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,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR PLAINTIFF-APPELLANT

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

ROBERT F. FINK
STANLEY MCDERMOTT III
JOSHUA S. SOHN
SARAH J. STERKEN
DLA PIPER US LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

(Co-counsel for Plaintiff-Appellant)

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

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Course of Proceedings 3

C. The Decision Below 4

STATEMENT OF FACTS 5

A. U.S. Detention 6

B. Syrian Detention 10

C. The Canadian Inquiry 13

SUMMARY OF ARGUMENT 14

A. TVPA 15

B. Substantive Due Process (Torture and Arbitrary Detention) 16

C. Substantive Due Process (U.S. Detention) 17

D. Declaratory Relief 17

STANDARD OF REVIEW 17

I. THE DISTRICT COURT ERRED IN DISMISSING THE TVPA CLAIM 18

A. The TVPA Covers Arar 18

1. This Court Has Applied the TVPA to Foreign Nationals 18

2. The Text of the TVPA Protects All Individuals—Not Just U.S. Citizens 19

3. The Legislative History Supports the Text's Plain Meaning 19

B. By Acting Jointly With the Syrians, Defendants Conspired in Subjecting Arar to Torture Under Color of Syrian Law 20

1. Courts Must Look to § 1983 Jurisprudence in Construing the TVPA's "Color of Law" Requirement. 22

TABLE OF CONTENTS
(continued)

Page

2. Defendants Acted Under Color of Foreign law by Conspiring with Syrian Officials 22

3. The Same "Under Color of Law" Standard Applies to Federal Officials and Private Parties 24

4. Schneider and Billings are Inapposite 26

II. ARAR'S TRANSFER TO SYRIA TO BE ARBITRARILY DETAINED AND TORTURED VIOLATED THE FIFTH AMENDMENT AND WARRANTS A DAMAGES REMEDY UNDER BIVENS 28

A. Defendants' Actions Violated Arar's Substantive Due Process Rights 29

1. Under the State-Created Danger Doctrine, Defendants' Violation of Arar's Due Process Rights Arose in the U.S. 32

2. The Fifth Amendment Bars Torture No Matter Where It Takes Place 35

B. A Damages Remedy Under Bivens is Necessary. 37

1. No "Special Factors" Are Present Here. 38

2. No Satisfactory Alternative Remedy Exists. 44

III. ARAR'S DETENTION AND MISTREATMENT IN THE U.S. ALSO VIOLATES THE FIFTH AMENDMENT AND WARRANT A DAMAGES REMEDY UNDER BIVENS. 45

A. Based on Notice Pleading Standards, Arar Has Pleaded a Cognizable Claim That His Substantive Fifth Amendment Rights Were Violated By His Mistreatment Within the United States 45

B. Arar Has Stated a Claim for Violation of His Right to Substantive Due Process Based on His Conditions and Treatment While in U.S. Custody 46

C. Arar Has Nonetheless Pleaded Gross Physical Abuse 49

D. Arar Has Satisfied the Notice Pleading Requirement of Alleged Interference with Access to Counsel or the Courts 50

TABLE OF CONTENTS
(continued)

Page

IV. ARAR'S ONGOING HARM WARRANTS DECLARATORY RELIEF. 53

CONCLUSION 56

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 22

Allaire Corp. v. Okumus,
433 F.3d 248 (2d Cir. 2006) 17

Alston v. Parker,
363 F.3d 229 (3d Cir. 2004) 50

Bell v. Hood,
327 U.S. 678 (1946) 37

Bell v. Wolfish,
441 U.S. 520 (1979) 46, 47, 48

Berlin Democratic Club v. Rumsfeld,
410 F. Supp. 144 (1976) 40

Billings v. United States,
57 F.3d 797 (9th Cir. 1995) 27

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971) 37

Brown-Alleyne v. White,
No. 96 CV 2507, 1999 WL 1186809 (E.D.N.Y. Oct. 11, 1999)..... 35

Bush v. Lucas,
462 U.S. 367 (1983) 42

Butz v. Economou,
438 U.S. 478 (1978) 42

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005) 18

TABLE OF AUTHORITIES
(continued)

Page

Caiola v. Citibank, N.A.,
295 F.3d 312 (2d Cir. 2002) 17

Carlson v. Green,
446 U.S. 14 (1980) 38, 42, 44

Carroll v. Blinken,
42 F.3d 122 (2d Cir. 1994) 24

Christopher v. Harbury,
536 U.S. 403 (2002) 51-52

Colon v. Coughlin,
58 F.3d 865 (2d Cir. 1995) 46

Colorado v. Connelly,
479 U.S. 157 (1986) 30

Conley v. Gibson,
355 U.S. 41 (1957) 18, 50

Correa v. Thornburgh,
901 F.2d 1166 (2d Cir. 1990)..... 31

Dailey v. Vought Aircraft Co.,
141 F.3d 224 (5th Cir. 1998) 54

Dames & Moore v. Regan,
453 U.S. 654 (1981) 39

Davis v. Passman,
442 U.S. 228 (1979) 37

Dennis v. Sparks,
449 U.S. 24 (1980) 23

TABLE OF AUTHORITIES
(continued)

Page

Doherty v. Meese,
808 F.2d 938 (2d Cir. 1986) 41

Dwares v. City of New York,
985 F.2d 94 (2d Cir. 1993) 32, 34, 35

Elmaghraby v. Ashcroft,
No. 04 CV 1409 (JG) (SMG), 2005 WL 2375202
(E.D.N.Y. Sept. 27, 2005), *appeal docketed*,
No. 05-5768 (2d Cir. Oct. 25, 2005) 40, 45, 48

Enahoro v. Abubakar,
408 F.3d 877 (7th Cir. 2005) 18

Enwonwu v. Gonzalez,
438 F.3d 22 (1st Cir. 2006) 33

Filartiga v. Pena-Irala,
610 F.2d 876 (2d Cir. 1980) 14, 29

Ford v. Surget,
97 U.S. 594 (1878) 39

Garcia v. Brown,
442 F. Supp. 2d 132 (S.D.N.Y. 2006) 34

Gastelum-Quinones v. Kennedy,
374 U.S. 469 (1963) 41

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 39

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 40

Harbury v. Hayden,
444 F. Supp. 2d 19 (D.D.C. 2006), *appeal docketed*, No. 06-5282
(D.C. Cir. Sept. 26, 2006) 28

TABLE OF AUTHORITIES
(continued)

Page

Hemphill v. Schott,
141 F.3d 412 (2d Cir. 1998) 33

Hughes v. Patrolmen's Benevolent Association,
850 F.2d 876 (2d Cir. 1988) 24

Ingraham v. Wright,
430 U.S. 651, 671 n. 40, 674 (1977) 47

Jackson v. Indiana,
406 U.S. 715 (1972) 47

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) ..... *passim*

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 47

Kletschka v. Driver,
411 F.2d 436 (2d Cir. 1969) 16, 21, 24, 25

Koohi v. U.S.,
976 F.2d 1328 (9th Cir. 1992) 39

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804)..... 39

Lockhart v. Sullivan,
720 F. Supp. 699 (N.D. Ill. 1989) 37

Lugar v. Edmonson Oil Co.,
457 U.S. 922 (1982) 23, 27

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 55

TABLE OF AUTHORITIES
(continued)

Page

Lynch v. Cannatella,
810 F.2d 1363 (5th Cir. 1987) 31, 49

Martinez-Aguero v. Gonzalez,
459 F.3d 618 (5th Cir. 2006) 32

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941) 53, 54

Matican v. New York,
424 F. Supp. 2d 497 (E.D.N.Y. 2006)..... 32

Michel v. INS,
206 F.3d 253 (2d Cir. 2000) 52

Miller v. Fenton,
474 U.S. 104 (1985) 30

Mitchell v. Forsyth,
472 U.S. 511 (1985) 40

Mitchell v. Harmony,
54 U.S. (12 How.) 115 (1851) 39

Moi Chong v. INS,
264 F.3d 378 (3d Cir. 2001) 55

Montilla v. INS,
926 F.2d 162 (2d Cir. 1991) 52, 53

Ngo v. INS,
192 F.3d 390 (3d Cir. 1999) 31

Olim v. Wakinekona,
461 U.S. 238 (1983) 31

Palmer v. Richards,
364 F.3d 60 (2d Cir. 2004) 48

TABLE OF AUTHORITIES
(continued)

