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 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.

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

AMICI CURIAE BRIEF OF U.S. AND CANADIAN SCHOLARS ADVOCATING REVERSAL IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

This case addresses whether courts are barred from providing judicial redress for allegations of torture caused by the actions of U.S. officials taken on U.S. soil. *Amici curiae* are law professors in the United States and Canada.[1] The professional interest of U.S. *amici*—all of whom have written and taught extensively on the subjects of constitutional law and federal jurisdiction—is in explaining the trial court's error in concluding that the *Bivens* remedy was unavailable, especially given the important role of the federal courts in protecting fundamental individual rights in the context of the war on terror. Canadian *amici*—experts on individual rights under Canadian and international law—join this brief to draw the Court's attention to the recent Canadian public inquiry concerning the same matter. *Amici curiae* have no personal, financial, or other professional interest, and take no position respecting any other issue raised in the case below.

SUMMARY OF ARGUMENT

This case—involving allegations that federal officials conspired to torture Arar, a non-citizen passing through a U.S. airport—falls squarely within the purview of the *Bivens* doctrine, whose defining function is to ensure that some

[1] Names and affiliations of *amici curiae* are listed in the Appendix. All parties consented to the filing of this brief.

remedy is available to protect the fundamental rights of the powerless from abuse by government officials. Despite finding that defendants had failed "to identify an alternative venue through which Arar could have satisfactorily preserved some avenue for judicial relief," the district court improperly concluded that a *Bivens* remedy is not available because this case touches upon national security and foreign policy considerations. *Arar v. Ashcroft,* 414 F. Supp. 2d 250, 280-81 (E.D.N.Y. 2006).

Amici respectfully submit that the district court's holding was wrong, legally and factually. First, the district court improperly invoked the "special factors" exception to the *Bivens* doctrine based on vaguely articulated claims concerning Congressional immigration authority and "national security and foreign policy concerns." *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971). The application of such broad "special factors" exceptions is highly questionable in light of the guiding principle of *Bivens* and its progeny: Violations of individuals' constitutional rights merit redress. *Bivens*, 403 U.S., at 397 (quoting *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803)) ("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."). Moreover, the factors cited by the district court as foreclosing a *Bivens* action on separation of powers grounds would be insufficient to find the case non-justiciable under a traditional

political question inquiry. In actions brought in the wake of the September 11, 2001 terrorist attacks—including *Bivens* claims—courts have time and again declined to dismiss for lack of justiciability, underscoring the presumptions in favor of judicial review and redress for violations of fundamental individual rights, even where national security and foreign affairs may be implicated.

Second, an assertion central to the district court's holding—that permitting this case to proceed could jeopardize foreign relations between the United States and Canada—is unfounded in light of the Canadian government's own exhaustive public inquiry. Moreover, that same inquiry exonerated Arar of any links to terrorism, thereby almost entirely eliminating the possibility that adjudicating Arar's constitutional rights claims would pose any significant threat to national security.

At best, this decision and its unjustified expansion of the "special factors" exception creates a legal "no man's land" whereby government officials can violate the fundamental rights of persons present on U.S. soil simply by "outsourcing" otherwise banned practices to foreign governments. At worst, it precludes future damages claims that merely touch upon anti-terrorism efforts. The District Court's loose reasoning could be interpreted to bar a *Bivens* action for any case involving government abuse of non-citizens suspected of ties to terrorism, no matter how unfounded those suspicions might be or how grievous the

violations. If this nation is to be a "government of laws and not of men," *Marbury,* 1 Cranch (5. U.S.) at 163, Arar—and all those like him who find themselves mistakenly swept up in its anti-terrorism efforts—must be afforded the opportunity to vindicate their most basic rights, which indisputably include the right to be free from torture.

I. A *BIVENS* REMEDY IS ESPECIALLY APPROPRIATE IN LIGHT OF THE GRIEVOUS AND CLANDESTINE NATURE OF THE CONDUCT ALLEGED.

Since its inception, the *Bivens* action has served a dual purpose: remediation and deterrence. *Bivens* itself rested upon the longstanding judicial tenet that "where 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." *Bivens*, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). At its core, *Bivens* is a vehicle to provide a remedy for a government official's violation of individual constitutional rights, so that those rights do not "become merely precatory." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

In addition to providing an individual with an otherwise unavailable remedy, *Bivens* provides an essential deterrent and signaling function. *See Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter the [federal] officer from infringing individuals' constitutional rights."); *Polanco v. United States Drug Enforcement Admin*., 158 F.3d 647, 653 (2d Cir.

