06-4216-cv

United States Court of Appeals

for the

Second Circuit

MAHER ARAR,

Plaintiff-Appellant,

– v. –

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

(For Continuation of Caption See Inside Cover)

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

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

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

Defendants-Appellees.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

A. Introduction and Nature of the Case 2

B. Course of Proceedings. 5

C. The District Court Decision 6

D. The Panel Decision 7

STATEMENT OF FACTS 8

A. U.S. Detention 9

B. Syrian Detention 12

C. Defendants' Involvement 14

D. The Canadian Inquiry 16

SUMMARY OF ARGUMENT 16

STANDARD OF REVIEW 21

ARGUMENT 22

I. The District Court and the Panel Majority Erred in Refusing to Recognize a *Bivens* Claim for Defendants' Violation of Arar's Substantive Due Process Rights by Subjecting Him to Torture and Arbitrary Detention ...22

A. Defendants' Alleged Conduct Violates Fundamental Due Process Rights 23

B. The Existence of an Immigration Review Scheme Does Not Preclude a *Bivens* Remedy for Federal Conspiracies to Torture and Arbitrarily Detain 25

1. There Is No Evidence That Congress Deliberately Chose to Preclude Damages Liability for Federal Conspiracies to Torture and Arbitrarily Detain 26

2. A *Bivens* Action Is Especially Appropriate Where, as Here, Defendants Blocked Access to Congressionally-Authorized Judicial Review 29

C. National Security and Foreign Affairs Concerns Do Not Preclude Recognition of a *Bivens* Action in This Case 33

1. Federal Courts—Including This One—Regularly Review The Propriety of Executive Action Affecting National Security and Foreign Relations....................34

2. The Claims At Issue In This Case Require Virtually The Identical Inquiry That A Review Of The Removal Order Would Have Involved Had Defendants Not Prevented Arar From Seeking It 37

II. Arar's Access to Court Claim Fully Satisfies Notice Pleading Requirements....................38

III. Arar's Allegations that Defendants Subjected Him to Torture Under Color of Syrian Law by Conspiring with the Syrians States a Claim for Relief Under the TVPA 44

IV. Defendants' Abusive Treatment of Arar While Detained in the United States Violated is Due Process Rights Because It was Imposed for No Legitimate Purpose 49

V. Arar Has Standing to Seek Declaratory Relief Because He Suffers an Ongoing Injury From His Unconstitutional Removal Order. 51

CONCLUSION 53

TABLE OF AUTHORITIES

Cases

*Arar v. Ashcroft***,** 414 F. Supp. 2d 250 (E.D.N.Y. 2006) .... *passim*

Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008)... *passim*

Abney v. McGinnis, 380 F.3d 663 (2d Cir. 2004)... 31

Aldana v. Del Monte Fresh Produce, 416 F.3d 1242 (11th Cir. 2005)................. 48

Allaire Corp. v. Okumus, 433 F.3d 248 (2d Cir. 2006) 21

Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) 35, 36

Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987).. 28

Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) 34

Beechwood Restorative Care Center v. Leeds, 436 F.3d 147
(2d Cir. 2006).. 47

Bell v. Wolfish, 441 U.S. 520 (1979) 50

Benjamin v. Kerik, 102 F. Supp. 2d. 157(S.D.N.Y. 2000) 39

Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980).. 30, 32, 33

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971)... *passim*

Boumediene v. Bush, 128 S. Ct. 2229 (2008) 24, 35, 36

Bounds v. Smith, 430 U.S. 817 (1977)... 39

Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288
(2001) 46

Brownell v. Krom, 446 F.3d 305, 311 (2d Cir. 2006)....................................... 31, 32

Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424 (1965) 32

Bush v. Lucas, 462 U.S. 367 (1983) 34

Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345
(S.D. Fla. 2001) 32

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) 49

Caiola v. Citibank, N.A., 295 F.3d 312 (2d Cir. 2002) 21

Carlson v. Green, 446 U.S. 14 (1980) 25

Cesar v. Achim, 542 F. Supp. 2d 897 (E.D. Wis. 2008) 29

Chavez v. Martinez, 538 U.S. 760 (2004) 23

Christopher v. Harbury, 536 U.S. 403 (2002) 42, 43

Colorado v. Connelly, 479 U.S. 157 (1986) .... …..23

Commer. Cleaning Servs. v. Colin Serv. Sys., 271 F.3d 374
(2d Cir. 2001) 44

Dahlberg v. Becker, 748 F.2d 85 (2d Cir. 1984) 46

Dames & Moore v. Regan, 453 U.S. 654 (1981) 36

Dennis v. Sparks, 449 U.S. 24 (1980) 19, 45

Dotson v. Griesa, 398 F.3d 156 (2d Cir. 2005) 17, 26, 27

Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) 5, 24

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005) 49

Erickson v. Pardus, 127 S. Ct. 2197 (2007) 43

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) 4, 23

Freedman v. Turnage, 646 F. Supp. 1460 (W.D.N.Y. 1986) 30

Grichenko v. United States Postal Services, 524 F. Supp. 672 (E.D.N.Y. 1981) 30

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 35

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) 47

Hindes v. F.D.I.C., 137 F.3d 148 (3d Cir. 1998) 47

Hughes v. Patrolmen's Benevolent Ass'n, 850 F.2d 876 (2d Cir. 1988) 45

Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) 34, 35

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 46, 49

Khorrami v. Rolince, 493 F. Supp. 2d 1061 (N.D. Ill 2007) 29

Khouzam v. Hogan, 529 F. Supp. 2d 543 (M.D. Pa. 2008) 37

Kittay v. Kornstein, 230 F.3d 531 (2d Cir. 2000) 41

Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969) 45, 47, 48

Koohi v. U.S., 976 F.2d 1328 (9th Cir. 1992) 36

Little v. Barreme, 6 U.S. 170 (1804) 36

Martinez-Aguerro v. Gonzalez, 459 F.3d 618 (5th Cir. 2006) 25

McKune v. Lile, 536 U.S. 24 (2002) 23

Miller v. Fenton, 474 U.S. 104 (1985) 23

Mironescu v. Costner, 480 F.3d 664 (4th Cir. 2007) 37

Mitchell v. Harmony, 54 U.S. 115 (1851) 36

Moi Chong v. INS, 264 F.3d 378 (3d Cir. 2001) 51

Munsell v. Dept. of Agriculture, 509 F.3d 572 (D.C. Cir. 2007) 31

Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41 (2d Cir. 1997) 19, 41

Padilla v. Rumsfeld, 352 F.3d 695 (2d. Cir. 2003) 35

Pena v. Deprisco, 432 F.3d 98, 109 (2d Cir. 2005) 24, 43

Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007) 37

Pratt v. Tarr, 464 F.3d 730 (7th Cir. 2006) 43

Ramsameachire v. Ashcroft, 357 F.3d 169 (2d Cir. 2004) 37

Rauccio v. Frank, 750 F. Supp. 566 (D. Conn. 1990) 30

Rochin v. California, 342 U.S. 165 (1952) 23

Rumsfeld v. Padilla, 542 U.S. 426 (2004) 35

Sanchez v. Rowe, 651 F. Supp. 571 (N.D. Tex. 1986) 28

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) 37

Schweiker v. Chilicky, 487 U.S. 412 (1988) 26, 30, 34

Small v. City of New York, 274 F. Supp. 2d 271 (E.D.N.Y. 2003) 43

Sonntag v. Dooley, 650 F.2d 904 (7th Cir. 1981) 30

Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004) 51

Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 43

Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001) 51

The Paquete Habana, 175 U.S. 677 (1900) 36

Thomson v. Washington, 362 F.3d 969 (7th Cir. 2004) 42

Turkmen v. Ashcroft, No. cv-02-2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006) 28

United States v. Fausto, 484 U.S. 439 (1988) 48

United States v. Russo, 302 F.3d 37 (2d Cir. 2002)... 48

United States ex rel. Caminito v. Murphy, 222 F.2d 698
(2d Cir. 1955).. 23

Wagenmann v. Adams, 829 F.2d 196, 211 (1st Cir. 1987).................................... 46

West v. Atkins, 487 U.S. 42, 48 (1988) 46

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)........................... 36

Zadvydas v. Davis, 533 U.S. 678, 690 (2001) 23

International Authorities

AS [&DD](Libya) v. Sec'y of State for the Home Dep't, (Civ.) 289,
2008 WL 833659 (Apr. 9, 2008) ....….34

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1994)..*passim*

Ismoilov v. Russia, Application No. 2947/06
(Eur.Ct.H.R. April 24, 2008) 35

Saadi v. Italy, Application No. 37201/06
(Eur.Ct.H.R. Feb. 28, 2008) 35

Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada, 2002, SCC 1. File No. 27790
January 11, 2002 35

Federal Statutes

8 U.S.C. § 1231(b)(2)(C)... 15

8 U.S.C. § 1231, note.. 34, 35

18 U.S.C. § 2340A.. 35

28 U.S.C. § 1291.. 1

28 U.S.C. § 1331.. 1

28 U.S.C. § 1350.. 34

28 U.S.C. § 1350, note.. *passim*

42 U.S.C. § 1983.. 44, 48

Federal Regulations

8 C.F.R. § 292.5(a) (2002).. 12

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, because this case raises federal questions under the Constitution and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note.

This Court has jurisdiction under 28 U.S.C. § 1291. Arar appeals from a final judgment entered by the Honorable David G. Trager on August 17, 2006 (SPA.92–93) (opinion reported at 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (SPA.1–88)), disposing of all claims. Arar timely filed his Notice of Appeal on September 12, 2006. J.A.470. A divided panel of this Court upheld the district court's judgment on June 30, 2008 (as corrected August 1, 2008) (opinion reported at 532 F.3d 157 (2d Cir. 2008)). On August 12, 2008, this Court *sua sponte* ordered rehearing *in banc*.