Page

Pena v. DePrisco,
432 F.3d 98 (2d Cir. 2005) 33

Perrin v. U. S.,
444 U.S. 37 (1979) 19

Ramirez de Arellano v. Weinberger,
745 F.2d 1500 (D.C. Cir. 1984), *vacated on grounds of mootness*,
471 U.S. 1113 (1985) 43

Rasul v. Bush,
542 U.S. 466 (2004) 35, 36, 39

Rochin v. California,
342 U.S. 165 (1952) 30

Rosenbaum v. New York,
975 F. Supp. 206 (E.D.N.Y. 1997)..... 35

Sanchez-Espinoza v. Reagan,
770 F.2d 202 (D.C. Cir. 1985)..... 42, 43

Schneider v. Kissinger,
310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd on other grounds*,
412 F.3d 190 (D.C. Cir. 2005)..... 26

Schweiker v. Chilicky,
487 U.S. 412 (1988) 42, 43

Shaughnessy v. U.S. ex rel. Mezei,
345 U.S. 206 (1953) 31

Sierra v. INS,
258 F.3d 1213 (10th Cir. 2001) 31

Simon v. Eastern Kentucky Welfare Rights Org.,
426 U.S. 26 (1976) 55

TABLE OF AUTHORITIES
(continued)

Page

Sosa v. Alvarez-Machain,
124 S. Ct. 2739 (2004) 15

Swaby v. Ashcroft,
357 F.3d 156 (2d Cir. 2004) 54

Tapia Garcia v. INS,
237 F.3d 1216 (10th Cir. 2001) 55

The Paquete Habana,
175 U.S. 677 (1900) 39

Tungwarara v. United States,
400 F. Supp. 2d 1213 (N.D. Cal. 2005) 32

Turkmen v. Ashcroft,
No. 02 CV 2307, 2006 WL 1662663
(E.D.N.Y. June 14, 2006), *appeal docketed*,
No. 06-3745 (2d Cir. Aug. 10, 2006) 46, 47, 48, 53

U.S. v. Verdugo-Urquidez,
494 U.S. 259 (1990) 36

United States ex rel. Accardi v. Shaughnessy,
347 U.S. 260 (1954) 53

United States v. Bagaric,
706 F.2d 42 (2d Cir.) *cert denied*, 464 U.S. 840 (1983) 37

United States v. Classic,
313 U.S. 299 (1941) 27

United States v. Maturo,
982 F.2d 57 (2d Cir. 1992) 36

United States v. Price,
383 U.S. 787 (1966) 22

TABLE OF AUTHORITIES
(continued)

Page

United States v. Stanley,
483 U.S. 669 (1987) 42

United Steelworkers of America v. Phelps Dodge Corp.,
865 F.2d 1539 (9th Cir. 1989) 23

Vitek v. Jones,
445 U.S. 480 (1980) 55-56

Wagenmann v. Adams,
829 F.2d 196 (1st Cir. 1987) 23

Waldron v. INS,
17 F.3d 511 (2d Cir. 1994) 52

Walker v. City of New York,
974 F.2d 293 (2d Cir. 1992) 5

West v. Atkins,
487 U.S. 42 (1988) 27

Williams v. Smith,
781 F.2d 319 (2d Cir. 1986) 46

Wiwa v. Royal Dutch Petroleum Co.,
No. 96 CIV. 8386 (KMW), 2002 WL 319887
(S.D.N.Y. Feb. 28, 2002) 23

Wong v. United States,
373 F.3d 952 (9th Cir. 2003) 31

Wong Wing v. United States,
163 U.S. 228 (1896) 31, 47

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 39

TABLE OF AUTHORITIES
(continued)

Page

Zadvydas v. Davis,
533 U.S. 678 (2001) 30, 41

STATUTES AND CODES

8 C.F.R. § 208.17 44

8 C.F.R. § 235.3(b)(4)(i), (ii) 52, 53

8 C.F.R. § 235.8(b) 2

8 U.S.C. § 1225 (b)(1)(B)(iv) 52

8 U.S.C. § 1225(c)(2) 2

8 U.S.C. § 1231(b)(2)(C) 2, 44

8 U.S.C. § 1252(a) 51

8 U.S.C. §1291 5

8 U.S.C. §1301 5

8 U.S.C. §1362 52

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1350 ..... 1, 2, 18

28 U.S.C. § 2201 54

28 U.S.C. § 2241(c)(3) 51

28 U.S.C. § 2331 19

18 U.S.C. § 2340 43

TABLE OF AUTHORITIES
(continued)

Page

18 U.S.C. § 242 22

42 U.S.C. § 1983 ..... 16, 21, 22

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), because this case raises federal questions under the Constitution and the Torture Victim Protection Act, 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 (supporting opinion reported at 414. F. Supp. 2d 250 (Feb. 16, 2006 E.D.N.Y.)), disposing of all claims. SPA.92. Arar timely filed his Notice of Appeal on September 12, 2006. A.470.

STATEMENT OF THE ISSUES

1. Did the District Court err by dismissing plaintiff's claim based on the Torture Victim Protection Act on the ground that the Act does not protect non-citizens, or that the defendant U.S. officials, although conspiring with Syrians officials to have plaintiff tortured in Syria, were nonetheless not acting under color of foreign law?

2. Did the District Court err by dismissing plaintiff's Fifth Amendment substantive due process claims against U.S. officials for sending him to Syria to be tortured and arbitrarily detained on the ground that foreign-policy and national-security concerns foreclose a *Bivens* damages remedy?

3. Did the District Court err by requiring plaintiff to re-plead his Fifth Amendment substantive due process claims against U.S. officials for subjecting him to abusive treatment in the U.S., when his complaint meets notice pleading requirements?

4. Did the District Court err by denying plaintiff standing for declaratory relief against the U.S. when he continues to suffer an ongoing harm—including a bar to re-entry—which such relief would redress?

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff Maher Arar, a 36-year-old Canadian citizen, appeals from the decision of the United States District Court for the Eastern District of New York, dismissing claims against the U.S. officials responsible for (i) causing him to be unlawfully detained for thirteen days in New York in September 2002 while en route to Canada and (ii) then sending him to Syria to be arbitrarily detained and tortured by Syrian officials over the next twelve months. Arar maintains that defendants violated his rights under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note, and the Fifth Amendment.

Defendants John Ashcroft and Larry D. Thompson were respectively the Attorney General and Acting Attorney General authorized to approve removal orders without further judicial inquiry[1] and to override an alien's designation of his country of removal.[2] Defendants James Ziglar and Scott Blackman were senior Immigration and Naturalization Service ("INS") officials responsible for Arar's detention in New York. According to the INS Final Notice of Inadmissibility, Ziglar and Blackman determined that Arar was inadmissible in the U.S., and each

---

1 8 U.S.C. § 1225(c)(2); 8 C.F.R. § 235.8(b).

2 8 U.S.C. § 1231(b)(2)(C).

expedited Arar's removal to Syria. Defendant Robert Mueller, the Director of the FBI, was in charge of the numerous FBI agents actively involved in Arar's mistreatment in New York and removal to Syria to be detained and tortured.[3] Defendant Edward J. McElroy was formerly District Director of the INS for the New York District. INS officials were extensively involved in, among other things, interrogating Mr. Arar and lying to his attorney regarding his whereabouts.

B. Course of Proceedings.

On January 22, 2004, Arar filed a complaint stating four claims for relief. A.19. The first claim alleges that by sending Arar to Syria to be tortured, defendants are liable under the TVPA for conspiring with Syrian officials to subject Arar to torture under color of foreign law. A.38. The second claim alleges that defendants violated Arar's substantive due process rights under the Fifth Amendment by transporting Arar to Syria so that he would be tortured and coercively interrogated there. A.38-40. The third claim alleges that defendants similarly violated Arar's substantive due process rights by transporting him to Syria to be arbitrarily detained there. A.40-41. The fourth claim alleges that defendants' abusive treatment of Arar while he was detained in the United States,

---

[3] Defendants Ashcroft and Mueller were also sued in their official capacities, as were Defendants Tom Ridge and Paula Corrigan.

including barring his access to counsel by lying to him and his attorney, further violated his substantive due process rights. 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 timely filed a notice of appeal. A.470.