1998) ("The causes of action established by … *Bivens* …are punitive in nature, because they are intended to prevent intentional violations of the Constitution.") (citations omitted). In doing so, a *Bivens* remedy affirms the principle of equality before the law: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Butz v. Economou*, 438 U.S. 478, 506 (1978) (internal citations omitted).

These principles are particularly important where, as here, the plaintiff alleges that U.S. officials not only purposefully deprived him of fundamental rights,[2] but that they purposely did so in a manner to evade public scrutiny and

[2] The allegations at the root of this case unquestionably give rise to a *Bivens* action. "Extraordinary rendition"—the transport of a person from the United States to another country for the express purpose of interrogation and torture—is plainly unconstitutional. *See McKune v. Lile*, 536 U.S. 24, 41(2002) (referring to the "the physical torture against which the Constitution clearly protects" as a benchmark for adjudicating the constitutionality of more "de minimis harms"); *see also Chavez v. Martinez*, 538 U.S. 760, 773 (2003) ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial"); *Id.* at 789 (2004) (Kennedy, J. concurring in part, dissenting in part) ("A constitutional right is traduced the moment torture or its close equivalents are brought to bear."); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 701, 702 (2d Cir. 1955) ("It is imperative that our courts severely condemn confession by torture . . . . To treat it lightly, to condone it, encourages its continued use, with evil effects on the police . . . since he violates statutes *and the Constitution*. . . .") (emphasis added).

individual accountability. *Arar*, 414 F. Supp. 2d at 253-54 (summarizing allegations that defendants held Arar virtually incommunicado and misrepresented his status and whereabouts to his attorney). It is precisely that context that a *Bivens* remedy is most appropriate—without it, the right would be "merely precatory." *Davis*, 442 U.S. at 242.

II. NO "SPECIAL FACTORS" JUSTIFY DISMISSAL OF THIS CASE.

A. A Bivens *remedy is presumptively available, and the defendant bears the burden of proving any relevant exception.*

Federal courts since *Bivens* have consistently held that they are capable of crafting damage remedies for completed violations of individual constitutional

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Arar's status as an unadmitted non-citizen does nothing to undermine his right to be free from torture. Indeed, courts have explicitly cited torture as the prototypical abuse of government authority that illustrates the need for substantive due process protection for unadmitted non-citizens. *Lynch v. Cannatella*, 810 F.2d 1363, 1374-1375 (5th Cir. 1987) ("If the argument [that unadmitted aliens lack any substantive due process protection] were sound, the Constitution would not have protected the stowaways from torture or summary execution. *To state the proposition is to assure its rejection*.") (emphasis added); *see also Zadvydas v. Davis*, 533 U.S. 678, 703-04 (2001) (Scalia, J., dissenting on other grounds) (observing that neither unadmitted nor excludable aliens can be tortured or subject to hard labor without trial); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (acknowledging "gross physical abuse" standard). Just as an unadmitted alien has the right not to be shot at the border, he has a right not to be apprehended, detained, and sent abroad by federal officials in order to be tortured by a foreign party. *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506-09 (D.C.Cir.1984) (en banc) (emphasis in original), *rev'd on other grounds*, 471 U.S. 1113 (1985) ("[T]eaming up with foreign agents cannot exculpate officials of the United States from liability to United States citizens for the United States officials' unlawful acts.").

rights unless Congress has signaled its intent to the contrary. *Bivens*, 403 U.S. at 392, *Davis*, 442 U.S. at 245. The federal courts' competence to provide such remedies arises from their common law powers in conjunction with the general federal question jurisdiction provided by 28 U.S.C. § 1331, *Bivens*, 403 U.S. at 396, and therefore flows from the same sources that give rise to the "*presumed availability* of federal equitable relief against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring) (emphasis added). Damages actions are particularly necessary for victims of completed constitutional violations who lack recourse to effective alternative statutory remedies. For such victims, as Justice Harlan wrote, "it is damages or nothing." *Bivens*, 403 U.S., at 410.[3]

