06-4216-cv

United States Court of Appeals

for the

Second Circuit

MAHER ARAR,

Plaintiff-Appellant,

– v. –

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

(For Continuation of Caption See Inside Cover)

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

MARIA COURI LAHOOD
DAVID COLE
KATHERINE GALLAGHER
JULES LOBEL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6430

JOSHUA S. SOHN
DLA PIPER US LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

Co-counsel for Plaintiff-Appellant

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State and Other Cases

Federal Statutes

State Statutes

Federal Rules

Federal Regulations

Other Authorities

INTRODUCTION

This case challenges Defendants' conspiracy to detain a Canadian citizen passing through JFK airport, block his access to his lawyer and the courts in order to insulate their actions from legal review, and render him to Syria for indefinite detention and torture. This is *not* an immigration case, as much as Defendants try to recast it as such. That the U.S. immigration process was perverted to effect the rendition of Maher Arar to Syria for torture and arbitrary detention does not somehow make that conduct legal — or put it beyond the reach of judicial review. The Constitution requires, and justice demands, that such an abuse of power receive full review and careful consideration on the merits.

Because this case was resolved on a motion to dismiss, this Court must accept Arar's allegations as true. Against this standard, Defendants argue that they can intentionally send a Canadian citizen held in custody here to another country for the purpose of torturing him without violating the Constitution or the Torture Victim Protection Act ("TVPA"), that they can affirmatively interfere with his right to consult his lawyer and to petition this Court for review of his removal order, and that they can abuse and mistreat him while held in U.S. custody. They further argue that because they used the immigration process to effect their conspiracy, no court has jurisdiction to hold them responsible for their actions.

Defendants' arguments are flatly inconsistent both with the Constitution's prohibition on governmental conduct that shocks the conscience and with this Court's description of the torturer as "*hostis humani generis*, an enemy of all mankind," *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The very principle of *Filártiga* —that torture is so universally condemned that U.S. courts can hold foreign officials responsible for torture committed against their own citizens abroad —demands that the "*hostis humani*" label apply to all torturers, irrespective of the government they represent, where they engage in torture, and who they torture.

Defendants argue that Arar's *Bivens* claims fail at the threshold, because special factors counsel against recognizing a *Bivens* claim here, and on the merits, because as a foreign national, Arar's constitutional rights are limited (if they apply at all). But whether or not foreign nationals have constitutional protection from federal governmental action abroad, Arar was in the United States, in U.S. custody in Brooklyn, when Defendants executed their conspiracy to have him tortured. Moreover, this case is within the core of cases appropriate for *Bivens* actions, and no special factors apply here. While Congress has created a relatively comprehensive scheme for review of removal orders, Defendants affirmatively prevented Arar from seeking such review while here, by repeatedly lying to his attorney and holding the interrogation about his fears of being removed to Syria on

a Sunday evening with no advance notice to his attorney. Because Congress has explicitly provided that the kind of questions Arar raises about his removal to torture should be heard by the judiciary, whatever national security concerns those claims might raise do not preclude a *Bivens* remedy where Defendants have prevented the judicial review set forth by Congress.

Defendants are also liable under the TVPA, because they subjected Arar to torture under color of foreign law by conspiring with Syria, as would any private U.S. citizen who similarly acted. Defendants' status as U.S. government officials does not accord them any special immunity under the TVPA for subjecting Arar to torture.

Arar's claims arise under the Constitution and federal law, and therefore are properly before this Court. The immigration jurisdiction provisions are inapplicable, both because they could not have addressed many of Arar's claims, and because Defendants affirmatively interfered with Arar's ability to file a petition for review of his removal order while he was in custody here. Moreover, Arar has standing to seek declaratory relief against Defendants in their official capacities – a claim that requires no inquiry into *Bivens* special factors or qualified immunity – because he is suffering an ongoing injury in the form of a ten-year bar to his reentry. Finally, because the rights Arar seeks to vindicate are clearly established, Defendants cannot point to a single decision supporting federal

officials' authority to subject anyone to torture, arbitrary detention, and deliberate interference with his access to the legal process and legal assistance. Accordingly, Defendants' qualified immunity arguments must be rejected.

Ultimately, Defendants seek to evade responsibility for a reprehensible course of conduct that, as alleged, unquestionably shocks the conscience. Arar deserves his day in court, and if our commitment to the rule of law means anything, Defendants must be held accountable.

I. A *BIVENS* REMEDY IN THIS CASE IS APPROPRIATE TO REDRESS DEFENDANTS' CONSTITUTIONAL VIOLATIONS.

Defendants maintain that the federal courts are powerless to afford Arar a remedy even assuming, as the Court must, that Defendants detained him in New York, obstructed his access to his lawyer and the courts, and covertly transferred him in the middle of the night to Syria via Jordan for the purpose of having him tortured. They argue that Congress' comprehensive scheme for reviewing removal orders and the national security implications of Arar's claim preclude the Court from recognizing a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Furthermore, on the merits, they maintain that the Constitution does not protect foreign nationals from abuse imposed abroad, and that the "state-created danger" doctrine does not apply to removal decisions.

None of these arguments withstands analysis. As to the comprehensive remedial scheme, because Defendants intentionally blocked Arar from invoking the judicial remedy that Congress provided for challenging removal orders, they cannot now rely on the existence of that remedial scheme to preclude a *Bivens* remedy. *See infra,* Sections II(C) and IV. As to national security and foreign affairs matters, Defendants do not dispute that those same matters would have been judicially reviewable had Arar not been blocked from filing a petition for review. They do not become non-judiciable simply because Defendants obstructed access to the process Congress provided. Finally, Arar's constitutional injuries began while he was in custody in the United States, and whether or not due process would protect him had he never come into U.S. custody, it plainly protects him from torture because his subjection to torture began in the United States and was furthered through the abuse of American legal process. In addition, Arar's allegations that Defendants intentionally delivered him to Syria to have him tortured state a claim even under the most restrictive understanding of the state-created danger doctrine. Even if that doctrine does not cover routine claims that government officials erroneously denied a claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Apr. 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1994), it plainly extends to the circumstances alleged here. Moreover, intentional

government action to subject someone to torture violates the Fifth Amendment irrespective of the state-created danger doctrine.

A. Defendants' Affirmative Obstruction of Arar's Access to Any Judicial Review Precludes Their Reliance on the Statutory Review Scheme as a Bar to *Bivens* Relief.

Defendants claim that the "calibrated and channeled review scheme" of the Immigration and Nationality Act ("INA") and the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified as note to 8 U.S.C. § 1231), "counsel against judicial creation of remedies going beyond what Congress chose to create." *See, e.g.*, U.S. Br. at 39; Thompson Br. at 16-20, 30. They contend that the exclusive avenue for review of Arar's claims was a petition for review of his removal order filed in this Court. The U.S. claims Arar's "quarrel is with the deliberate choices that Congress made concerning how to implement Article 3 of the CAT." U.S. Br. at 42.

This Court need not decide whether *Bivens* actions are generally available for claims arising from removal decisions. It need only decide whether such a remedy is appropriate where Defendants have deliberately interfered with the mechanism Congress provided for review of removal decisions. Defendants lied to and misled Arar's counsel, lied to Arar, and deliberately proceeded with Arar's removal in a manner designed to block him from seeking judicial review before his

removal. *See* Arar Br. at 9-10. The existence of a comprehensive remedial scheme that ordinarily might militate against the creation of a *Bivens* remedy does not preclude a damages action where Defendants have themselves interfered with the process established by Congress. *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990); *Grichenko v. U.S. Postal Service*, 524 F. Supp. 672, 676-77 (E.D.N.Y. 1981); *Bishop v. Tice*, 622 F.2d 349, 357-58 (8th Cir. 1980); *Moon v. Phillips*, 854 F.2d 147, 151 (7th Cir. 1988) (citing *Bishop* for the proposition that while a *Bivens* action generally would not be permitted when an otherwise adequate alternative administrative remedy is available, such an action would be permitted where the "Defendants had interfered with and blocked" access to the administrative remedy).

By obstructing Arar's ability to file a petition for review, Defendants interfered "with the deliberate choices Congress made." U.S. Br. at 42. Congress intended to provide all foreign nationals ordered removed an "adequate and effective" judicial forum to review their constitutional and legal claims. *See*, *e.g.*, H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep), *as reprinted in* 2005 U.S.C.C.A.N. 240, 300. "No alien, not even criminal aliens, will be deprived of judicial review of such claims." *Id.* at 174-75. Yet Defendants intentionally obstructed Arar's access to the remedies Congress provided, and left as his only constitutional remedy this *Bivens* action.

In *Rauccio v. Frank*, the court recognized that the regulations applicable to Post Office employees constitute a comprehensive regulatory scheme that would generally preclude a *Bivens* action, "even if the substantive remedy available to the plaintiff is woefully inadequate, or indeed, non-existent." 750 F. Supp. at 571 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988)). However, because Defendants "rendered effectively unavailable any procedural safeguard established by Congress," a *Bivens* remedy was available. *Id.*

Similarly, in *Grichenko v. U.S. Postal Service*, the court found that while the "comprehensive" Federal Employees Compensation Act was generally "the exclusive remedy against the United States available to a federal employee injured in the course of employment," it did not preclude a *Bivens* action where Defendants allegedly sought to deprive the employee of the opportunity to present his claims under the Act's procedures. 524 F. Supp. at 676-77. To the contrary, Defendants' interference warranted "the availability of a strong deterrent." *Id.* The same reasoning requires a *Bivens* remedy here. Whatever remedy was available to Arar in theory, Defendants intentionally precluded it in fact.

An elaborate remedial scheme may bar a *Bivens* remedy for certain grievances not otherwise remediable by that scheme where Congress' failure to provide a remedy was *not inadvertent*. *Dotson v. Griesa*, 398 F.3d 156, 167-72 (2d Cir. 2005); *see also Schweiker v. Chilicky*, 487 U.S. at 423 ("special factors"

inquiry requires "an appropriate judicial deference to indications that congressional inaction has not been inadvertent."). In *Dotson*, this Court carefully analyzed whether the absence of a statutory remedy was "an uninformative consequence of the limited scope" of the statute, in which case a *Bivens* remedy would be appropriate, or "a manifestation of a considered congressional judgment" that no review should exist for that type of claim, in which case *Bivens* relief would be barred. *Griesa*, 398 F.3d at 167 (quoting *United States v. Fausto*, 484 U.S. at 448-49). As this Court insisted, to preclude relief congressional action must not be "inadvertent but deliberate." *Griesa*, 398 F.3d at 170.

It strains credulity to claim that Congress deliberately intended to foreclose relief where government officials send someone to another nation to be tortured and intentionally prevent him from asserting his rights to review under the INA. On the contrary, as noted above, Congress intended that all foreign nationals should have an "adequate and effective" judicial forum to remedy unlawful removals. There is simply no evidence that Congress deliberately intended to immunize governmental interference with the petition for review process by denying any remedy whatsoever. *Cf. Turkmen v. Ashcroft*, No. CIV. 02-2307, 2006 WL 1662663 at *29 (E.D.N.Y. June 14, 2006), *appeal docketed*, No. 06-3745 (2d Cir. Aug. 10, 2006) ("no evidence that the Congress gave thought to what

remedies should be available" when immigration officials commit constitutional violations in administering the statutory scheme).

Congress' failure to provide any "significant opportunity to expose allegedly unconstitutional conduct" is a strong indication that such omission was inadvertent. *Bagola v. Kindt*, 131 F.3d 632, 643 (7th Cir. 1997). The *Bagola* court noted that in all the cases where a comprehensive scheme was held to preclude a *Bivens* remedy, "it was evident" that:

> Congress intended to encompass administrative review of constitutional violations in crafting its remedial scheme, even though it may not have provided specific relief for these violations. Administrative schemes that expose unconstitutional conduct by government officials, even if they do not provide a distinct remedy for that conduct, serve a deterrent purpose that renders the availability of a *Bivens* claim less essential. If an administrative scheme that did not safeguard a claimant's constitutional rights precluded a *Bivens* claim, unconstitutional conduct would be insulated from review by any adjudicatory forum. Such a result would stand in sharp contrast to those cases in which courts have held that an administrative scheme precludes a *Bivens* claim.

Id. at 644. Despite a statute that expressly precluded a damages award greater than that provided in the Federal Employees Compensation Act, the court in *Bagola* allowed a prisoner's *Bivens* action, finding that the absence of any meaningful remedy to expose governmental misconduct indicated that the congressional omission was inadvertent. *Id.*; *see also Weaver v. Bratt*, 421 F. Supp. 2d 25, 38-39

(D.D.C. 2006) (allowing a *Bivens* action where Civil Service Reform Act provided no administrative redress whatsoever).

The principle that plaintiffs should not be denied a remedy where defendants have obstructed access to an administrative or judicial forum is also reflected in other areas of the law. For example, this Court and others have held that the Prison Litigation Reform Act's (PLRA) exhaustion requirement—which provides that "*no* action will be brought with respect to prison conditions under section 1983 . . . until such administration remedies as are available are exhausted"—will not bar a § 1983 action when "prison officials inhibit an inmate's ability to utilize grievance procedures." *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004); *Brownell v. Krom*, 446 F.3d 305, 311 (2d Cir. 2006) (holding that "special circumstances" can justify noncompliance with the PLRA's exhaustion requirements). For similar reasons, statutes of limitations are equitably tolled where "Defendants' wrongful conduct prevented plaintiff from asserting the claim." *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001) (TVPA); *Oshiver v. Levin*, 38 F.3d 1380, 1387 (3d Cir. 1994); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428-29 (1965) (Federal Employers' Liability Act action not barred when defendants misled plaintiff).