STATEMENT OF THE ISSUES

1. Does the existence of a statutory review scheme for removal orders preclude a constitutional damages action for the injuries Arar suffered as a result of defendants' conspiracy to have him tortured and arbitrarily detained, especially where defendants affirmatively obstructed Arar from pursuing that statutory review scheme?

2. Do "special factors" preclude a constitutional damages remedy for conspiracy to subject Arar to torture and arbitrary detention, where courts routinely adjudicate cases implicating national security and foreign policy concerns, and this Court could have considered substantially similar issues on a petition for review of Arar's removal order?

3. Do allegations that defendants affirmatively obstructed Arar's access to court in order to prevent judicial interference with their conspiracy

to subject him to torture state a claim for obstruction of access to court in violation of due process?

4. Do allegations that defendants subjected Arar to torture under color of Syrian law by conspiring with Syrian officials state a claim for relief under the Torture Victim Protection Act?

5. Do Arar's allegations of a course of abusive treatment, including incommunicado interrogation, deprivation of food and sleep, denial of access to counsel or court, and subjection to extended and abusive interrogations for the purpose of getting him to "talk" state a claim for relief under the Due Process Clause?

6. Does Arar have standing to seek declaratory relief against the U.S., where he claims that his removal order was constitutionally invalid and should be declared null and void, and where that order continues to subject him to ongoing harm, including a bar on re-entry to the United States?

STATEMENT OF THE CASE

A. Introduction and Nature of the Case

> The defendants did not themselves torture Arar; they "outsourced" it. But I do not think that whether the defendants violated Arar's Fifth Amendment rights turns on whom they selected to do the torturing: themselves, a Syrian intelligence officer, a warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles.[1]

Plaintiff Maher Arar was tortured. This torture was the culmination of a conspiracy orchestrated by defendants that emerged when Arar was detained at JFK Airport while changing planes on his way home to Canada from a family vacation, included defendants' delivery of Arar to the Syrian security service

[1] *Arar v. Ashcroft*, 532 F.3d 157, 204–05 (2d Cir. 2008) (Sack, J., dissenting), *reh'g in banc granted* (2d Cir. Aug. 12, 2008).

officials to torture him, and continued until the Canadian government secured his release approximately a year later—without a single charge having been brought against him. In order to ensure that the courts would not interfere with their conspiracy, defendants blocked Arar's access to court by lying to him and his lawyer, scheduling a critical interview session at a time that would preclude the lawyer's participation, and not serving Arar with his removal order until he was being taken to the federally-chartered jet that would take him on his way to Syria. Defendants furthered their conspiracy by providing Arar's interrogators with a dossier on Arar and obtaining from them the answers extracted from him through torture.

Arar's allegations, which must be accepted as true on this appeal from a motion to dismiss, have been largely confirmed both by a Canadian Commission of Inquiry,[2] which fully exonerated him of any connection to terrorism, and by the Department of Homeland Security's Inspector General.[3] These allegations state a claim for the violation of fundamental constitutional rights, including the right not

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[2] *See* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT ON THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND, VOL. I (2006) ("Commission Report"), available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm (last visited Sept. 18, 2008).

[3] DEPT. OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA ("IG Report") (publicly released June 5, 2008), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_08-18_Jun08.pdf (last visited Sept. 18, 2008). *See also, Inspector General Report OIG-08-18, 'The*

to be tortured or arbitrarily detained and the right of access to a court. In addition, Arar's allegations state a claim under the Torture Victim Protection Act, which provides a cause of action against those who subject an individual to torture under color of foreign law, and holds liable all those who conspire in or aid such conduct.

The district court below, and a majority of the initial panel on this appeal, held that even accepting as true that defendants deliberately subjected Arar—an innocent man—to arbitrary detention and torture, and kept him out of court to ensure that result, Arar is entitled to no remedy, and defendants are left unaccountable for their actions.

That result effectively gives a green light to torture and official obstruction of justice. This Court has famously ruled that torture is so universally condemned that U.S. courts can hold foreign officials accountable for torture they inflict on foreigners in foreign countries. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Under *Filártiga*, this Court could clearly hold the *Syrians* liable for what they did to Arar, if those officials came within U.S. jurisdiction. Yet the district court and the panel majority held that the U.S. officials who conspired with the

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Removal of a Canadian Citizen to Syria': Joint Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int'l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives, 110th Cong. (2008) ("IG Joint Hearing Transcript"), available at http://foreignaffairs.house.gov/110/42724.pdf (last visited Sept. 18, 2008).

Syrians to have Arar tortured there escape *all* liability. As Judge Sack's dissent reasoned, had defendants tortured Arar themselves, or had they handed him over to a gang of thugs in Queens to beat him to make him "talk," a *Bivens* remedy would unquestionably lie. *Arar v. Ashcroft*, 532 F.3d at 203–05 (Sack, J., dissenting); *cf., Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (police officers violated plaintiff's constitutional rights when they conspired with skinheads to permit them to beat up flag burners by assuring them they would not interfere). The fact that defendants "outsourced" the abuse to Syria does not alter that conclusion. *Arar*, 532 F.3d at 205.

B. Course of Proceedings.

On January 22, 2004, Arar filed a complaint stating four claims for relief. J.A.19. The first claim alleges that by conspiring with Syrian officials to subject Arar to torture in Syria, defendants are liable under the TVPA. J.A.38. The second and third claims allege that defendants' conspiracy to subject Arar to torture and arbitrary detention violated his substantive due process rights under the Fifth Amendment. J.A.38–41. The fourth claim alleges that defendants' mistreatment of Arar while he was in their custody, including obstructing his access to court by lying to him and his attorney, violated due process. J.A.41–42.

On February 16, 2006, the district court granted defendants' motions to dismiss the complaint. SPA.1. On August 17, 2006, the district court issued a

final judgment dismissing the action based on the Order. SPA.92. Arar appealed, and a panel consisting of Judges Cabranes, McLaughlin, and Sack affirmed by a divided vote. This Court then granted rehearing *in banc*.

C. The District Court Decision.

The district court dismissed Arar's claims that defendants' conspiracy to have him tortured and arbitrarily detained violated due process on the ground that special national-security and foreign-policy factors foreclose any *Bivens*-based remedy. *Arar,* 414 F. Supp. 2d at 287 (SPA.87).

The court dismissed Arar's claim for relief under the TVPA on the alternative grounds that the TVPA does not provide a right of action to foreign nationals, and that, despite conspiring with Syrian officials to have plaintiff tortured in Syria, the federal defendants were not acting under color of foreign law, as the TVPA requires. *Id.*

The court dismissed Arar's claims arising from his mistreatment while in U.S. custody—including interference with his access to court—without prejudice, but required plaintiff to replead them without regard to defendants' decision to send him to Syria. *Id.* at 287–88 (SPA.87–88). Arar chose to stand on his allegations and appeal. J.A.467–68.

The court ruled that Arar lacked standing to seek declaratory relief because such relief could not vacate his removal order and lift the bar on his re-entering the U.S. *Id.* at 259 (SPA.19–20).

D. The Panel Decision

The panel affirmed the district court's decision by a 2-1 vote. The majority, comprised of Judges Cabranes and McLaughlin, determined that Arar's constitutional *Bivens* claims for defendants' conspiracy to subject him to torture and arbitrary detention were precluded for two reasons: (1) Congress had created an "alternative remedial scheme" in the form of a petition for review of a removal order, 532 F.3d at 179–80; and (2) Arar's claims implicated national security and foreign policy concerns that constituted "special factors" counseling against relief. *Id.* at 181–84.

The majority dismissed Arar's access to court claim by concluding that Arar had failed to specify adequately in his complaint the legal theory that he was blocked from pursuing by defendants' obstruction. *Id.* at 188–89. The majority ruled that Arar's allegations of physical and psychological abuse did not rise to the level of a due process violation. *Id.* at 189–90.

The panel also concluded that defendants could not be found liable under the TVPA for conspiring to subject Arar to torture under color of Syrian law unless

they acted under the direction and control of the Syrians. Arar's allegations of conspiracy were found to be insufficient. *Id.* at 175–76.

Finally, the panel found that Arar lacked standing to request declaratory relief, for the same reason given by the district court. *Id.* at 191–92.

Judge Sack dissented. He maintained that Arar's allegations of a conspiracy to torture and arbitrarily detain did not constitute an immigration case, and that the existence of a process for appellate review of removal orders therefore did not preclude Arar from holding defendants accountable for their part in the conduct alleged here. *Id.* at 211–12 (Sack, J., dissenting). Judge Sack also rejected the contention that national security and foreign policy concerns preclude any consideration of Arar's claims, reasoning that the judiciary has a long history of reviewing such matters, and that any interest in shielding confidential information could be protected by proper application of the state-secrets privilege. *Id.* at 212–13.

STATEMENT OF FACTS

The district court below and Judge Sack have set forth Arar's factual allegations in substantial detail,[4] so Arar merely summarizes those facts here.

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[4] *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252-57 (E.D.N.Y. 2006) (SPA.1–12); *Arar*, 532 F.3d at 179, 194–99 (2d Cir. 2006) (Sack, J., dissenting).

A. U.S. Detention.

Arar's ordeal began on September 26, 2002, while on his way home to Canada from a family vacation in Tunisia. He flew first to Zurich for an overnight stopover, and then to John F. Kennedy Airport ("JFK"), to catch a connecting flight to Montreal. J.A.29. Officials of the Immigration and Naturalization Service (INS) detained Arar as he sought to transit to his connecting flight. *Id*. Arar repeatedly asked to make a telephone call. His requests were refused. *Id*.