C. The Decision Below.

First Claim. The District Court dismissed plaintiff'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, in conspiring with Syrian officials to have plaintiff tortured in Syria, the federal defendants were acting under color of federal law and not under color of foreign law, as the TVPA requires. SPA.87.

Second and Third Claims. The District Court dismissed plaintiffs' second and third claims, alleging that sending Arar to Syria to be tortured and arbitrarily detained violated his Fifth Amendment substantive due process rights, on the ground that special national-security and foreign-policy factors foreclose any *Bivens*-based remedy. SPA.87.

Fourth Claim. The District Court dismissed plaintiff's fourth claim, concerning his mistreatment while detained in the United States, without prejudice, requiring plaintiff to re-plead the claim (i) without regard to his rendition to Syria,

(ii) naming those defendants personally involved in the domestic detention, and (iii) specifying his injuries in more detail. After the District Court denied plaintiff's request to certify his first three claims for immediate appeal, Arar decided not to replead the fourth claim for relief, believing that the complaint states a valid domestic-detention due process claim. A.467.

Declaratory Relief. The District Court ruled that plaintiff lacked standing to seek declaratory relief because such relief could not redress his ongoing harm, including the current bar to re-entering the U.S. SPA.19-20.

STATEMENT OF FACTS[4]

Maher Arar is a Canadian citizen who has lived in Canada since he emigrated from Syria with his family as a teenager. A.22-23. He has worked as a software engineer in Canada and the United States. *Id.* He lives in Canada with his wife, Dr. Monia Mazigh, and their two young children. *Id.* He has never been charged with any crime. A.23.

In September 2002, Arar was on a trip with his family in Tunisia when his employer, MathWorks, asked him to return early to Canada to consult with a

---

[4] With the exception of the last two paragraphs relating the results of an official Canadian inquiry into Arar's case, this statement of facts is based on the Complaint, allegations of which must be accepted as true for purposes of reviewing the grant of a motion to dismiss. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992).

prospective client. A.28-29. Arar departed Tunisia, flew to Zurich where he had an overnight stopover, and then caught a flight to John F. Kennedy Airport in New York ("JFK"), where he was to catch a connecting flight to Montreal. A.29.

A. U.S. Detention.

When Arar's flight landed at JFK on September 26, 2002, he was required to pass through immigration before catching his connecting flight. A.29. At immigration, Arar presented a valid Canadian passport and was instructed to wait. *Id.* While he waited, he was fingerprinted and photographed, and his wallet, carry-on bags, and luggage were searched. *Id.* Concerned that he would miss his connecting flight, Arar repeatedly asked to make a telephone call. *Id*. The immigration officer refused his requests. *Id.*

Two hours later, three or four men told Arar that they wanted to ask him some questions, but assured him he would make his connecting flight. A.29. Arar asked the men for a lawyer, but was told that only U.S. citizens were entitled to lawyers. *Id.* The interrogation, conducted by an FBI agent, lasted five hours. *Id*. Throughout the interrogation, the agent "constantly yelled and swore at him," calling Arar a "fucking smart guy" with a "fucking selective memory." *Id*. The agent questioned Arar about his profession, his travels in the U.S., and his relationships with a number of specific individuals. A.29-30. An immigration officer then questioned Arar for another three hours regarding his membership in,

or affiliation with, various terrorist groups. A.30. Arar told the immigration officer that he had no affiliation with any terrorist group. *Id.* At midnight, officials took Arar, in chains and shackles at the ankles and wrists, to another building at JFK and put him in solitary confinement without a bed and with the lights remaining on, where he did not sleep at all that night. A.30.

At 9:00 a.m. on September 27, two FBI agents began what would be a five-hour interrogation during which the FBI agents again screamed and swore at Arar. A.30. Arar categorically denied any connection to terrorists or involvement in terrorist activity, and repeatedly requested legal assistance and permission to make a phone call, but his requests were refused. *Id*. Afterwards, the FBI agents returned Arar to his cell and gave him his first food in two days—a cold meal from McDonalds. *Id*.

That evening, an immigration officer visited Arar in his cell and asked him to "volunteer" to go to Syria. A.30-31. Arar refused and told the officer that he would agree to go only to Canada or Switzerland. *Id.* Angered by Arar's response, the officer stated that the U.S. Government had a "special interest" in him, and instructed him to sign a form without allowing him to read it. *Id.* Fearing adverse consequences if he did not sign, Arar complied. *Id.* Later Arar was taken in chains and shackles to the Metropolitan Detention Center ("MDC") in Brooklyn where he was strip-searched and placed in solitary confinement. A.31.

Over the next three days U.S. officials denied Arar's repeated requests both for legal counsel and for permission to make a telephone call. A.31. On Tuesday, October 1, Arar was given a document issued by INS finding that he was inadmissible because he belonged to al Qaeda, but he was not given any evidence to support that assertion. *Id*. He was also not given any opportunity to contest the finding. *Id.* That same day—after six days of being held incommunicado—Arar was permitted to make one telephone call. He called his mother-in-law in Ottawa, Canada. *Id*. His wife then retained Ms. Amal Oummih, an immigration attorney in New York, to represent him. *Id.*

Three days later, on October 4, two immigration officers visited Arar's cell and asked him to designate in writing the country to which he wished to be removed. He designated Canada. A.31-32.

On Saturday, October 5, Ms. Oummih visited Arar. A.32. This was the first and only time that he saw his lawyer.

Late on Sunday, October 6, several INS officers brought Arar in chains and shackles to a room where approximately seven INS officials questioned him for six hours about why he did not want to go to Syria. A.32. Arar initially refused to answer the questions without his lawyer present, but eventually did so after the officials told him falsely that his attorney had declined to attend. *Id*. Throughout the interrogation, Arar expressed grave concern that he would be tortured if sent to

Syria. *Id*. The INS officials said they were discussing the issue with "Washington, D.C." *Id*. The interrogation ended in the early morning hours of Monday, October 7.

When Ms. Oummih arrived at work that morning, she heard, for the first time, a voicemail message left by defendant McElroy the previous evening—Sunday—advising her that Arar was about to be interrogated. A.32. Later that morning, an INS official informed Ms. Oummih, falsely, that Arar had been taken to offices in Manhattan "for processing," and would then be transferred to a detention facility in New Jersey. A.33. Several hours later, the same official telephoned Ms. Oummih to tell her, again falsely, that Arar had arrived at an unspecified New Jersey detention facility. *Id*. The agent instructed Ms. Oummih to call back the next day to get Arar's exact location, but by then he was on his way to Syria. *Id*.

In fact, that day, October 7, INS Regional Director Blackman signed a removal order ("Order") stating that Arar was to be "removed without further inquiry." A.86. The Order stated that the INS Commissioner had determined that Arar's removal to Syria was "consistent" with Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. *Id.* The decision stated that Arar was inadmissible because he was a

member of al Qaeda, but offered no evidentiary support for that determination. A.88.

On October 8 at 4:00 a.m., INS agents told Arar that, based on classified information, he would be deported to Syria. A.33. Arar's pleas for reconsideration, based on his fear that he would be tortured in Syria, were ignored. *Id*. He was also informed that he would be barred from re-entry into the United States. *Id*.

Deputy Attorney General Larry Thompson signed Order removing Arar to Syria. A.33. Arar was taken to New Jersey where he was flown aboard a "specially chartered jet" to Washington, D.C. A.33, 97. Once in Washington, a new team of officials boarded the jet and flew with him to Amman, Jordan, where he was blindfolded, chained, and beaten upon arrival. A.33-34. Arar was then driven to Syria and handed over to Syrian officials. A.34, 97. When Arar saw photos of the Syrian president and "realized [he] was indeed in Syria," he "wished [he] had a knife in [his] hand to kill [himself]." A.97.

B. Syrian Detention.

Arar spent the next ten months jailed by the Palestine Branch of Syrian Military Intelligence ("Palestine Branch"), which is known by the State Department to have "committed serious human rights abuses." A.34, 45. Arar was locked in a damp cold underground grave-like cell that measured six feet long, seven feet high, and three feet wide. A.35. His only source of light was a small

aperture in the ceiling, through which rats entered and cats urinated. *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*.