Defendants argue that it is for Congress, not the Court, to decide whether to imply a *Bivens* remedy. *See, e.g.*, Ashcroft Br. at 31-32. Yet Congress expressly

sought to provide foreign nationals such as Arar an adequate and effective remedy. Defendants rendered that remedy meaningless. A *Bivens* remedy is necessary to implement Congress' intent.[1]

B. Arar's *Bivens* Claim Raises Issues that Congress Intended the Judiciary Review.

Defendants argue that a *Bivens* remedy is also inappropriate because litigation of Arar's claims would raise matters relating to foreign affairs and national security. U.S. Br. at 45-47; Ashcroft at 36-39. Notably, Defendants do *not* argue that Plaintiff's claims present a political question, but only that these factors militate against a *Bivens* action.[2] Defendants argue that resolution of Arar's claim

---

[1] Defendants suggest that Arar is responsible for his lack of an available remedy, and that he had statutory relief that he never sought. U.S. Br. at 8-9; Thompson Br. at 31-32 n.8; Ashcroft Br. at 27-28 nn.20-22. They suggest that he could have brought a habeas petition before defendants designated him for removal to Syria, Thompson Br. at 31, or an emergency petition for stay of removal in the time between his designation and his removal, or a post removal petition.

As the District Court pointed out, while theoretically Arar might have filed an emergency petition or a habeas action, "his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay." SPA.66 n.12, 69. Moreover, Arar's attorney was never informed of Defendants' order to remove him to Syria and was lied to about his whereabouts and destination. A.32, 33, 36, ¶43, 46, 60. As the District Court correctly recognized, after Arar's removal to Syria, his "only available remedy under the INA would have been an order seeking his return," which would have "had no bearing on his detention and coercive interrogation" by Syria. SPA.40-41.

[2] In this Court, the individual Defendants who argued that the case presented a political question have abandoned that argument. But if the case presents an

would require impermissible judicial inquiry into such matters as Defendants' decision to send Arar to Syria rather than Canada, and the existence, adequacy, and legal effect of any assurances by Syrian officials that they would not torture Arar. *See* U.S. Br. at 45-46. According to Defendants, "such an inquiry not only intrudes upon the Executive's role in foreign affairs but risks embarrassment to our government in dealing with foreign governments." Ashcroft Br. at 38.

This argument ignores the fact that Congress expressly provided for judicial review of just such questions, on a petition for review. Courts of appeals hearing petitions for review routinely consider claims that a foreign national will be tortured if removed to the country that government officials have selected. Had Defendants not obstructed Arar's ability to file a petition challenging the order of removal, this Court would have had to engage in precisely the inquiry that Defendants now say is too sensitive and impermissible.[3] If these issues would have been appropriate for judicial resolution on a petition for review, they are just as appropriate for judicial review in adjudicating a *Bivens* claim, especially where,

---

otherwise justiciable question proper for judicial resolution, Defendants have offered no reason for why the fact that Arar seeks damages relief under *Bivens* ought to bar judicial review.

[3] *See, e.g., Mironescu v. Costner*, No. CIV. 06-6457, 2007 WL 852356, at * 8 (4th Cir. Mar. 22, 2007) (neither foreign policy implications nor sensitive confidential communications with other nations bar judicial consideration of a habeas action questioning whether extradition to another country would violate CAT).

as here, Defendants affirmatively blocked Plaintiff from filing a petition for review.

Defendants cite *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005), for the proposition that "removal decisions, including the selection of a removal alien's destination, may implicate our relations with foreign powers." U.S. Br. at 46; Ashcroft Br. at 38. But, the Court in *Jama* adjudicated Jama's claim on the merits, notwithstanding these implications. Here, as in *Jama*, Congress expressly authorized judicial review of claims that an alien's removal might subject him to torture. Congress created no exceptions to that jurisdiction for cases that might prove embarrassing to other nations or the United States, for in the context of torture claims such an exception would have likely swallowed the rule.[4]

[4] Nor does *Jama* support the notion that courts ought not infer causes of action in areas affecting foreign affairs. *Jama* did not involve whether to infer a cause of action, but rather the question whether U.S. officials are to obtain a formal acceptance from a country before ordering an individual's removal to that country. The Court reasoned that "to infer an absolute rule. . . where Congress has not clearly set it forth would run counter to our customary policy of deference to the President." 543 U.S. at 348. Here, by contrast Congress did set forth an "absolute rule" that no foreign national is to be removed to a country where he is likely to be tortured, and recognizing Arar's cause of action is fully consistent with that rule.

C. Arar's Claim That Defendants Intentionally Removed Him from United States Territory for the Purpose of Subjecting Him to Torture States a Valid Constitutional Claim.

Defendants argue that Arar's constitutional claims are without merit because the Fifth Amendment does not apply to an alien outside of U.S. Territory. *See, e.g.*, U.S. Br. at 27-29; Thompson Br. at 34-37. But as explained in Arar's Opening Brief, Defendants grossly misstate the law. Neither the Supreme Court nor this Court has ever held that federal officials are constitutionally free to inflict torture on foreign nationals abroad. The Supreme Court's decisions involving the rights of foreign nationals held abroad are quite specific, and hold only, for example, that foreign nationals seeking the privilege of admission are not entitled to due process in connection with their admission, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), that foreign nationals do not have a Fourth Amendment right to object to searches of their homes abroad, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and that enemy aliens tried and convicted abroad for war crimes do not have a right to seek habeas corpus. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). These cases do not, by any stretch of the imagination, stand for the remarkable proposition advanced by Defendants — that federal officials may torture foreign nationals abroad with constitutional impunity. Given this Court's unequivocal declaration in *Filártiga v. Peña-Irala,* 630 F.2d 876, 890 (2d Cir. 1980), that the torturer is the "enemy of all mankind," there is no

basis for accepting such a principle here. *See* Arar Br. at 35-37. Because U.S. involvement in torture "shocks the conscience" it violates substantive due process, no matter where it is inflicted. *Cf. Rochin v. California*, 342 U.S. 165, 209 (1952).

Because Arar's Complaint alleges that Defendants' involvement in his torture began when he was detained in the United States, it is unnecessary to decide the full extent of constitutional protection enjoyed by foreign nationals subjected to federal officials' abuse while held abroad. Defendants do not dispute that substantive due process would prohibit federal officials from torturing an unadmitted foreign national detained in the United States. Thompson at 45-46 (recognizing that unadmitted aliens have constitutional protection against gross physical abuse). They also do not and could not claim that federal officials could have avoided that constitutional mandate by handing Arar over to a private gang in the U.S. so that it could torture him. *Dwares v. City of New York,* 985 F.2d 94 (2d Cir. 1993). But Defendants maintain that they somehow escaped this most fundamental constitutional prohibition by transporting Arar to a foreign country to be tortured there. Indeed, on Defendants' logic, they would not even need to rely on other countries to do their dirty work; they would be constitutionally free to inflict the torture themselves once they transferred him abroad. Substantive due process does not permit such evasion. It would have "shocked the conscience" to inflict torture on Arar in Brooklyn. It is no less conscience-shocking to manipulate

the immigration process to send him from Brooklyn to another country for that precise purpose.

Defendants claim that even where federal officials "were in the United States" when they conspired to torture someone abroad, the Fifth Amendment does not apply if the actual torture occurs in a foreign country." Thompson Br. at 36-37 (citing *Verdugo-Urquidez*, 494 U.S. at 262, and *Harbury v. Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000), *rev'd*, 536 U.S. 403 (2002)); U.S. Br. at 28. But neither *Verdugo-Urquidez* nor *Harbury* supports the broad proposition Defendants advance. *Verdugo-Urquidez* was expressly limited to the Fourth Amendment warrant requirement. The plurality held that the Fourth Amendment's reference to "the people" did not include foreign nationals who did not voluntarily come to the United States, 494 U.S. at 266 (opinion of Rehnquist, C.J.), while Justice Kennedy, who provided the crucial fifth vote, reasoned only that applying the Fourth Amendment to searches abroad would be anomalous, and therefore that particular amendment ought not apply. 494 U.S. at 277-78 (Kennedy, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957)). Had defendants in that case sent Verdugo-Urquidez back to Mexico for the purpose of having him tortured, neither the plurality's nor Justice Kennedy's rationale would have led to the conclusion that the Fifth Amendment was not implicated**.**

Nor does *Harbury* govern here. In that case, the court of appeals for the District of Columbia, in a decision reversed on other grounds by the Supreme Court, rejected the argument that the Fifth Amendment applies to torture of a foreign national abroad when U.S. officials allegedly conspired within the United States to have the victim tortured abroad. 233 F.3d at 603-04. In doing so, the court expressly distinguished cases extending Fifth Amendment protection to excludable aliens physically present in the United States, and to aliens whose torture abroad would "threaten the integrity of the United States judicial process." *Id.* (citing *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974)).

This case is distinguishable on both grounds. Arar was physically present and in *U.S. custody in this country* when Defendants began the course of conduct that intentionally subjected him to torture and arbitrary detention. Furthermore, Defendants employed the United States legal process for that conscience-shocking end, thereby directly implicating the integrity of that process.

That Arar's constitutional violation arose here in the United States is shown by the "state-created danger" doctrine, which this Court has applied to hold New York police officers liable where they let a gang know that they would look the other way as it beat up plaintiff. *Dwares,* 985 F.2d at 99. If due process is violated by that degree of government complicity in a third party's physical abuse, it necessarily follows that due process is violated where, as alleged here, Defendants

actually conspired with the third party (in this case, Syrian security services) to deliver the victim and have him tortured.

Citing two cases from other circuits, Defendants argue that the "state created danger" doctrine "has no place in our immigration jurisprudence," and that removal decisions that create a heightened risk of torture do not violate the Constitution. U.S. Br. at 33-35, Thompson Br. at 37-39, citing *Kamara v. Att'y Gen.*, 420 F.3d 202, 217 (3d Cir. 2005), *Enwonwu v. Gonzales*, 438 F.3d 22 (1st Cir. 2006). Those cases are inapposite for two reasons. First, they involved typical CAT claims, namely that the government erred in declining to grant CAT relief where, in the foreign national's view, there was a significant likelihood that he would be tortured when removed. Arar, by contrast, does not argue that the government erred or that its actions increased the risk that he would be tortured, but that it intentionally transported him to Syria for the very purpose of having him tortured. Neither the First nor the Third Circuit confronted such an allegation. It may make sense to bar use of the state-created danger doctrine when the foreign national claims that the government erroneously denied him CAT relief. In that situation, the immigration processes are not themselves being misused for unconstitutional purposes. In this case, by contrast, the immigration processes were exploited to achieve an unconstitutional purpose —a purpose that neither Congress nor the Constitution would condone.

Next, both the First and Third Circuits emphasized that Congress had provided an alternative avenue of review for claims that removal might result in torture. *Enwonwu*, 438 F.3d at 31, *Kamara*, 420 F.3d at 218. Indeed, both cases were remanded for a determination of whether CAT relief was warranted. Here, by contrast, as noted above, Defendants deliberately obstructed Arar's access to the congressionally authorized CAT remedy, so that for Arar, "there is no possible remedy" except for a *Bivens* claim. *Enwonwu,* 438 F.3d at 31.[5]

Defendants also argue that the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." Thompson Br. at 21 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)); Ashcroft Br. at 29; U.S. Br. at 35-36; Thompson Br. at 22-23. Arar, however, does not seek to "extend" *Bivens* liability, but only to apply the "core holding of *Bivens*

[5] *Linnas v. INS*, 790 F.2d 1024 (2d Cir. 1986), which Defendant Thompson characterizes as this Court's rejection of the "state-created danger" theory, only highlights the sharp distinction between the cases Defendants rely upon and Arar's claim here. The *Linnas* Court refused to enjoin Linnas' removal to the Soviet Union despite his claim that he would be denied due process if sent there because the Court's jurisdiction did not extend to supervising the Soviet judicial system. Linnas did not claim that the United States was conspiring with the Soviets to deny him due process, and such a claim would have obviously presented a different question. Indeed, the Court noted that the government had sought in good faith to find another country to accept Linnas and that those efforts were not "a mere facade," suggesting that it would have treated a government conspiracy to evade U.S. law differently. *Id.* at 1031. Moreover, the government in *Linnas* did not obstruct the procedures that Congress had mandated to protect his rights, but rather "meticulously observed" them. *Id.*

liability" already recognized in *Carlson v. Green*, 446 U.S. 14 (1980), that federal officials cannot inflict cruel and inhumane treatment on people they detain. *Malesko,* 534 U.S. at 67. As the Court said in *Malesko*:

> In thirty years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct.

Id. at 70 (emphasis in original).

Here, Arar alleges that individual officers acted unconstitutionally, and he has no alternative remedy. Under these circumstances, it is no "extension" to hold defendants liable in damages.

II. ARAR HAS STATED A CLAIM FOR SUBSTANTIVE DUE PROCESS VIOLATIONS DURING HIS DOMESTIC DETENTION UNDER *BIVENS.*

Arar also alleges that his substantive due process rights were violated by the unjustified treatment he received while in U.S. custody, and by defendants' interference with his right to an attorney, and with his separate right to access to court. The district court erroneously required Arar to replead these claims, which are more than adequately plead on the face of the complaint.

A. Arar Has Stated a Claim for Violation of His Right to Substantive Due Process Based on His Conditions of Confinement and Treatment while in U.S. Custody.

Arar has alleged that he was held in solitary confinement, chained and shackled, denied food and purposefully deprived of sleep for extended periods of time. A.30, ¶ 32. He was subjected to excessively long interrogations conducted at odd hours of the day and night and otherwise isolated completely from the outside world. A. 29-31, ¶¶ 27-29, 31–33, 37. He was strip searched, chained, and shackled without any legitimate penological purpose. A. 30, 32-34, ¶ 32, 34, 36, 43, 45, 49. As stated in Arar's opening brief, the District Court erred by requiring Arar to plead "gross physical abuse." Arar Br. at 45-49. Substantive due process prohibits inhumane treatment that amounts to punishment; this includes all restrictions that are not rationally related to a legitimate governmental interest. Arar's allegations, however, satisfy either standard.

In defending the "gross physical abuse" standard, Defendants rely heavily on this Court's statement in a footnote in *Correa v. Thornburgh* that "[o]ther than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection." 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). That statement does not resolve the matter for two reasons.

First, Arar had established ties to the United States during previous stays, and thus is not subject to the same standard applicable to excludable aliens. Arar

had authorization to work here in the United States, and was employed by MathWorks, a Massachusetts' company between 1999 and 2002. A.23, ¶ 12. For the time that Arar was employed at MathWorks, he lived in Boston. *Id.* *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (holding alien's regular and lawful entry into the United States pursuant to a valid border-crossing rises to the level of "substantial connections" to the United States); *cf. United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (relying on fact that foreign national brought involuntarily into the United States for prosecution had "no *previous* significant voluntary connection with the United States" to hold that he was not part of the "people" for purposes of constitutional analysis).

