06-4216-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAHER ARAR,

Plaintiff-Appellant,

—against—

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 Reginal Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, FEDERAL BUREAU OF INVESTIGATION AND/OR IMMIGRATION AND NATURALIZATION SERVICE AGENTS, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, UNITED STATES,

Defendants-Appellees.

ON EN BANC REHEARING OF AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF NORMAN DORSEN, HELEN HERSHKOFF, FRANK MICHELMAN, BURT NEUBORNE AND DAVID L. SHAPIRO AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of law who have devoted much of their academic careers to study of the United States Constitution, including the powers vested in, and the limits imposed on, the branches of the federal government under the doctrine of separation of powers.[2] The Executive's policy of "extraordinary rendition," pursuant to which alien-detainees suspected of ties to Al Qaeda are "rendered" to certain foreign countries to undergo harsh interrogation amounting to torture, raises profound issues of Executive power and Judicial role.

In *Arar v. Ashcroft*, 532 F.3d 157 (2nd Cir. 2008), a divided panel of this Court declined to recognize a cause of action for damages arising out of alleged connivance by American officials in Arar's "extraordinary rendition" and torture. Judge Sacks, in dissent, argued forcefully for the recognition of a constitutionally-based damage claim. *Arar*, 532 U.S. at 193. 208-214 (Sacks, J. dissenting). The full Circuit, acting *sua sponte*, granted re-hearing en banc on August 12, 2008.

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[1] All parties have consented to the filing of this brief. Pursuant to Rule 29(b), F. R. App. P, a motion for leave to file accompanies this brief.

[2] *Amici* are Norman Dorsen, *Frederick I. and Grace A. Stokes Professor of Law, N.Y.U. Law School*; Helen Hershkoff, *Anne and Joel Ehrenkranz Professor of Law, N.Y.U. Law School*; Frank Michelman, *Robert Walmsley University Professor, Harvard Law School*; Burt Neuborne, *Inez Milholland Professor of Civil Liberties, N.Y.U. Law School*; and David L. Shapiro, *William Nelson Cromwell Professor of Law, Emeritus, Harvard Law School.* Academic affiliations are listed solely for the purposes of identification.

Amici respectfully urge the en banc Court to recognize, at a minimum, a constitutionally-based cause of action for damages arising out of appellees' actions in affirmatively blocking appellant's access to a reviewing court. Appellant, Maher Arar, alleges that Executive officials (the "appellees"), confronted with a Congressional statute affording Arar access to an Article III court empowered to prevent his expulsion to Syria, knowingly circumvented the constitutional and statutory limits on their power by affirmatively preventing Arar from seeking judicial relief. Such lawless insistence on Executive unilateralism constitutes both a deprivation of liberty without due process of law, and a particularly corrosive attack on the constitutional doctrine of separation of powers, empowering – indeed obliging - the Article III judiciary to award damages for injuries flowing from appellees' affirmative preclusion of Arar's right of access to the courts.

STATEMENT OF THE CASE

Arar alleges that he has been the target of a successful conspiracy by officials of the Executive branch to deny him access to a Congressionally-authorized judicial forum in connection with his "extraordinary rendition" to

Syria.[3] In compliance with the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Punishment or Treatment*, April 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1994) ("CAT"), Congress has provided a judicial remedy to minimize the risk that immigration authorities will remit an excludable alien to a country where he or she is likely to suffer torture. The *Foreign Affairs Reform and Restructuring Act* ("FARRA"), codified as 8 U.S.C. ¶1231, note a, (Pub L. 105-277, Div. G, Title XXII § 2242 (Oct. 21, 1998), 112 Stat. 2681-82), provides:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[4]

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[3] Arar's allegations concerning denial of access to court and counsel are set forth at ¶¶ 37, 44, 46, and 93 of his complaint. The allegations are summarized in Judge Sack's dissent at 532 F.3d. at 194-197, and in Judge Trager's District Court decision at 414 F. Supp.2d at 252-54. At the Rule 12(b)(6) stage, it is well settled that allegations in an unverified pleading must be accepted as true. *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007), cert granted sub nom *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008); *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 89 (2d Cir. 2000); *Albert v. Carovono*, 851 F.2d 561, 571, n.3 (2d Cir. 1988) (en banc). See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

[4] Regulations implementing FARRA provide:

> The United States will not send individuals to countries where they are "more likely than not to be tortured." 8 C.F.R. §§208.16(c)(2)-(4).

