harlan explained in his *Bivens* concurrence: "the judiciary has a particular responsibility to assure the vindication of constitutional interests" and should provide a damages remedy whenever it is "damages or nothing." 403 U.S. at 407, 410. Consequently, the Supreme Court has confirmed the *Bivens* remedy's availability as "an otherwise nonexistent cause of action against *individual officers*

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[2] *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) (arguing that the Constitution requires that "some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation") (citing Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 345-57 (5th ed. 2003); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953)).

alleged to have acted unconstitutionally" and also as "a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (emphases in original). Moreover, as discussed in Point II *infra* pp. 21-22, such remedial alternatives must provide "a convincing reason," and not be impractical or merely theoretical, to warrant denying a *Bivens* remedy. *Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007).[3]

II.

NATIONAL SECURITY AND FOREIGN AFFAIRS ARE NOT SPECIAL FACTORS COUNSELING AGAINST A *BIVENS* REMEDY

The district court and the panel majority concluded that the national security and foreign relations questions implicated by Arar's allegations were "special factors" counseling against a *Bivens* remedy. In so doing, the district

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[3] Two exceptions to this axiom are based on special circumstances, not relevant here, in which the defendant has voluntarily entered into an employment relationship with the government that implicitly precludes later *Bivens* damages claims. First, a *Bivens* damages remedy is unavailable to military personnel suing on service-related claims. *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). This exception is based on the Constitution's provision conferring on Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces", U.S. Const. art. I, § 8, cl. 14, and Congress' exercise of this authority to "establis[h] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure" and the need for "a special and exclusive system of military justice." *Stanley*, 483 U.S. at 679 (quoting *Chappell*, 462 U.S. at 302, 300). The other exception is based on long-established public policy forbidding the maintenance of any suit depending on the existence of an espionage contract with the government. *Doe v. Tenet*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1876). Anyone entering such a contract knows a priori that the need for secrecy bars its disclosure in a court of law and that it is therefore unenforceable.

court and panel majority overlooked the long history of judicially crafted remedies for unconstitutional conduct that are available even in times of war and other crises, and in spite of claims that a remedy would intrude on the Executive's role in protecting national security and conducting foreign affairs. The district court and the panel majority also misread cases counseling deference to the Executive and Congress involving national security and foreign affairs. Those cases counsel such deference only where the Executive or Congress has *constitutionally* exercised its powers. They do not counsel deference where an exercise of such powers exceeds constitutional limits. Here, a *Bivens* remedy is fully consistent with the most recent Supreme Court *Bivens* jurisprudence, the historical role of the judiciary in times of war and crisis, and the rule of law.

A. The Judiciary Enforces the Constitution Against Executive Abuses Notwithstanding Claims that National Security and Foreign Affairs Are Implicated

There is a long tradition, stretching from our Republic's earliest days to the Supreme Court's most recent term, of federal courts reviewing the constitutionality of executive conduct in emergencies and in the domain of national security and foreign affairs. The panel majority's decision denying review here sharply breaks from this tradition.

In the decades immediately after the Founding, federal courts grappled repeatedly with the legality of executive action in wartime. During the "Quasi-War" with France, the Supreme Court thus affirmed a damages remedy against the captain of the U.S. Frigate *Boston* for the unlawful seizure of a Danish ship. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176-79 (1804). Chief Justice

Marshall held that seizure of the Danish ship was illegal because it contradicted the precise terms of military action Congress had authorized. *Id.*; *see also Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801) (adjudicating a challenge to a U.S. warship's capture of a foreign vessel during the Quasi-War). The War of 1812 brought before the Court more civil damages actions challenging wartime executive action. In *Brown v. United States*, the Court held unlawful a seizure of 550 tons of timber belonging to British subjects. 12 U.S. (8 Cranch) 110 (1814); *see also The Julia*, 12 U.S. (8 Cranch.) 181 (1814) (holding that a seizure of American citizens' property sailing under an enemy flag in the War of 1812 was licit under prize law). Wartime circumstances in these cases did not oust the courts' authority to issue damages awards based on non-statutory admiralty and common-law theories.

During the Civil War, federal courts had to grapple with the legality of executive action in the midst of the most serious and sustained military conflict to occur on American soil. *See The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (challenges to seizure of vessels captured by the United States during the Civil War).