Accordingly, the dismissal of a *Bivens* action is appropriate only in certain, limited circumstances where (1) "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective," or (2) there are "'special factors counseling hesitation in the absence of affirmative action by Congress.'" *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (quoting *Bivens*, 403 U.S. at 396). The district court rightly rejected respondents' argument that an equally effective

[3] *Amici* do not assert that Arar is precluded from all other avenues of redress but note that in the event that the Court upholds the district court's barring of Arar's TVPA and other claims, a *Bivens* action is especially necessary.

alternative remedial regime precludes Arar's *Bivens* claim. *Arar*, 414 F. Supp. 2d at 280-81. The district court erred, however, in finding the presence of "special factors counseling hesitation."

B. This case does not fit either of the two narrow circumstances in which the Supreme Court has found special factors sufficient to defeat a Bivens *remedy.*

An examination of Supreme Court jurisprudence reveals that special factors analysis embraces only a narrow range of concerns: (i) where prior Congressional action implicitly precludes or preempts a damages remedy; or (ii) where the action arose within a "domain that is so independent in the constitutional system" as to preclude Article III judicial oversight. *Carlson v. Green*, 446 U.S. 14, 19 (1980); *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) (rejecting defendants' special factors defense on the basis that they incorrectly "confuse the presence of *special* factors with *any* factors counseling hesitation") (emphasis in original). In practice, separation of powers concerns have justified dismissal under the special factors analysis only where alternative remedial mechanisms exist or where the absence of any mechanism strongly suggests that Congress intentionally omitted such remedies. This is unsurprising, given that any special factor must be balanced

against *Bivens'* founding principle that every wrong deserves a remedy. *Bivens*, 403 U.S., at 410.[4]

The trial courts' reasoning—that the general national security and foreign policy concerns at issue in this case constitute special factors justifying dismissal—cannot be reconciled with either the Supreme Court's *Bivens* jurisprudence or separation of powers principles. First, there is no indication that Congress intended to preclude a damages remedy for extraordinary rendition. Second, it is highly questionable whether executive authority over national security and foreign affairs alone can justify dismissal of a claim alleging violations of fundamental individual rights. Such a dismissal would not be warranted by *Bivens* precedent and would unnecessarily raise significant constitutional questions regarding the separation of powers and individual rights.

[4] *Amici* leave open the question whether such remedy is constitutionally mandated under all circumstances, but instead point to the vindication of individual rights as the primary principle underlying *Bivens* and its progeny. *See Bush v. Lucas*, 462 U.S. 367, 379 n.14 (1983) ("We need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate.") (internal citations omitted); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991) (noting that even if subject to limited exceptions in practice such as qualified immunity, principle that "every wrong deserves a remedy" is normatively desirable).

1. There is no suggestion of Congressional preemption of a Bivens *remedy for extraordinary rendition.*

The first "special factor" looks to whether prior Congressional action implicitly pre-empts or precludes a damage remedy for constitutional torts arising from a particular context, typically through the statutory creation of an alternative or exclusive remedial scheme. In *Bush v. Lucas*, 462 U.S. at 368, the Court held that a *Bivens* remedy is inappropriate for claims arising out of a "relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Similarly, in *Schweiker v. Chilicky*, the Court ruled that the special factors analysis requires the judiciary to show "appropriate judicial deference to indications that congressional inaction has not been inadvertent," in particular when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." 487 U.S. 412, 423 (1988); *see also Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106, 111–13 (2d Cir. 2005) (affirming dismissal of *Bivens* action alleging unconstitutional enforcement of tax code and noting numerous statutory means that taxpayers could employ to shield themselves from effects of retaliatory audits).