During the first day of his confinement, Arar was interrogated by an FBI agent for five hours and by an INS official for another three. Arar asked for a lawyer, but his request was denied. *Id.* The FBI agent "constantly yelled and swore at him," calling Arar a "fucking smart guy" with a "fucking selective memory." *Id*. At midnight, officials took Arar, in chains and shackles, to another building at JFK and put him in solitary confinement without a bed. The lights were left on all night and Arar was unable to sleep. He was given no food. J.A.30.

At 9:00 the next morning, two FBI agents conducted another five-hour interrogation, screaming and swearing at Arar. J.A.30. Arar repeatedly requested a lawyer and permission to make a phone call. Again, his requests were refused. *Id*.

That evening, an immigration officer asked Arar to "volunteer" to go to Syria. Arar was born in Syria, but had emigrated to Canada as a teenager with his

family some fifteen years earlier. J.A.30–31. Arar told the officer that he would agree to go only to Canada, his home and destination, or to return to Switzerland. *Id.* He was then taken to the Metropolitan Detention Center ("MDC") in Brooklyn where he was strip-searched and placed in solitary confinement. J.A.31.

Over the next three days, U.S. officials denied Arar's repeated requests for legal counsel and to make a telephone call. J.A.31. On Tuesday, October 1, Arar was given an INS document preliminarily notifying him that he had been deemed inadmissible to the U.S. because he belonged to al Qaeda—an assertion Arar vigorously denied. He was given no evidence to support this "determination," nor any opportunity to contest it. *Id.* That same day—after six days of being held incommunicado—Arar was finally permitted to make a phone call. He called his family in Ottawa, Canada, who retained Amal Oummih, an immigration attorney in New York, to represent him. *Id.*

On Saturday, October 5, Ms. Oummih met with Arar at the MDC. J.A.32. This was the first and only time that he saw his lawyer. Defendants then hastily scheduled a highly unusual Sunday night session with Arar, running from 9:00 p.m. to 3:00 a.m. the next morning. *Id.* During that session, approximately seven officials questioned Arar. *Id.* Arar again repeatedly requested his lawyer, but the officials lied to him, telling him that his attorney had declined to attend. *Id.* In fact, his attorney had done no such thing. She was unaware that the interrogation

session was taking place as the only "notice" defendants provided was a voicemail left by Defendant McElroy on her office voicemail that same Sunday evening. *Id*.

During the Sunday night session, Arar repeatedly expressed his fears that he would be tortured in Syria. J.A.32. INS officials said they were discussing the matter with "Washington, D.C." *Id*.

When Ms. Oummih arrived at work Monday morning, she heard, for the first time, the voicemail message left by McElroy the night before. J.A.32. When she contacted INS, an official lied to her, telling her that Arar had been taken to Manhattan, and would then be transferred to New Jersey. J.A.33. Several hours later, an INS official again lied to Ms. Oummih, telling her that Arar had been taken to an unspecified New Jersey detention facility, and that she would have to call back the next day to get his exact location. *Id*.

In fact, that same day, Defendant INS Regional Director Blackman executed the Final Notice of Inadmissibility stating that Defendant James Ziglar, then INS Commissioner, had determined that Arar's removal to Syria was consistent with the Convention Against Torture ("CAT"). J.A.24–25, 86. The INS had initially "concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture," IG Report at 22, but that

decision was "ultimately overridden."[5] At 4:00 a.m. the next morning, INS agents took Arar from his cell and informed him that he would be sent to Syria. J.A.33, 86. They served him with his final removal order—a prerequisite to judicial review—only as they were taking him to the airport to deliver him to Syria. *Id.* Defendants never served the order on Ms. Oummih, as required by 8 C.F.R. § 292.5(a) (2002), and never informed her that Arar had been removed to Syria. J.A.36.

B. Syrian Detention.

Syria is renowned for using torture to extract information during interrogations, J.A.27, and "for years has been near the top of U.S. lists of human rights violators." J.A.78. The State Department has consistently reported for at least a decade that Syrian officials practice torture. J.A.27. The State Department's 2001 report detailed multiple specific torture practices used by Syrian security forces. J.A.45.

Arar spent the next year jailed in Syria, for most of that time at the Palestine Branch of Syrian Military Intelligence. J.A.34. For more than ten months, he was locked in a damp, cold, underground cell the size of a grave—it measured only three feet wide, six feet long, and seven feet high. J.A.35. His only source of light was a small aperture in the ceiling, through which rats ran across and cats urinated.

[5] IG Joint Hearing Transcript, 110th Cong. 56 (Statement of the Honorable Richard

Id. The officials allowed Arar one cold-water bath each week and gave him barely edible food. *Id*. By the end of his detention, Arar had lost forty pounds. *Id*.

During the first twelve days of his Syrian detention, Arar was interrogated for up to eighteen hours a day. J.A.34. The interrogations were guided by U.S. officials who had forwarded a dossier on Arar, compiled in part from the interrogations at JFK. J.A.34–35. During these interrogations, Syrian security officers physically and psychologically tortured Arar. J.A.34. He was beaten on his palms, hips, and lower back with a two-inch-thick electric cable. *Id.* He was beaten in his stomach, face, and the back of his neck with fists. *Id.* The officers also threatened to use a spine-breaking "chair," a tire (in which he would hang upside down for beatings), and electric shocks. *Id.* Arar often heard the screams of other detainees being tortured. *Id.*

The Syrian officials tortured Arar into falsely confessing that he had trained in an al Qaeda camp in Afghanistan, even though he has never been to Afghanistan and has never been involved with al Qaeda or any terrorist activity. J.A.34, 98. Syrian security officers supplied the information extracted from Arar to U.S. officials. J.A.35, 97.

On October 20, the Canadian Ambassador met with the Syrian Government to inquire about Arar and confirm his whereabouts. J.A.36. That day, Syrian

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L. Skinner, Inspector Gen. of the Dep't of Homeland Security).

security officers ended the long interrogations and severe physical beatings. J.A.36. The Canadian consulate visited Arar several times over the next year, but Syrian officials threatened Arar with further torture if he complained of his mistreatment. *Id.* On August 14, 2003, Arar told the Canadian consular official that he had been tortured and was being kept in a cell the size of a grave. J.A.36. Five days later, Syrian security officials brought Arar to the Syrian Military Intelligence's Investigations Branch and forced him to sign another false confession stating that he had participated in terrorist training in Afghanistan. *Id.*

On October 5, 2003, Syria released Arar into the custody of Canadian Embassy officials in Damascus. He was never charged with any crime. J.A.36–37. The next day—one year and two weeks after he had landed at JFK on his way home to Canada—the Canadian consulate flew Arar to Ottawa, where he was reunited with his wife and young children for the first time in over a year. J.A.37.

To this day, Arar suffers severely from his ordeal. *Id.* He has difficulties relating to his wife and children, and frequently has nightmares about his treatment in the U.S. and Syria. *Id.* Because he has been labeled a terrorist, he has been unable to find work. *Id.* He is also barred from reentering the U.S. J.A.23, 33, 86.

C. Defendants' Involvement.

Defendants were personally involved in the above conspiracy in a variety of ways. Then-Attorney General John Ashcroft oversaw both the removal process

and the search for suspected Al Qaeda members, and was authorized to approve summary removal orders and to override Arar's designation of Canada as his country of removal. 8 U.S.C. § 1231(b)(2)(C). Then-Deputy Attorney General Larry D. Thompson concluded that returning Arar to Canada would be prejudicial to U.S. interests, thereby making way for his removal to Syria. J.A.24.

Then-INS Commissioner Ziglar determined that Arar's removal to Syria was consistent with CAT, J.A.24–25, and oversaw the INS officials who detained and interrogated Arar in the U.S. J.A.30. Then-INS Regional Director Scott Blackman determined that Arar was inadmissible and executed the Final Notice of Inadmissibility. J.A.7, 93. Edward J. McElroy, then-District Director of the INS for the New York District, 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. Robert Mueller, the Director of the FBI, supervised FBI agents interrogating Arar in New York and, like Ashcroft, was intimately involved in overseeing investigation of Al Qaeda suspects in the United States. J.A.29–30, 34. It is evident that this was a high-level decision in which the most senior levels of the Justice Department were intimately involved.

D. The Canadian Inquiry.

After Arar returned to Canada, the Canadian Government convened an official commission in February 2004, chaired by the Honorable Dennis R. O'Connor, Associate Chief Justice of Ontario, to investigate Arar's case. On September 16, 2006, the Commission issued a three-volume report of its findings and conclusions.[6]

The Commission Report fully exonerated Arar, finding no evidence that he was involved with any terrorist activities, or that he posed any threat to the security of Canada. The head of the Commission stated, "I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada."[7]

SUMMARY OF ARGUMENT

This appeal asks whether federal officials who conspire to subject an individual to arbitrary detention and torture, and affirmatively block his access to

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[6] The Court granted judicial notice of the existence of the Canadian Commission Report and the scope if its contents. *See* Oct. 23, 2007 Order Granting Motion For Judicial Notice of the *Report of the Events Relating to Maher Arar* (2006) *by the Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar*; *see also* Nov. 6, 2007 Order Granting Motion For Judicial Notice of Addendum issued Aug. 9, 2007 (releasing previously redacted portions of the Commission Report), available at http://foreignaffairs.house.gov/110/42724.pdf (last visited Sept. 20, 2008). During the course of the Canadian inquiry, Arar submitted materials released by the Commission to the district court. J.A.190, 370.

court to ensure that he cannot protect himself, can be held accountable under U.S. law for their actions. There can be little dispute that a conspiracy to torture and arbitrarily detain, if proven, would violate core constitutional guarantees. But the district court and the panel majority nonetheless denied all relief, leaving the federal officials responsible wholly unaccountable. That untenable result is flawed for six reasons.