The most significant of those cases is instructive of the principles that have guided courts even in times of national crises. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a United States citizen successfully challenged his conviction before a military tribunal. The Court rejected the government's argument that "[a]fter war is originated . . . the whole power of conducting it . . . is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration." *Id.* at 18 (citations omitted). Instead, the

Court emphasized the importance of the judiciary's role in protecting constitutional rights even in wartime:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Id. at 120-21 (emphasis added).

Subsequent wars furnished no cause to derogate from *Milligan's* wisdom. *See, e.g.*, *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (reading statute declaring martial law narrowly to preserve rights). In *Youngstown Sheet & Tube Co. v. Sawyer*, the possibility of a strike that would have crippled our nation's military power during the Korean War did not deter the Court from limiting executive power. 343 U.S. 579 (1952). Despite the government's dire warnings about the repercussions of the steel strike on military and foreign policy, the Court still enjoined the President's seizure of the steel mills as beyond his executive powers. *Id.* at 587-89.

The undiminished role of federal courts, during war or grave threats to national security, in checking executive actions that exceed constitutional limits, is

confirmed by recent Supreme Court cases involving detainees designated "enemy combatants" by the President.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court rejected arguments that the prosecution of war justified the denial of basic due process to an American citizen captured on an Afghan battlefield. Despite the President's designation of Hamdi as an "enemy combatant", the Court held that Hamdi was entitled to procedural due process in a challenge to that designation, including notification of the charges and the proof relied on by the government, a fair opportunity to rebut the government's charges before a neutral decision-maker, and assistance of counsel. *Id.* at 533, 539 (plurality op.). Rejecting claims that national security considerations required the Court to defer to the President, the Court explained that "the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government." *Id.* at 535-36 (emphasis in original); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").[4]

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[4] Citing *Hamdi*, a federal district court rejected claims that the post-9/11 national security situation was a "special factor" counseling against a *Bivens* remedy for aliens claiming various abuses while detained at the Metropolitan Detention Center in Brooklyn. *Elmaghraby v. Ashcroft*, 04 CV 1409 (JG) (SMG), 2005 U.S. Dist. Ct. LEXIS 21434, at *43-45 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part on other grounds sub. nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court reviewed a challenge to the President's power to convene military tribunals to try "enemy combatants", as "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure." *Id.* at 567. The Court found that the President lacked inherent power to establish the commissions despite the danger that the petitioner and other terrorism suspects potentially posed to the United States:

> We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity . . . . But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

Id. at 635.

Just this past term, the Supreme Court struck down under the Suspension Clause legislation limiting jurisdiction to entertain habeas corpus petitions from Guantanamo detainees. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Rejecting arguments that recognizing and enforcing such constitutional rights would undermine national security during a time when our nation faces grave terrorist threats, Justice Kennedy's majority opinion stated in terms equally applicable to the allegations of torture at stake here:

2008), *cert. granted sub. nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (June 16, 2008) (No. 07-1015).

> Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.

Id. at 2277.

Furthermore, *Boumediene* explicitly sanctioned federal court litigation that will intrude far more than Arar's case into Executive Branch decision-making about national security, implicating *inter alia* delicate dealings with other nations within the context of counterterrorism cooperation and other sensitive intelligence matters.[5] In stark contrast to the striking lack of confidence in federal judges' competence evinced by the district court and panel majority here, Justice Kennedy affirmed and relied upon "the expertise and competence of the District Court to address in the first instance" evidentiary and procedural handling of these legal and factual issues. *Id.* at 2276.[6]

The district court and the panel majority ignored this long tradition of cases affirming the federal courts' role in protecting constitutional rights, even in

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[5] That litigation is now ongoing.

[6] *Amici* note that the Court's conclusion in *Boumediene* that non-citizen Guantanamo detainees held outside the territorial United States were protected by constitutional rights to fair process, 128 S. Ct. at 2275, 2277, considerably strengthens the conclusion reached by Judge Sack in dissent that Arar is entitled to invoke the Constitution as a shield against torture even though he was not "admitted" to the United States under immigration law. *See Arar*, 532 F.3d at 205 (Sack, J., dissenting). *But see id.* at 185-87 & nn.25-26 (Cabranes, J.) (concluding that Arar, as an unadmitted alien, was entitled only to the procedure Congress chose to give). It would be at minimum perverse to treat Guantanamo detainees as entitled to a larger constitutional entitlement than a person, such as Arar, who was physically held in a Brooklyn federal jail for more than a week and subjected to decisions made by government officials in the United States, while he was detained there, to transfer him to Syria.

cases implicating national security or foreign affairs concerns. Instead, they extracted language from Supreme Court cases that does not support any limitation on the judiciary's authority to check unconstitutional executive conduct.