Syria is well known for using torture to extract information during interrogations, A.27, and "for years has been near the top of U.S. lists of human rights violators and sponsors of terrorism." A.78. The State Department has long regarded Syria as a systematic violator of human rights, and has reported for at least the past ten years that Syrian officials practice torture. A. 27. The State Department's 2001 report details multiple specific torture practices used by Syrian security forces. A.45.

During the first twelve days of his Syrian detention, Arar was interrogated for up to eighteen hours a day. 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. A.34-35. During these interrogations, Syrian security officers physically and psychologically tortured Arar. 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 (where he would hang upside down for beatings), and electric shocks. *Id.* Even when not being tortured, Arar could often hear 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 in any terrorist activity. A.34, 98. Arar explained that with "just one hit of this cable, it's like you just forget everything in your life. Everything." A.98. Syrian security officers supplied the information extracted from Arar to U.S. officials. A.35.

On October 20, the Canadian Embassy contacted the Syrian Government regarding Arar's detention. A.36. That day, Syrian security officers ended the long interrogations and severe physical beatings. The Canadian consulate visited Arar several times over the next ten months of his detention, and each time the Syrians threatened him with additional acts of torture if he complained of mistreatment. *Id*.

Finally, on August 14, 2003, the Canadian consulate's last visit, Arar told the Canadian consular official that he had been tortured and was being kept in a cell the size of a grave. A.36. Five days later, Syrian security officials brought Arar to the Syrian Military Intelligence's Investigations Branch and forced him to sign a false confession stating that he had participated in terrorist training in Afghanistan. *Id*. The Syrian officers then transferred Arar to Sednaya Prison, where he remained until September 28, 2003, when he was transferred back to the Palestine Branch and placed in solitary confinement for a week. *Id*.

On October 5, 2003, Syrian officials took Arar to the Syrian Supreme State Security Court where a prosecutor told him that he would be released and that he was not being charged with any crime. A.36-37. The Syrian security officials then released Arar into the custody of Canadian Embassy officials in Damascus without charging him with any crime. *Id*.

On October 6, 2003—one year and two weeks after he had landed at JFK Airport on his way home to Canada—the Canadian consulate flew Arar to Ottawa where he was reunited with his family. A.37.

To this day, Arar suffers severely from the effects of 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 terrorist, and because of the publicity surrounding his ordeal, he has been unable to find work. *Id*. He is also barred from reentering the U.S., where he has worked from time to time. A.23, 33.

C. The Canadian Inquiry.

After Arar returned to Canada, the Canadian Government, on the recommendation of the Deputy Prime Minister, convened an official commission in February 2004, chaired by the Honorable Dennis R. O'Connor, Associate Chief Justice of Ontario to investigate and report on the actions of Canadian officials in relation to Maher Arar. *See* Declaration of Maria LaHood in Support of Appellant

Maher Arar's Motion for Judicial Notice ("LaHood Declaration") ¶ 2. On September 16, 2006, the Commission issued a three-volume report of its findings and conclusions.[5] *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar* (2006) ("Commission Report").

The Commission Report fully exonerates Arar, finding no evidence that he was involved with any terrorist activities, or that he posed any threat to the security of Canada. LaHood Decl. ¶¶ 6-7. The Commission also found no evidence that Canadian officials acquiesced in the decision to detain Arar or remove him to Syria. *Id*. ¶ 8.

SUMMARY OF ARGUMENT

More than a quarter-century ago, this Court declared that "[t]he torturer has become like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind," and in a landmark decision ruled that foreign officials could be held liable in U.S. courts for torturing their own citizens in their own countries. *Filartiga v. Pena-Irala*, 610 F.2d 876, 890 (2d Cir. 1980). Since then,

---

[5] While the Commission Report post-dates the District Court's decision, it is an official government document of which this Court may take judicial notice. (*See* Motion for Judicial Notice, filed herewith.) During the course of the inquiry, Arar submitted materials released by the Commission to the District Court. A.190, 370.

Congress—reconfirming and expanding the reach of *Filartiga*—enacted the TVPA to solidify the right to seek damages for torture, and the Supreme Court has affirmed *Filartiga's* central holding that claims of torture committed anywhere are cognizable in federal courts. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

This case presents the question whether U.S. officials may be held liable for their part in the very conduct this Court so strongly condemned in *Filartiga*. The District Court could not accept as true Arar's allegations that defendants transported him to Syria for the purpose of having the Syrian security services subject him to arbitrary detention and torture, yet nonetheless dismiss his TVPA and Fifth Amendment claims.

A. *TVPA*. Under the TVPA, U.S. officials who intentionally send an individual to a foreign country to be tortured are just as responsible as the foreign officials who inflict the torture. Arar's allegations that defendants willfully transported him to Syria to be tortured states a claim that defendants were complicit with the Syrians in subjecting Arar to torture under color of Syrian law. The District Court's conclusion that the TVPA extends only to U.S. citizens is contrary to *Kadic v. Karadzic*, 70 F.3d 232, 245-47 (2d Cir. 1995), the text of the TVPA, and its legislative history. The District Court's conclusion that the defendants could not be responsible for subjecting Arar to torture under color of Syrian law unless they were acting at the direction of the Syrian officials is

contrary to this Court's rulings that (i) the TVPA's "under color of law" requirement is to be guided by analogous jurisprudence under 42 U.S.C. § 1983, (ii) joint action is sufficient to satisfy the "under color of law" requirement, and (iii) there is "no reason" to treat federal officials differently from private individuals. *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969). Had private parties abducted and delivered Arar to Syria to be tortured, they would clearly be liable under the TVPA. There is no reason to treat defendants differently.

B. *Substantive Due Process (Torture and Arbitrary Detention)*. The District Court's conclusion that foreign affairs and national security constitute "special factors" barring *Bivens*-based damages relief for defendants' complicity in subjecting Arar to torture and arbitrary detention in Syria is groundless speculation. In effect, the District Court concluded that Federal courts lack competence to adjudicate Arar's claims. But that conclusion is refuted by the fact the Supreme Court has repeatedly adjudicated challenges to executive action in wartime, and sanctioned the award of damages for such violations. Arar does not challenge U.S. foreign policy, but the actions of individual officials acting in direct contravention of Federal statutes, regulations, and official executive statements that unequivocally prohibit torture under all circumstances. If torture is so universally condemned that a U.S. court may (as in *Filartiga*) hold a Paraguayan official liable for torturing a Paraguayan national in Paraguay, then surely U.S. courts are

competent to hold U.S. officials responsible for purposeful actions within the U.S. designed to inflict the same abuse overseas.

C. *Substantive Due Process (U.S. Detention)*. Arar's allegations of abuse and denial of access to counsel and the courts while detained in New York are more than sufficient under notice pleading standards to state a violation of the Fifth Amendment. The yardstick of the defendants' conduct is not the "gross physical abuse" standard applicable to aliens seeking entry into the U.S., but rather whether the abusive conditions imposed on Arar were unduly harsh and punitive. Even if the "gross physical abuse" standard were applicable, Arar's complaint sufficiently pleads gross physical abuse and more.

D. *Declaratory Relief*. Finally, Arar has standing to seek declaratory relief. Among other things, the ongoing bar to his ability to re-enter the U.S. is an injury in fact that would be redressed by a decision declaring Arar's removal order null and void.

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). Dismissal is appropriate only when "it appears beyond doubt

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

I. THE DISTRICT COURT ERRED IN DISMISSING THE TVPA CLAIM.

Section 2(a) of the TVPA states that an "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual[.]" Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350, note. Arar's assertion that defendants acted in concert with Syrian officials to subject him to torture under color of Syrian law states a valid TVPA cause of action. The District Court's conclusions that (i) the TVPA does not cover foreign citizens, and (ii) federal officials acting jointly with Syrian officials cannot be liable unless acting under the direction of the Syrian officials, are contrary to binding Second Circuit precedent.

A. The TVPA Covers Arar.

1. This Court Has Applied the TVPA to Foreign Nationals.

In *Kadic*, 70 F.3d at 245-47, this Court held that foreign nationals stated a cause of action under the TVPA. That decision is binding here, and requires reversal of the District Court's determination that "U.S. citizens, and only U.S. citizens, are covered by the TVPA." SPA.29; *see also 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). Moreover, *Kadic*'s result is supported by the text of the TVPA and its legislative history.