First, the panel majority's conclusion that an immigration statute providing for judicial review of removal orders precludes a *Bivens* action for defendants' conspiracy to subject Arar to torture and arbitrary detention directly conflicts with binding precedent holding that such relief should be denied only where Congress intentionally sought to preclude review. *See infra,* sec. I.B. In *Dotson v. Griesa*, 398 F.3d 156, 170 (2d Cir. 2005), this Court held that a *Bivens* claim cannot be precluded without evidence that Congress *deliberately* declined to provide relief for the type of injury alleged. The panel majority cited no such evidence, and none exists. Furthermore, by remitting Arar to a "review" mechanism that defendants affirmatively blocked, the panel's decision rewards obstruction of justice. It marks the first time *any* court has barred all *Bivens* relief based on "alternative remedies"

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[7] Press Release, Arar Comm'n, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case 1 (Sept. 18, 2006), quoted in *Arar*, 532 F.3d at 199–200 (Sack, J., dissenting).

where defendants themselves affirmatively obstructed access to the purported alternative scheme.

Second, the district court and the panel majority impermissibly treated national security and state secrets as "special factors" precluding a *Bivens* claim. *See infra,* sec. I.C. These concerns are properly addressed through the political question and state secrets doctrines, neither of which warrant dismissal at this juncture. Instead of applying these doctrines, the district court and the panel majority loosely and improperly invoked national security concerns to deny *Bivens* relief. As recent Supreme Court decisions have underscored, however, the federal courts have an obligation to hold executive officials accountable for constitutional violations, even when national security and foreign relations are implicated. Moreover, the panel majority's "alternative review" analysis assumed that Arar's claims could have been addressed on a petition for review of removal—had defendants not blocked Arar from filing one. These claims do not become inappropriate for judicial resolution simply because defendants' obstructionist actions have relegated Arar to retrospective relief.

Third, the majority's conclusion that Arar's complaint did not sufficiently plead the legal theory he was barred from pursuing with respect to his *Bivens* claim for obstruction of access to court conflicts with this Court's precedent holding that

under "notice pleading," one need only plead facts, not legal theories.[8] *See infra,* sec. II. The legal claim Arar was blocked from pursuing—that CAT forbade his removal to Syria—was clear to all. It was identified in the first paragraph of Arar's complaint, expressly articulated in Arar's briefs, and acknowledged by defendants and by the panel majority itself in its opinion. Moreover, litigation of Arar's access-to-court claim presents none of the national security or foreign relations concerns that the district court and panel majority found precluded Arar's torture and arbitrary detention claims.

Fourth, the district court's and the panel's dismissal of Arar's TVPA claim conflicts with established case law on the meaning of "under color of law." *See infra,* sec. III. The panel treated one of several standards for showing that individuals acted "under color of law"—that they acted under the control or influence of a state official—as the *exclusive* standard. But precedent from the Supreme Court, this Circuit, and other courts establishes that there are many other ways to satisfy the "under color of law" standard, including by showing, as Arar alleges here, that defendants were willful participants in joint action with state officials.[9] The touchstone of liability under the color of law standard that Congress

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[8] *See, e.g., Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 45–46 (2d Cir. 1997).

[9] *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969).

set forth in the TVPA is not which actor does the ordering, but whether the foreign and domestic actors engaged in joint conduct to torture someone.

Fifth, the district court and the panel majority both erroneously dismissed Arar's challenge to the abusive treatment he received while in custody in the United States. *See infra,* sec. IV. That course of conduct, which as Judge Sack noted, was part and parcel of defendants' scheme to coerce Arar into talking, violates due process. *Arar*, 532 F.3d at 203. It was not imposed for any legitimate purpose, but instead to coerce Arar into talking and to obstruct his ability to seek legal protection.

Sixth, the district court and the panel erred in finding that Arar lacked standing to seek declaratory relief. Both courts concluded that because Arar did not in this lawsuit challenge the determination that he was associated with Al Qaeda—a fact he has consistently and vigorously denied, but did not consider reviewable here—he is not entitled to an order declaring the removal order null and void. But if the removal order is unconstitutional, either because it was entered for the purpose of subjecting him to torture and arbitrary detention, or because defendants affirmatively precluded him from challenging it via a petition for review, the order is void as violative of due process. Arar need not establish that it is invalid on all grounds—including ones that are not reviewable here—in order to obtain appropriate relief. *See infra,* sec. V.

While Arar's appeal identifies multiple errors, his claim is fundamentally rooted in basic principles of separation of powers: Article II executive officials may not enter into an unlawful conspiracy to subject an individual held in the United States to torture and arbitrary detention in a foreign country, and carry the conspiracy into effect by affirmatively obstructing his access to the Article III judicial remedy designed by the Article I Congress to ensure respect for the rule of law. The executive officials in this case took a carefully crafted system designed to include all three branches in the removal process, and twisted it into a blatantly unlawful unilateral exercise of executive power. This action seeks to hold those officials accountable, provide redress to an innocent man, and reaffirm the commitment to separation of powers and fundamental human rights that is, at bottom, the judiciary's greatest responsibility.

STANDARD OF REVIEW

Arar's appeal of the district court's dismissal of his complaint is reviewed *de novo*. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249–50 (2d Cir. 2006). On a motion to dismiss, all allegations in the complaint must be taken as true and all inferences drawn in the plaintiff's favor. *Caiola v. Citibank, N.A.*, 295 F.3d 312, 321 (2d Cir. 2002).

ARGUMENT

I. THE DISTRICT COURT AND THE PANEL MAJORITY ERRED IN REFUSING TO RECOGNIZE A *BIVENS* CLAIM FOR DEFENDANTS' VIOLATION OF ARAR'S SUBSTANTIVE DUE PROCESS RIGHTS BY SUBJECTING HIM TO TORTURE AND ARBITRARY DETENTION.

There can be little dispute that Arar's allegations that defendants conspired to subject him to arbitrary detention and torture state a claim for violations of the Fifth Amendment Due Process Clause. The district court and the panel majority nonetheless held that Arar was entitled to no relief, because he could not pursue a *Bivens* action for his injuries. In fact, as shown below, Arar alleges precisely the kind of violations that warrant the remedy of a *Bivens* action.

The district court and the panel majority declined to recognize a *Bivens* claim for two reasons. First, the panel majority noted that Congress provided an "alternative remedy" for such interests in a petition for review of a removal order. *Arar*, 532 F.3d at 177. Second, echoing the district court's reasoning, the panel majority held that adjudicating Arar's claims "would interfere with the management of our country's relations with foreign powers and affect our government's ability to ensure national security." *Id.* at 182. Both conclusions conflict with decisions of this Court and the Supreme Court.

A. Defendants' Alleged Conduct Violates Fundamental Due Process Rights.

Had defendants tortured Arar themselves at JFK, their conduct would plainly "shock the conscience" and violate substantive due process. *Rochin v. California*, 342 U.S. 165, 172–73 (1952). Torture is universally condemned,[10] and was cited in *Rochin* as the paradigmatic violation of substantive due process. *Id.* at 172.[11] Similarly, had defendants themselves locked Arar in a cell the size of a grave for nearly a year without charges, their actions would indisputably constitute arbitrary detention and violate substantive due process.[12]

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[10] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1994); *Filártiga*, 610 F.2d at 890 (torturer has become "*hostis human generis*, an enemy of all mankind"); *See* brief of International Human Rights Law Clinic, American University Washington College of Law for Amicus Curiae supporting Plaintiff-Appellant (filed December 21, 2006); *see also* brief of Center for Social Justice, Seton Hall Law School, for Amicus Curiae Scholars of American Constitutional Law, supporting Plaintiff-Appellant (filed December 21, 2006).

[11] *See also Colorado v. Connelly*, 479 U.S. 157, 163 (1986) ("certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.") (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)); *McKune v. Lile*, 536 U.S. 24, 41 (2002) (finding that under the Fifth Amendment, "the Constitution clearly protects" against "physical torture"); *Chavez v. Martinez*, 538 U.S. 760, 789 (2003) (Kennedy, J., concurring in part, dissenting in part) ("A constitutional right is traduced the moment torture or its close equivalents are brought to bear."); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 701, 702 (2d Cir. 1955) ("It is imperative that our courts severely condemn confession by torture").

[12] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("government detention violates the [Due Process] Clause unless the detention is ordered in a *criminal* proceeding

Conspiracies to have others torture and arbitrarily detain an individual equally "shock the conscience" and violate substantive due process. Defendants would be equally liable had they conspired to have Arar tortured and detained by a private gang in New York. *Cf., Dwares v. City of New York,* 985 F.2d 94 (2d Cir. 1993).[13] As Judge Sack explained, the fact that defendants handed Arar over to thugs in Syria instead of Queens should not alter the analysis.

Because defendants' involvement in the conspiracy to subject Arar to torture and arbitrary detention began at least 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 abroad. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 279 (E.D.N.Y. 2006) (SPA.67).

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with adequate procedural protections, or in certain special and 'narrow' non-punitive 'circumstances'") (citation omitted); *see also Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) ("Chief among [freedom's first principles] are freedom from arbitrary and unlawful restraint").

[13] Arar's allegations of a conspiracy to torture and arbitrarily detain go far beyond those this Court found sufficient to hold government officials responsible in *Dwares*. In that case, plaintiff alleged merely that defendant police officers let a group of "skinheads" know that they would not intervene if the skinheads beat plaintiff. The federal defendants here did not merely let Syria know that they would look the other way. They affirmatively took Arar into custody, held him under abusive conditions, coercively interrogated him, kept him from accessing a court, transported him to Syria to be tortured, and then worked with the Syrians in guiding the interrogation. *See, Pena v. Deprisco*, 432 F.3d 98, 109 (2d Cir. 2005) (constitutional liability may arise where government fails to protect an individual with whom it has a "special relationship," such as a detainee).