Second, and more importantly, the *Correa* court did not invoke the term "gross physical abuse" as a pleading standard, but only as shorthand to signify that excludable aliens have a right to humane treatment protected by substantive due process. The Court did not apply the standard, because the case involved only an excludable alien's challenge to her exclusion order, and not a challenge to conditions of confinement. 901 F.2d at 1168.

The *Correa* court's invocation of the phrase "gross physical abuse" stemmed from the Fifth Circuit's opinion in *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987). *Correa*, 901 F.2d at 1171 n.5 (citing *Lynch*). In *Lynch*, the court described "gross physical abuse," 810 F.2d at 1374, alleged by the Jamaican

plaintiffs in finding a "right of excludable aliens detained within the United States territory to humane treatment." *Id.* at 1373. "Gross physical abuse" was merely a characterization of the aliens' allegations. The court clearly identified the right as a "right to humane treatment."

Lynch involved allegations that the New Orleans harbor police engaged in gross physical abuse of excludable aliens in their custody. Defendants sought qualified immunity by arguing that excludable aliens have "virtually no constitutional rights." *Id.* at 1372. The Fifth Circuit disagreed, and held that due process protections "apply universally to 'all persons within the territorial jurisdiction, without regard to any difference of race, color, or of nationality.'" *Id.* at 1373, *quoting Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The *Lynch* Court reasoned that the "entry fiction" may limit "aliens' rights with regard to immigration and deportation proceedings" but "does not limit the right of excludable aliens detained within the United States territory to *humane treatment*." *Id.* at 1373 (emphasis added); *see also*, *Martinez-Aguero*, 459 F.3d at 623. The government's interest in determining who may enter the country "plays virtually no role in determining whether the Constitution affords any protection to excludable aliens while they are being detained by state officials and awaiting

deportation." *Id.* at 1374.[6] Thus, there is no legitimate reason to afford excludable aliens any less protection against inhumane treatment than any other person detained in the United States by U.S. officials. *Zadvydas v. Davis*, 533 U.S. 678 (2001) does not hold otherwise, as the Supreme Court did not have the opportunity to consider the extent to which substantive due process protects excludable aliens. Nor is the Court's dictum distinguishing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), relevant, as that case involved the power of the government to deny an alien entry into this country. *See* Arar Br. at 31-32 n.12. *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997), also relied on by Defendants, is irrelevant for the same reasons.

As in any due process inquiry, the Court must decide whether the treatment serves some "*legitimate governmental purpose*." *Bell v. Wolfish*, 441 U.S. 520, 538 (1979) (emphasis added). When a "restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not

[6] Defendants also rely on an Eleventh Circuit case, which quotes the *Lynch* court's description of "gross physical abuse" to dismiss conditions and abuse challenges by excludable aliens. *See Adras v. Nelson*, 917 F.2d 1552, 1559-60 (11th Cir. 1990) (dismissing allegations by Haitian refuges of "severe overcrowding, insufficient nourishment, inadequate medical treatment and other conditions of ill-treatment arising from inadequate facilities and care" as "harsh or less than ideal" but "not approaching the 'gross' physical abuse outlined in *Lynch*"). *Adras* is wrongly decided, for the reasons explained in the text.

constitutionally be inflicted upon detainees *qua* detainees." *Bell*, 441 U.S. at 539. Thus, the Court in *Lynch* asked whether the mistreatment alleged there advanced any "articulable, rational public interest." *Lynch*, 810 F.2d at 1375.

An individual's status as an alien at the border may support different governmental interests than those presented by a pre-trial detainee and may thus allow longer confinement, or confinement on less evidence or with lesser process, but it does not change the meaning of the word "punishment." Defendants do not (and cannot on a motion to dismiss) cite any legitimate non-punitive purpose to justify Arar's treatment and they fail to explain why abuse that is unjustified by any legitimate governmental purpose must be both "gross" and "physical" to amount to "inhumane" treatment or "punishment" in violation of due process.

Defendant Blackman accepts the *Bell* standard and primarily relies on cases regarding the rights of pre-trial detainees and convicted prisoners to argue that it has not been met by Arar's allegations. Blackman Br. at 16, 20. Each of the cases Blackman relies upon, however, involves a determination on summary judgment, or judgment after trial, that various restraints or searches in fact served legitimate penological interests based on developed facts. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (shackling of "dangerous inmate[s]"); *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993) (same); *Jackson v. Cain*, 864 F.2d 1235, 1244 (5th Cir. 1989) (shackling of inmates *outside the prison*); *Hay v. Waldron*, 834 F.2d

481, 485-86 (5th Cir. 1987) (strip searches in response to wave of violence within target population). No legitimate penological purpose for Arar's treatment can be found on the face of the complaint, nor can Defendants invent one at this stage in the proceedings. A determination of the reasonableness of Defendants' treatment of Arar cannot be made prior to discovery. *See* Arar Br. at 48.

Even if this Court adopts the "gross physical abuse" standard urged by the District Court, that standard has been met by Arar's complaint. *See id*. at 49-50. The Court in *Lynch* did not require allegations of "severe physical injury," as Defendants suggest, but only allegations of injury serious enough to constitute deprivation of a constitutionally protected liberty interest. 810 F.2d at 1376 (holding stowaway's allegations of emotional or mental injury resulting from beatings and harsh treatment sufficient to allow discovery). Arar, too, has alleged significant injury. *See* A.29-33. And no matter which standard applies, Defendants cannot be entitled to qualified immunity for abuse or restrictive conditions unjustified by any legitimate penological interest. *Lynch,* 810 F.2d at 1375.[7]

[7]Ashcroft suggests that claim four must be dismissed because Arar declined to re-plead the claim after dismissal by the District Court. Ashcroft Br. at 58. Ashcroft cites no precedent to support this argument, nor is counsel aware of any.

B. Arar Was Deprived of his Due Process Right to Counsel.

Defendants schemed and lied to prevent Arar from obtaining the assistance of his counsel to defend himself in his immigration proceedings and to invoke judicial review, so that he was unable to stop their plan to send him to Syria to be detained and interrogated under torture. It is difficult to conceive of a more blatant interference with due process or a more transparently odious purpose. Defendants and the District Court erroneously conflated Arar's right to *counsel* claim with the right to access the *courts* at issue in *Christopher v. Harbury*, 536 U.S. 403 (2002). Ashcroft Br. at 60; Mueller Br. at 44-46; Blackman Br. at 22-23; McElroy Br. at 13. Although interrelated, the "two rights are not the same," and require distinct legal treatment. *Bourdon v. Loughren*, 386 F.3d 88, 90 (2d Cir. 2004) (quoting *Benjamin v. Fraser*, 264 F.3d 175, 186 (2d Cir. 2001). *Christopher* involved no claim of interference with access to a lawyer, but a claim that defendants' failure to disclose information inhibited her from filing a lawsuit. 536 U.S. at 419.

An alien's right to counsel is a "fundamental right derived from the Sixth Amendment right to counsel in criminal cases and the Fifth Amendment right to due process in civil cases." *Waldron v. INS,* 17 F.3d 511, 517 (2d Cir. 1993); *see also Michel v. INS*, 206 F.3d 253, 258 (2d Cir. 2000); *Montilla v. INS,* 926 F.2d 162, 166 (2d Cir. 1991) ("[T]he Due Process clause and the Immigration and Nationality Act affords an alien the right to counsel of his own choice at his own

expense."). "[I]n the context of the right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right." *Benjamin*, 264 F.3d at 185.

Arar not only had a due process right to counsel under the Fifth Amendment, but also by statute and under the regulations. Arar had a right to the assistance of his attorney before being deemed inadmissible, before being removed to a country where he would be tortured, and in order to appeal as of right to this Court. Due process required at a minimum that Defendants not intentionally interfere with Arar's access to his own lawyer to represent him for these purposes.

Without counsel, Arar was unable to defend himself in the immigration proceedings. *See, e.g., Turkmen v. Ashcroft*, No. 02-cv-2307, 2006 WL 1662663, at *21 (E.D.N.Y. June 14, 2006), *appeal docketed*, No. 06-3745 (2d Cir. Aug. 10, 2006). The INA specifically provides for representation for someone in Arar's situation. Section 235 of the INA relating to removal on security grounds provides that "[t]he alien or the alien's representative [including an attorney] may submit a written statement and additional information for consideration by the Attorney General." 8 U.S.C. § 1225(c)(3); 8 C.F.R. § 235.8(a); 8 C.F.R. § 292.1(a)(1). But Arar was never even provided the means to prepare a written statement, and the day after Arar met with his lawyer, officials impeded her from finding him by

lying about his whereabouts while they prepared to fly him to Syria via Jordan that very night.[8]

Arar had a substantive right not to be sent to Syria to be tortured under Article 3 of CAT, and therefore a constitutional right to due process in proceedings designed to adjudicate that right. The Immigration and Naturalization Service ("INS") was required to "assess the applicability of Article 3 [of CAT] through the removal process to ensure that a removal order [would] not be executed under circumstances that would violate the obligations of the United States under Article 3." 8 C.F.R. § 208.18(d); *see also* Ashcroft Br. at 17. This mandatory assessment certainly requires due process, and excludable aliens are entitled to be represented by counsel in that process.[9]

---

[8] *See infra,* Sections IV(A) and V.

[9] *See, e.g.,* Administrative Procedure Act, 5 U.S.C. § 555(b) (2002) (A person compelled to appear before an agency or agency representative is "entitled to be accompanied, represented, and advised by counsel."); Representation and Appearances, 8 C.F.R. § 292.5(b) (2002) (providing right to representation by an attorney whenever an examination is provided); 8 C.F.R. § 3.61(a) (2002) (requiring aliens in immigration proceedings to be given a list of free legal service providers); Representation and Appearances, 8 C.F.R. § 292.5(a) (2002) (requiring service to be upon attorney of record). Notably Arar was provided a list of attorneys, A.89, but his attorney was *not* served with his final order of inadmissibility. A.86. Moreover, aliens who express a fear of torture and undergo a credible fear interview have the right to consult with someone before the interview and have them attend. Immigration and Nationality, 8 U.S.C. § 1225(b)(1)(B)(iv); Inspection of Persons Applying for Admission, 8 C.F.R. § 235.3(b)(4) (2002); Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.30(d)(4) (2002).

Arar also had a right to obtain assistance from his counsel in order to vindicate his statutory rights to petition this Court to review his removal and file a habeas corpus petition. Arar had a constitutional due process right to invoke CAT and FARRA, the mandatory prohibition against being sent to a country where he would be tortured. *See, e.g., Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). In *United States v. Perez*, 330 F.3d 97, 102-04 (2d Cir. 2003), this Court found that an alien's Fifth Amendment due process rights were violated because ineffective assistance of counsel deprived him of the opportunity for judicial review, rendering the entry of his deportation order fundamentally unfair. If ineffective assistance of counsel can violate due process, surely affirmative governmental interference with an individual's statutory and constitutional right to counsel does so.

Defendant Blackman argues that Arar had no right to counsel to challenge his deportation proceeding, but the authorities he cites do not support that proposition.[10] Blackman Br. at 24. For example, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), refused to apply the Fourth Amendment exclusionary rule to civil deportation proceedings, just as the Court has refused to apply the exclusionary rule to all forms of civil proceedings. Moreover, the Court in *Lopez-Mendoza*

---

[10] Blackman incorrectly presumes that Arar seeks a remedy only because Defendants prevented him from having counsel during interrogations, not because he was removed without the benefit of counsel. Blackman Br. at 23. Arar seeks a remedy on both accounts.

qualified its holding by noting that an egregious violation "might transgress notions of fundamental fairness." *Id.* at 1051, n.5 (citing *Matter of Garcia,* 17 I. & N. Dec. 319, 321 (BIA 1980) (finding due process warranted excluding involuntary admissions where government officials interfered with alien's attempts to communicate with his attorney)).

Similarly, *Michelson v. INS,* 897 F.2d 465, 468 (10th Cir. 1990) held that "lack of appointed counsel [at government expense] does not provide a valid ground for challenging the order of deportation because he has not shown prejudice which would cast doubt on the fundamental fairness of the proceeding." This a far different question from whether Arar had a right to have Defendants not interfere with his own lawyer, who was retained at his *own* expense. In addition, *Michelson* suggested that there might even be a right to *appointed* counsel in a civil deportation if doubts were raised about the fundamental fairness of the proceeding.[11] *Id.*

[11] Blackman's reliance on Sixth Amendment cases brought by convicted prisoners is similarly misplaced. Blackman Br. at 24. *United States v. Gouveia*, 467 U.S. 180 (1984), held that the Sixth Amendment does not require *appointment* of counsel to indigent inmates being investigated for other crimes, again a very different question than whether Arar had a right to assistance from his own counsel. *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999) held that the Sixth Amendment right to counsel does not attach until prosecution is commenced, but considered that it might attach earlier if the state and federal authorities had colluded to manipulate the timing of the state dismissal and the federal charges in order to deprive the suspect of his right to counsel.

Blackman argues that Arar was not prejudiced by the interference with his right to an attorney because there was little an attorney could have done for him if his exclusion was lawful and if he has no *Bivens* remedy. Blackman Br. at 23. But one need not show prejudice to obtain relief where "fundamental rights derived from the Constitution or federal statutes are implicated, such as the right to counsel." *Waldron,* 17 F.3d at 518 (citing *Montilla,* 926 F.2d at 169). Arar's attorney could have sought to prevent his removal to Syria on the grounds that he would be tortured had she not been prevented from doing so. Both the District Court and Defendants claim that "any denial of access claim must concern more than his removal" on the incorrect premise that Arar was not challenging his removal. SPA.82; Blackman Br. at 22; Mueller Br. at 45. But Arar does challenge Defendants' "removal" of him to Syria to be tortured, and the denial of his access to counsel in order to effect that "removal."

C. Arar's Access to the Courts Claim is Not Precluded by *Christopher v. Harbury.*

In addition to Arar's access to counsel claim, he also alleges that Defendants violated his legally distinct due process right of access to the courts by preventing him from seeking relief under FARRA or CAT through a petition for review of his removal or habeas corpus. That claim falls squarely within the parameters of permissible court access claims set forth by *Christopher v. Harbury*, 536 U.S. 403 (2002). Harbury's claim failed for two reasons, both of which do not apply here.