Thus, the panel majority cited *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), for the proposition that "determinations relating to national security fall within 'an area of executive action in which courts have long been hesitant to intrude.'" *Arar*, 532 F.3d at 181. But, in fact, *Lincoln* did not apply this proposition to constitutional causes of action. *Lincoln* involved claims that health care funds for Native American children previously allocated to reservations in the Southwest were improperly reallocated by the Department of Health and Human Services to reservations throughout the United States. The petitioners claimed the reallocation violated federal law, agency regulations, and Due Process. The Supreme Court held that Congress gave complete discretion to the Executive to allocate the funds, and that the resulting exercise of that discretion was unreviewable. But tellingly, the Court did not reject the constitutional claims. Citing *Webster*, 486 U.S. at 603-04, the Court stated that "judicial review will be available for colorable constitutional claims" and remanded the petitioners' constitutional claims for further development. *Lincoln*, 508 U.S. at 195.

The panel majority also cited *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988), for the proposition that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." But *Egan*, like *Lincoln*, did not apply this proposition to a constitutional claim. *Egan* concerned whether an

employee whose security clearance had been denied based on a felony record he had disclosed and a prior felony he had concealed, was entitled to administrative review of that denial. The Supreme Court held he was not entitled to substantive review of the denial of clearance because clearance was a "sensitive and inherently discretionary judgment call that is committed by law to . . . the Executive Branch . . . ." *Id.* at 527. There was no claim that the denial violated the Constitution. As the Court explained, "no one has a 'right' to a security clearance." *Id.* at 528.

Four months after *Egan*, the Supreme Court held in *Webster v. Doe* that even though termination of CIA employment is ordinarily within the discretion of the CIA Director and hence not judicially reviewable, an employee's claim that he was terminated due to his sexual orientation in violation of the Constitution *was* judicially reviewable. As discussed, *supra* at 6-7, the Supreme Court warned that serious constitutional questions would be raised by a denial of any judicial remedy at all and that the applicable statute therefore would not be read to deny judicial review absent a clear statement by Congress to that effect. *Webster*, 486 U.S. at 603-05.

Webster also sheds light on the panel majority's reliance on an anticipated state secrets privilege claim to foreclose all litigation in Arar's case. In *Webster*, the government also opposed judicial review of the constitutional claims, arguing that such review would involve disclosure of confidential materials to the detriment of national security. *Id.* at 604. Chief Justice Rehnquist rejected this argument, noting that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to

proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* (citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394 (1976); *United States v. Reynolds*, 345 U.S. 1 (1953)). Similarly, the *Boumediene* Court pointed to the state secrets privilege as a device to *enable* litigation that implicates sensitive materials, and rejected a government argument that secrecy concerns warranted the termination of all litigation. 128 S. Ct. at 2276.

In contrast to these Supreme Court decisions, the panel majority relied on an untested government assertion of state secrets privilege to block further litigation, based on unfounded assumptions that the litigation would require reliance on sensitive information and that the privilege would so dominate further proceedings that it would make further litigation of Arar's claims impossible. *Arar*, 532 F.3d at 181-83. Even aside from the absence of any record basis for its assumption about the validity of the government's privilege invocation, the panel majority's reasoning conflicts with Chief Justice Rehnquist's and Justice Kennedy's conclusion that the protections for sensitive information afforded by the state secrets privilege are a reason for allowing litigation to proceed, not a reason to block it.

Finally, none of the cases cited by the panel majority support the proposition that federal courts ought to abstain from protecting victims of unconstitutional conduct, where that conduct purportedly occurs during the Executive's conduct of foreign affairs.