Federal courts have recognized that damages are an appropriate remedy for similar constitutional violations.[14] Indeed, the United States has expressly stated that a *Bivens* remedy is available where federal officials subject an individual to torture.[15] Nonetheless, the panel majority and the district court declined to recognize a *Bivens* claim here, and thereby immunized defendants from any liability for their part in this universally condemned abuse. As explained below, their reasons for doing so are unfounded.

B. The Existence of an Immigration Review Scheme Does Not Preclude a *Bivens* Remedy for Federal Conspiracies to Torture and Arbitrarily Detain.

The panel majority concluded that what it called an "alternative remedy"—namely, a petition for review of a removal order—precluded Arar's *Bivens* action. It is true that had defendants not blocked Arar from filing a petition for review, he could have argued in a court of appeals that his removal to Syria would violate the

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[14] *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing damages claim for abuse by prison officials that violates the Eighth Amendment); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing damages claim for unlawful search and seizure); *Martinez-Aguerro v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (recognizing *Bivens* claim for excessive force during immigration detention).

[15] United States Diplomatic Mission to the United Nations in Geneva, *List of Issues to be Considered During the Examination of the Second Periodic Report of the united States of America: Response of the United States of America*, 10 (May 5, 2006), available at http://geneva.usmission.gov/Press2006/CAT-May5.pdf (stating that U.S. law provides a *Bivens* remedy against federal officials for torture).

Convention Against Torture, and that court could have prohibited his removal. But that fact does not preclude a *Bivens* action here for two reasons.

1. There Is No Evidence That Congress Deliberately Chose to Preclude Damages Liability for Federal Conspiracies to Torture and Arbitrarily Detain.

The existence of a statutory review mechanism for removal orders does not bar a *Bivens* remedy unless Congress's failure to provide a damages remedy was "deliberate" and "conscious," and not "inadvertent." *Dotson v. Griesa*, 398 F.3d 156, 160, 176 (2d Cir. 2005). Where Congress has intentionally chosen to deny a damages remedy for a particular wrong, the courts should not imply one as a matter of constitutional common law. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("special factors" inquiry requires "an appropriate judicial deference to indications that congressional inaction has not been inadvertent"). But there is simply no evidence that in enacting the immigration review statute, Congress deliberately chose not to provide a remedy for conspiracies by federal officials to intentionally subject individuals to torture or arbitrary detention. Absent such evidence, the immigration review scheme does not preclude a *Bivens* action.

Dotson v. Griesa demonstrates what is required to find that a congressional review scheme precludes a *Bivens* remedy. 398 F.3d 156. In assessing whether to afford a terminated judicial employee a *Bivens* remedy, this Court asked whether the absence of a statutory damages remedy was "an uninformative consequence of

the limited scope" of the statute Congress enacted, 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. *Id.* at 167 (quoting *United States v. Fausto*, 484 U.S. 439, 448-49 (1988)). The Court then pointed to the structure of the Civil Service Reform Act, which covers all federal employees but "expressly excluded . . . [judicial employees] . . . from specific procedural rights and remedies;" Congress's repeated decisions to "not extend these procedural protections to judicial branch personnel;" and Congress's deference to the judiciary's own internal redress procedures. *Id.* at 170. On this extensive record, the Court found that Congress's decision not to provide a remedy for judicial employees was "not inadvertent, but a conscious and rational choice made and maintained over the years." *Id*. at 176.

In contrast to *Dotson*, the panel majority here cited no evidence whatsoever that in enacting the immigration review statute, Congress intended to deny remedies to persons subjected to a federal conspiracy to arbitrarily detain and torture. In fact, the panel never even asked that question. Had it done so, it could not have concluded that Congress intended the immigration review statute to preclude liability for such conduct. Long before the current immigration review statute was enacted in 1996, courts had recognized *Bivens* actions for constitutional

violations.[16] Yet there is not a hint in the statute or legislative history that Congress sought to eliminate *Bivens* actions from the immigration setting.

More importantly, as Judge Sack explained, Arar's lawsuit is not fundamentally an immigration case at all. 532 F.3d at 202. Arar challenges federal officials' intentional conspiracy to subject him to arbitrary detention and torture. The exploitation of the immigration power was simply one part of the overall conspiracy, which included defendants' abusive detention and coercive interrogations of him, blocking of his access to counsel and court, and coordination with Syrian officials. The complaint alleges a broad *intentional* conspiracy to subject Arar to torture, not simply an erroneous immigration decision. Even if routine immigration errors ought not give rise to *Bivens* claims, there is no evidence that Congress intended to immunize such intentional conspiracies from liability when it enacted the immigration review scheme. Courts have consistently held that the INA does not preclude a *Bivens* remedy for constitutional violations committed in the course of immigration enforcement.[17] If anything, the case for *Bivens* review is stronger here, given the egregious nature of the conduct alleged.

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[16] *See, e.g., Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Sanchez v. Rowe*, 651 F. Supp. 571, 574 (N.D. Tex. 1986).

[17] *Cf. Turkmen v. Ashcroft*, No. CIV. 02-2307, 2006 WL 1662663, at *29, 2006 U.S. Dist. LEXIS 39170, at *91 (E.D.N.Y. June 14, 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), *appeal docketed*, No. 06-3745 (2d Cir. Aug. 10, 2006); *Turnbull v. United States of*

2. A *Bivens* Action Is Especially Appropriate Where, as Here, Defendants Blocked Access to Congressionally-Authorized Judicial Review.

Defendants affirmatively blocked Arar from pursuing the very "alternative remedy" that the panel majority would now treat as exclusive. By denying his initial requests for a lawyer, lying to him and his attorney once he retained one, scheduling his "fear of torture" interview late on a Sunday night, failing to notify his attorney in a timely fashion, not serving Arar with his removal order until he was on his way to the airplane that would fly him out of the country, and never serving his counsel with that order, defendants ensured that Arar could not file a petition for review of his removal. It is inconceivable that Congress deliberately intended the INA to preclude review in those cases where the defendants themselves render the potential statutory remedy unavailable. Yet the panel majority's reasoning perversely rewards official obstruction of justice.

America et. al, 2007 U.S. Dist LEXIS 53054, at *34-35, 2007 WL 2153279 at *11 (N.D. Ohio July 23, 2007) (finding no evidence that Congress intended to preclude a constitutional *Bivens* claim that defendants violated a court order in removing alien from country); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (N.D. Ill. 2007) (the INA does not bar *Bivens* action for claims of physical and psychological abuse and arbitrary detention); *Cesar v. Achim*, 542 F. Supp. 2d 897, 900–01 (E.D. Wis. 2008) (INA's provisions "do not mention or provide any means of redress for constitutional violations" relating to detention, and therefore do not bar *Bivens* action for unconstitutional detention).

Every other court to consider the issue has held that an otherwise preclusive remedial statute does *not* bar *Bivens* relief where defendants block access to it.[18] In *Rauccio v. Frank*, for example, the court recognized that Post Office regulations constituted 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. 566, 571 (D. Conn. 1990) (citing *Schweiker*, 487 U.S. at 428-29). 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 sought to deprive the employee of the opportunity to present his claims under the Act's procedures. 524 F. Supp. 672, 676-77 (E.D.N.Y. 1981). According to that court, defendants' interference warranted "the availability of a strong deterrent." *Id.*

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[18] *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981); *Bishop v. Tice*, 622 F.2d 349, 357-58 (8th Cir. 1980); *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990); *Freedman v. Turnage*, 646 F. Supp. 1460, 1466 (W.D.N.Y. 1986); *Grichenko v. U.S. Postal Service*, 524 F. Supp. 672, 676-77 (E.D.N.Y. 1981).

The rationale behind refusing to deny a *Bivens* remedy in this situation was explained recently by the D.C. Circuit in *Munsell v. Dept. of Agriculture*, 509 F.3d 572 (D.C. Cir. 2007). In a case alleging that Department of Agriculture officials retaliated against plaintiff for his speech, the court assumed that the availability of Administrative Procedure Act (APA) review might ordinarily present a "special factor" counseling against recognition of a *Bivens* claim. The court noted, however, that such a result would make "little sense" where defendants allegedly foreclosed plaintiff from pursuing APA relief:

> [I]n a case of this sort, were the possibility of APA review deemed sufficient to foreclose a *Bivens* remedy, the very success of the unconstitutional conduct in removing Munsell/MQF from the regulated arena would make APA review unavailable and insulate the conduct entirely from judicial review. That would make little sense.

Munsell, 509 F.3d at 591.

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 shall 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, 666–67 (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) (tolling statute of limitation for TVPA claim); *see also 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).

The panel majority defended its result by claiming that in *Bishop v. Tice,* 622 F.2d 349 (8th Cir. 1980), one of the cases recognizing a *Bivens* claim where defendants had interfered with access to a statutory review scheme, defendants "could not be sued for the underlying injury that the remedial scheme was designed to redress." *Arar*, 532 F.3d at 180. But *Bishop* in fact ruled that plaintiff *could* pursue a *Bivens* action for obstruction of access to otherwise exclusive remedies, *and* could recover fully for his underlying injuries as well if he could show that he "would have prevailed had he received any hearing to which he was entitled." *Bishop*, 622 F.2d at 357, n.17. Thus, far from rewarding official obstruction, the court in *Bishop* ruled that the plaintiff could obtain all the relief he was denied.[19]

[19] Moreover, as Judge Sack recognized, here unlike *Bishop*, Defendants' denial of Arar's access to court is itself an integral part of the conspiracy to torture him, and therefore cannot be separated from the substantive due process claim in the way

By contrast, the majority here leaves Arar with no remedy at all, and gives defendants a windfall immunity for their deceitful and obstructionist behavior.[20]

C. National Security and Foreign Policy Concerns Do Not Preclude Recognition of a *Bivens* Action in This Case.

There is no dispute that this case touches on foreign policy and national security, or that future litigation may require the courts to address the government's assertion of "state secrets."[21] But those considerations do not constitute "special factors" counseling against recognition of a *Bivens* remedy.