2. The Text of the TVPA Protects All Individuals—Not Just U.S. Citizens.

By its plain terms, the TVPA affords a cause of action to all "individuals" subjected to torture under color of foreign law. *See Perrin v. U. S.*, 444 U.S. 37, 42-43 (1979) (words should be interpreted as taking "their ordinary, contemporary, common meaning"). Congress could have limited the TVPA to U.S. citizens, but did not do so. *See, e.g.*, Anti-Terrorism Act, 18 U.S.C. §§ 2331 et seq. (§ 2333 provides a remedy for "[a]ny national of the United States") (passed in 1992, the same year, and by the same Congress, as the TVPA). Moreover, as the District Court itself recognized, TVPA claims may be pursued under the jurisdiction conferred by the ATCA, which applies only to aliens. SPA.28 (citing multiple cases, including *Kadic*, 70 F.3d at 241).

3. The Legislative History Supports the Text's Plain Meaning.

The TVPA's legislative history underscores Congress's intent to provide relief for torture inflicted on foreign nationals and citizens alike. This Court has recognized that "Congress enacted the [TVPA] to codify the cause of action recognized by this Circuit in *Filartiga* [under ATCA], and to further extend that cause of action to plaintiffs who are U.S. citizens." *Kadic*, 70 F.3d at 241 (citing

H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86). The TVPA "establish[es] an unambiguous and modern basis for a cause of action that has been successfully maintained under" the ATCA. H.R. Rep. No. 102-367 at 86; *see also* S. Rep. No. 102-249 (1991), 1991 WL 258662, at *4. Since the ATCA cause of action was available only to foreign nationals, a statute enacted to "codify" that cause of action necessarily extends to foreign nationals. As *Kadic* explains, the extension of TVPA rights of action to U.S. citizens expands the historic ATCA remedy. It does not narrow that remedy by excluding non-citizens.

B. By Acting Jointly With the Syrians, Defendants Conspired in Subjecting Arar to Torture Under Color of Syrian Law.

The District Court properly noted that the TVPA authorizes claims for "secondary liability" against individuals "who aid or abet, or conspire with, primary violators." SPA.23-24.[6] Under that standard, Arar's allegations that "defendants operated under color of law of a foreign nation by conspiring with, or aiding and abetting, Syrian officials in their unlawful detention and torture of Arar"

[6] The Senate Report expressly provides that the TVPA extends "to lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No. 249, 1991 WL 258662, at *8.

are plainly sufficient to state a TVPA claim.[7] SPA.31-32. Yet the Court concluded that complicity was not enough, and that defendants could not be held liable for their role in subjecting Arar to torture under color of Syrian law unless they acted at the direction of the Syrian officials. SPA.36. That conclusion is contrary to binding precedent of this Court establishing that: (i) the TVPA's "color of law" requirement is governed by the jurisprudence interpreting that term under 42 U.S.C. § 1983; (ii) under § 1983, willful participation in joint activity with a state actor is sufficient; (iii) allegations that state officials controlled other's actions are not required; and (iv) there is "no reason" to treat federal officials differently from private actors for these purposes.

Had private parties abducted Arar and transported him to Syria to be tortured by Syrian authorities, they would unquestionably be liable under the TVPA. There is no reason why abuses by U.S. officials should be exempt from liability under the TVPA when the same abuses by private parties are actionable.

---

[7] The District Court found that Arar's "allegations of conspiracy or aiding and abetting liability are sufficient," SPA.26, and therefore would have been sufficient had defendants been private actors, but the District Court then superimposed an additional requirement unique to federal officials, *i.e.*, that they must also be alleged to have acted under Syrian officials' orders. That is contrary to this Court's binding precedent in *Kletschka*.

1. Courts Must Look to § 1983 Jurisprudence in Construing the TVPA's "Color of Law" Requirement.

Kadic instructs courts to look to 42 U.S.C. § 1983 jurisprudence in construing the TVPA's "color of law" requirement. *See* 70 F.3d at 245; *see also* S. Rep. No. 102-249 1991 WL 258662, at *8 (stating that courts should look to § 1983 in construing under color of law "in order to give the fullest coverage possible"). Without any legal support, the District Court nonetheless found that the analogy to § 1983 fails as "this equation of the duties and obligations of federal officials under state and federal law is ill-suited to the foreign arena." SPA.35. That conclusion, directly contradicting *Kadic* and the TVPA's legislative history, also defies logic as every TVPA claim by definition involves conduct "in the foreign arena."

2. Defendants Acted Under Color of Foreign law by Conspiring with Syrian Officials.

Under § 1983 jurisprudence, there is no legal basis for the District Court's conclusion that defendants would have acted under color of foreign law "only if Syrian officials ordered U.S. officials to torture Arar, not vice versa—as alleged." SPA.36. To act under color of law, "[i]t is enough that [the accused] is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966) (construing 18 U.S.C. § 242, the criminal counterpart of § 1983); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (finding private

defendant could be liable under §1983 for conspiring with state official); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (finding private defendants who conspired with a judge to have an injunction corruptly issued acted under color of law).

In construing the TVPA, this Court in *Kadic* similarly found that a "private individual acts under color of law within the meaning of § 1983 when he acts "together with state officials or with significant state aid." 70 F.3d at 245 (citing *Lugar v. Edmonson Oil Co*., 457 U.S. 922, 937 (1982)); *see also Wiwa v. Royal Dutch Petroleum Co*., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *13 (S.D.N.Y. Feb. 28, 2002) (finding corporate defendants acted under color of law because of a "substantial degree of cooperative action" with the Nigerian Government).

There is simply no requirement that plaintiffs show that state officials controlled the actions of others with whom they jointly acted. Indeed, a *non-state* actor can be held liable under § 1983 for exerting influence on *state* officials. *Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (private individual can act under color of law if he "exerted influence" over the police, conspiring with them to have plaintiff arrested and imprisoned); *see also United Steelworkers of Am. v. Phelps Dodge Corp*., 865 F.2d 1539, 1546 (9th Cir. 1989) (private defendant acted under color of law by conspiring with police officers to have strikers arrested and detained). Arar has clearly alleged that defendants were

"willful participants" in the torture to be inflicted in Syria, and that in transporting Arar to Syria they acted "together with [Syrian] officials." Nothing more is required to establish TVPA liability.

3. The Same "Under Color of Law" Standard Applies to Federal Officials and Private Parties.

The District Court's ruling could stand only if a different "under color of law" standard governed federal officials and private parties when acting in concert with officials of another state or foreign country. But in *Kletschka*, this Court rejected that reasoning, holding that there is "no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons." 411 F.2d at 448. Nothing in *Kletschka* suggests, as the District Court erroneously concluded, that U.S. officials "must act 'under the control or influence of the [foreign] defendants'" to be acting under color of foreign law.[8] SPA.36.

---

[8] Other decisions by this Court also make clear that private defendants acting jointly with state officials need not be controlled by them to act under color of law. *See, e.g., Hughes v. Patrolmen's Benevolent Ass'n*, 850 F.2d 876, 880-81 (2d Cir. 1988); *Carroll v. Blinken*, 42 F.3d 122, 131 (2d Cir. 1994).

On the contrary, *Kletschka* holds that the § 1983 test is satisfied if "the state or its officials played a 'significant' role in the result."[9] 411 F.2d at 449. It cannot be denied that the Syrians played a "significant" role in Arar's torture, and that is sufficient to establish the federal defendants' liability if they acted jointly with the Syrians. Indeed, the Court in *Kletschka* ruled that plaintiff's allegations supported a claim against the local federal defendants, but found the allegations against the Washington, D.C. federal defendants insufficient only because plaintiff could point to "no overt acts [by these officials] taken in concert with" the state officials.[10] *Id.* Plaintiff's allegations of joint action on the part of U.S. and Syrian officials are more than sufficient to establish defendants' responsibility for subjecting Arar to torture under color of Syrian law.

---

[9] The "significant role" test, although met here, is not required under the TVPA insofar as that test satisfies not only the "color of" law requirement under § 1983, but also the separate § 1983 requirement that "defendants subjected plaintiff to this deprivation, or '[caused]' him to be so subjected." *Kletschka,* 411 F.2d at 447.

[10] The lack of evidence that the Washington investigation "was under the control or influence of the State defendants," 411 F.2d at 449, was relevant only because plaintiff had asserted joint activity by alleging that the state defendants exerted influence and control over the federal defendants. *Id.* at 447-48. Here, Arar alleges that the federal defendants conspired with Syrian officials to have Arar tortured, and aided and abetted that torture by delivering him to Syrian officials and helping to guide the interrogation.