Aliens threatened with expulsion to a country where they are likely to be tortured may petition for judicial enforcement of §1231 pursuant to 8 U.S.C. §1252(a)(2)(D). This Circuit routinely considers such petitions. See *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2nd Cir. 2006); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2006); *Zhou Yi Ni v. U.S. Dep't of Justice*, 424 F.3d 172, 174 (2d Cir. 2005); *Calcano Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000).[5]

Arar alleges that he repeatedly warned appellees that he would be subjected to torture if they expelled him to Syria. In the teeth of that warning, Executive officials decided to prevent Arar from gaining access to a judicial forum to assert his claim to be free from torture. Appellees prevented Arar from conferring with his lawyer; affirmatively lied to his lawyer about Arar's whereabouts, erroneously assuring her that he was being transferred to custody in New Jersey, even as he

[5] *See, e.g.*, *Rafiq v. Gonzales*, 468 F.3d 165, 166 (2d Cir. 2006); *Granados Rios v. Mukasey*, 04-3650-ag NAC, 2008 U.S. App. LEXIS 4671 (2d Cir. March 4, 2008) (remanding after the Immigration Judge used the wrong standard of proof in a CAT petition); *Barwari v. Mukasey*, 06-3238-ag NAC, 2007 U.S. App. LEXIS 29785 (2d Cir. 2007) (same); *Gomez-Castano v. Dep't of Homeland Sec.*, 04-4962-ag, 2007 U.S. App. LEXIS 7512 (2d Cir. March 29, 2007) (vacating and remanding a BIA holding of no evidence of government acquiescence in light of *Khouzam*); *De Jesus Buritica-Colorado v. Gonzales*, No. 03-40829-ag NAC, 2007 U.S. App. LEXIS 3081 (2d Cir. Feb. 8, 2007) (same); *Del Pilar Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007) (remanding for failure to consider certain arguments); *Chuan Min Zhang v. Gonzales*, No. 05-6391-ag, 2007 U.S. App. LEXIS 7054 (2d Cir. Jan. 11, 2007) (same); *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) (holding, in reversing the BIA, that government officials "willfully accepting" torture was as good as actual knowledge).

was being expelled to Syria; served Arar with an expulsion order *en route* to the airport; and, immediately thereafter, without permitting Arar to contact his lawyer, placed Arar on a jet bound, eventually, for Syria, where he underwent grievous torture before finally being allowed to return home to Canada.

ARGUMENT

I.

RESPECT FOR THE DOCTRINE OF SEPARATION OF POWERS IS AT THE STRUCTUAL CORE OF THE UNITED STATES CONSTITUTION

To many Founders, the principle of separation of powers codified in the 1787 Constitution was a more reliable protection of freedom than the "parchment barriers" in the 1791 Bill of Rights.[6] While history has demonstrated that judicial enforcement of "parchment barriers" can be far more effective than the Founders imagined, respect for the limits on unilateral government action imposed by the constitutional doctrine of separation of powers remains a crucial bulwark of our liberty. When, as here, Executive officials allegedly resorted to deception and force

[6] For example, on August 20, 1787, Charles Pinckney urged the Committee on Detail to adopt provisions protecting freedom of the press and prohibiting the quartering of troops. The recommendation was rejected. On September 17, with James Madison's support, the full Convention rejected the idea of a Bill of Rights as less effective than structural guarantees. See generally, Robert A. Goldwin, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (2006).

to block Arar's access to a Congressionally-established judicial review mechanism, the Executive violated the Fifth Amendment by unilaterally depriving Arar of his liberty without due process of law, and willfully undermined the constitutional doctrine of separation of powers. See *Bush v. Boumediene*, 553 U.S. , 128 S.Ct. 2229 (2008).

The idea of separation of powers was born in antiquity in the writings of Aristotle,[7] and the functioning of the Roman Republic.[8] The concept was re-discovered and significantly amplified during the Enlightenment by James Harrington in *Oceana* (1656), John Locke in *On Civil Government* (1690), and, most importantly for our system of government, Baron Montesquieu in *The Spirit of the Laws* (1748)(T. Nugent Tr. (1949).[9] Montesquieu's now-familiar analysis divides government into three powers – the power to make new law; the power to

[7] ARISTOTLE, POLITICS, Book IV, part XII-XIV (Benjamin Jowett tr.), available at (http//classics.mit.edu/Aristotle/politics.html)

[8] The unwritten constitution of the Roman Republic separated power among the Senate, which functioned as a collective Executive; the people, exercising plebiscitary legislative power through direct democracy; and an array of administrative officials carrying out the *lex* enacted by the people. See Kurt Von Fritz, THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY (1975).