Unlike Harbury, Arar had a "separate and distinct right to seek judicial relief," an underlying claim that Defendants' conduct compromised – namely a right to petition the Court to enjoin his removal to a country that would torture him, as a violation of FARRA and CAT.[12] 536 U.S. at 415, 418. Defendants blocked Arar and his counsel from being able to bring a claim to stop Defendants from sending him to Syria to be tortured. Arar adequately pled that Defendants removed Arar to Syria in direct contravention of CAT, failing to consider Article 3 of CAT, as required by 8 C.R.F. §235.8(b)(4), and precluded Arar from petitioning the courts for redress of these grievances. A.20, A.25, A.42. Harbury had not stated any underlying claim in her complaint. 536 U.S. at 418. Defendants precluded Arar from bringing a claim for injunctive relief to stop his removal to Syria in violation of Article 3 of CAT, and FARRA, the statute enacted to implement it.

[12] Mueller incorrectly claims that Arar distinguishes his claim from that in *Christopher* because of the nature of the *underlying* claim that he was precluded from grieving, i.e., a constitutional or statutory claim as opposed to a tort claim. Mueller Br. at 46. Although there is authority supporting the unique treatment afforded a detainee's constitutional claims, *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 419 (1974), Arar does not rely on the nature of the underlying claim. Arar's access to *counsel* claim, which was not at issue in *Christopher,* is not contingent on *any* underlying claim. Harbury had not alleged that Defendants had any duty to facilitate her access to counsel or the courts, as neither she nor her husband were detained in U.S. custody or facing administrative proceedings. 536 U.S. at 410, n.3. Arar's access to *courts* claim is distinguishable from Harbury's because he seeks relief that is no longer available on an underlying claim that he was prevented from bringing. Arar was detained in isolation, denied access to counsel, and whisked away on a jet in the middle of the night, and his lawyer was lied to about his location in order to prevent her from bringing a claim on his behalf.

Even assuming that Harbury had stated an underlying claim that she was prevented from bringing – a claim for intentional infliction of emotion distress – her access to courts claim still failed because she did not seek any relief that was no longer available on the underlying claim. 536 U.S. at 421-22. Arar, however, seeks damages for Defendants' obstruction of his underlying FARRA/CAT claim under which he could have petitioned the Court for injunctive relief. Unlike Harbury, Arar seeks a remedy that he cannot now obtain on an existing FARRA/CAT claim, because it is too late for Arar to enjoin Defendants from sending him to Syria, and he is statutorily precluded from bringing a damages claim to remedy Defendants' violation of FARRA/CAT. FARRA, § 2242(d). In contrast, the same underlying tort claims which Harbury maintained she was prevented from bringing were still surviving and before the court, in addition to her access to courts claim. *Christopher*, 536 U.S. at 422. Damages relief on Arar's access to courts claim would address an injury in a way that could not be addressed by his underlying claim, unlike in *Christopher*. Whether Arar can maintain a *Bivens* or TVPA claim for damages in this suit is inapposite, as it is his FARRA/CAT claim that Defendants prevented him from grieving, and for which he cannot now obtain relief.

III. ARAR HAS STATED A CLAIM UNDER THE TVPA BY ALLEGING THAT DEFENDANTS SUBJECTED HIM TO TORTURE UNDER COLOR OF SYRIAN LAW.

As explained in Arar's opening brief, had private parties conspired with the Syrians to subject him to torture in Syria, they would plainly be liable under the TVPA. 28 U.S.C. § 1350, note. Defendants nonetheless argue that they cannot be liable under the same statute because 1) they were U.S. officials, and 2) they were not the ones who physically beat Arar and whipped him with electrical cables, but were only alleged to have aided and abetted and conspired in subjecting him to this torture.[13] The TVPA imposes liability on *anyone* who participates in subjecting an individual to torture under color of foreign law, and creates no special exemption for federal officials who *also* abuse their own authority in so conspiring.

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

The TVPA imposes liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture. TVPA, § 2(a)(1). Defendants do not argue that there was no foreign state action here, but maintain that they cannot be liable under the TVPA even when they conspire with foreign officials to subject an individual to torture. Binding

[13] Defendants do not argue that the TVPA fails to protect foreign nationals, as decided *sua sponte* by the District Court, so this Court should reverse, finding that all individuals, including foreign nationals, may bring TVPA claims. *See* Arar Br. at 18-20.

precedent from this Court holds, however, that the TVPA's "under color of law" language is to be construed as that term is construed under 42 U.S.C. §1983, *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995), and that federal officials who conspire with state officials to violate an individual's rights are just as liable under §1983 as private parties who so conspire. *Kletschka v. Driver,* 411 F.2d 436, 448 (2d Cir. 1969).

Defendants do not dispute that this Court's precedent and the TVPA's legislative history direct courts to look to § 1983 jurisprudence in construing the "color of law" requirement. *Kadic,* 70 F.3d at 245; S. Rep. No. 102-249, 1991 WL 258662 (Leg. History), at *8 (1991); H.R. Rep. No. 102-367, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87. Instead, Defendants argue that § 1983 "color of law" jurisprudence does not apply in the foreign or "multinational" context, Mueller Br. at 17, or to actors "who do not share the same body of law and practice." Ashcroft Br. at 12. But the TVPA "foreign" state action requirement necessarily implicates a foreign or multinational context. Defendants cannot evade Congress's use of the term under "color of law" in the TVPA, nor the § 1983 jurisprudence used to interpret it.

Defendants acted under color of Syrian law because, as alleged in the Complaint, they were "willful participant(s) in joint activity with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (finding private actor who

conspires with state official acts under color of law under § 1983); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (same); *United States v. Price*, 383 U.S. 787, 794 (1966). While these specific cases involved private rather than federal actors, this Court has held that there is "no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons." *Kletschka,* 411 F.2d at 448. Arar has therefore stated a claim under the TVPA, as he alleged that "defendants operated under color of law of a foreign nation by conspiring with, or aiding and abetting, Syrian officials in their unlawful detention and torture of Arar". SPA.31-32; *see also* A.38.

Describing *Kletschka* as "elderly," and ignoring the Supreme Court precedent holding that defendants who conspire with state officials act under color of law, Defendant Thompson incorrectly claims that Arar relies on the incorrect color-of-law tests that were disavowed by *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40 (1999).[14] Thompson Br. at 53, 58. As the Supreme Court has even more recently reiterated, however, state action can be found in various ways, including

[14] Arar does not, as Thompson suggests, rely on the *Sullivan* close nexus test governing state regulation of private activity, 526 U.S. at 52, nor the symbiotic relationship test involving interdependence with private entities, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), or the test concerning the use of a state's prejudgment property attachment procedures. *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 939, n.21 (1982).

when the State exercises coercive power or provides significant encouragement, when a private entity is controlled by the State, has been delegated a public function, or is entwined with the government, "*or* when a private actor operates as a willful participant in joint activity with the State or its agents." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001) (emphasis added) (internal quotation marks omitted). This Court has made clear that where a plaintiff makes § 1983 allegations that private actors conspired with state officials to violate the plaintiff's rights, the "relevant precedent is not *Lugar*, but rather *Adickes*." *Conway v. Mt. Kisco*, 750 F.2d 205, 214, n.12 (2d Cir. 1984) *reaff'd*, 758 F.2d 46 (2d Cir. 1985), *cert. dismissed sub nom. Cerbone v. Conway*, 479 U.S. 84 (1986).[15]

Defendants argue that in order to be liable under TVPA's analogue to § 1983, they must have acted under the control or influence of Syria. Mueller Br. at 18-19; Thompson Br. at 56-57; U.S. Br. at 53. But this Court's decisions, ignored by Defendants, confirm that non-state defendants acting jointly with state officials need not be controlled by them to act under color of law. Arar Br. at 24, n.8;

[15] *Case v. Milewski*, 327 F.3d 564, 567 (7th Cir. 2003), cited by Ashcroft at 14, n.5, confirms that defendants may act under color of state law "when the state has cloaked the defendants in some degree of authority," *or* when defendants have "conspired or acted in concert with state officials." *Case* also supports Arar's position by assuming "that a § 1983 action can lie against federal employees—as it can against private individuals—if they conspire or act in concert with state officials . . . ." *Id.*

Hughes v. Patrolmen's Benevolent Ass'n, 850 F.2d 876, 880-81 (2d Cir. 1988); *Carroll v. Blinken*, 42 F.3d 122, 131 (2d Cir. 1994); *see also, Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980) (finding allegations that defendant hospital employees gave plaintiff's personal effects and surgically removed items to the police constituted a conspiracy allegation and met the § 1983 *Adickes* joint activity color of law test).[16]

In the face of this overwhelming precedent, Defendants rely primarily on a decision from the Ninth Circuit and a D.C. district court opinion. Defendants argue that *Billings v. United States*, 57 F.3d 797 (9th Cir. 1995), requires that federal officials must act at the behest of state officials in order to act under color of state law. Thompson Br. at 57-58; Mueller Br. at 18-19; U.S. Br. at 53. *Billings*, which devoted two paragraphs to the § 1983 issue, is inapplicable here. The court found that the federal and state officials had not "acted jointly." 57 F.3d at 801. There simply was no conspiracy or common scheme alleged in *Billings*, as there

[16] Non-state defendants also act under color of law where *they exert influence* over the state actors. Arar Br. at 23; *Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1546 (9th Cir. 1989). Under the TVPA, American corporations have been found to act under color of foreign law when a foreign military acts as their agent. *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175 (C.D. Cal. 2005), *appeal docketed*, No. 05-56175, 05-56178, 05-56056 (9th Cir. Aug. 8, 2005). Arar has alleged that the Syrians acted at Defendants' behest, so this is an independent basis for finding that Defendants acted under color of Syrian law (notwithstanding their own independent abuse of federal law).

was no allegation that the federal officials handed plaintiff to the state officials to effectuate an unlawful act, as there is here, nor of any other dealings between the officials. The court's dictum that "if" the officials had acted jointly it would have been under color of federal law directly contradicts the holdings of this Court, and deserves no weight.

Defendants' reliance on *Harbury v. Hayden,* 444 F. Supp. 2d 19 (D.D.C. 2006), *appeal docketed*, No. 06-5282 (D.C. Cir. Sept. 26, 2006) is similarly misplaced. Thompson Br. at 51-53; Mueller Br. at 15-18; U.S. Br. at 49-51. *Harbury v. Hayden* erred in finding that in order for federal officials who conspire or act in concert with state officials to act under color of state law there must *also* be a misuse of power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 444 F. Supp. 2d at 42-43 (quoting *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031 (1941)). *West* and *Classic* do not stand for the proposition that in order to establish action under color of law, it is necessary to show anything more than conspiracy with state officials.[17] *Harbury v. Hayden* does not even cite the line of cases from this Court and the Supreme Court holding that non-state actors who willfully participate in joint

[17] *Harbury v. Hayden* similarly errs by relying on the incorrect premise that in order to act under color of foreign law, U.S. officials must have "acted as agents" of the foreign government. 444 F. Supp. 2d at 64.

activity with state officials act under color of state law, e.g., *Adickes*, 398 U.S. at 152.[18]

Defendants' argument that they could only act under color of Syrian law if they acted under the control of Syrian officials would lead to the incongruous result that they would be liable if controlled by Syrian officials, but not if they played an even more culpable role by either acting as full partners with the Syrians, or by directing the Syrians. The TVPA should not be interpreted to produce such an absurd result, especially considering Congress' clear intent to hold liable all who subject individuals to torture under color of foreign law. *See, e.g., Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).

Defendants' argument that they were acting under color of U.S. law —and only U.S. law —because they acted by virtue of their government positions is contrary to *Kletschka,* which found that federal officials acted under color of state

[18] Defendant Ashcroft claims there is no state action "for federal defendants where the interaction was one of 'cooperation between state and federal bureaucracies acting in regulatory spheres. . . .'" Ashcroft Br. at 14 (quoting *Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 154 (2d Cir. 2006). In *Beechwood,* this Court found that federal officials' cooperation with state officials did not rise to the level of a conspiracy because they were not doing so to accomplish an unlawful act. 436 F.3d at 154-55. Here, by contrast, Arar alleges that Defendants conspired with Syrian officials to subject him to torture, indisputably an unlawful act. *Beechwood* supports Arar's position that federal actors may act under color of state law by conspiring with state officials, without any requirement that federal officials act under their control or influence. 436 F.3d at 154.

law even where their conduct was made possible by virtue of their federal government positions. 411 F.2d at 449. Mueller Br. at 15; Ashcroft Br. at 10; Thompson Br. at 51; U.S. Br. at 50. Attempting to support their position that as federal officials they cannot be held liable for conspiring to subject Arar to torture under color of Syrian law, Defendants cite *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006), which was dismissed on political question grounds. U.S. Br. at 56; Ashcroft Br. at 12; Mueller Br. at 15. The district court opinion in *Gonzalez-Vera*, however, supports Arar's position here, as it found that Kissinger, a U.S. official, did not act under color of Chilean law "because he was neither a higher official who authorized and directed acts of torture or extrajudicial killing nor an individual who acted in concert with a foreign state to commit such acts." *Gonzalez-Vera v. Kissinger*, No. 02-cv-02240, 2004 U.S. Dist. LEXIS 30256, at *34-36 (D.D.C. Sept. 17, 2004), *aff'd on other grounds,* 449 F.3d 1260 (D.C. Cir. 2006).