4. Schneider and Billings are Inapposite.

The District Court relied on two cases to support its ruling that in order to act under color of another sovereign's law federal agents must act at the direction of that sovereign—one from a district court in the District of Columbia, and the other from the Ninth Circuit. Neither is binding here, of course, and certainly cannot overrule this Court's precedents, set forth above.

The District Court principally relied on *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005). But that case devotes a single sentence in dictum to the issue, offers no reasoning, and is directly contrary to this Court's decisions. The *Kissinger* court first ruled that the suit—brought by heirs of a Chilean general murdered during an attempted coup in Chile—presented a nonjusticiable political question. Having ruled that it could not address the merits, the court then stated, in dictum, that there was also no TVPA claim against then National Security Advisor Henry Kissinger, because in "carrying out the direct orders of the President of the United States, Kissinger was most assuredly acting pursuant to U.S. law. . ." 310 F. Supp. 2d at 267. The D.C. Circuit affirmed on political question grounds alone, and therefore did not reach the TVPA issue. *Schneider*, 412 F.3d at 190. The *Schneider* dictum offers no analysis, and fails even to discuss, much less apply, the § 1983 jurisprudence that this Court has found controlling.

The District Court also relied on *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995), but that decision is distinguishable on its facts. In *Billings* the plaintiff did not allege that federal and state officials "conspired" or acted "in concert" to deprive her of her civil rights. Rather, plaintiff's "arrest was initiated and effected *solely* by the Secret Service Agents," and while the Sheriff's officers "*eventually* took [plaintiff] into custody, they were clearly acting at the behest and under the direction of the federal agents." *Id.* at 801 (emphasis added). The federal officials' conduct in *Billings* simply did not constitute willful participation in joint activity with state officials.

To the extent *Billings* suggests that in order to act "under color of law," the "wrongdoer [must be] clothed with the authority of state law," 57 F.3d at 801, it is contrary to Supreme Court authority, which has made clear that there are two separate tests for showing whether a defendant acts under color of law under § 1983. *See West v. Atkins*, 487 U.S. 42, 49 (1988) (differentiating between the "clothed with the authority of state law" test in *United States v. Classic,* 313 U.S. 299, 326 (1941), and the state action test of *Lugar,* 457 U.S. at 935, which applied the "joint activity" test). *West* makes clear that a showing that one is "clothed with

the authority of state law" is simply *not* required for "under color of law" purposes where there is willful participation in joint activity with the state.[11]

II. ARAR'S TRANSFER TO SYRIA TO BE ARBITRARILY DETAINED AND TORTURED VIOLATED THE FIFTH AMENDMENT AND WARRANTS A DAMAGES REMEDY UNDER *BIVENS*

Arar's allegations that defendants detained and forcibly transported him to Syria for the purpose of subjecting him to torture and arbitrary detention plainly states a violation of the Fifth Amendment. Such mistreatment is at the core of what "shocks the conscience." The District Court did not find that Arar's allegations do not "shock the conscience," but instead dismissed his complaint

---

[11] A recent district court decision in *Harbury v. Hayden,* 444 F. Supp. 2d 19 (D.D.C. 2006), *appeal docketed*, No. 06-5282 (D.C. Cir. Sept. 26, 2006), decided after the District Court's decision here, is similarly flawed. The court in *Harbury* first rejected plaintiff's TVPA claim as untimely and prejudicial, then suggested in dicta that plaintiff would not have had a claim in any event. The court applied the *Classic* "clothed with authority" test and found that the CIA defendants did not act under color of foreign law because they did not "possess[] authority by virtue of the laws of Guatemala" and were not "clothed with the authority" of Guatemalan law. 444 F. Supp. 2d at 43. The court did not even address the line of Supreme Court authority applied in this Circuit holding that the "color of law" requirement is satisfied by an allegation of "joint activity."

Harbury misinterprets the TVPA's "color of law" test to require the federal-official defendants to have "acted as agents" of the foreign government. 444 F. Supp. 2d at 42. This holding is contrary to the § 1983 jurisprudence that merely requires willful participation in joint activity. While agency principles are relevant in construing the "under actual or apparent authority" alternative prong of the TVPA (*see Kadic*, 70 F.3d at 245), agency is not required to show defendants acted under "color of law" by acting jointly with Syrian officials to achieve a common end.

because it concluded that the court lacked competence to adjudicate a challenge that in its view touched on foreign relations and national security and could well prove to be embarrassing. SPA.73.

That conclusion is wrong. Arar has alleged fundamental violations of due process. His allegations do not interfere with the foreign policy or the national security of the U.S. Federal statutes, regulations and official policy statements all unequivocally forbid torture. Moreover, the federal courts have routinely adjudicated far more direct challenges to the legality of executive actions during wartime, and have awarded damages for illegal conduct.

This Court has held that torture is so universally proscribed that federal courts may hold a Paraguayan official liable for torturing a Paraguayan national in Paraguay. *Filartiga*, 610 F.2d at 880. The District Court's double standard finds no support in the case law and contravenes the principle of universal accountability for torture animating *Filartiga*.

A. Defendants' Actions Violated Arar's Substantive Due Process Rights.

Had U.S. officials, instead of sending Arar to Syria, simply tortured him in an interrogation room at JFK Airport, they would unquestionably have violated his Fifth Amendment rights. The fact that his rights were violated through joint action taking place in two countries does not render Defendants' conduct permissible for

two reasons: (1) the constitutional violation arose in the U.S., and (2) the Constitution bars U.S. officials from subjecting individuals to torture and arbitrary detention outside our borders, particularly when the defendants willfully transported Arar overseas to evade constitutional restrictions.

Torture is quintessentially conduct that "shocks the conscience" and thereby violates substantive due process rights. The case establishing the "shocks the conscience" standard, *Rochin v. California*, 342 U.S. 165, 172-73 (1952), found that stomach pumping for drugs in a hospital violated due process precisely because it was "too close to the rack and screw." *Id.* at 172. And it is well settled that any physical coercion or even threat of physical coercion violates substantive due process rights. *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)).

Arar also alleges that defendants sent him to Syria to be arbitrarily detained without charges. Indefinite arbitrary detention, like torture, violates substantive due process protection against the arbitrary deprivation of liberty. *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001) ("government detention violates the [Due Process] Clause" unless it is imposed as punishment in a criminal proceeding

conforming to the rigorous procedures constitutionally required for such proceedings, or "in certain special and 'narrow' non-punitive circumstances").

Arar's status as an unadmitted foreign national does not deprive him of substantive due process protection. *See Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (unadmitted foreign national is protected by substantive due process); *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999) (excludable alien is "a 'person' for purposes of the Fifth Amendment" who "is thus entitled to substantive due process") (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)); *see also Sierra v. INS*, 258 F.3d 1213, 1218 n.3 (10th Cir. 2001).[12] Arar is protected

---

[12] While foreign nationals seeking the discretionary benefit of entry are not entitled to *procedural* due process in connection with that application, *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), that is because admission is a discretionary benefit, and denial of a discretionary benefit does not deprive one of a liberty interest sufficient to trigger *procedural* due process protections. *See Olim v. Wakinekona*, 461 U.S. 238, 248-49 (1983) (holding that procedural due process not triggered by denial of discretionary parole, because no liberty interest infringed). Accordingly, the so-called "entry fiction" is "a fairly narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away." *Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2003); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the U.S. determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within the U.S. to humane treatment.")

Courts have declined to differentiate between the constitutional rights of excludable and deportable aliens outside the context of procedural-due-process challenges to exclusion proceedings. *See, e.g.*, *Wong*, 373 F.3d at 973 (entry fiction does not deprive alien of equal protection rights under the Fifth

here because (i) the constitutional violations arose while he was detained in the U.S., (ii) defendants transported Arar to Syria for the precise purpose of evading constitutional protections; and (iii) due process forbids federal officials' complicity in the infliction of torture regardless of where it occurs.