[9] The leading modern academic discussions of the evolution of separation of powers theory occur in M.C.J. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967, reissued 1998), and William B. Gwyn, THE MEANING OF SEPARATION OF POWERS (1965).

enforce existing law; and the power to resolve disputes about the application of law to specific factual settings, and urges dispersal of the three powers to prevent a dangerous concentration of power in any one organ. The Founders enthusiastically adopted Montesquieu's model of separation of powers, vesting power to enact new laws in the Article I Congress, power to enforce existing laws in the Article II Executive, and power to adjudicate disputes about the application of law to particular "cases or controversies" in the Article III Judiciary.

For more than two centuries, the Supreme Court has implemented the Founders' vision by enforcing limits on the unilateral authority of each branch. Thus, the Judiciary may not rule on issues of law in the absence of a concrete case or controversy.[10] The Executive may not enact rules of law, or take action

[10] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (judicial review is an incident of the adjudication of a case or controvery); *Frothingham v. Mellon*, 262 U.S. 447 (1923) (courts lack power to act in absence of case or controversy). See also *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792) (Article III judges may not perform non-Article III functions). Conversely, the Judiciary has refused to accede to efforts by the other branches to abrogate or undermine its constitutional functions. Eg., *Bush v. Boumediene*, 553 U.S. , 128 S.Ct. 2229 (2008) (in the absence of a formal suspension of the writ of habeas corpus, neither Congress nor the President may oust the judiciary from adjudicatory authority over persons detained by the Executive in territory permanently under the control of United States); *United States v. Klein*, 80 U.S. 128 (1872) (Congress may not interfere with Article III adjudicatory process); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)(Congress may not require an Article III court to re-open a case that has been finally decided).

purportedly authorized by rules of its own making.[11] And, Congress may not participate in the enforcement of the laws it has enacted.[12] While the boundary lines separating the branches are not always clear, and areas of overlap are bound to exist in the modern administrative state,[13] the basic principle of respect for the constitutionally-mandated separation of powers remains fundamental to our constitutional structure, and to the prevention of undue concentration of power in one branch. The force of that principle is especially clear when, as here, to paraphrase Justice Jackson in *Youngstown*, the Executive has not only acted unilaterally, but has done so in the face of a specific congressional grant of authority to the Judiciary to check abuses of Executive power. 343 U.S. at 634 (Jackson, J. concurring). Judicial recognition of a constitutionally-based cause of action for damages caused by the Executive's refusal to abide by the separation of

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[11] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

[12] Eg., *Buckley v. Valeo,* 424 U.S. 1, 119-143 (1976) (invalidating Congressional power to appoint implementing officials); *Bowsher v. Synar,* 478 U.S. 714 (1986) (invalidating Congressional power to remove implementing officials); *INS v. Chadha,* 462 U.S. 919 (1983) (invalidating legislative veto of administrative actions); *Springer v. Philippine Islands,* 277 U.S. 189 (1928) (legislature may not seek to play role in enforcing the law).

[13] Eg., *Humphreys Executor v. United States,* 295 U.S. 602 (1935)(upholding Congress's power to provide for fixed terms of office for certain administrative officials); *Morrison v. Olson,* 487 U.S. 654 (1988) (upholding statute providing for judicial appointment and supervision of Special Prosecutors).

powers is an especially apt remedy for such an unconstitutional usurpation of unilateral power.

II.

EXECUTIVE ACTION DESIGNED TO PREVENT A DETAINEE FROM EXERCISING A STATUTORY RIGHT TO ACCESS TO COURT IS UNIQUELY CORROSIVE OF SEPARATION OF POWERS

Congress has established a process governing the expulsion of excludable aliens that involves all three branches of government. See *supra* at 2-4. A Congressional statute defines when an alien is excludable, and vests broad power in the Executive to enforce it, including initial power to choose the country to which a lawfully excluded alien will be remanded.[14] Upon receipt of a notice of expulsion from the Executive, an allegedly excludable alien may petition an Article III court to assure that the law is being properly applied to him. Of particular importance here, the excludable alien may raise the question of whether he would be at unlawful risk of torture in the country to which he is to be remanded. 8 U.S.C. §1252(a)(2)(D).[15]

[14] 8 U.S.C. §1252 *et. seq.*

[15] As described *supra* at 2-4, Congress has provided for access to the Circuit courts pursuant to §1252(a)(2)(D) to enable an allegedly excludable alien to raise constitutional and statutory