Defendants also rely on one sentence of dictum in *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005). Thompson Br. at 51; Mueller Br. at 15-16; U.S. Br. at 50; Ashcroft Br. at 12. The court in *Schneider*, without analysis or mention of § 1983, found Kissinger must have acted pursuant to U.S. law because he was carrying out the President's orders, even if his co-conspirators were acting under color of

foreign law. 310 F. Supp. 2d at 267. This dicta is inconsistent with this Court's binding precedent in *Kadic*, which directs courts to look to § 1983, and in *Kletschka*, which found that federal officials who conspire with state officials act under color of state law.[19]

Finally, Defendants warn that finding that U.S. officials could have acted under color of foreign law could have "significant foreign policy and political implication." Mueller Br. at 17; Ashcroft Br. at 12. But there is no reason that finding *U.S.* officials liable for subjecting someone to torture would have any greater foreign policy implications than holding *foreign* officials liable for such conduct. In enacting the TVPA, the political branches entrusted the resolution of claims of torture under color of law of a foreign nation to the judiciary, including claims against individuals who conspire with foreign officials to subject others to

[19] Defendants Ziglar and Thompson raise President George H.W. Bush's signing statement expressing his belief that Congress did not intend that the TVPA "should apply to United States Armed Forces or law enforcement operations." Ziglar Br. at 20; Thompson Br. at 53; Statement By Pres. George H. W. Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992). Defendants cite no authority that the President's belief about Congressional intent regarding the TVPA should be given any weight. In *United States v. Story*, this Court expressed "doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent," 891 F.2d 988, 994 (2d Cir. 1989), but looked to it because the Executive Branch had participated in negotiating compromise legislation, regarding which the "managers of the bill for the House and the Senate expressed diametrically opposing positions." *Id.* at 992. Defendants do not argue that the TVPA presidential signing statement illuminates congressional intent here, much less provide any authority.

torture. Arar has adequately alleged that Defendants subjected him to torture under color of foreign law by willfully participating in joint activity with Syrian officials, and has therefore stated a claim under the TVPA.

B. The TVPA Imposes Liability on Those Who Subject Individuals to Torture, Including Those who Aid and Abet or Conspire to Torture.

Contrary to the U.S.'s assertion, U.S. Br. at 54, Arar does not argue that Defendants may be liable under the TVPA for aiding and abetting or conspiring with someone who acted under color of law, but that Defendants *did* act under color of law by conspiring with, or willfully participating in joint activity with, Syrian officials.[20] *See, e.g., Sparks*, 449 U.S. at 27-28. Contrary to all TVPA precedent, Defendants claim that the District Court was incorrect in holding that the TVPA authorizes claims for "secondary liability" against individuals "who aid or abet, or conspire with, primary violators." SPA.23-24. In fact, "every court construing this question has…[held] that the TVPA can be interpreted to allow claims for secondary liability." SPA.24.[21]

---

[20] Notably, in another pending case the United States has acknowledging that liability under the TVPA "is not limited to those committing torture, and is properly read to encompass accessory liability of those who, acting under the color of foreign law, order or facilitate torture." Brief of the United States as Amicus Curiae at 25, *Corrie v. Caterpillar, Inc*., No. 05-36210 (9th Cir. Aug. 11, 2006).

[21] *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (holding that "TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the

The TVPA imposes liability on anyone who "subjects" someone to torture under authority or color of law of any foreign nation. TVPA, § 2(b)(1). Arar alleges that Defendants directly violated the TVPA by subjecting him to torture. A.38-A.39. The fact that they did so by conspiring with the Syrians does not in any way immunize them from liability. Looking to the definition of "subject," which "means to cause someone 'to undergo the action of something specified; to expose . . . to make liable or vulnerable,'" *Wiwa v. Royal Dutch Petroleum Co*., No. 96-cv-8386, 2002 WL 319887 at *15 (S.D.N.Y. Feb. 28, 2002) (quoting Random House Webster's College Dictionary (1999)), the *Wiwa* court found that "individuals who 'cause someone to undergo' torture or extrajudicial killing, as well as those who actually carry out the deed, could be held liable under the TVPA." *Id. See also* Amicus Center for International Human Rights of Northwestern University School of Law ("Northwestern Amicus") at 6.

---

violation"); *Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996) (finding liability attaches under the TVPA to those "who authorized, tolerated or knowingly ignored those acts is liable" without distinction); *Wiwa v. Royal Dutch Petroleum Co*., No. 96-cv-8386, 2002 WL 319887 at **15-16 (S.D.N.Y. Feb. 28, 2002) (holding that the TVPA includes liability for those who cause the victim to undergo torture, specifically including those who aid, abet, and conspire to torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) (holding that liability under the TVPA includes those who aid and abet torture); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002) (finding legislative intent that command responsibility liability attaches under the TVPA).

Mueller argues that this Court should not look to unanimous TVPA precedent permitting aiding and abetting and conspiracy claims, but instead to Ninth Circuit § 1983 jurisprudence interpreting the word "subjects" to require that a defendant must personally participate in a deprivation of rights. Mueller Br. at 23 (citing *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). Unlike the legal term of art "color of law," there is no authority, either in TVPA caselaw or legislative history, for looking to § 1983 jurisprudence to construe the common word "subjects."[22] Moreover, the actual Ninth Circuit test is that a "person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy,* 588 F.2d 740, 744 (9th Cir. 1978) (citation omitted). Even if the Ninth Circuit § 1983 test were applicable here, Arar has sufficiently alleged that Defendants "subjected" him to torture.

The U.S. and Mueller argue that the reasoning of *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), which construed § 10(b) of the Securities Exchange Act of 1934, precludes "secondary liability" under the TVPA.

[22] Words should be interpreted as taking "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

U.S. Br. at 54-57; Mueller Br. at 20-22. Every court to consider this argument has rejected it in the TVPA context. *See, e.g., Wiwa,* 2002 WL 319887, at **15-16; *Mujica*, 381 F. Supp. 2d at 1174. As the District Court properly held, *Central Bank* does not "require an unequivocal congressional mandate before allowing a claim for secondary liability. Rather, the case holds that the scope of liability must be based on a fair reading of statutory text." SPA.25.[23]

Central Bank found that the § 10(b) prohibition on certain manipulative or deceptive acts did not create a cause of action for conduct that aids and abets such acts, if the conduct itself it is not manipulative or deceptive. 511 U.S. at 175, 177. Section 10(b) liability could not be extended "beyond the scope of conduct prohibited by the statutory text."[24] *Id.* The issue is not whether the statute uses the words aiding and abetting or conspiracy, but whether the statute makes the alleged conduct a basis for liability. *See Boim v. Quranic Literacy Inst.,* 291 F.3d 1000, 1020-21 (7th Cir. 2002) (finding *Central Bank* did not preclude secondary liability

[23] The District Court also noted that the TVPA "provides an express cause of action," making the link to secondary liability less attenuated than in *Central Bank*, which "involved an aiding and abetting claim in the context of an implied, not express, right of action." SPA.25 (citing *Central Bank,* 511 U.S. at 173).

[24] Contrary to the U.S. and Mueller's assertions, *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 842 (2d Cir. 1988) provides no support for applying *Central Bank*'s reasoning to the TVPA, as it merely extended *Central Bank*'s aiding and abetting reasoning to conspiracy liability under the same statute, § 10(b). *See* U.S. Br. at 54; Mueller Br. at 21.

under the Anti-Terrorism Act of 1990 (ATA) because the prohibited activities – those that "involve" violent or dangerous criminal acts - subsume acts that aid and abet such activity); *see also Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (finding aiding and abetting and conspiracy liability under the ATA); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.* 530 U.S. 238, 246 (2000) (holding that ERISA reaches beyond the immediate wrongdoer because it does not limit the universe of possible defendants, but focuses on redressing the prohibited acts); *MCI Telecomms. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 130 (D.N.J. 1995) (the "fundamental question is whether the conduct complained of can be construed as that which the statute forbids").[25] Unlike § 10(b), the act of conspiring to torture, or aiding and abetting torture, is covered by the TVPA text that imposes liability for "subjecting" someone to torture. *See also* Northwestern Amicus, at 5-12.

[25] *MCI Telecomms. Corp.* and other cases applying *Central Bank*'s reasoning to other statutes are not to the contrary. *See* Mueller Br. at 21-22, citing *MCI Telecomms. Corp,* 881 F. Supp. at 130 (provision of Sherman Act that criminalizes monopolizing or conspiring to monopolize trade or commerce does not cover conduct that merely aids monopolistic conduct"); *In re Currency Conversion Fee Antitrust Litig*., 265 F. Supp. 2d 385, 431–33 (S.D.N.Y. 2003) (Truth in Lending Act provision that any "creditor" can be liable for breaching a duty does not apply to defendants who are not creditors and do not owe such a duty; *Pa. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 843 (3d Cir. 2000) (refusing to extend civil remedy to aiding and abetting a RICO conspiracy, where RICO explicitly prohibits conspiracy).

The TVPA Senate Report makes clear that the statute applies to those who "ordered, abetted, or assisted in the torture." S. Rep. No. 102-249, 1991 WL 258662, at *8. By contrast, nothing in the legislative history of § 10(b) indicated intent to impose aiding and abetting liability. *Central Bank,* 291 F.3d at 184; *see also Boim,* 291 F. 3d at 1010-11 (looked to legislative history to conclude ATA was intended to reach beyond those who committed the violent act). Nothing in the House Report conflicts with the Senate Report's assertion.[26]

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

Defendants next argue that they cannot be liable under the TVPA because they did not have "custody or physical control" of Arar. Mueller Br. at 29-32; Thompson Br. at 59-61. But the TVPA does not require that the "defendant" had custody or physical control over the torture victim in order to be held liable, but only that the "offender," *i.e.,* the torturer, did. *Id.* The TVPA's requirement that torture be "directed against an individual in the offender's custody or physical control" is in the definition of torture, and concerns whether "torture" occurred, not

[26] Without citing any authority, the U.S. and Mueller argue that the Court should disregard this statement of Congressional intent in the Senate Report, because the shorter House Report does not contain this language, and it was the House Bill that was passed. U.S. Br. at 55; Mueller Br. at 27. But the relevant statutory language —that an individual who "subjects" an individual to torture shall be liable —was substantively identical in the Senate Bill and the House Bill. *Compare* H.R. Rep. No. 102-367 *as reprinted in* 1992 U.S.C.C.A.N. 84, 84, *with* S. Rep. No. 102-249, 1991 WL 258662, at *3-4.

whether a specific defendant can be liable, which is determined by whether the defendant "subjected" an individual to torture. TVPA, § 3(b)(1).

In any event, courts have liberally construed the TVPA's custody or physical control requirement. In *Xuncax v. Gramajo*, the court found that plaintiff "was in the defendant's 'custody' for purposes of TVPA liability, given that the defendant had authority and discretion to order that [plaintiff] be released." 886 F. Supp. 162, 178, n.15 (D. Mass. 1995). *Xuncax* looked to the TVPA Senate Committee Report, which noted that "a higher official need not have personally performed or ordered the abuses in order to be held liable." *Id.* (quoting S. Rep. No. 102-249, 1991 WL 258662, at *9). *See also Hilao v. Estate of Marcos*, 103 F.3d 767, 778-779 (9th Cir. 1996) (stating claim for torture under the TVPA though plaintiff was never in the "custody or control" of defendant President Marcos, but in the custody and control of individuals under his command).

Defendants Mueller and Thompson claim that there is a difference between the "vertical control exercised by a higher official over his subordinates, as was the case [in *Xuncax*], and the degree of custody or control exercised by U.S. officials over Syrian officials, even if, as plaintiff alleges, the Syrians acted at the behest of U.S. officials." Mueller Br. at 30 (citing SPA.27); Thompson Br. at 60. Defendants provide no authority to support treating command responsibility

differently from conspiracy or aiding and abetting liability under the TVPA. To the contrary, courts have permitted TVPA claims to proceed under each theory.[27]

Arar alleges precisely the custody or control contemplated by the Senate's use of this term —he was subjected to torture while held in custody by Syrian officials acting in concert with and/or at Defendants' behest.[28] Defendants cannot avoid liability under the TVPA by delivering someone in their custody and control to the custody of others for the purpose of subjecting him to torture there.[29]

---

[27] *See, supra,* fn. 25.

[28] As Ashcroft noted, the custody or control requirement does not appear in CAT, but was originated as a U.S. understanding to its ratification of the treaty. Ashcroft Br. at 9. The provision was "intended to clarify the point that the convention does not apply to situations *before* custody is obtained, but rather comes into play when an individual has been subjected to the custody or control of a government official or agent acting on the official's behalf." *Id.* at 17 (emphasis added). *Convention Against Torture: Hearing before the Senate Comm. on Foreign Relations*, 101st Cong. 13 (1990) (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

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

D. Other Statutes Prohibiting Complicity In Torture Do Not Indicate Congressional Intent to Preclude a Remedy under the TVPA.

Defendants Ashcroft and Mueller argue that the District Court was correct in asserting that "the absence of a right of action under FARRA sheds light on the [TVPA], specifically with regard to 'whether Congress intended to create a remedy' under the TVPA in situations like Arar's." SPA.30; Ashcroft Br. at 16-17; Mueller Br. at 25-26. FARRA bars the "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. . . ." Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231).

But the "legislative decision not to create a new private remedy does not imply that a private remedy is not already available under" an existing statute. *Kadic,* 70 F.3d at 242. Moreover, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Defendants' counter-intuitive argument that they should not be liable under the TVPA because other statutes also prohibit the conduct alleged here must be rejected.[30]

[30] Mueller also contends that because the U.S. statute criminalizing torture explicitly criminalizes conspiracy to torture, 18 U.S.C. § 2340A(c) (1994), and provides no enforceable right in a civil proceeding, 18 U.S.C. § 2340B, Congress could not have intended the TVPA to provide damages for conspiracy to torture.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT HAD JURISDICTION OVER ARAR'S CLAIMS

The District Court properly found that it had jurisdiction under 28 U.S.C. § 1331 to entertain Arar's claims that his detention in the U.S. and transfer to Syria and subsequent detention and treatment there violated his constitutional and statutory rights. SPA.23, 45, 48-49 and 54. These claims "arise under" the Fifth Amendment and the TVPA, and that is all that § 1331 requires. Defendants contend, however, that jurisdiction over these claims is precluded by various provisions of the INA, which aim to consolidate judicial review of removal orders in the courts of appeals on a petition for review.[31]

The District Court properly rejected that argument for two reasons. First, and most importantly, Defendants affirmatively obstructed Arar's ability to file a petition for review. While there is evidence that Congress sought to *consolidate* review in the courts of appeals, there is no evidence that it intended to preclude *all*

Mueller Br. at 24-25. This argument fails for the same reason as the FARRA argument above, as the criminal torture statute was passed in 1994, two years *after* the TVPA was enacted. Moreover, to support the assertion that the TVPA covers aiders and abettors, the TVPA Senate Report cites the CAT requirement that state parties must ensure that any act of torture or act "which constitutes complicity or participation" in torture is a criminal offense. S. Rep. No. 102-249, 1991 WL 258662, at *9 n.16 (quoting Article 4(1) of CAT).