1. Under the State-Created Danger Doctrine, Defendants' Violation of Arar's Due Process Rights Arose in the U.S.

Because defendants' violation of Arar's constitutional rights arose while he was present in the U.S. and in Federal custody, this Court need not address whether foreign nationals with no connection to the U.S. are protected by substantive due process. Substantive due process liability arises under the state-created danger doctrine when Government officials take affirmative steps that increase the vulnerability of an individual to others. *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Matican v. New York*, 424 F. Supp. 2d 497, 505 (E.D.N.Y. 2006) (state-created danger doctrine "applies only when the governmental actor's

---

Amendment); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006) (entry fiction has no impact on an excludable alien's excessive force claims); *Tungwarara v. United States*, 400 F. Supp. 2d 1213, 1220 (N.D. Cal. 2005) (excludable alien has a Fourth Amendment protection from suspicion-less strip searches).

conduct can be fairly characterized as 'affirmative,' as opposed to 'passive'").[13] This Court has found "affirmative" behavior where the governmental actor takes one or more steps to put the plaintiff in harm's way. *See, e.g., Pena v. DePrisco*, 432 F.3d 98, 111 (2d Cir. 2005) (holding that dismissal was not proper where plaintiff alleged that police officers implicitly condoned misconduct of defendant); *Hemphill v. Schott*, 141 F.3d 412 (2d Cir. 1998) (holding summary judgment by district court improper on a substantive due process claim where police officers provided a gun to a private citizen with a known grudge against the victim and then brought the two together).

In *Dwares*, for example, New York police officers allegedly conspired with "skinheads" to "permit the latter to beat up flag burners with relative impunity,

---

[13] Defendants may be expected to raise *Enwonwu v. Gonzalez* to excuse their conduct. 438 F.3d 22 (1st Cir. 2006) (denying convicted aggravated felon's attempt to invoke state created danger doctrine prospectively to avoid removal). Not only is *Enwonwu* not controlling in this Circuit, but it is also distinguishable on both its underlying facts and procedural posture. The plaintiff in *Enwonwu* was a Nigerian heroin smuggler who had been convicted of an aggravated felony and was afraid of being tortured upon his arrival in Nigeria because he had cooperated with U.S. law enforcement to avoid incarceration following his arrest. As a result of his conviction, he had no removal destinations available to him other than Nigeria, which meant that if he were not removed he would have had to stay in the U.S. Accordingly, the First Circuit refused to allow Enwonwu to avoid removal by prospectively arguing that the state-created danger doctrine would prohibit it. Instead, according to the First Circuit, application of the state-created danger doctrine under the circumstances presented would usurp the role of the other branches of government in making removal decisions. *Id.* at 31.

assuring the 'skinheads' that unless they got totally out of control they would not be impeded or arrested." 985 F.2d 99. Under those circumstances, this Court ruled, plaintiffs sufficiently alleged a substantive due process violation. *Id.*; *see also Garcia v. Brown*, 442 F. Supp. 2d 132, 139 (S.D.N.Y. 2006) ("allegations that [Defendants] deliberately failed to prevent violence carried out by private actors, or sat by and watched it happen, state a claim for a constitutional violation").

Arar's complaint goes "well beyond allegations that the defendant[s] merely stood by and did nothing." *Dwares*, 985 F.2d at 99. Here, defendants did not merely look the other way or let Syria know that it would not object. Defendants affirmatively took Arar into custody, lied to him to keep him from a lawyer, transported him to Syria to be tortured, and then worked with the Syrians in guiding the interrogation. The defendants "made [Arar] more vulnerable" to torture in Syria through "prearranged official sanction" of Arar's imprisonment

and torture in Syria, which "surely [] violate[s] [Arar's] rights under the Due Process Clause." *Id.*[14]

Here, absent the steps taken by defendants, Arar would not have been subjected to torture or arbitrary detention abroad. As such, they violated Arar's due process rights while he was in the U.S.

2. The Fifth Amendment Bars Torture No Matter Where It Takes Place.

Even if defendants' mistreatment of Arar did not occur in the U.S., substantive due process would bar them from conspiring with Syrian officials to inflict torture and arbitrary detention abroad—doubtless for the express purpose of evading constitutional protections. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court stated that constitutional rights extend to "enemy combatants" never held within the U.S. While the case principally addresses jurisdictional issues, the Court squarely states that:

> Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or

---

[14] *Brown-Alleyne v. White*, No. 96 CV 2507, 1999 WL 1186809, at *3 (E.D.N.Y. Oct. 11, 1999) (denying motion to dismiss because plaintiff alleged "'prearranged official sanction of private violence' and 'affirmative act by a state actor to interfere with the protective services which would otherwise have been available'"); *Rosenbaum v. New York*, 975 F. Supp. 206, 217 (E.D.N.Y. 1997) (denying motion to dismiss because plaintiff alleged that defendants had "exacerbated the danger to the Hasidic community and rendered the community more vulnerable to violence by private actors.")

> treaties of the United States.' 28 U.S.C. § 2241(c)(3). Cf. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein.

542 U.S. at 484 n.15

In *Verdugo-Urquidez*, relied on by the *Rasul* Court, Justice Kennedy noted that fundamental constitutional rights extend to foreign nationals overseas when application of the right would not be "impracticable and anomalous." *Verdugo-Urquidez*, 494 U.S. at 277-78. There is nothing impracticable or anomalous about holding U.S. officials to the due process prohibitions on torture and arbitrary detention when they conspire with others to subject an individual to torture and arbitrary detention. The prohibitions on torture and arbitrary detention are universal (unlike the Fourth Amendment warrant requirement at issue in *Verdugo-Urquidez*). The concern that U.S. officials must be able to operate abroad in a legal and political framework very different from that of the U.S.—as in *Verdugo-Urquidez*—does not arise when the prohibition-of-torture norm is universal.

Moreover, defendants sent Arar to Syria for the very purpose of evading constitutional requirements. As this Court has recognized, constitutional requirements apply "where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials." *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992) (deciding whether to apply the exclusionary rule to evidence obtained

abroad) (citing *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir.) *cert. denied*, 464 U.S. 840 (1983)). Accordingly, Arar's allegations state a claim for violation of substantive due process because defendants (i) acted against him while he was in Federal custody within the United States and; (ii) transported him abroad precisely to evade constitutional protections. The universal protections at issue here apply wherever Federal officials act.

B. A Damages Remedy Under *Bivens* is Necessary.

The Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* recognized a damages right of action for constitutional violations: "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 403 U.S. 388, 392 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *see also Davis v. Passman*, 442 U.S. 228, 242 (1979). Accordingly, where federal officials violate constitutional rights, *Bivens* remedies are presumptively available unless defendants can show that either of two exceptions to *Bivens* applies. *Lockhart v. Sullivan,* 720 F. Supp. 699, 705 (N.D. Ill. 1989). Defendants must show either that (1) there are "special factors counseling hesitation in the absence of affirmative action by Congress," or (2) "Congress has provided an alternative remedy which is explicitly declared to be a substitute for

recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Neither exception applies here.

1. No "Special Factors" Are Present Here.

The District Court erroneously held that the national-security and foreign-policy considerations raised by this case constitute "special factors" barring *Bivens* relief. SPA.70-77. In essence, the Court treated plaintiff's claim as a nonjusticiable "political question," inappropriate for judicial intervention. It did so notwithstanding the fact that the U.S., which would presumably raise such concerns if they were legitimate, did not argue in its briefs that this case presented either a political question or "special factors" precluding *Bivens* relief. The District Court's determination that Arar's claims are not appropriate for judicial resolution is refuted by the fact that the Supreme Court regularly reviews statutory, constitutional, and international law challenges to executive actions in wartime, including actions for damages, and has done so in cases that have raised direct challenges to executive authority.

In three recent cases, for example, the Supreme Court has adjudicated challenges to official presidential determinations that individuals are "enemy combatants" and should be tried for war crimes in military tribunals created by presidential order—and has ruled against presidential assertions of war powers in

each case.[15] Historically, the Court has reversed a presidential directive ordering the seizure of steel mills to protect the production of armaments for the Korean War,[16] reviewed on the merits a presidential order resolving the Iranian hostage crisis,[17] and awarded damages on claims arising out of executive actions during wartime.[18] These precedents amply refute the District Court's conclusion that because this case involves foreign relations and national security, the federal courts lack competence "to define the line between appropriate and inappropriate conduct." SPA.75. If courts are competent to review challenges by "enemy combatants" captured on the battlefield, surely they are competent to adjudicate Arar's claims.

---

15 *See Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul*, 542 U.S. at 466-67.