There is no comparable evidence here that Congress intended federal officials to escape accountability for extraordinary rendition. The district court

opined that the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350), and the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 1681-822 (codified as 8 U.S.C. § 1231 *et seq*.), each provide such a basis, but neither statute touches upon extraordinary rendition or creates an exhaustive remedial system sufficient to demonstrate Congressional intent to preclude judicial remedies for fundamental constitutional violations. With respect to the TVPA, the district court seemed to base its conclusion on its holding that the TVPA does not apply to torture committed by U.S. officials. *See Arar*, 414 F. Supp. 2d at 263-66. Even assuming that is true, it wholly inappropriate to infer further that Congress meant to exempt U.S. officials from *any* liability for using the rendition process for the purposes of torture. Instead, it seems that the most the district court's reasoning could show is that the TVPA says nothing at all about torture-related violations of the Fifth Amendment by U.S. officials—and therefore cannot be read to preclude a *Bivens* claim for such violations.

Likewise, FARRA contains no mention of constitutional standards, but merely implements Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, and the principle of non-refoulement—i.e., the duty not to remove a person "to a country in which there are substantial grounds for

believing the person would be in danger of being subjected to torture ….” 8 U.S.C. § 1231, at Note. Therefore, as with the TVPA, it would be particularly implausible to read this statute as foreclosing a damages remedy to address the torture-related rights claims arising from the Constitution, a source entirely independent from FARRA or the CAT.

The omission of any statutory remedy for torture committed by U.S. officials under the TVPA or FARRA is insufficient evidence that Congress deliberately chose to preclude a remedy to plaintiffs like Arar. To the contrary, it is more likely that Congress failed to provide a remedy for torture by federal officials in either the TVPA or FARRA because it believed that the Constitution already prohibits federal officials from committing torture, and that the *Bivens* action accordingly provides a damages remedy.[5] That interpretation is preferable, given that the district court's approach unnecessarily raises serious constitutional questions. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[A] serious constitutional question . . . would arise if a federal statute were construed to deny

[5] The State Department recently affirmed this position in its report under the CAT: "U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention [Against Torture] . . . these can include . . . suing federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts.'" U.S. State Department, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America (May 5, 2006)

any judicial forum for a colorable constitutional claim."); *Krueger v. Lyng*, 927 F.2d 1050, 1055 (8th Cir. 1991) ("To allow an administratively-created scheme to foreclose a *Bivens* action, without some real indication that Congress intended the . . . result, would require us to hold that the legislative power to foreclose a *Bivens* action has been delegated . . . in violation of the separation of powers doctrine.").[6]

2. "National security and foreign affairs" are not specific domains that enjoy such independence in the constitutional order that they preclude judicially created remedies.

The second "special factor" concerns the Court's refusal to create *Bivens* remedies in domains in which federal officers "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson*, 446 U.S. at 19. In application, however,

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(citing *Bivens*, 403 U.S. at 388; *Davis*, 442 U.S. at 228), *available at* http://www.usmission.ch/Press2006/CAT-May5.pdf.

[6] Any argument that Congressional remedies preclude a *Bivens* action in this case is particularly specious in light of Arar's allegation that defendants deliberately interfered with his access to any remedial mechanisms the immigration process might have provided him. Such interference itself rises to the level of a constitutional violation and must not redound to violators' benefit in subsequent *Bivens* claims. *See Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990) (permitting *Bivens* claim to go forward despite acknowledgement that Civil Service Reform Act's comprehensive remedial scheme normally would preclude such an action, because "assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress."); *Freedman v. Turnage*, 646 F. Supp. 1460, 1466 (W.D.N.Y.1986) (similar); *see also Bounds v. Smith*, 430 U.S. 817, 822 (1977) (finding that Constitution commands that "the state and its officers … not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.").

courts have only invoked this exception in the context of a separate procedural system that indicates clear legislative intent to preclude judicial remedies for constitutional violations or provides some alternative form of redress.

The paradigmatic example is the armed forces, for which Congress has enacted an exclusive system of justice, pursuant to its authority under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces." Art. I, s. 8, cl. 14. The Court decided in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), that the independent system of military justice that Congress has enacted effectively precluded judicially created remedies for constitutional torts. In deciding that special factors sufficient to defeat *Bivens* actions existed in these cases, the Court in particular cited "the need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice" as well as the Constitution's explicit conferral to Congress of exclusive "authority to establish a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Stanley*, 483 U.S. at 679 (internal citations omitted). The overriding imperative the Court identified in these cases was the exclusive nature of the military justice system's internal remedial mechanisms, thereby indicating Congressional intent to preclude a *Bivens* remedy. *Id.* It is instructive that the

Supreme Court has not recognized any domain other than the military in which federal officers enjoy comparable independence so as to preclude the possibility of sustaining *Bivens* claims against them.