None of the Supreme Court cases cited by the panel majority and the district court for that proposition remotely concern executive violations of individual constitutional rights. *See, e.g.*, *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (discussing inapplicability of act-of-state doctrine where Executive informs court its application would not advance U.S. interests); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005) (interpreting immigration statute to allow deportation to a country without advance consent of its government); *Demore*, 538 U.S. at 517 (relying *inter alia* on *Webster*, 486 U.S. at 603, in refusing to read immigration statute as barring judicial review of alien's constitutional challenge in absence of clear congressional statement so indicating); *accord Baker v. Carr*, 369 U.S. 186, 211 (1962) ("It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

Both the district court and the panel majority invoked *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), but that decision, involving highly unusual circumstances, ought not to be extended to this case. *Sanchez-Espinoza* involved claims by members of Congress, Nicaraguan citizens, and Florida residents, which, on different legal theories, expressed a common opposition to the Reagan Administration's then on-going support for the Contras. While other appellants sought injunctive relief to bar continued support of the Contras, the Nicaraguan citizens invoked *Bivens* to sue for injuries suffered at the hands of the Contras, alleging that these injuries could be traced to the Reagan Administration's support for the Contras. The D.C. Circuit held that a *Bivens*

remedy was unavailable because the danger was "acute" that litigation in situations such as this could be used to "obstruct the foreign policy of our government." *Id.* at 209.

But Arar's claim differs significantly from the Nicaraguan plaintiffs' claims in *Sanchez-Espinoza*. Unlike those plaintiffs, Arar is not challenging a U.S. policy of support for one party in a foreign civil war because that party's members were inflicting harm on their fellow citizens. He is claiming that U.S. officials deliberately and knowingly sent him to Syria to be tortured. Such conduct cannot be any part of U.S. foreign policy, as it is forbidden by the Constitution,[7] U.S. law,[8] and U.S. treaty obligations.[9] Far from challenging U.S. policy, Arar's position tracks the position taken by the Executive Branch of the United States before the United Nations:

> No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an

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[7] *See, e.g., Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).

[8] *E.g.*, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified as a note to 8 U.S.C. § 1231 (2000)) ("FARRA") ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[9] *E.g.*, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that no party to the Convention "shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

> order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture . . . . The U.S. Government does not permit, tolerate, or condone torture . . . by its personnel or employees under any circumstances.[10]

The panel majority thus erred grievously when it suggested that a *Bivens* remedy here would interfere with "the ability of the federal government to speak with one voice to its overseas counterparts." *Arar*, 532 F.3d at 182. Arar's efforts to enforce the constitutional prohibition on torture and complicity in torture are entirely congruent with and reinforce U.S. policy.

In sum, federal courts have consistently adhered to their obligation to protect constitutional rights even where national security and foreign affairs concerns are implicated and, notwithstanding such concerns, have assured that there is some judicial remedy to redress violations of those rights, absent a clear statement from Congress prohibiting them from doing so. The district court and the panel majority turn these principles upside down: invoking national security and foreign affairs, they would deny Arar the sole remedy available to vindicate his constitutional rights in the absence of *any* statement from Congress requiring that result.

B. Current *Bivens* Jurisprudence Confirms that Arar Is Entitled to a *Bivens* Remedy

Arar's claims fully satisfy current Supreme Court standards for the assertion of a *Bivens* claim. Under *Correctional Services Corp. v. Malesko*, a

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[10] *See* Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America (May 6, 2005), U.N. Doc. CAT/C/48/Add.3 at 4, *available at* http://www.state.gov/g/drl/rls/45738.htm.

Bivens remedy against federal officials based on the Due Process Clause is available when, as here, no other remedy is available to provide redress for violations of constitutional rights. 534 U.S. at 70. As noted, Arar's claims meet this standard, for the reasons stated by the district court, Judge Sack, and the Appellant. *Supra* at 2.

Arar's claims also satisfy the standards for *Bivens* liability most recently applied in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007). Although the Court rejected the *Bivens* claim before it in *Wilkie*, application of its analysis confirms that a *Bivens* remedy is appropriate here.

Wilkie involved a landowner's claim that government officials had embarked on a campaign of harassment to extract an easement from him. Suing under *Bivens*, the landowner, Robbins, claimed that the harassment amounted to an attempted taking of his property without compensation in violation of the Fifth Amendment. *Wilkie*, 127 S. Ct. at 2593-97.

Writing for the Court, Justice Souter set forth a two-step analysis. First, the Court considered whether there was an "alternative, existing process for protecting [Robbins'] interest amount[ing] to a convincing reason for the Judicial Branch to refrain from providing a new . . . remedy in damages." *Id.* at 2598. Although Robbins had a variety of judicial and administrative remedies for each of the individual acts of harassment, those acts were so numerous and so costly to respond to individually that Justice Souter concluded that the availability of those

remedies alone supplied no convincing reason to deny a *Bivens* remedy.[11] This reasoning applies a fortiori here, where the government is alleged to have deliberately prevented Arar from invoking the pre-removal remedy provided by FARRA to prevent his removal to Syria, leaving him with no remedy to vindicate his interests other than an after-the-fact damage claim. *See Arar*, 532 F.3d at 211-12 (Sack, J., dissenting).