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that the *Bishop* court separated Bishop's wrongful dismissal claim and his procedural due process claim.

[20] For similar reasons, the district court correctly ruled that it had jurisdiction over Arar's torture and arbitrary detention claims. *Arar*, 414 F. Supp. 2d at 273-74 (SPA.54). As the district court properly held, the immigration review scheme was "intended 'to consolidate judicial review of immigration proceedings into one action in the court of appeals,' not to eliminate judicial review altogether." 514 F. Supp. 2d at 270 (quoting *INS v. St. Cyr*, 533 U.S. 289, 313 (2001)) (SPA.45). Those provisions are "of questionable relevance . . . [where] defendants by their actions essentially rendered meaningful review an impossibility." *Id.* at 273 (SPA.53–54). There is simply no evidence that Congress intended to deny federal court jurisdiction where government officials succeeded in obstructing a foreign national's access to court for congressionally-authorized review.

[21] The United States asserted a "state secrets" privilege below, but the district court did not reach that assertion, and the parties agreed on appeal that it was premature for this Court to address the privilege assertion where the district court had not addressed it and no party briefed it. The Government further stated that it would need to provide new or updated state secrets declarations in light of intervening events. Letter Brief from Counsel for the United States to the Clerk of Court (Oct. 30, 2007).

1. Federal Courts—Including This One—Regularly Review The Propriety of Executive Action Affecting National Security and Foreign Relations.

The Supreme Court has *never* treated foreign policy, national security, or the possibility of "state secrets" as "special factors" counseling against a *Bivens* remedy.[22] The "special factors" analysis is designed to identify areas where *Congress* has determined that judicial redress is inappropriate. *Schweiker*, 487 U.S. at 423; *Bush v. Lucas*, 462 U.S. 367, 389 (1983). Yet Congress has given no indication that torture claims are inappropriate for judicial resolution; on the contrary, it has repeatedly directed the courts to adjudicate such claims, whether they involve U.S. or foreign officials, U.S. citizens or foreign nationals.[23] Resolution of cases involving torture in other countries may well affect foreign relations, but Congress has made clear that the need for *judicially* enforced accountability for and protection from torture outweighs the possibility of

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[22] *See also Elmaghraby v. Ashcroft,* 2005 U.S. Dist. LEXIS 21434, at *44–46, 2005 WL 2375202, at *14 (rejecting argument that national security need to investigate 9/11 terrorist attacks was a "special factor" precluding *Bivens* remedy), *aff'd in part, rev'd in part by Iqbal v. Hasty*, 490 F.3d 143, 159-60 (2d Cir. 2007) (rejecting post-9/11 "exigent circumstances" as basis for qualified immunity because the "strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times"), *cert. granted on other grounds, Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008).

[23] *See* TVPA Sec. 2 (a)(1), 28 U.S.C. § 1350, note (2008) (providing liability for those who subject individuals to torture under color of foreign law); Alien Tort Statute, 28 U.S.C. § 1350 (2008) (providing liability for those who commit torts against aliens in violation of the law of nations, including torture); 8 U.S.C. § 1231 note (2008) (providing for judicial review of claims that an alien's removal will

diplomatic embarrassment. Moreover, concerns about classified information, should they arise, can be addressed through more appropriate tools in the course of the litigation.[24]

Virtually *every* challenge to executive action in the name of counterterrorism touches on foreign policy and national security, yet federal courts, including this one, adjudicate the merits of these claims in a wide variety of situations.[25] The Supreme Court has shown repeatedly in recent years that courts have a critical role

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expose him or her to a risk of torture); 18 U.S.C. § 2340A (2008) (making torture and conspiracy to torture a felony).

[24] Courts outside the United States have adjudicated claims involving diplomatic communications and exchanges with foreign countries where allegations of exposure to torture were at issue. *See, e.g., Saadi v. Italy*, Application No. 37201/06 (Eur.Ct.H.R. Feb. 28, 2008), at 32–33, ¶ 138, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Saadi%20|%20v.%20|%20Italy&sessionid=14028254&skin=hudoc-en (last visited Sept. 22, 2008); *AS [& DD] (Libya) v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ.) 289, 2008 WL 833659 (Apr. 9, 2008) (Eng.), *available at* http://www.lawreports.co.uk/WLRD/2008/CACiv/apr0.4.htm; *Ismoilov v. Russia,* Application No. 2947/06 (Eur.Ct.H.R. April 24, 2008), ¶¶ 127-128, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=2947/06&sessionid=14028254&skin=hudoc-en (last visited Sept. 22, 2008); *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada,* 2002, SCC 1. File No. 27790, January 11, 2002, available at http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html (last visited Sept. 22, 2008).

[25] *See, e.g., Boumediene*, 128 S. Ct. 2229; *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006) (declaring President's military tribunal order invalid); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (reviewing detention of enemy combatant), *rev'd on other grounds, Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Iqbal,* 490 F.3d 143 (reviewing allegations of abuse in post-9/11 detentions); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (reviewing detention of enemy combatant).

to play in ensuring that measures taken in the name of national security comport with the rule of law. As the Court said earlier this year, "The laws and the Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

Over its history, the Supreme Court has reversed a presidential directive ordering the seizure of steel mills to protect the production of armaments for the Korean War,[26] reviewed on the merits a presidential order resolving the Iranian hostage crisis,[27] and awarded damages on claims arising out of executive actions during wartime.[28] While courts must not substitute their policy judgments for those of the executive branch on matters constitutionally committed to that branch, Arar's case demands no judgment of policy, but instead asserts core constitutional violations. Under our Constitution, the decision to subject an individual to torture and arbitrary detention is not a policy option. If courts can adjudicate claims that

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

[27] *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

[28] *Little v. Barreme*, 6 U.S. 170 (1804) (awarded damages for an illegal presidential seizure of a ship during war with France); *see also Mitchell v. Harmony*, 54 U.S. 115 (1851) (adjudicating liability of U.S. soldier for trespass for seizing plaintiff's goods in Mexico during Mexican War); *The Paquete Habana*, 175 U.S. 677 (1900) (imposing damages for illegal seizure of fishing vessels during wartime); *Koohi v. U.S.*, 976 F.2d 1328, 1331 (9th Cir. 1992) (finding

the President, acting pursuant to a congressionally authorized military conflict, violated enemy combatants' constitutional rights, surely a court can—and should—adjudicate Arar's claims.[29]

2. The Claims At Issue In This Case Require Virtually The Identical Inquiry That A Review Of The Removal Order Would Have Involved Had Defendants Not Prevented Arar From Seeking It.

The propriety of judicial review here is underscored by the panel majority's own conclusion that a court could have heard Arar's claim that he would be tortured in Syria had he been able to file a petition for review of his removal order. *Arar*, 532 F.3d at 170. Petitions for review addressing CAT claims routinely involve inquiry into foreign countries' national security apparatuses, and inevitably affect our foreign policy—but they are adjudicable nonetheless.[30]

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damages claims by the deceased passengers and crew of a civilian aircraft shot down by a U.S. warship justiciable).

[29] The panel majority's reliance on *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), was misplaced. *Arar*, 532 F.3d at 182. That case challenged the President's political determination to support overthrow of the Nicaraguan government. Here, both political branches have uniformly condemned torture by anyone, anywhere, under any circumstances. Thus, adjudicating this case *reinforces* federal policy, whereas *Sanchez-Espinoza* sought to upend it.

[30] *See, e.g., Pierre v. Gonzales*, 502 F.3d 109, 116 (2d Cir. 2007) (examining Haitian governmental policies and practices and country conditions as part of CAT assessment); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 185 (2d Cir. 2004) (reviewing claims that alien would be tortured by Sri Lanka on petition for review); *Mironescu v. Costner*, 480 F.3d 664, 672–73 (4th Cir. 2007) (neither foreign policy implications nor sensitive confidential communications with other nations bar judicial consideration of a habeas action questioning whether extradition to another country would violate CAT); *see also Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008) (finding Khouzam had a right under CAT

Had defendants not obstructed Arar's ability to file a petition challenging the order of removal, this Court would have had to engage in substantially the same inquiry that the district court and the panel majority claim is now impermissible. But if Arar's claims would have been appropriate for judicial resolution on a petition for review, there is no reason why they should suddenly raise insurmountable national security and foreign policy issues simply because Arar seeks damages. The nature of the relief sought—damages vs. an order barring removal—has no relevance to the national security and foreign policy issues at stake.

II. ARAR'S ACCESS TO COURT CLAIM FULLY SATISFIES NOTICE PLEADING REQUIREMENTS.

Arar also seeks damages for defendants' affirmative obstruction of his access to a congressionally-established judicial remedy designed to ensure compliance with the rule of law (and particularly the obligation to avoid torture) in removal cases. The Due Process Clause and fundamental principles of separation of powers bar executive officials from interfering with access to court by those in their custody. If the executive is permitted to obstruct access to congressionally-established judicial remedies, we cease to be a government of separation of powers, and revert to a *de facto* regime of unilateral executive power.

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and the Due Process clause to challenge diplomatic assurances that Egypt would not torture him), *appeal docketed,* No. 08-01094 (3d Cir. Jan. 10, 2008).

The constitutional obligation to preserve detainees' access to congressionally-established judicial remedies entails affirmative duties, such as the maintenance of an adequate prison law library or other measures that ensure a reasonable opportunity for prisoners to seek and receive the assistance of attorneys. *Bounds v. Smith*, 430 U.S. 817 (1977); *Benjamin v. Kerik*, 102 F. Supp. 2d. 157, 175–78 (S.D.N.Y. 2000). If it violates the Constitution to fail to provide an adequate law library, then *a fortiori* it violates the Constitution to affirmatively frustrate access to court by denying a detainee's request for a lawyer, lying to the detainee and his attorney, scheduling proceedings to ensure the lawyer will not be present, and serving a judicially-reviewable removal order in such a way as to ensure that there is no way the detainee can gain access to a court.