In this case, the district court cited two bases for the proposition that the defendants "enjoy[ed] such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson*, 446 U.S. at 19. First, the court pointed to Congressional authority over "the regulation of aliens." *Arar*, 414 F. Supp. 2d at 281. Second, the court broadly referenced the judiciary's lack of competence to "define and adjudge the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States." *Id*. at 282. Both reasons are insufficient to justify dismissal.

a. *Congress' inherent immigration power provides no basis for dismissal of a* Bivens *claim relating to fundamental constitutional violations.*

The district court observed that "Article I, Section 8 of the U.S. Constitution places the regulation of aliens squarely within the authority of the Legislative branch." *Id*. at 281. That the Constitution assigns primary responsibility for the regulation of immigration to Congress, however, provides no basis for precluding the judicial enforcement of individuals' constitutional rights solely because they touch on this sphere. Unlike the military context, federal courts have historically engaged in significant review of immigration matters through a variety of statutory

and other mechanisms—including the consideration of *Bivens* actions—especially when litigants allege violations of constitutional rights. *See, e.g.*, *Heikkila v. Barber*, 345 U.S. 229 (1953) (noting that federal courts have consistently retained competence to review immigration matters, even when statutory regimes made executive decisions "nonreviewable to the fullest extent possible under the Constitution"); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (affirming denial of motion to dismiss *Bivens* claim brought against border guard for alleged use of excessive force during immigration detention); *Wong v. United States*, 373 F.3d 952 (9th Cir. 2004) (rejecting motion to dismiss *Bivens* claim against immigration officials for alleged violations of First, Fourth and Fifth Amendments arising out of detention and removal proceedings); *see generally* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).[7]

[7] The district court properly recognized that Arar, unlike the defendants in *Schweiker* or *Hudson Valley*, lacked access to any independent review mechanism that could have prevented federal officials' alleged abuse of their authority in conspiring to render him to Syria to effect his torture; any mechanism that would effectively deter federal officials from engaging in similar constitutional violations by investigating and penalizing their conduct; or any alternative mechanism through which he could retroactively obtain compensation for the constitutional violations he has suffered. Under the existing immigration system, Arar's only formal means of challenging defendants' actions in detaining and rendering him to Syria to effect his torture was to petition the Second Circuit Court of Appeals for a writ of habeas corpus following a final decision of removal. Of course, Arar lacked the capacity to obtain even this limited form of relief as a result of defendants' own actions. *See Arar*, 414 F. Supp. 2d at 280-81. Thus, it is clear

b. Any foreign relations or national security concern present in this case is insufficient to preclude a Bivens action.

The district court broadly concluded that "the task of balancing individual rights against national security concerns is one that courts should not undertake without the guidance of the coordinate branches." *Arar*, 414 F. Supp. 2d at 283. That assertion cedes too much ground to the Executive, particularly in light of the numerous Congressional statements against torture by U.S. officials. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]"). *Cf.* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027; 18 U.S.C. § 2340A (criminalizing torture by U.S. nationals abroad); 18 U.S.C. § 2441 (criminalizing war crimes as specified in 1949 Geneva Conventions, including torture, by U.S. military personnel and U.S. nationals); Note to 8 U.S.C. § 1231 (adopting principle of non-refoulement as official U.S. policy).

The district court's conclusion that national security and foreign affairs concerns preclude a *Bivens* remedy finds very little support in either *Bivens* or

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that the immigration system's standard oversight mechanisms contributed nothing to the revelation of the constitutional violations Arar suffered, and it is quite possible that these allegations would never have become a matter of public record had Arar died while in Syrian custody.

political question jurisprudence. Where, as here, there is no alternative means of redressing fundamental constitutional violations, and there is no evidence of Congressional intent to foreclose a judicial remedy for violations of fundamental rights, any foreign affairs or national security concern must be very carefully weighed against *Bivens'* primary concern that constitutional rights not become "merely precatory." *Davis*, 442 U.S. at 242. Since *Youngstown*, it has been clear that the Constitution endows the judiciary with the power and obligation to review and enjoin unconstitutional executive action involving national security or foreign affairs. There is therefore no reason to conclude that the judiciary does not have the power to award the less intrusive remedy of money damages to deal with unconstitutional executive action in this context.