The *Wilkie* Court then proceeded to the second step of the *Bivens* analysis, under which "federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." 127 S. Ct. at 2598 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). It concluded that special factors counseled against a *Bivens* claim in the case before it. But its analysis demonstrates why "the kind of remedial determination appropriate for a common-law tribunal" compels the conclusion that a *Bivens* remedy is appropriate here.

The *Wilkie* Court contrasted Robbins' claims in the case before it with claims of wrongful discharge in retaliation against the exercise of First Amendment rights. The latter cases, Justice Souter explained, involve the

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[11] While concluding that the remedies available to Robbins were not a "convincing reason" to deny a *Bivens* remedy under the first step, in ultimately rejecting the *Bivens* claim under the more flexible second step of the analysis, Justice Souter took into account, as one factor of a larger analysis, the fact that Robbins "had ready at hand a wide variety of administrative and judicial remedies to redress his injuries." *Id.* at 2598, 2604. By contrast, Arar had no other remedies "ready at hand."

relatively simple issue of whether a discharge was for a genuine job-related reason or for an unconstitutional reason. *Id.* at 2601. He referred to this type of case as a "what for" case, for which a *Bivens* remedy was appropriate. *Id.*

By contrast, Justice Souter explained, Robbins' claim was much more complex and problematic. The salient government's purpose there—to obtain an easement—was unquestionably a legitimate one. But in analyzing the numerous harsh exercises of government powers—*e.g.*, refusing Robbins a right of way, prosecuting him criminally for a trivial alleged violation—a court would have to draw a line between permissible "hard bargaining" through the exercise of legitimate government powers, and improper harassment by "too much" exercise of those powers. *Id.* at 2602-04. Justice Souter concluded that because of the difficulty of drawing such a distinction, supplying a *Bivens* damages remedy for "too much" cases like *Wilkie* "would invite claims in every sphere of legitimate governmental action affecting property interests . . . ." *Id.* at 2604. The Court therefore rejected Robbins' *Bivens* claim.

Arar's claim, however, raises none of the difficulties associated with the "too much" case that troubled Justice Souter. Arar's claim, involving allegations of unlawful government purpose and indeed deliberate circumvention of federal and international law, falls squarely within the "what for" case model, which the Court recognized as appropriately redressed by a damage remedy. Indeed, a *Bivens* remedy in this case follows a fortiori from the "what for" model. The "what for" determination that must be settled through evidentiary presentation here is between an unlawful purpose—complicity in torture—and some as yet to

be identified legitimate purpose for sending Arar to Syria. Here, the circumstances alleged render the claim of unlawful purpose at least plausible: Arar volunteered to be removed to Canada; he was a Canadian citizen with home, family, and work in Canada; he left Syria as a teenager 15 years before; and the information on which the FBI and INS were acting was supplied by Canada. Meanwhile Syria has a well-documented record of torture in State Department Country Reports and elsewhere.[12] These allegations, viewed together with the actions allegedly taken by the government to conceal Arar's removal to Syria from Arar, his lawyer and Canadian authorities until it was too late to prevent it, raise serious issues concerning the government's motive for transferring Arar to Syria. The facts, of course, must be determined on remand by the district court, but it is clear from Arar's allegations that recognizing a *Bivens* remedy in this case would hardly open any "floodgate" to litigation challenging the removal of persons suspected of terrorism regardless of their destination or the surrounding circumstances.

Moreover, as Justice Souter noted in *Wilkie*, in determining whether there are "special factors" counseling against a *Bivens* remedy, a federal court

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[12] *See* Bureau of Democracy, Human Rights, and Labor, Dep't of State, *Country Reports on Human Rights Practices for 2002*, at 2109 (2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm (finding "credible evidence that security forces continued to use torture" in Syria); *see also, e.g.*, 2 Bureau of Democracy, Human Rights, and Labor, Dep't of State, *Country Reports on Human Rights Practices for 2007*, at 2054 (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100606.htm (finding that Syrian security forces "continued to use torture frequently" and that "[t]orture and abuse of detainees was . . . reportedly common"); Human Rights Watch, *World Report 2008* at 522, *available at* http://hrw.org/englishwr2k8/docs/2008/01/31/syria17619.htm ("Torture remains a serious problem in Syria, especially during interrogation.").