Arar alleges that, instead of complying with Congress's plan, overly-zealous members of the Executive branch decided to act unilaterally in expelling him to Syria in the mistaken belief that torture by Syrian law enforcement agents would yield information about Al Qaeda. In furtherance of their unlawful decision to act unilaterally, appellants conspired to block Arar's access to the courts. According to Arar's allegations, after American officials detained him as he sought to change planes at Kennedy Airport en route to his home in Montreal, they held him *incommunicado* for six days, affirmatively interfered with his lawyer's efforts to communicate with him or to learn his whereabouts, lied to her about his whereabouts, placed him in an automobile headed for the airport, and served him with an expulsion order shortly before bundling him onto a jet for Syria, where he was tortured, only to be released when it became clear that he was the victim of a grievous mistake.

When the Executive asserts power to act unilaterally, it usually seeks to justify the assertion on the basis of a claim of authority conferred by the

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claims, including torture-based claims under *The Foreign Affairs Reform & Restructuring Act of 1988*, Pub. L. 105-277, codified as 8 U.S.C. §1231, note a, (*FARRA)*, and the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Punishment or Treatment*, April 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1994) (*CAT)*. Given the Supreme Court's holdings in *St. Cyr v. INS*, 533 U.S. 289 (2001), and *Bush v. Boumediene*, *supra*, a putatively excludable alien confined in the United States may also raise the issue of torture in a *habeas corpus* petition. Arar was denied the opportunity to do both.

Constitution. See, *e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (assertion of Presidential power under Article II to determine whether communications with the President are constitutionally privileged); *Youngstown Sheet & Tube Co v. Sawyer*, *supra* (assertion of Presidential power under Article II to seize steel mills during the Korean war); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (assertion of Presidential power under Article II to detain alleged terrorists). Unlike *Hamdi*, *Nixon* or *Youngstown*, appellees do not argue that the Constitution vests the Executive with *de jure* authority to ignore the courts in exclusion proceedings involving alleged members of Al Qaeda. Rather, they assert a *de facto* power to ignore the courts with impunity, arguing that the judicial branch is powerless to recognize a damage remedy for the Executive's willful refusal to permit a detainee access to the courts. It is hard to imagine a more direct assault on the rule of law.

The Supreme Court has long held that government-imposed obstacles to access to court are unconstitutional, calling for prospective relief designed to remove the obstacles.[16] In this case, it is too late to remove the obstacles. In *Christopher v. Harbury*, 536 U.S. 403 (2002), the Court recognized that, in an appropriate case, a damage action would lie against government officials whose

[16] See, e.g, *Bounds v. Smith*, 430 U.S. 812 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

past acts had made it impossible for a person to assert his legal rights. Justice Souter, writing for the Court in *Harbury*, cautioned that a plaintiff asserting such a backwards-looking "access to the courts" damage claim must demonstrate, first, that a "non-frivolous" legal claim existed that had been frustrated by defendants' behavior; and, second, that it was now impossible to obtain adequate compensation by pursuing the underlying legal claim in a contemporaneous judicial forum. 536 U.S. at 415-16.

In *Harbury*, the plaintiff failed both tests. *Harbury*'s counsel was unable to articulate a non-frivolous legal claim that had been frustrated by defendants' activity, and that could not now be pressed equally well in the courts. 536 U.S. at 418-22. In this case, however, Arar clearly satisfies both *Harbury* criteria. Arar's colorable claim under the Convention Against Torture and FARRA to be spared from torture in Syria was not only non-frivolous, it was compelling. And, unless the en banc Court recognizes either a statutory or constitutionally-based cause of action arising out of the torture itself, no contemporaneous legal relief is possible. Indeed, this is precisely the case that Justice Souter imagined in *Harbury*.

The panel majority misapplied *Harbury*, and ruled that Arar may not complain about being unlawfully deprived of access to the courts because he failed

to plead the details of the precise legal claim that he would have advanced in the prorogued judicial forum. 532 F.3d at 188-89. But the panel majority admits that it is clear from the pleadings and the record that, apart from any constitutional claims, Arar would have raised a claim under FARRA to be spared expulsion to Syria under the Convention Against Torture (CAT). See, *supra,* 2-4, and n.15. In fact, the panel majority appears to have misunderstood *Harbury* as imposing a heightened pleading requirement obliging Arar to refer formally to CAT or FARRA in his pleadings, even though the record makes it absolutely clear that, had appellees not blocked his access to the courts, Arar would have asked a reviewing court (or a *habeas corpus* court) to block his expulsion to Syria because, applying 8 C.F.R. §208.16(c)(4), it was "more likely than not" that he would be tortured in Syria. Since such a claim would clearly have raised a colorable – indeed, a compelling - legal issue under both FARRA and CAT, it would fly in the face of a generation of Supreme Court cases to create an arcane pleading trap for the unwary. *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). See also, *e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002) (unanimous opinion delivered by Justice Thomas); *Leatherman v. Tarrant County Narcotics Intelligence and Co-*

ordination Unit, 504 U.S. 163, 168 (1993) (unanimous opinion delivered by Chief Justice Rehnquist).