[31] Defendants do not dispute that the district court had subject matter jurisdiction over his claims that he was mistreated while in U.S. detention.

judicial review where the government affirmatively blocked access to the ordinary channels of review.

Second, some of Arar's claims raise issues distinct from his removal order, and could not have been presented in a petition for review —including claims for injuries that he suffered *after* he was removed, which by necessity could not have been presented on a petition for review. There is no evidence that Congress sought to preclude review of issues that *could not have been reviewed* on a petition for review. In short, while Congress surely intended to channel judicial review into the courts of appeals, Defendants' position in this case would have the effect not of channeling judicial review, but of eliminating it altogether.

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

Defendants argue that if Arar were concerned about being tortured in Syria, he should have filed a petition for review in the court of appeals while he was detained here. Defendants themselves, however, did everything within their power to ensure that Arar *could not* file such an action. They questioned him about his fears of being sent to Syria on a Sunday night without his lawyer present, and did not attempt to notify her until that same night, when they left a message on the voicemail machine at her office, which was of course closed on a Sunday. A.32 ¶¶

43-45. The next day, while Defendants were preparing to transfer Arar to *Jordan* and then on to Syria, an INS official twice lied to Arar's lawyer about his whereabouts. At no point did Defendants notify Arar's lawyer that he had been ordered removed to Syria, and in fact told her he was in detention in New Jersey. A.36. By the middle of the night, Defendants had secretly placed Arar on a federally chartered jet bound for Jordan, where he was subsequently handed over to the Syrians. Arar was then held in a grave-like underground cell in Syria for ten months. The notion that Arar could have somehow filed a petition for review before he was removed, while Defendants were lying to his attorney about his whereabouts and secretly arranging for his removal in the dead of night, is ludicrous.

In light of these facts, the jurisdictional question presented is this: Did Congress, in enacting the INA judicial review provisions, intend to preclude general federal question jurisdiction where, as here, government officials affirmatively obstruct an immigrant's ability to pursue any statutory remedies available to him? Defendants have cited no evidence to suggest that Congress intended such a counterintuitive result. As the District Court correctly noted, the immigration jurisdiction provisions were "intended 'to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals,' not to eliminate judicial review altogether." SPA.45 (quoting *INS v. St. Cyr*, 533 U.S.

289, 313 (2001)). These provisions are "of questionable relevance . . . [where] defendants by their actions essentially rendered meaningful review an impossibility." SPA.53-54.

If Defendants' arguments were to prevail here, the result would be to empower the government to preclude all judicial review even of blatantly unconstitutional actions in the course of the removal process so long as they make sure to obstruct the foreign national's access to court. Because such a result would itself raise serious constitutional questions, the Supreme Court requires a clear and unequivocal statement of legislative intent before concluding that Congress has stripped the federal courts of jurisdiction to hear legal and constitutional challenges to federal activity. *See Demore v. Hyung Joon Kim*, 538 U.S. 510, 534 (2003) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *St. Cyr*, 533 U.S. at 299-300 ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'. . . we are obligated to construe the statute to avoid such problems.") (internal citations omitted).[32] There is no

[32] *See also Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) ("'[C]lear and convincing' evidence of congressional intent required … before a statute will be construed to restrict access to judicial review."); *McBrearty v. Perryman*, 212 F.3d 985, 987 (7th Cir. 2000) ("[D]oor-closing statute[s] . . . are often interpreted as being inapplicable to constitutional challenges.").

evidence, much less the clear and unequivocal evidence required, that Congress sought to preclude judicial review where, as alleged here, government officials affirmatively obstructed a foreign national's ability to file a petition for review. Absent such evidence, this case is properly heard under 28 U.S.C. § 1331.

B. Arar's Claims That are Distinct From His Removal Order Are Not Governed by the Immigration Jurisdiction Provisions Cited by Defendants.

The District Court also properly found that the immigration jurisdiction provisions are inapplicable because many of Arar's challenges are distinct from his removal order, and therefore could not have been adjudicated in a petition for review even if Defendants had not affirmatively obstructed Arar's ability to file one. SPA. 39-41. That holding provides an independent basis for jurisdiction over those claims that could not have been adjudicated on a petition for review.

Arar's claim under the TVPA, for example, alleges that Defendants conspired with the Syrians to have Arar subjected to torture under color of Syrian law, and that therefore they are liable in damages for the torture he suffered in Syria. That claim could not have been presented on a petition for review. Similarly, Arar's constitutional challenge to Defendants' complicity in his torture and arbitrary detention in Syria is at least in part distinct from his removal order. Any attempt to seek redress for the injuries Arar suffered in Syria (with

Defendants' complicity) would have been premature, as the injuries had not yet occurred at the time a petition for review might have been filed.

1. 8 U.S.C. §1252(a)(2)(B)(ii) Does Not Bar Arar's Claims.

Defendants' most sweeping contention is that their decision to remove Arar to Syria was discretionary, and therefore there would have been no basis for judicial review of that decision even had Arar been able to file a petition for review. Ashcroft Br. at 23-25; Thompson Br. at 16-17. But statutes precluding review of exercises of discretion have consistently been held not to apply to legal challenges to unconstitutional or *ultra vires* action, because the government has no discretion to violate the Constitution or federal statutes. *See, e.g., Webster*, 486 U.S. at 603 (holding provision precluding judicial review of CIA employment decisions by committing them to "agency discretion" did not bar judicial review of *constitutional* claims).

Neither the Attorney General nor any other government official has discretion to violate the Constitution by deliberately subjecting an individual to torture. "[D]ecisions that violate the Constitution cannot be 'discretionary,' so claims of constitutional violations are not barred by § 1252(a)(2)(B)." *Kwai Fun Wong v. INS*, 373 F.3d 952, 962 (9th Cir. 2004).[33] As the District Court correctly

[33] *See also Cheong Wai Wong v. Warden, FCI Raybrook*, 171 F.3d 148,149 (2d Cir. 1999) ("[J]udicial review exists over allegations of constitutional

reasoned, while 1252(a)(2)(B)(ii) does bar review of certain exercises of discretion, it does not apply here because Arar's claim is that Defendants were acting *ultra vires*, by violating the Constitution and federal law. SPA.50-51.[34]

2. *8 U.S.C. §§1252(b)(9) and (g) Do Not Bar Arar's Claims.*

Defendants also argue that to the extent *any* judicial review of their actions was proper, 8 U.S.C. §§ 1252(b)(9) and 1252(g) preclude any avenue of redress other than a petition for review. The District Court correctly rejected this contention, not only because Defendants made the filing of a petition for review impossible, but also because many of Arar's claims are distinct from the removal

---

violations even when the agency decisions underlying the allegations are discretionary."); *Beslic v. INS*, 265 F.3d 568, 571 (7th Cir. 2001) (finding that an IIRIRA provision providing "there shall be no appeal of any discretionary decision [under 8 U.S.C. § 1255(a)]" did not apply where petitioners raised a "substantial constitutional claim[]" (quoting *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir. 2001))); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (finding it retained jurisdiction to review colorable claims of constitutional violations); *Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001) (finding due process claims are reviewable).

[34] This Court has interpreted related provisions of the INA that bar review of discretionary decisions to preserve judicial review of questions of law, such as statutory eligibility for otherwise discretionary relief. *See Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005) (holding that 1252(a)(2)(B)(i) does not bar review of legal questions); *see also Santos-Salazar v. United States DOJ*, 400 F.3d 99, 104 (2d Cir. 2005) (interpreting provision barring judicial review of removal orders based on certain criminal conduct to preserve review of whether the provision applies to a specific case, as well as review of "'substantial constitutional challenges.'" (quoting *Calcano-Martinez v. Ins*, 533 U.S. 348, 350 n.2 (2001))).

order, and therefore could not have been raised through that vehicle for judicial review, even had Defendants not affirmatively obstructed his ability to file a petition. SPA.46-47.

8 U.S.C. §1252(b)(9) seeks to streamline judicial review of removal orders by consolidating constitutional and statutory challenges arising from the removal process in a petition for review in the court of appeals. But even if Defendants had not employed the immigration removal process to transport Arar to Syria, he would have substantial claims under the TVPA and the Constitution based on Defendants' complicity in his torture and arbitrary detention while he was in Syria. Those claims are at least in part distinct from the removal order, in that the injuries occurred *after* removal. The fact that Defendants exploited the immigration process to begin their violations of Arar's rights does not mean that all subsequent statutory and constitutional claims are somehow immunized from judicial review. There is no evidence that Congress, in enacting 1252(b)(9), sought to eliminate judicial review over government violations of rights that occur subsequent to removal.

This result is supported by *St. Cyr*, 533 U.S. at 313, which held that § 1252(b)(9) "does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)." In upholding habeas jurisdiction to hear the challenge of a "criminal alien" to his removal, the Court reasoned that the "purpose [of § 1252(b)(9)] is to consolidate 'judicial review' of immigration proceedings

into one action in the court of appeals, but it applies only 'with respect to review of an order of removal under subsection (a)(1).'" *Id.* As a "criminal alien," St. Cyr could not obtain review of his removal order in a petition for review under § 1252(a)(1), and therefore the Court held that § 1252(b)(9) did not apply. *Id.* Here, too, § 1252(b)(9) does not apply to those aspects of Arar's claims that could not have been adjudicated on a petition for review.[35]

Defendants' reliance on § 1252(g) is also misplaced. The Supreme Court has rejected a broad reading of § 1252(g) and instead interpreted it narrowly to apply "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'"—all "challenges to the Attorney General's exercise of prosecutorial discretion." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 n.9 (1999) (quoting § 1252(g)). Arar does not challenge any "exercise of prosecutorial discretion," however, because as noted above, the government has no discretion to violate the Constitution and federal law by removing an alien for the deliberate purpose of subjecting him to torture.

[35] Congress subsequently superseded the specific result in *St. Cyr* by expressly precluding habeas jurisdiction in the REAL ID Act, §106(1), 119 Stats. at 310. But Arar does not seek habeas relief, and even in the REAL ID Act, there is no indication that Congress sought to preclude all review of constitutional and legal challenges that could not have been raised on a petition for review.

3. FARRA Does Not Preclude Relief.

Defendant Ashcroft argues that Arar's challenge is barred by the Foreign Affairs Reform and Restructuring Act (FARRA),[36] and claims that "the absence of FARRA from Arar's brief speaks for itself." Ashcroft Br. at 18. But FARRA was absent from Arar's opening brief for a simple reason — Arar makes no claim for relief under FARRA or the Convention Against Torture (CAT). Thus, Ashcroft's argument is predicated on a false premise —namely, that "the crux of Arar's claim is that his transport to Syria in execution of a final order of removal violated Article 3 of the CAT." Ashcroft Br. at 19. In fact, Arar claims only violations of the TVPA and the Constitution, not the CAT. The jurisdictional provision of FARRA upon which Ashcroft relies, § 2242(d), bars courts from reviewing regulations promulgated under FARRA and restricts review of claims directly under the CAT to petitions for review of removal orders.[37] But Plaintiff challenges no regulation, asserts no CAT claim, and was affirmatively denied the review he

[36] Pub. L. No. 105-277, div. G, Title XXII, 112 Stat. 2682-82 (1998)(codified at 8 U.S.C. § 1231).

[37] "[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under [CAT] or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act." FARRA § 2242(d).

would have been entitled to under FARRA. Accordingly, FARRA's provisions are inapplicable here.

V. ARAR'S COMPLAINT ADEQUATELY ALLEGES THE PERSONAL INVOLVEMENT OF EACH DEFENDANT.

Defendants claim that they had insufficient personal involvement in Arar's detention, interrogation and removal to Syria to establish personal liability against them. *See, e.g.,* Ashcroft Br. at 44-47. In fact, Arar's allegations are more than sufficient to establish personal involvement, particularly given the high-level nature of this case, involving an alleged Al Qaeda member and negotiations with at least two foreign governments. While the fact that Defendants sought to further this conspiracy in secret makes it difficult to be more specific than Arar has been, his allegations are plainly sufficient under the liberal pleading rules.[38]

Each Defendant exercised his authority and made decisions that contributed affirmatively to the conspiracy to subject Arar to mistreatment here and arbitrary detention and torture in Syria. McElroy ensured that Arar's attorney did not have advance notice of Arar's questioning regarding his removal to Syria by calling her office on the Sunday evening of the proceeding so she could not attend and not

[38] Arar did not "ignore" the issue of personal involvement on appeal, as certain Defendants aver. *See, e.g.,* Mueller Br. at 6. To the extent that the district court found its pleadings to be lacking for Count 4, Arar declined to replead, standing on his allegations in the Complaint. A.467-48. Moreover, Arar addressed the involvement of Defendants in Arar Br. at 2-3, and 46, fn 22, and detailed the facts related to Count 4, Arar Br. at 6-10.

prevent his removal to Syria. This demonstrates his involvement in Arar's detention in the U.S., as well as Arar's impending "removal" to Syria. A.32, ¶ 43.[39] Blackman determined that Arar was inadmissible and executed the Final Notice of Inadmissibility, failing to give proper consideration to Article 3 of CAT as then Regional Director of the Eastern Regional Office of the INS. A.93 and 7, ¶ 18. Ziglar purported to determine that Arar's removal to Syria was consistent with CAT, A.24-25, ¶ 17, and oversaw INS officials who interrogated Arar during his detention in the U.S. and asked Arar to "volunteer" to be sent to Syria. A.30, ¶¶ 31, 35. Thompson personally executed the order to remove Arar to Syria. A.24, ¶ 15.

As FBI Director, Mueller was tasked with counter-terrorism operations and oversaw interrogations by FBI agents in New York —interrogations that contained strikingly similar questions to those conducted by Syrian security officers. A.29-30, 34.[40] And as Attorney General, Ashcroft oversaw both the removal process and the search for suspected Al Qaeda members. "For INS detainees. . . the Attorney

---

[39] In addition, the Complaint alleges that INS officials were extensively involved in, among other things, interrogating Arar and lying to Arar's attorney regarding his whereabouts, all of which was done under the supervision of McElroy as former District Director of the INS for the New York District. A.29-33, ¶¶ 27, 28, 31, 35, 41-47.