should exercise its judgment as a *common-law* tribunal. A common-law tribunal should take account of the consequences of denying a remedy as well as granting one. Arar stands "in Bivens' shoes, it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan J., concurring). Thus, denial of a *Bivens* remedy would raise the possibility that flagrant and shocking violations of constitutional law, international treaties, and human rights would go unredressed. This would not only undermine our constitutional system of checks and balances, but would undermine the rule of law and respect for the United States throughout the world, while creating the wrong kind of incentives for executive officials. *See Carlson v. Green*, 446 U.S. 14, 20-21 (1980) (upholding *Bivens* remedy against prison officials for Eighth Amendment violations, notwithstanding the availability of a damages remedy against the United States under the Federal Tort Claims Act, because a remedy against the United States would not satisfy *Bivens*' purpose of deterring *officials* from engaging in unconstitutional conduct).

As Justice Harlan explained in *Bivens*, "at the very least such a [damages] remedy would be available for the most flagrant and patently unjustified sorts of police conduct," for "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." 403 U.S. at 411.

This case too calls for a judicial remedy if the "flagrant and patently unjustified" conduct alleged here is proven.

CONCLUSION

For the reasons set forth above, the Court should reverse the district court's order insofar as it dismissed Arar's claims under the *Bivens* doctrine for damages resulting from the violation of his constitutional rights.

Dated: October 27, 2008

Respectfully submitted,

/s/ Sidney S. Rosdeitcher
Sidney S. Rosdeitcher
Counsel of Record
Aaron S. Delaney
Brian A. Kohn
Eric Tam*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Aziz Huq
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 992-8632

* *Not yet admitted; under supervision of counsel of record*

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I, Sidney S. Rosdeitcher, hereby certify pursuant to F.R.A.P 32(a)(7) that, according to the word-count feature of Microsoft Word 2003, the foregoing appellate brief contains 6,979 words (exclusive of the table of contents, table of authorities, signature block, and this certificate) and therefore complies with the 7,000 word limit for *amicus* briefs in the Federal Rules of Appellate Procedure for the Second Circuit.

Dated: October 27, 2008

/s/ Sidney S. Rosdeitcher
Sidney S. Rosdeitcher

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Dennis Barghaan, Esq.
Larry Gregg, Esq.
Office of the U.S. Attorney
Eastern District of Virginia, Civil Division
2100 Jamieson Avenue
Alexandria, VA 22314-5794
(703) 299-3700
(703) 299-3737
Attorneys for John Ashcroft

Jeremy Maltby, Esq.
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA, 90071
(212) 430-6000
Attorney for Robert Mueller

William Alden McDaniel, Jr., Esq.
Bassel Bakhos, Esq.
Law Office of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, MD, 21201
(410) 685-3810
Attorneys for James W. Ziglar

Debra L. Roth, Esq.
Thomas M. Sullivan, Esq.
Shaw, Bransford, Veilleux & Roth, P.C.
1100 Connecticut Avenue NW
Washington, DC, 20036
(202) 463-8400
Attorneys for Edward J. McElroy

Thomas G. Roth, Esq.
Law Offices of Thomas G. Roth
395 Pleasant Valley Way, Suite 201
West Orange, NJ 07052
(973) 736-9090
Attorney for J. Scott Blackman

JeffreyA. Lamken, Esq.
Jamie S. Kilberg, Esq.
Baker Botts LLP
1299 Pennsylvania Avenue NW
Washington, DC, 20004
(202) 639-7978
Attorneys for Larry D. Thompson

Robert M. Loeb, Esq.
Barbara L. Herwig, Esq.
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue NW
Room 7268
Washington, DC 20530
(202) 514-5425
(202) 514-4332

Scott Dunn, Esq.
Assistant United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Floor
Brooklyn, NY 11201-2776
(718) 254-6029
Attorneys for Defendants-Appellees in Their Official Capacities

Maria Couri LaHood, Esq.
David Cole, Esq.
Jules Lobel, Esq.
Katherine Gallagher, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6430

Joshua S. Sohn, Esq.
DLA Piper LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 335-4500
Attorneys for Maher Arar

/s/ Aaron S. Delaney
Aaron S. Delaney

Dated: October 27, 2008

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Aaron S. Delaney

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