III.

NO "FACTORS COUNSELING HESITATION" IMPEDE JUDICIAL RECOGNITION OF A DAMAGE CLAIM ARISING OUT OF APPELLEES' WILLFUL OBSTRUCTION OF ARAR'S ACCESS TO COURT

When federal courts adjudicate constitutional claims against defendants acting under color of state law, they are aided by an explicit Congressional grant of authority in 42 U.S.C. §1983 to issue injunctions and award damages. Federal judges enjoy no such luxury in constitutional cases against federal officials. Instead, the Supreme Court has found authorization to remedy constitutional violations by federal officials in the Constitution itself.

In *Ex parte Young*, 209 U.S. 123 (1908), in the absence of statutory authorization,[17] the Supreme Court upheld the issuance of injunctive relief against officials acting in violation of the 14th Amendment's due process clause. It is now uncontested that a cause of action for injunctive relief exists in virtually every constitutional case.

[17] In *Ex parte Young*, 42 U.S.C. § 1983 was not, and under then-existing precedent, could not have been, invoked.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized a constitutionally-based cause of action for damages against federal law enforcement agents acting in violation of the Fourth Amendment. Where no "special factors counseling hesitation" exist, *Bivens* authorizes the federal judiciary to use its traditional remedial tool kit in dealing with constitutional claims against federal officials. In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court recognized a constitutionally-based damage claim against a member of Congress for allegedly engaging in gender discrimination in violation of the equality aspects of the due process clause of the Fifth Amendment. The Court rejected the argument that Passman's status as a member of Congress, "counseled hesitation." *Bivens* was applied, as well, in *Carlson v. Green*, 446 U.S. 14 (1980) to recognize a damage claim against individual federal defendants for harms arising out of grossly inadequate prison medical care constituting a violation of the Eighth Amendment. The *Carlson* Court rejected an argument that the availability of a remedy against the government under the Federal Tort Claims Act "counseled hesitation."

In the years since *Bivens*, the Supreme Court has declined to recognize a constitutionally-based cause of action for damages when Congress has provided an

alternative method of enforcing the constitutional rights at issue, or when the constitutional claim, on the merits, posed severe problems of judicial administration. Thus, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court declined to recognize a First Amendment damage claim for retaliatory demotion of a federal employee because Congress had established a Civil Service remedial mechanism that had already reversed the demotion and ordered back-pay. Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a damage claim arising out of the procedural due process clause of the Fifth Amendment because the administrative remedial scheme established by Congress had already restored the full retroactive contested Social Security benefits. In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court declined to imply a Fifth Amendment damage claim for alleged racial discrimination in the military, noting the "unique disciplinary" status of the military, and the existence of an elaborate military remedial system designed to process such complaints.[18] In *Correctional Services Corp. v. Malesko*, 532 U.S. 902 (2001), the Court declined to expand *Bivens* to suits against private contractors acting under color of federal law,

[18] *Chappell* was expanded in *United States v. Stanley*, 483 U.S. 669 (1987) to "counsel hesitation" about implied constitutional damage remedies arising from any aspect of a plaintiff's military service.

reasoning that state tort law provided an adequate remedy against private defendants. Finally, in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), the Court declined to recognize a substantive due process *Bivens* claim against facially lawful, but improperly motivated, federal law enforcement actions, fearing that recognition of such a cause of action would threaten the vigorous enforcement of federal law.

Appellees successfully argued before the panel that issues of national security, foreign affairs, and access to evidence should "counsel hesitation" about recognizing a *Bivens* cause of action arising out of appellees' connivance with Syrian law enforcement officials in Arar's torture. 532 F.3d at 179-84. Judge Sacks, dissenting from the panel opinion, argued persuasively that no insurmountable obstacles exist to the recognition of a *Bivens* claim arising out of appellees' involvement in the torture of Arar. 532 F.3d at 208-214 (Sacks, J. dissenting).