There is no binding precedent for the notion that foreign affairs or national security concerns may serve as "special factors" to justify dismissal of a *Bivens* claim. The only reported decision arguably in support of this proposition is *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), decided more than twenty years ago, which involved a broad array of claims brought by Nicaraguan and U.S. citizens against various federal officials for supporting the Contras.[8] The

[8] The district court also cited Justice Rehnquist's dicta in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which the Court held that the Fourth Amendment's protections against unreasonable search and seizure are inapplicable to property held by non-citizens outside the United States. Justice Rehnquist stated that the contrary position might expose federal officials carrying out foreign affairs

question on appeal was whether Nicaraguan citizens could assert Fourth and Fifth Amendment claims against federal officials to remedy injuries that occurred entirely within Nicaragua. Then-Judge Scalia expressed skepticism that non-resident non-citizens possessed such rights, but refused to reach that question, instead dismissing the *Bivens* actions on special factors grounds. *Id*. at 209. He compared the "special needs of the armed forces" involved in cases such as *Chappell v. Wallace*, 462 U.S. 298 (1983), with "the special needs of foreign

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duties outside the United States to *Bivens* liability. Such exposure could "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 273–74. In the course of his hypothetical analysis, Justice Rehnquist mentioned that "*[p]erhaps* a *Bivens* action might be unavailable in *some or all* of these situations due to 'special factors counseling hesitation'" (quoting *Chappell*, 462 U.S. at 298) (emphasis added). This dictum—cited by no other subsequent decision—does not justify dismissing Arar's claim. Justice Rehnquist did not explain what the "special factors" might be, and he expressly contemplated that *Bivens* remedies might be available for "some" extraterritorial searches. Indeed, it was the very threat of *Bivens* actions for extraterritorial searches that contributed to the Court's holding. *Cf. Lamont v. Woods*, 948 F.2d 825, 840 (2d Cir. 1991) (discussing *Verdugo* Court's concern over possible *Bivens* actions). Moreover, whereas the allegations underlying the claim in *Verdugo-Urquidez* occurred entirely outside of the United States, Arar alleges that he was captured within the United States and that the conspiracy resulting in his rendition and torture was conducted by officials located within the United States.

affairs [that] must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Id*.

Sanchez-Espinoza's suggestion that courts should bar a *Bivens* remedy merely on the basis of executive authority over foreign affairs and national security should be viewed with a great deal of caution. Notably, when faced with the question of judicial competence to provide a damages remedy only three years later in *Stanley*, 483 U.S. at 679, newly appointed Supreme Court Justice Scalia did not repeat the broad assertion about executive authority that he had made in *Sanchez-Espinoza*—indeed, he declined to cite *Sanchez-Espinoza* at all. Instead, Justice Scalia cited as the paramount consideration "the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683 (emphasis added). As evidence that Congress intended to preclude implied judicial remedies in the military sphere, the Court further pointed to the "consequent need and justification for a special and exclusive system of military justice" and the Constitution's explicit conferral to Congress of exclusive "authority to establish a comprehensive internal system of justice to regulate military life." *Id.* at 679.

Furthermore, *Sanchez-Espinoza* must be read narrowly on its facts. Prior to dismissing the case on prudential "special factors" grounds, Then-Judge Scalia

noted that any constitutional claim at issue was dubious, in light of plaintiffs' standing as non-resident, non-citizens who were complaining of injuries that occurred entirely within a foreign state. *Id.* It is unsurprising, therefore, that no subsequent decision has ever cited *Sanchez-Espinoza* for the principle that Executive authority over national security and foreign affairs is sufficient to preclude judicial remedies for cognizable and otherwise irremediable constitutional violations. *Cf. Elmaghraby v. Ashcroft*, 2005 WL 2375202, at *14 (E.D.N.Y. Sept. 27, 2005) ("The problems posed by issues of national security are not akin to those posed by military service, where the need for a separate system of military justice precludes the provision of a *Bivens* remedy.") (citing *Chappell*, 462 U.S. at 304; *Stanley*, 483 U.S. at 683–84).