[40] Mueller asserts that the elements for conspiracy, i.e., agreement among co-conspirators, that Mueller joined the conspiracy, and that he engaged in an overt act in furtherance of it, have not been adequately pled. Mueller Br. at 11. The district court found to the contrary. SPA.26.

General has the power to produce the petitioner, and remains the ultimate decisionmaker, and 'in this respect, the extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique.'" *Bell v. Ashcroft,* No. CIV. 03-0766, 2003 WL 22358800, at * 3 (S.D.N.Y. Oct. 15, 2003) (quoting *Henderson v. INS*, 157 F.3d 106, 126 (2d Cir. 1998)). It is only the Attorney General and Deputy Attorney General that have the authority to override Arar's designation of Canada as his country of removal. 8 U.S.C. § 1231(b)(2)(C). Given Ashcroft's responsibilities, and his specific oversight of the 9/11 investigation and the effort to identify suspected Al Qaeda members, it strains credulity to suggest that Ashcroft was not involved in the detention, interrogation and removal of Arar to Syria.[41]

In short, from the moment Arar was stopped at JFK airport, each action taken by the individual Defendants is alleged to have been part of a covert plan to detain, interrogate, and transfer Arar to Syria the purpose of subjecting him to torture. Defendants agreed amongst themselves and Syrian officials to deliver Arar to Syria to be interrogated by torture. A.38-39, ¶ 77. Defendants were each fully aware of the policy of state-sponsored torture in Syria, and knowingly gave that

[41] Ashcroft determined two weeks before Arar was stopped in New York that "Al Qaeda might be planning specific attacks on the U.S." *See* A.90-91, n. 2 (citing Remarks of the Attorney General, Threat Level Press Conference, September 10, 2002).

government substantial assistance to torture Arar. A.39, ¶ 78. Defendants provided their Syrian counterparts with a dossier on Arar, and suggested matters to be covered during his interrogation. A.34-35, ¶ 55. They then received from the Syrian security officers all information coerced from Arar while he was interrogated and tortured. A.35, ¶ 56. *See* A.75 ("We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.").[42]

Arar seeks to hold Defendants accountable *not* solely because of their positions, as Defendants assert. *See, e.g.,* Blackman Br. at 14; Mueller Br. at 2. Their positions are relevant, of course, to their role in the specific conspiracy alleged here, but the allegations are predicated on direct personal involvement. Each Defendant is accountable because of the specific acts and omissions taken in unlawfully detaining, interrogating, abusing and ultimately removing Arar to Syria Arar also seeks to hold Defendants liable for the specific acts and omissions of their subordinates who acted under their direction and/or carried out the policies or customs the Defendants established.

[42] The then-Syrian Ambassador to the United States said that "Syrian intelligence had never heard of Arar before the U.S. government asked Syria to take him," and reported that Syrian intelligence shared its reports with the U.S. A.97.

Arar's theory of liability is based on Defendants' responsibilities for creating and enforcing the policies and specific orders that caused numerous constitutional violations, and does not allege supervisory responsibility based on "mere linkage" in the chain of command, as certain Defendants assert. *See, e.g.,* Ashcroft Br. at 46-47. This Court has found such allegations to be sufficient to withstand a motion to dismiss. *McKenna v. Wright,* 386 F.3d 432, 437-38 (2d Cir. 2004).

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

Defendants' calls for greater particulars of their personal involvement, *see, e.g.,* Thompson Br. at 44 and Mueller Br. at 4-12, and the District Court's holding that Arar must "detail which defendants directed, ordered and/or supervised the alleged violations. . . .[or] were otherwise aware, but failed to take action, while Arar was in U.S. custody," SPA.84-85, are inconsistent with the liberal pleading standards on a motion to dismiss. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512 (2002) (finding that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits). *See also Brown v. W. Conn. State Univ.*, 204 F. Supp. 2d 355, 364 (D. Conn. 2002) ("While plaintiff may not yet know the details of the alleged conspiracy, that is precisely the purpose of discovery under the liberal pleading rules"); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (it is "inappropriate to require

plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct").[43]

Plaintiffs are not required to include detailed facts regarding personal involvement in their pleadings. *See Jean-Laurent v. Wilkerson*, 438 F. Supp. 2d 318, 325 (S.D.N.Y. 2006) ("To survive a motion to dismiss, a § 1983 complaint need only allege that the supervisor was personally involved in the constitutional deprivation and need not plead detailed facts about the involvement.") Requiring a plaintiff to plead detailed facts regarding personal involvement "would amount to a heightened pleading standard and is unwarranted" under Federal Rule of Civil Procedure 8(a)(2). *Locicero v. O'Connell*, 419 F. Supp. 2d 521, 526 (S.D.N.Y. 2006) (citing *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002)).

Defendants argue that the Complaint includes "conclusory allegations" of personal involvement. *See, e.g.,* Mueller Br. at 6. Ashcroft relies on the Sixth Circuit opinion in *Nuclear Transport and Storage, Inc. v. United States*, Ashcroft

[43] Indeed, this Court reversed the dismissal by the same district court judge of another case in which he ordered the plaintiff in a § 1983 action to replead his case, which alleged a 'common conspiratorial scheme,' such that the case against each separate defendant be separately specified, with the evidence and theory of the case against each defendant separately pled. The Court found that "nothing in our past precedents requires plaintiffs formally to separate claims defendant by defendant in order to satisfy [Rule 8 of the Federal Rules of Civil Procedure.]" *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004).

Br. at 45, decided before *Swierkiewicz*, which deemed insufficient the "assertion that a former cabinet officer and two other officials 'acted to implement, approve, carry out, and otherwise facilitate' alleged unlawful policies." 890 F.2d 1348, 1355 (6th Cir. 1989) (citation to complaint). This Circuit, however, in *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995), reached the contrary conclusion that an official could be held personally liable for creating or approving the creation of a policy or custom that resulted in the constitutional violation.[44]

Defendant Thompson's reliance on *Crawford-El v. Britton*, 523 U.S. 574 (1998), is equally misplaced. Thompson Br. at 44. The "specific, nonconclusory allegations" language of *Crawford-El* refers to pleading improper motive for the purposes of deciding qualified immunity, a different inquiry than personal involvement in the violation itself. Moreover, *Swierkiewicz* unanimously rejected any suggestion that *Crawford-El* supports a heightened pleading standard in civil rights cases.[45]

---

[44] Neither *Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987) nor *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006) set out a different standard than *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995). Blackman Br. at 11, 12. Indeed, *Thomas* specifically refers to the liberal pleading standard endorsed by *Swierkiewicz*, and in applying that standard, reversed the district court's dismissal in relation to certain defendants for failing to allege sufficient personal involvement. *Thomas*, 470 F.3d at 496-97 n.7.

[45] The "mere conclusory allegations" language invoked by Defendants is relevant to consideration of motions for summary judgment, not motions to dismiss. *See Williams v. Smith,* 781 F.2d 319, 323-24 (2d Cir. 1986). *See also,*

B. Arar Adequately Alleged the Personal Involvement of Defendants.

The Complaint adequately sets forth the "personal involvement" of each defendant in this case for each count. Personal involvement of a supervisory official may be established by evidence that:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference. . . by failing to act on information indicating that unconstitutional acts were occurring.

Colon, 58 F.3d at 873.

Courts are "mindful of the difficulty of prescribing a bright line rule in this context." *Locicero*, 419 F. Supp. at 526. There is no requirement that a defendant "participated personally" in the tortious acts to be held liable under *Bivens*. *See* Mueller, Br. at 4, citing *Armour & Co. v. Celic*, 294 F.2d 432, 439 (2d Cir 1961). The requirement is personal *involvement*, not direct personal *participation* directly in the commission of the violation. While *respondeat superior* liability is improper

---

Flaherty v. Coughlin, 713 F.2d 10, 13 (2d Cir. 1983) ("[w]hile 'mere conclusory allegations or denials' are insufficient to withstand a motion for summary judgment *once the moving party has set forth a documentary case*, caution should be exercised in granting summary judgment where state of mind is in issue or when the party opposing the motion has been denied relevant discovery.") (internal citations omitted) (emphasis added).

for *Bivens* claims, *Ellis v. Blum*, 643 F.2d 68, 85 (2d Cir. 1981), *Colon* makes clear that superiors can be held liable for their acts or omissions in relation to ensuring their subordinates act in a lawful manner, requiring superiors to take steps to prevent violations or punish the perpetrators thereof.[46]

Arar's allegations support liability under *all* of the five factors set out in *Colon*, but particularly factors one and three.[47] The allegations meet the liberal pleading standards set forth in *Swierkiewicz* and *Colon*. Arar has adequately pled personal involvement of each of the Defendants in his illegal domestic detention, interrogation, and ultimately in his "extraordinary rendition" to Syria.

[46] To the extent that *Leonhard v. United States*, 633 F.2d 599, 621 n.30 (2d Cir. 1980), relied upon by Defendant Mueller, denies the existence of superior responsibility (as opposed to *respondeat superior* liability), it is inconsistent with the subsequent case-law of this Circuit cited above.

[47] *See Bussey v. Phillips*, 419 F. Supp. 2d 569, 590 (S.D.N.Y. 2006) (direct participation through Deputy Superintendent's signature on a decision to reject an appeal sufficient personal involvement to withstand a motion for summary judgment ("Thornton's signature suggests at least some level of review of Bussey's case.")); *Turkmen*, 2006 WL 1662663; *Elmaghraby v. Ashcroft*, No. CIV. 04-1409, 2005 WL 2375202 , at *21 (E.D.N.Y. Sep. 27, 2005) (alleged "sufficient facts to warrant discovery as to the defendants' involvement, if any, in a policy that subjected plaintiffs to lengthy detention in highly restrictive conditions while being deprived of any process for challenging that detention.").

VI. THE COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS.

Defendants Mueller, Ashcroft and Ziglar argue that the District Court lacked personal jurisdiction over claims against them in their personal capacities. Mueller Br. at 12-14; Ashcroft Br. at 47; and Ziglar Br. at 13-15. Based on each person's involvement in a plan to deprive Arar of his constitutional rights and subject him to torture —a plan that was set in motion and carried out while he was in Defendants' custody in New York —this Court has personal jurisdiction over all Defendants for all claims.

A. Defendant Ziglar Waived the Defense of Personal Jurisdiction.

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

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

The crux of Mueller, Ashcroft, and Ziglar's arguments is that each bears no responsibility for the torts and constitutional violations alleged because they are not domiciled in New York, and apparently argue they were not in New York at the relevant time. Under New York's long-arm statute, however, jurisdiction is proper where a non-domiciliary defendant purposefully directs activity toward the state of New York and the plaintiff's cause of action arises from that purposeful activity. N.Y.C.P.L.R. § 302(a)(1) (2006). Section 302(a)(1) is a "single act" statute: "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful" and the cause of action arises out of the activity. *Kreutter v. McFadden Oil Corp*., 71 N.Y.2d 460, 467 (N.Y. 1988); *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005).

Arar has sufficiently alleged that Defendants purposefully acted in New York by having Arar stopped, detained and interrogated in New York and then authorizing his transfer from New York to Syria. Defendants effected these acts either personally, or by directing their subordinates, including immigration officers and FBI agents. All the claims raised by Arar arise directly out of Defendants' activities. *See, e.g*., A.28-35. It is simply inconceivable that the Attorney General, the FBI Director, and the INS Commissioner were unaware of, and uninvolved in,

these acts, particularly in light of Arar's allegation that his treatment was not aberrational, but part of a pattern and practice of renditions. A.28 ¶ 24 and A.68-79.

Personal jurisdiction over the Defendants also attaches under N.Y.C.P.L.R. § 302(a)(2), as Defendants conspired to subject Arar to torts committed in New York. *See, e.g. Best Cellars Inc. v. Grape Finds at Dupont, Inc*., 90 F. Supp. 2d 431, 445 (S.D.N.Y. 2000) ("Acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under C.P.L.R. 302(a)(2).").[48] In this case, Arar has sufficiently pled such conspiracy involving all Defendants. *See* A.21, 23-26, and 28-38. Arar need only make a *prima facie* showing that personal jurisdiction exists as there has been no evidentiary hearing; his jurisdictional allegations must be construed "liberally" and uncontroverted factual allegations "take[n] as true." *Robinson v. Overseas Military Sales Corp*., 21 F.3d 502, 507 (2d Cir. 1994).[49]

---

[48] Personal jurisdiction over the defendant was found lacking in *Nwanze v. Philip Morris Inc.*, Mueller Br. at 14, only because the facts pled to support the conspiracy were insufficient; there was no question that a well-pled conspiracy can establish personal jurisdiction under either C.P.L.R. § 302(a)(1) or (a)(2). 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000). *See also Reeves v. Phillips*, 388 N.Y.S.2d 294, 296 (N.Y. App. Div. 1976) (New York activities of a co-conspirator can be imputed to an out-of-state tortfeasor for jurisdictional purposes).

[49] The Court must look to the totality of Defendants' contacts with the forum state in assessing whether there is a prima facie showing of personal jurisdiction. *See Grand River Enters.*, 425 F.3d at 166; *Banker v. Esperanza Health Sys., Ltd.,*

The cases cited by Defendants to contest the application of the long-arm statute rely upon the fiduciary shield doctrine. *See Green v. McCall*, 710 F.2d 29 (2d Cir. 1983); *Grove Press Inc. v. Angleton*, 649 F.2d 121 (2d Cir. 1981). After *Green v. McCall* and *Grove Press* were decided, the New York Court of Appeals rejected the application of this doctrine to both C.P.L.R. § 302(a)(1) and C.P.L.R. § 302(a)(2). *See Kreutter*, 71 N.Y.2d at 471; *CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268 (N.Y. 1987). Subsequent cases squarely rebuke the holding in *Green* that "unless the agents represented the defendants in their *individual*, as contrasted with their *official*, capacities," jurisdiction is lacking. *Green*, 710 F.2d at 33 (emphasis added). Jurisdiction over a corporate employee cannot be defeated under the long-arm statute because his dealings were in a corporate capacity. *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 981 (S.D.N.Y. 1992). Moreover, "[w]here an individual defendant acts through corporate entities within his control, the acts of those corporations can form the basis for jurisdiction over the individual." *Savage Universal Corp. v. Grazier Const., Inc.*, No. CIV. 04-

---

201 Fed. Appx. 13, 15 (2d Cir. 2006). At a minimum, Arar should be permitted discovery if personal jurisdiction is questioned. *See Kinetic Instruments*, 802 F. Supp. at 988-89.