Whatever the correct answer to that dispute may be, no factors "counsel hesitation" in connection with recognition of a constitutionally-based cause of action for damages arising out of appellees' unlawful behavior in willfully blocking Arar's access to a Congressionally-authorized Article III forum. As in

Bivens, *Davis,* and *Carlson*, the facts underlying Arar's "access to court" claim are readily available, there are no alternative legal remedies, recognition of the claim would not inhibit any lawful government action, no contrary Congressional intent exists, and the need for defense of the rule of law is acute. Unlike *Bush* and *Schweiker*, appellants frustrated Congress's remedial scheme by blocking Arar from using it. Unlike *Chappell* and *Stanley*, recognition of Arar's "access to court" claim would not disrupt sensitive Executive programs, since insisting that immigration decisions be made in accordance with law threatens no legitimate governmental interest. And, unlike *Wilkie*, recognizing Arar's "access to court" claim does not risk inhibiting lawful Executive action. Finally, recognizing a damage remedy for unlawful actions designed to frustrate Congress's plan can hardly be deemed contrary to Congress's wishes.

In *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982), the Supreme Court held that government negligence resulting in the destruction of a colorable legal claim constituted a deprivation of property without due process of law. In *Logan*, state administrative officials had negligently failed to process a discrimination claim within the mandated time requirements, resulting in dismissal of the claim. The Supreme Court held that the state had destroyed a property right

without due process of law. Where, as here, Arar's colorable – indeed compelling - legal claim to be spared from torture was not destroyed by mere negligence, but pursuant to a decision by Executive officials to exercise unlawful unilateral Executive power, there is no basis to decline to recognize a constitutionally-based cause of action sounding in a deprivation of liberty under the Fifth Amendment, caused by a willful violation of the doctrine of separation of powers.[19]

In analogous settings under 42 U.S.C. § 1983, the Supreme Court has recognized that principles of constitutional federalism are, in significant part, designed to protect individuals against abuse of authority. See, *e.g.*, *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103 (1989) (upholding ability to sue under § 1983 for harm caused by state regulation allegedly preempted by federal law and thus subject to challenge under the Supremacy Clause); *Dennis v. Higgins*, 498 U.S. 439 (1991) (upholding ability to sue under § 1983 for harm caused by

[19] As Justice Souter noted in *Harbury*, the Supreme Court has grounded "access to court" claims in a number of constitutional provisions. 536 U.S. at 515, n.12. See *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142 (1907)(Privileges and Immunities Clause of Article IV); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (First Amendment petition clause); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985)(5th Amendment due process clause); *Pennsylvania v. Finley*, 481 U.S. 551, 557-58 (1987)(14th Amendment equal protection clause); *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974)(14th Amendment due process clause); *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971)(same). *Amici* suggest that, under the facts of this case, the damage claims should be grounded in the 5th Amendment due process clause, and constitutional principles of separation of powers.

state regulation allegedly in violation of the non-textual "dormant" Commerce Clause). The constitutional principle of separation of powers is at least as important a protection of liberty as were the principles of federalism at issue in *Golden State Transit Co. and Dennis v. Higgins*. Thus, whether the en banc court chooses to ground a *Bivens* damage claim in the text of the Fifth Amendment's due process clause, the constitutional doctrine of separation of powers, or both, appellees' willful deprivation of Arar's Congressionally-established right to a day in court should give rise to an action for damages for harms flowing from that lawless act.

CONCLUSION

For the above-mentioned reasons, the decision of the panel majority should be vacated, and the case remanded to the District Court for, at a minimum, consideration of appellant's claim that he was unconstitutionally denied access to the courts.

Dated: October 21, 2008
New York, New York

Respectfully submitted,

/s/ Burt Neuborne

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CERTFICATION OF BAR MEMBERSHIP

I certify that Burt Neuborne, counsel of record herein, is admitted to practice and in good standing before the Bar of the United States Court of Appeals for the Second Circuit.

/s/ Burt Neuborne

Burt Neuborne

CERTIFICATION OF COMPLIANCE WITH Fed. R. App. P. 32(a)

I certify that the foregoing brief complies with Fed. R. App. P. 32(a). It has been prepared using Microsoft WORD in 14-point type in Times New Roman font. According to the Word Count feature of WORD, the foregoing brief contains 3,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Burt Neuborne

Burt Neuborne

CERTIFICATE OF SERVICE

2006-4216-cv Arar v. Ashcroft

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I, Raceel Pascall, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/24/2008) and found to be VIRUS FREE.

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