The Supreme Court has recognized the need to protect individual rights even in the presence of national security and foreign affairs concerns. Although the political branches traditionally enjoy a great deal of deference from the judiciary in the realm of national security and foreign affairs on institutional competency and prudential grounds, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962); *see also Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2775 n.23 (2006) (finding that separation of powers bars Executive from unilaterally abrogating minimum requirements of Uniform Code of Military Justice in trying

foreign alleged enemy combatants); *Reid v. Covert*, 354 U.S. 1, 14 (1957) ("If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended. . . . But we have no authority, or inclination, to read exceptions into it which are not there."). Foreign affairs cases involving plaintiffs seeking to vindicate their individual constitutional rights, as opposed to plaintiffs seeking to challenge the wisdom of foreign policy decisions, are generally justiciable.[9] *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) ("The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive carte blanche to trample the most fundamental liberty and property rights of this country's citizenry."); *Koohi v. U.S.*, 976 F.2d 1328 (9th Cir. 1992) (finding justiciable FTCA claim against United States and defense contractors asserted by heirs of deceased passengers and crew of civilian aircraft mistakenly shot down by

[9] By contrast, those cases touching on foreign affairs where the plaintiff does *not* seek to vindicate a right deriving from the Constitution, a treaty, or a statute are uniformly found non-justiciable. *See Nat. Org'n For Reform of Marijuana Laws (NORML) v. United States*, 452 F. Supp. 1226, 1234-1235 (D.D.C. 1978) (denying plaintiff's request for a mandatory injunction directing defendants to use their "best efforts" to persuade the Government of Mexico to call a moratorium on herbicide spraying program); *Dumas v. President of the United States*, 554 F. Supp. 10, 17 (D. Conn. 1982) (denying plaintiff's request for an order requiring the United States government to make formal demand of the Governments of China and North Korea to allow recovery of remains of United States service personnel buried within the two countries).

U.S. warship during Iran-Iraq war). This rule applies with equal force to citizens and non-citizens. *See McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991) (holding that trial court had jurisdiction to hear Due Process challenge brought by illegal immigrants against implementation of the "Special Agricultural Worker" program); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (reaching merits on non-citizens' claim that deportation on grounds of former Communist Party membership violated First Amendment); *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980) (holding that political question doctrine did not apply to claim challenging constitutionality of government decision to withdraw only official empowered to naturalize Filipino army veterans at close of World War II).

As the Eastern District of New York recently stated in *Elmaghraby*, "our nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here." 2005 WL 2375202, at *14. As in the present case, the plaintiffs in *Elmaghraby* were foreign nationals who alleged grievous violations of their constitutional rights committed by federal officers who detained them because of their suspected involvement in the September 11, 2001 terror attacks. That the federal officials defending Arar's claims chose to send the plaintiff to a foreign state to be tortured rather than detaining and abusing him in Brooklyn does not constitute sufficient grounds to distinguish his case from

Elmaghraby. *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506-09 (D.C. Cir. 1984) (en banc), *rev'd on other grounds*, 471 U.S. 1113 (1985) (rejecting defendant's assertion of act of state doctrine, observing that "teaming up with foreign agents cannot exculpate officials of the United States from liability to United States citizens for the United States officials' unlawful acts.").

Appellant Arar is not challenging the wisdom of the "War on Terror." Nor is he questioning the effectiveness of the appellees' methods of combating terrorism. Rather, he seeks only to vindicate his Fifth Amendment right to be free from torture.[10] "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886). *Amici* respectfully urge this Court to reject the implication that the judiciary is incapable of performing its constitutional duties with respect to any national security claim that touches the international realm. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) ("[I]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested.").

[10] Because Appellant Arar asks only for damages—a remedy that is "particularly judicially manageable [and] . . . nonintrusive"—there is little danger here that this Court will intrude on the Executive's constitutional prerogative to conduct foreign relations. *Koohi*, 976 F.2d at 1332.

III. THE CANADIAN GOVERNMENT'S PUBLIC INQUIRY INTO THIS MATTER CONTRADICTS ANY CLAIM THAT THIS CASE IMPLICATES FOREIGN AFFAIRS OR NATIONAL SECURITY CONCERNS.