Moreover, adjudication of Arar's access to court claim implicates none of the national security and foreign policy concerns that the district court and the panel majority raised regarding his torture and arbitrary detention claims. The facts surrounding defendants' efforts to keep Arar out of court all occurred here, and can be established without inquiry into communications with foreign governments. And there can be no national security justification for barring a

prisoner from even *requesting* the judicial relief that Congress has explicitly provided.[31]

The panel majority and the district court rejected Arar's access to court claim as insufficiently pleaded, but for different reasons. The majority concluded that Arar's complaint did not adequately specify "the underlying cause of action" Arar would have pursued had he not been kept out of court. *Arar*, 532 F.3d at 188. Yet the panel itself was fully aware of the cause of action lost—namely, a claim to "enjoin[] his removal to a country that would torture him, as a violation of FARRA and [the Convention against Torture ('CAT')]." *Id.* (quoting Pl. Reply Br. at 34). In fact, the very first paragraph of Arar's complaint alleges that defendants violated the CAT (J.A.20), and subsequent paragraphs lay out the details of their obstruction of his access to court. Defendants were not only aware that this would have been Arar's claim on a petition for review,[32] but successfully argued that this

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[31] Indeed, defendants have never argued that such factors precluded review of Arar's claim that he was denied access to the courts, and neither the district court nor the panel found that they did.

[32] *See, e.g.,* Br. for Defendant-Apellee John Ashcroft at 20 (stating that judicial review of Arar's FARRA claims should have been in "the circuit court of appeals, as part of the review of a final order of removal"); *id.* at 25 (arguing that "a petition for review is the 'sole and exclusive' means for review of CAT claims"); Br. for the Official Capacity Defendants-Appellees and United States as Amicus Curiae at 41 (arguing that the CAT determination in Arar's case was "subject to judicial review through....a petition for review of the removal order"); United States Mot. Dismiss Reply Br. 10 (noting that non-citizens fearing torture upon removal have a cognizable CAT claim on a petition for review of a removal order); Mot. Dismiss Oral Arg. Tr. 13 (Counsel for the U.S. argued below that Arar's right to access a

was Arar's *exclusive* avenue for review, barring his *Bivens* claims. *Arar*, 532 F.3d at 178–80. The panel majority's dismissal of Arar's access to court claim for failure to plead a legal theory that everyone understood is contrary to established precedent on notice pleading. It harks back to an age where technical pleading requirements were used as traps for the unwary. Such long-rejected notions are especially inappropriate in a case like this, raising fundamental questions about executive branch commitment to separation of powers and the rule of law.

As this Court has warned, a plaintiff's complaint may not be dismissed because it does not set forth a legal theory, "so long as she has alleged facts sufficient to support a meritorious legal claim." *Northrop v. Hoffman of Simsbury, Inc*., 134 F.3d 41, 45–46 (2d Cir. 1997). "The failure in a complaint to cite a statute or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters." *Id.* at 46. "[I]f the court understood the allegations sufficiently to determine that they could state a claim for relief, the complaint has satisfied Rule 8." *Kittay v. Kornstein,* 230 F.3d 531, 541 (2d Cir. 2000).

Arar's complaint fully satisfies this standard. It expressly states that "Federal officials removed Mr. Arar to Syria . . . in direct contravention of the [CAT]." J.A.20. Its allegations gave defendants notice that Arar claimed that they

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court encompassed prospective challenges under the INA and CAT that he would

blocked him from seeking judicial review that would have forestalled his removal to Syria under the CAT. It alleges that Arar expressly objected to removal to Syria because of his concerns about being tortured there, and repeatedly asked for a lawyer. J.A.31–33, 44, 47. It further alleges that defendants lied to him and his lawyer, and waited to serve him his removal order—the prerequisite to a petition for review—until they were taking him to the jet that flew him to Syria, and never notified his lawyer that he was being removed to Syria. J.A.32–33, 36. These allegations were clearly sufficient; defendants' own arguments reflect their understanding that Arar could have pursued a CAT claim had he not been blocked from going to court.

Christopher v. Harbury, 536 U.S. 403 (2002), does not require a different result. While *Harbury* required plaintiff to identify an adequate legal claim that she was barred from pursuing, it did not establish a heightened pleading standard.[33] The Court ruled against Harbury not because her complaint was insufficiently pled, but because the legal claim she identified provided no relief that she could not directly pursue in the case at hand. *Harbury*, 536 U.S. at 421.[34] The legal claim the

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be tortured if sent to Syria).

[33] *Harbury,* 536 U.S. at 417 ("complaint should state the underlying claim in accordance with Federal Rule of Civil Procedure 8(a)"); *see also Thomson v. Washington*, 362 F.3d 969 (7th Cir. 2004) (no heightened pleading for access to court claims).

[34] By contrast, the CAT/FARRA claim Arar was barred from pursuing is no longer actionable. Moreover, if Arar's substantive due process claims under *Bivens* are

Court considered, moreover, was not pled in Harbury's complaint, but only in her responses to questions at oral argument before the court of appeals. *Id.* at 419-22 and n.19. Decisions since *Harbury* have similarly permitted plaintiffs to identify the specific cause of action lost "through their opposition papers and at oral argument."[35]

A complaint's allegations must merely be "sufficient to give fair notice to a defendant." *Harbury*, 536 U.S. at 416 (citing *Swierkiewicz v. Sorema,* 534 U. S. 506, 513–15 (2002)). The majority's decision violates that principle, allowing defendants to escape accountability for blocking Arar's access to court where everyone knew what his claim would have been.

The district court also erred in dismissing Arar's access-to-court claims. The court did so without prejudice to replead the claims, but directed that, upon repleading, "any denial-of-access claim must concern more than [Arar's] removal." *Arar,* 414 F. Supp. 2d at 285–86 (SPA.82). In fact, Arar's denial-of-access claim turns precisely on denial of access to a court to seek review of his removal order

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dismissed, then he is left with no remedy whatsoever with respect to defendants' conspiracy to torture and arbitrarily detain him.

[35] *Small v. City of New York*, 274 F. Supp. 2d 271, 278-79 (E.D.N.Y. 2003), *vacated and remanded on other grounds, Pena v. Deprisco*, 432 F.3d 98 (2d Cir. 2005); *Pratt v. Tarr,* 464 F.3d 730, 733 (7th Cir. 2006) (legal basis of plaintiff's claim may be explained through a brief or memorandum, and claim may not be dismissed if court can determine whether plaintiff has any tenable theory and defendants are on notice); *cf., Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)

under the CAT, and therefore the district court's order placed Arar in an impossible position—it prohibited him from alleging the very claim that the panel majority determined he *had* to allege.

In sum, Arar's access to court allegations are sufficient to proceed as is. At a minimum, however, Arar should be granted leave to replead without the restriction improperly imposed by the district court. *See Commer. Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 387 (2d Cir. 2001) (vacating dismissal because of district court's incorrect reading of causation requirements and allowing plaintiff to replead other aspect of claim on remand).

III. ARAR'S ALLEGATIONS THAT DEFENDANTS SUBJECTED HIM TO TORTURE UNDER COLOR OF SYRIAN LAW BY CONSPIRING WITH SYRIAN OFFICIALS STATES A CLAIM FOR RELIEF UNDER THE TVPA.

Arar claims that federal officials were liable under the TVPA for subjecting him to torture under color of Syrian law by conspiring with Syrian officials. J.A.20–21. Neither the district court nor the panel disputed that conspirators are liable under the TVPA, or that the TVPA's requirement that the torture be inflicted under "color of foreign law" is governed by the "color of law" jurisprudence under 42 U.S.C. § 1983. But they concluded that in order to act under color of foreign law, federal officials must do more than conspire with foreign officials—they must

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(noting that plaintiff had bolstered his claim by making more specific allegations in post-complaint filings).

actually be "under the control or influence" of those foreign officials. *Arar*, 532 F.3d at 175–76; *Arar,* 414 F. Supp. 2d at 266 (SPA.36). In fact, Supreme Court and Second Circuit precedent establish that "willful participation in joint action" is sufficient to establish action under "color of law."

A conspiracy between private and state actors fully satisfies the "color of law" requirement, even when the private party does not act "under the control or influence of" state officials. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). And this Court has held that "a joint conspiracy between federal and state officials should [] carry the same consequences under § 1983 as does joint action by state officials and private persons." *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969). The panel's holding directly conflicts with these precedents.

In *Sparks,* the Court found that private parties who bribed a judge to issue an injunction acted under color of state law. 449 U.S. at 27–28. The private parties did not act under the judge's influence or control; rather, they sought to influence the judge. The Court deemed it sufficient, however, that they were "willful participant[s] in joint action." *Id.* at 27.[36]

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[36] *See also Hughes v. Patrolmen's Benevolent Ass'n*, 850 F.2d 876, 880–81 (2d Cir. 1988) (private defendants act under color of law where they conspire with state officials who know of, endorse, and assist their efforts); *Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (private actor who "exerted influence" over the police by conspiring with them to have plaintiff arrested acted under color of law). To accept the panel's reasoning would therefore work a major change in the way courts have viewed conspiracies under § 1983.