1089, 2004 WL 1824102, at *9 n. 3 (S.D.N.Y. Aug. 13, 2004), *citing Kreutter*, 71 N.Y.2d at 467.[50]

There is no logical or legal justification for why a court should not have personal jurisdiction over a government official where it would have jurisdiction over a corporate officer through the corporation's acts. As the New York Court of Appeals found in *Kreutter*, "[t]the equitable concerns which motivated development of the [fiduciary shield] doctrine are amply protected by constitutional due process requisites which guarantee that jurisdiction over a nonresident will be sustained only when the demand for his presence is reasonable and consistent with notions of 'fair play and substantial justice.'" *Kreutter*, 71 N.Y.2d at 470 (citations omitted).

VII. DEFENDANTS' CONDUCT IS NOT PROTECTED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

Finally, Defendants argue that qualified immunity shields them from accountability for what they did, and conspired to do, to Arar. Their argument requires this Court to accept the proposition that in October 2002, a reasonable person in Defendants' positions would not have known that an individual in U.S. custody in the United States had a right to be free from torture, arbitrary detention,

[50] To the extent that Defendant Mueller asserts that Arar must show that FBI agents were acting as Mueller's "personal agents" and for his "personal benefit," this position is untenable in light of *Kreutter v. McFadden Oil Corp*., and *Kinetic Instruments, Inc. v. Lares*. The acts of the FBI agents need not be on behalf of, and for the benefit of, Mueller *individually.*

and deliberate interference with his access to counsel and the courts. Although the precise contours of their arguments vary somewhat, Defendants principally maintain that because there were no cases directly on point in October 2002, Arar's right not to be mistreated *under the precise circumstances alleged in his complaint* was not clearly established. *See, e.g.,* Mueller Br. at 49 ("No case holds that a U.S. official may be held liable under the TVPA for removing an unadmitted alien to a country where he could face torture.").[51] Defendants, however, misapprehend the proper analysis of invocations of qualified immunity in this Circuit, which requires only that the general right be clearly established, not that there be an identical case on point.

Qualified immunity analysis is a two-part process. The Court first asks "whether the facts, viewed in the light most favorable to the plaintiff, demonstrate

---

[51] Significantly, no Defendant argues that torture is constitutional and indeed, no such argument could be sustained. *See* Brief of Scholars of American Constitutional Law as *Amici Curiae* in Support of Plaintiff-Appellant and Urging Reversal (filed December 26, 2006, order granted on January 5, 2007).

No case has extended qualified immunity, a judicially constructed doctrine developed in the context of constitutional violations, to the TVPA. Allowing for qualified immunity would frustrate the purpose of the TVPA to provide a cause of action against *any* individual who subjects someone to torture under color of foreign law. H.R. Rep. No. 102-367, *as reprinted in* 1992 U.S.C.C.A.N. 84, 84-85. Furthermore, it is at odds with the jurisdictional finding that the conduct complained of violates not only "clearly established" law (customary international law) but a *jus cogens* norm, which has as its corollary that persons have the right to be free from torture.

a constitutional violation by the government officer who is sued." *See, e.g.* Ashcroft Br. at 43 (citing *Saucier v. Katz*, 533 U.S. 194, 199 (2001); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the answer to this question is yes, the Court must then determine "whether the particular right in question was "clearly established," from a "particular perspective." *See, e.g.,* Ashcroft Br. at 43 (citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)); *Poe v. Leonard*, 282 F.3d 123, 132 (2d Cir. 2002). As Defendants acknowledge, these two questions must be addressed "in proper sequence." *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see also Brousseau v. Haugen*, 543 U.S. 194, 198 n. 3 (2004).

On a motion to dismiss, the Court should not find qualified immunity unless there are absolutely no facts that may emerge in discovery that could undermine Defendants' claimed entitlement to the protection. *See Velez v. Levy,* 401 F.3d 75, 101 (2d Cir. 2005) ("We emphasize that this qualified immunity determination is made in view of the procedural posture of the case."); *Johnson v. Newburgh Enlarged Sch. Dist.,* 239 F.3d 246, 255 (2d Cir. 2005) (finding defendants not entitled to qualified immunity as a matter of law on a motion to dismiss); *McKenna v. Wright*, 386 F.3d 432, 438 (2d Cir. 2004) (same).

As the other sections of this brief make plain, the answer to the first question is that Defendants violated Arar's constitutional rights by the process through which they rendered him to Syria to be indefinitely detained and tortured. For the

reasons that follow, the answer to the Court's second question is necessarily also yes: Arar's right to be free from torture and the other conduct that comprised the conspiracy was so clearly established in the fall of 2002 that no reasonable government official could have believed otherwise.

A. The Rights to be Free from Torture, Arbitrary Detention, and Deliberate Interference with Access to Lawyers and the Courts Were Clearly Established in 2002.

A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). Arar need not demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established"). Nor need he identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Arar need only show that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional. *Id.* at 740. Government officials may have such fair warning "even in novel factual circumstances," *id.* at 741, because prior decisions may "clearly foreshadow" a ruling that the challenged conduct is unconstitutional,

African Trade & Info. Ctr., Inc. v. Abromaitis, 294 F.3d 355, 362 (2d Cir. 2002) (internal citation and quotation omitted), or a previously announced "general constitutional rule" may apply "with obvious clarity to the specific conduct in question even though 'the very action in question has not previously been held unlawful." *United States v. Lanier*, 520 U.S. 259, 271 (1997). "Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar conduct.'" *Hope*, 536 U.S. at 753.

There can be no doubt that the general rights at issue in this case were clearly established in the fall of 2002. Defendants cite no cases or principles that would even suggest that it is permissible for federal officials to take a person into custody and deny him access to lawyers and the courts for the purpose of having him subjected to arbitrary detention, and torture. This course of conduct was patently conscience-shocking, and no reasonable officer could have concluded otherwise.

B. A Reasonable Person in the Defendants' Circumstances Would Have Known that His Conduct Violated Clearly Established Constitutional Rights.

Defendants argue that the proper question is not whether their treatment of Mr. Arar violated his constitutional and statutory rights, but whether in the fall of 2002 existing judicial decisions had so squarely decided the precise issues

presented by this case that Defendants reasonably knew not only that their participation in the overall conspiracy was unlawful, but also precisely which statutes or cases made it so. *See, e.g.,* Ashcroft Br. At 47-58; Thompson Br. at 39-42, 49, 62-3; Mueller Br. at 49-53.[52] Thus, Defendants argue that they could not have possibly had the required degree of legal acumen they argue was required because some of the relevant cases —*Rasul, Turkmen,* and *Elmaghraby* —had not been decided when they were conspiring to send Arar to be tortured in Syria. *See, e.g.,* Mueller Br. at 51. Defendant Mueller argues that Arar asserts "extremely abstract rights," which by their very abstraction could not have been clearly established. Id. at 49.

In fact, as established above and in Arar's Opening Brief, the rights asserted by Arar are among the most fundamental and universally recognized in the twenty-first century world. Torture, arbitrary detention, and deliberate interference with access to courts and counsel in order to insulate these actions from review are paradigmatic violations of substantive due process. No court has suggested that

[52] Defendant McElroy argues that he cannot be held liable because he necessarily must have been acting reasonably within legal contours because he was simply doing his job, following federal regulations, rubber stamping Defendant Thompson's actions. *See* McElroy Br. at 23-24. This defense, also known as the I-was-just-following-orders defense, has no place in substantive due process jurisprudence. *See, e.g., Raysor v. Port Auth.*, 768 F.2d 34, 38 (2d Cir. 1985) (holding police officer liable for false arrest under § 1983 even though arrest was made at superior's order).

any such conduct is permissibly directed against any person in U.S. custody, citizen or alien, admitted or at the border. *See Martinez-Aguero v. Gonzalez,* 459 F.3d 618, 623 (5th Cir. 2006) (affirming denial of qualified immunity because "'entry fiction' . . . does not limit the right of excludable aliens detained within the United States territory to humane treatment").

Defendants are fundamentally mistaken regarding the level of specificity required to demonstrate that a right is clearly established. In *United States v. Lanier*, 520 U.S. 259 (1997), the Supreme Court made clear that the central issue is fair notice or warning. Simply put, no matter how finely they seek to segment their plan to send Arar to Syria for detention and interrogation under torture, and to block his access to any legal assistance that might preclude that result, Defendants can put forth no convincing argument that a reasonable person would be unaware that such complicity violated Due Process and the TVPA.

This Court's recent decision in *Jones v. Parmle* rejected the very argument Defendants advance here; that for a right to be clearly established, it must have been previously adjudicated in circumstances directly applicable to the case before the court. 465 F.3d 46 (2d Cir. 2006).[53] In *Jones*, protestors brought an action

[53] *See also Anderson v. Blake*, 469 F.3d 910, 914-17 (10th Cir. 2006) (affirming denial of qualified immunity where "there is no case in this Circuit addressing" the issue before the court and a case in a different circuit deciding a similar issue with an opposite result); *Jennings v. Jones*, 479 F.3d 110, 124 (1st Cir. 2007) (rejecting defendants' claim of qualified immunity premised on absence

against numerous New York State Troopers alleging that the troopers had used aggressive force to interfere with their demonstration and violated their constitutional rights. The troopers argued that although the plaintiffs had a "constitutional right to protest," defining the right in those terms "was too general to be clearly established." *Id.* at 57. This Court, however, explained that:

> Defendants misapprehend the nature of the inquiry here. They essentially argue that we should find qualified immunity unless a Supreme Court or Second Circuit case expressly denies it, but that standard was rejected by the Supreme Court in favor of one in which courts must examine whether in 'the light of pre-existing law the unlawfulness is apparent.'

Id. (citations omitted). This Court held that given the generally known right to assemble and demonstrate, no state trooper could "have reasonably thought that indiscriminate mass arrests without probable cause were lawful under these circumstances," even absent a case on point. *Id.* at 60.

Here, too, no government official could have reasonably thought it legal to conspire to subject a person within his custody to torture and arbitrary detention, or

---

of "'fair warning' that it was unconstitutional for police officers to increase their use of physical force after an arrestee who had been resisting arrest stops resisting for several seconds and warns them that they are hurting his previously injured ankle"); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306-07 (11th Cir. 2006) (affirming denial of qualified immunity despite absence of "factually similar pre-existing caselaw" because "[e]very reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive measures is unreasonable.").

to deliberately block his access to judicial and legal avenues to ensure that he could not halt the conspiracy. No court has ever found qualified immunity for claims of torture, arbitrary detention, and deliberate interference with access to justice to further torture and arbitrary detention. This Court should not be the first.

CONCLUSION

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

Date: New York, New York
April 19, 2007

Respectfully submitted,

/s/ Maria C. LaHood
Maria C. LaHood
David Cole
Katherine Gallagher
Jules Lobel
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6430

Joshua A. Sohn
DLA PIPER US LLP
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 335-4500

Counsel for Plaintiff-Appellant Maher Arar

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

I, Maria C. LaHood, hereby certify that the foregoing appellate reply brief complies with the requirements of F.R.A.P. 32(a)(7) because according to the word count of the word processing system used to prepare it, it contains 21,758 words (including footnotes), which is within the 30,000 words allowed by this Court's Order filed March 23, 2007.

/s/ Maria C. LaHood
Maria C. LaHood

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK	)		**MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On April 19, 2007

deponent served the within**: Reply Brief for Plaintiff-Appellant**

upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York and via email.

Sworn to before me on April 19, 2007

ROBIN M. ZUCKERMAN
Notary Public State of New York
No. 01ZU5007194
Qualified in Orange County
Commission Expires Jan. 25, 2007

Job # 208208

Service List:

For Def. Ashcroft (individual capacity):
Dennis Barghaan
Larry Gregg
Assistant U.S. Attorney
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314-5794
703-299-3891
703-299-3737
dennis.barghaan@usdoj.gov
larry.gregg@usdoj.gov

For Def. Mueller (individual capacity):
Jeremy Maltby
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA, 90071
212-430-6000
jmaltby@omm.com

For Def. Ziglar (individual capacity):
William Alden McDaniel, Esq.
Bassel Bakhos
Law Office of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, MD, 21201
410-685-3810
wam@wamcd.com
bb@wamcd.com

For all Defendants in their official capacities:
Barbara L. Herwig Esq.
Robert M. Loeb Esq.
U.S. Department of Justice
Attorneys, Appellate Staff
Civil Division, Room 7268
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
202-514-5425
202-514-4332
barbara.herwig@usdoj.gov
robert.loeb@usdoj.gov

Scott Dunn
Assistant United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Floor
Brooklyn, NY 11201-2776
718-254-6029
scott.dunn@usdoj.gov

For Def. McElroy (individual capacity):
Debra L. Roth
Thomas M. Sullivan
Shaw, Bransford, Veilleux & Roth PC
1100 Connecticut Ave, NW
Suite 900
Washington, DC, 20036
202-463-8400
202-463-8400
droth@shawbransford.com
tsulliva@shawbransford.com

For Def. Blackman (individual capacity):
Thomas G. Roth
Law Offices
395 Pleasant Valley Way, Suite 201
West Orange, NJ 07052
973-736-9090
Tgroth395@aol.com

For Def. Thompson (individual capacity):
Stephen L. Braga Esq.
Jamie S. Kilberg
Baker Botts LLP
1299 Pennsylvania Ave., N.W.
Washington, DC, 20004
202-639-7704
stephen.braga@bakerbotts.com
jamie.kilberg@bakerbotts.com

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Arar v. Ashcroft

DOCKET NUMBER: 06-4216-cv

I, Robin M. Zuckerman, certify that I have scanned for viruses the PDF version of the

_____ Appellant's Brief

_____ Appellee's Brief

____X___ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Symantec AntiVirus version 10.0 was used.

_____
Robin M. Zuckerman

Date: April 19, 2007