One of the key premises of the district court's "special factors" ruling is that the case raises "crucial national-security and foreign policy considerations." *Arar*, 414 F. Supp. 2d. at 281-82. In particular, the district court reasoned that dismissal was necessary due to the potential "negative effect on our relations with Canada if discovery were to proceed in this case and . . . certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria." *Id*. In fact, almost immediately after Arar was released from Syrian custody, the Canadian government chose to engage in a detailed and public inquiry into the involvement of Canadian officials in Arar's rendition to torture.

In February 2004, the Canadian government, acting pursuant to Canada's Inquiries Act, R.S.C., ch. I-11 (1985), charged Associate Chief Justice Dennis O'Connor of the Ontario Court of Appeal with presiding over a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [hereinafter "Commission"]. The Commission's fact-finding process involved the examination of over 70 government officials and the production of approximately 21,500 documents, and resulted in. a three-volume, 1,195-page Report of the Events Relating to Maher Arar [hereinafter "O'Connor Report"], *available at* http://www.ararcommission.ca/eng/26.htm. Although the Commission reviewed

some of this evidence in camera for national security reasons, it was able to make public the entirety of its conclusions, as well as nearly all of the evidence supporting these conclusions. The Canadian government did not contest the Commission's findings. Instead, the O'Connor Report prompted several actions by the Canadian government that acknowledged that Arar's claims had been factually established. These included the Canadian Parliament's unanimous approval of a motion apologizing to Arar, as well as the Canadian Prime Minister's delivery of a formal protest to the United States government for its wrongful treatment of Arar.

The process and conclusions of the Commission establish that it is exceedingly unlikely that discovery as a result of litigation in a United States court would uncover any new information concerning Arar's rendition to Syria that would be capable of creating additional embarrassment to Canadian officials.[11] Although the Commission was not empowered to assess individuals' civil or

[11] Moreover, the threat of disclosure of any additional information that is either classified or embarrassing to the Canadian government does not justify dismissal at this stage; rather, the appropriate response would be to limit discovery or disclosure. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter."); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132-33 (2d Cir. 1977) (upholding denial of request for jury trial in order to protect classified evidence but allowing parties to use that evidence for *in camera* trial); *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (remanding for trial *in camera*).

criminal liability, it was authorized to draw factual conclusions concerning the conduct of government officials for the purpose of assessing the success or failure of governmental bodies to fulfill their legally mandated responsibilities. The Commission explicitly concluded that the Royal Canadian Mounted Police (RCMP), as well as specific RCMP units and leadership personnel, were responsible for failures in the handling and transfer of information to United States authorities that contributed to Arar's extraordinary rendition. *See* 3 O'Connor Report at 13-14.

The O'Connor Report contains several other factual findings that indicate that any national security threat that might result from fully adjudicating this case has been greatly overstated. The Commission "categorically" concluded that there exists "no evidence to indicate that Arar has committed any offence or that his activities constitute a threat to the security of Canada." 3 O'Connor Report at 59. Furthermore, Stephen Toope, the fact-finder appointed by the O'Connor Commission to assess Arar's claims of torture, found his account to be "completely credible," leading the Commission to conclude that Arar had been by removed against his will by United States officials in New York to Syria, where he was "imprisoned for nearly a year . . . [and] interrogated, tortured and held in degrading and inhumane conditions." 3 O'Connor Report at 9. The Commission recommended that the government of Canada deliver a formal objection to the

United States for its treatment of Arar, as well as for the misleading statements United States officials made to Canadian officials concerning their treatment of Arar. 3 O'Connor Report at 361.

The Commission's exhaustive findings and the Canadian government's unambiguous acceptance of the authority of these findings underscore the seriousness of the allegations and the appropriateness of judicial redress in this case. If anything, permitting Arar to pursue his claims to redress violations of his constitutional rights would improve the United States' foreign relations with Canada by helping the United States fulfill its obligations under international law and satisfy Canadian demands for redress.

CONCLUSION

For the reasons stated above, *amici* respectfully request that the Court reverse the district court opinion.

Respectfully submitted,

December 20, 2006

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