The panel and the district court erroneously treated one of several alternative "color of law" tests as the *exclusive* test. The panel relied on *West v. Atkins,* 487 U.S. 42, 48 (1988), which stated that the "traditional" definition of acting under color of state law requires defendants to have "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Arar*, 532 F.3d at 175 (quoting *West*, 487 U.S. at 49). But as *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001), made clear, there is no single test for action "under color of law," which may be found when a private actor has been "controlled by an 'agency of the State,'" "*or* when a private actor operates as a 'willful participant in joint activity with the State or its agents.'" *Id.* (emphasis added) (internal citations omitted); *see also Dahlberg v. Becker*, 748 F.2d 85, 92 (2d Cir. 1984) (same). As this Court has stated, under both the TVPA and section 1983, a private individual acts under color of law "when he acts together with state officials *or* with significant state aid." *Kadic v. Karadzic,* 70 F.3d 232, 245 (2d Cir. 1995) (emphasis added). An allegation that defendants acted "together" or jointly with Syrian officials clearly suffices under *Kadic* and § 1983 precedent. Neither *West* nor any other decision requires that state officials "control" private actors in order to establish action under color of law.

The panel suggested that the rule is different when defendants are federal officials. *Arar*, 532 F.3d at 176. This Court, however, expressly rejected that view in *Kletschka*, 411 F.2d at 448.[37] While the particular nature of the state action alleged in *Kletschka* was that the federal defendants acted under the influence of state officials, *Kletschka* did not purport to limit "color of law" for federal officials to such allegations. *Id.* at 447. Rather, it found plaintiffs' allegations sufficient against some federal officials, and found them insufficient against others because plaintiff alleged "no overt acts [by these officials] taken in concert with" the state officials—that is, no conspiracy at all. *Kletschka,* 411 F.2d at 449.

"It is a well-established principle…that federal officials are subject to section 1983 liability . . . where they have acted under color of state law, for example in conspiracy with state officials." *Hindes v. F.D.I.C.,* 137 F.3d 148, 158 (3d Cir. 1998) (citing Third, Fifth, Sixth, Eighth, and Ninth Circuit cases). The decisions cited in *Hindes* turned not on whether state officials exercised control over federal officials, but on whether there was joint action between federal and state officials. In *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980), for example, the court found that federal officials acted under color of state law when they initiated an investigation and

[37] *See also Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 154 (2d Cir. 2006) ("federal actor may be subject to section 1983 liability where there is

shared information with state officials to help effectuate federal counterintelligence goals, even though there was no allegation that the federal officials were acting under state control. More recently, in *Aldana v. Del Monte Fresh Produce,* 416 F.3d 1242, 1249, 1265 (11th Cir. 2005), the Eleventh Circuit sustained a TVPA claim where plaintiffs alleged that a U.S. corporation "hir[ed] and direct[ed] its employees and/or agents to torture the Plaintiffs and threaten . . . them with death," because one of the agents was a Guatemalan mayor. 416 F.3d at 1249. There was no allegation that the corporation acted under the control or influence of the mayor; the allegation that the corporation participated in joint action with a foreign official was sufficient.[38]

An allegation of joint action or conspiracy is sufficient to meet the "under color of law" requirement under 42 U.S.C. § 1983 and the TVPA. And as this Court made clear in *Kletschka*, there is no reason why a different rule should apply to federal officials and private parties. Had a private party abducted Arar and delivered him to Syria to be tortured by Syrian officials, a TVPA claim would lie

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evidence that the federal actor was engaged in a 'conspiracy' with state defendants").

[38] Even if the court were to accept the panel's unprecedented approach, Arar's allegations are sufficient. Under agency principles, "when two persons engage jointly in a partnership for some criminal objective, the law deems them agents for one another. Each is deemed to have authorized the acts and declarations of the other undertaken to carry out their joint objective." *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002). Therefore, where U.S. agents conspire with a foreign

against him. That defendants here *also* abused federal authority to obtain their end should not immunize them from liability where they willfully participated in a plan to subject Arar to torture under color of Syrian law.[39]

IV. DEFENDANTS' ABUSIVE TREATMENT OF ARAR WHILE DETAINED IN THE UNITED STATES VIOLATED HIS DUE PROCESS RIGHTS BECAUSE IT WAS IMPOSED FOR NO LEGITIMATE PURPOSE.

Finally, the district court and the panel majority erred in dismissing Arar's due process claim relating to his abusive treatment in the United States. As Judge Sack noted, Arar's challenges to his conditions of confinement, coercive interrogation, and denial of access to counsel and court are part and parcel of his claim that defendants violated his due process rights by subjecting him to a course of abusive treatment designed to get him to "talk." See *Arar*, 532 F.3d at 203 (Sack, J., dissenting). As such, they state a claim for violation of substantive due process.

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state to torture someone, the law deems them agents of the foreign state, and even under the panel's reasoning, they are acting under color of foreign law.

[39] As an alternative ground for dismissal, the district court held that the TVPA does not afford a cause of action to foreign nationals, even though it was never raised by defendants. SPA.29. No defendant even sought to defend this position on appeal. As the panel noted, "holdings of our Court, as well as those of our sister courts of appeals, strongly suggest that TVPA actions may in fact be brought by non-U.S. citizens." Arar, 532 F.3d at 176 n. 13; *Kadic*, 70 F.3d at 245–47 (holding that foreign nationals stated a cause of action under the TVPA); *Enahoro v. Abubakar*, 408 F.3d 877, 889 (7th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (both permitting TVPA claims by non-citizens).

The district court found that Arar's allegations regarding his treatment in the United States constituted borderline "gross physical abuse," but required him to replead them without regard to his subsequent subjection to torture and arbitrary detention. *Arar*, 414 F. Supp. 2d at 284 (SPA.81). But as Judge Sack correctly noted, the claims are interrelated, because they are all part of the same course of conduct.

The panel majority noted that this Court has not endorsed the "gross physical abuse" standard, but found Arar's allegations insufficient in any event. 532 F.3d at 189-90. The proper standard is established by *Bell v. Wolfish*, 441 U.S. 520, 538-59 (1979), which holds that substantive due process forbids conditions of confinement that are punitive, or "not reasonably related to a legitimate goal." The panel majority found no allegation that the conditions were imposed for an illegitimate purpose. But Arar's allegations that he was held incommunicado, in solitary confinement, chained and shackled, deprived of food and sleep, denied counsel, and subjected to lengthy and abusive interrogations at odd hours, establish conditions of confinement that were not reasonably related to a legitimate goal, but were designed for the illegitimate goal of coercing Arar to talk against his will, and interfering with his right to seek protection from the government's illicit objective. Accordingly, the district court and panel majority erred in dismissing these claims on the pleadings.

V. ARAR HAS STANDING TO SEEK DECLARATORY RELIEF BECAUSE HE SUFFERS AN ONGOING INJURY FROM HIS UNCONSTITUTIONAL REMOVAL ORDER.

In addition to seeking damages from defendants in their individual capacities, Arar also sues certain defendants in their official capacity, seeking a declaration that their actions violated due process, and therefore that his removal order is null and void. That removal order imposes a continuing burden because it carries a ban on re-entry.[40]

This Court has recognized that the bar to reentry is a collateral consequence of a removal order sufficient to sustain a case or controversy, thereby justifying relief under the Declaratory Judgment Act. *Swaby v. Ashcroft*, 357 F.3d 156, 159–61 (2d Cir. 2004). In *Swaby*, this Court held that "Petitioner asserts an actual injury—a bar to reentering the United States—that has a sufficient likelihood of being redressed by the relief petitioner seeks from this Court." 357 F.3d at 160 (citations omitted); *see also, Moi Chong v. INS*, 264 F.3d 378, 386 (3d Cir. 2001) (holding that a bar to re-entry is an injury-in-fact); *Tapia Garcia v. INS*, 237 F.3d 1216, 1218 (10th Cir. 2001) (same).

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[40] Arar is suffering ongoing legal disability due to defendants' unlawful actions. The bar on re-entry into the U.S. prevents him from applying for entry to or transit through the U.S. "without the prior written authorization of the Attorney General [without which Arar] will be subject to arrest, removal and possible criminal prosecution." J.A.86. The bar harms Arar because he has worked for sustained periods for U.S. companies in the past, and he would like to return to the U.S. for that purpose, as well as to visit relatives and friends. J.A.23.

The district court and the panel found that Arar lacks standing to seek declaratory relief because any judgment granting such relief would not redress his ongoing bar on re-entering the U.S. *Arar*, 414 F. Supp. 2d at 259 (SPA.19); *Arar*, 532 F.3d at 191–92. They reasoned that because Arar does not seek in this litigation to challenge the determination that he was inadmissible, the court would not be empowered to vacate the removal order.[41] But that conclusion does not follow.

Arar challenges the validity of the removal order on two grounds—it was entered for an unconstitutional purpose, and defendants affirmatively obstructed him from challenging it via a petition for review. If he prevails on either claim, the removal order violates due process, and is invalid. Courts do not divide up removal orders into parts, upholding some parts and reversing others. The removal order stands or falls as a whole. Thus, if a removal order was found to violate due process because the government failed to provide constitutionally required notice, the order would be invalid—even if the Court never reached other possible bases for challenging the order. Similarly, if Arar is correct that the removal order was unconstitutional because it was issued for the purpose of subjecting him to torture

[41] Arar did not challenge the determination that he was inadmissible only because he considered (rightly or wrongly) that the federal courts would lack jurisdiction to consider such a challenge. He has from the outset consistently denied any connection to Al Qaeda or any terrorist organization, *see, e.g.,* J.A.23, and the

and arbitrary detention, or because defendants blocked his access to court to review it, the removal order would be invalid as a whole. In that case, the re-entry bar would be lifted, and Arar would be free to apply for entry to the United States once again.

CONCLUSION

For the foregoing reasons, the district court decision should be reversed and the case remanded for further proceedings.

Date: New York, New York
September 23, 2008

Respectfully submitted,

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Canadian Commission of Inquiry, after a thorough investigation, fully exonerated him.

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

I, Maria C. LaHood, hereby certify that the foregoing replacement opening brief for rehearing *in banc* 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 13,423 words (including footnotes).

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Maria C. LaHood

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