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

17 *See Dames & Moore v. Regan*, 453 U.S. 654 (1981).

18 *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (awarded damages for an illegal presidential seizure of a ship during war with France); *see also Mitchell v. Harmony*, 54 U.S. (12 How.) 115 (1851) (adjudicating liability of U.S. soldier for trespass for seizing plaintiff's goods in Mexico during Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (U.S. soldier liable for trespass and wrongful seizure if his actions were not done in accordance with the law of 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) (awarding damages to the deceased passengers and crew of a civilian aircraft shot down by a U.S. warship).

Noting the Supreme Court's *Hamdi* decision, the district court in *Elmaghraby v. Ashcroft*, No. 04 CV 1409 (JG)(SMG), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *appeal docketed*, No. 05-5768 (2d Cir. Oct. 25, 2005), rejected a "special factors" defense to constitutional damages claims that arose in connection with the detention of suspects in the investigation of the September 11 terrorist attacks. The court reasoned that "our nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here." *Id*. at *14; *see also Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (1976) (permitted *Bivens* action for First and Sixth Amendment violations related to surveillance of American citizens abroad).

In an analogous setting, the Supreme Court has squarely rejected the argument that national security claims should immunize Federal officials from damages liability for constitutional violations. In *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985), the Supreme Court ruled that:

> "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate . . ." This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

472 U.S. at 524 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

None of the District Court's other rationales for treating this case as beyond judicial competence fare any better. The District Court deemed a damages remedy inappropriate because this case concerns the exercise of immigration powers. SPA.71. Federal courts, however, routinely review immigration cases, including those raising national-security claims. *See, e.g., Zadvydas*, 533 U.S. at 679 (rejecting executive claim that it can indefinitely detain deportable foreign national found to be a danger to community but not susceptible to removal); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) (reversing deportation of foreign national alleged to be a member of a group advocating violent overthrow of the U.S.); *Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986) (reviewing on the merits a deportation order against an alleged IRA terrorist).

The District Court notes that this case may touch on matters of secrecy, and might embarrass the U.S. or other Governments, and therefore interfere with foreign relations. SPA.73. Tellingly, while the District Court surmises that it might be embarrassing to Canada "if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria," SPA.72, Canada itself has conducted an exhaustive multi-million dollar inquiry into the role of Canadian officials in Arar's case. And Canada has issued a formal report exonerating Arar and holding Canadian officials responsible for their part in his mistreatment. If Canada is

willing to conduct a public inquiry into its officials' *indirect* role in Arar's mis-treatment, surely Federal courts should not be reluctant to examine the actions of those U.S. officials *directly* responsible for sending Arar to Syria.

The District Court also concluded that a *Bivens* action should be barred because claims for money damages might intrude too greatly on "officials in the performance of their duties." SPA.74-75. This reasoning, however, is contrary to the Supreme Court's jurisprudence holding that the qualified immunity doctrine adequately addresses any concerns that damages actions might chill the performance of officials, and that such concerns therefore do not bar *Bivens* relief. *See Carlson*, 446 U.S. at 19; *Butz v. Economou*, 438 U.S. 478, 503-17 (1978).

The only decision declining to recognize a *Bivens* action based on the "special factor" of foreign policy concerns is *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985).[19] In more than twenty years, no court has

---

[19] The Supreme Court has never recognized foreign policy or national security as a "special factor" precluding *Bivens* relief. It has found "special factors" in only limited settings. One such setting involves suits by military service members against their superiors. *See, e.g., United States v. Stanley*, 483 U.S 669, 683-84 (1987). Another setting is where litigants sued for constitutional injuries associated with the denial of statutory welfare benefits or civil service protections where Congress had provided a comprehensive remedial scheme. *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *see also Bush v. Lucas*, 462 U.S. 367 (1983). In *Schweiker*, the Court concluded that it would be inappropriate for the courts to recognize a *Bivens* remedy where a massive welfare scheme was involved and, Congress had created an elaborate remedial scheme for improper denials.

followed that court's application of *Bivens*. Moreover, the foreign policy implications presented by *Sanchez-Espinoza* were far more substantial than any posed here.[20] That case challenged President Reagan's presidential directive to fund the contras in Nicaragua, and as such presented a danger that the litigation would "obstruct the foreign policy of our government." *Sanchez-Espinoza*, 770 F.2d at 209.

Here, in contrast, Arar does not challenge a broad foreign policy initiative directly authorized by the President, but rather discrete actions by lower federal officials *in defiance of federal statutes, federal regulations, and the President's stated federal policy*. Notably, the President has not declared Arar an "enemy combatant," asserted the war power, or even suggested that sending people to be tortured is a necessary or even legitimate tactic in the "war on terror." Federal law makes torture a crime, 18 U.S.C. § 2340, federal statutes and regulations prohibit

---

Schweiker, 487 U.S. at 429. This case, in contrast, provides no occasion for deference to Congress, Congress has not created any meaningful alternative remedy.

[20] *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1512 (D.C. Cir. 1984), *vacated on grounds of mootness*, 471 U.S. 1113 (1985) (finding justiciable, and not a political question, a suit challenging the occupation of a ranch in Honduras by officials of the U.S. Government in connection with military operations in Honduras justiciable (and thus not a political question) because the suit presented a discrete challenge to U.S. officials' action, and did not "challenge the United States military presence in Honduras").

removal of foreign nationals to countries where they face a likelihood of torture, 8 U.S.C. § 1231, note, 8 C.F.R. § 208.17, and official executive policy flatly prohibits any involvement in torture.[21] Because Arar seeks damages for conduct that violates officially-stated U.S. policy, a traditional *Bivens* remedy will not interfere in any way with the nation's foreign policy or national security. Under U.S. law, torture is simply not a foreign policy option.

2. No Satisfactory Alternative Remedy Exists.

Bivens actions may also be precluded when "Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 18-19. Here, Congress has not declared any remedy to be a substitute for

---

[21] In its June 2005 report to the Committee Against Torture, the U.S. said:

> The United States is unequivocally opposed to the use and practice of torture. *No circumstances whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture.* […] The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. law prohibiting such practices applies both when the employees are operating in the United States and in other parts of the world.

U.N. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, Addendum: United States of America, ¶ 6, 7, CAT/C/48/Add.3, June 29, 2005.

recovery under the Constitution, and the alternative-remedy exception does not apply.

The defendants maintained below that because the INA creates a "comprehensive [regulatory] scheme," it should be read to implicitly preclude a *Bivens* remedy for the constitutional violations alleged here. But the District Court properly rejected that argument, finding that the manner in which the defendants removed Arar effectively impeded any opportunity to seek habeas relief, and that in any event the INA provides no after-the-fact relief for Arar's torture by Syrian officials. SPA.68-70. As the District Court found, the INA provides no compensatory remedies whatsoever for the violations Arar alleges.

III. ARAR'S DETENTION AND MISTREATMENT IN THE U.S. ALSO VIOLATES THE FIFTH AMENDMENT AND WARRANT A DAMAGES REMEDY UNDER *BIVENS*.

A. Based on Notice Pleading Standards, Arar Has Pleaded a Cognizable Claim That His Substantive Fifth Amendment Rights Were Violated By His Mistreatment Within the United States.

A motion to dismiss under Rule 12(b)(6) may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Elmaghraby*, 2005 WL 2375202, at *9. The District Court failed to properly apply this liberal notice pleading standard to Arar's fourth claim for relief. The District Court's own description of the

allegations of the complaint-stating that Arar alleged he was denied access to counsel-shows that the notice pleading requirements were met.

Arar's claims of unduly punitive conditions of confinement and physical abuse are analogous to conditions-claims by pre-trial detainees, and are thus analyzed under the substantive due process standard enunciated in *Bell v. Wolfish*, 441 U.S. 520 (1979). Moreover, even if this Court were to adopt the "gross physical abuse" standard that the District Court applied, Arar has adequately pleaded a claim under that standard.[22]

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

Treatment of aliens held in Federal custody is governed by the Due Process Clause. *See Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663, at *32 (E.D.N.Y. June 14, 2006) *appeal docketed*, No. 06-3745 (2d Cir. Aug. 10, 2006).

---

[22] For pleading purposes, also meets the standard formulated by this Court whereby personal involvement of supervisory officials may be established by evidence that "(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference… by failing to act on information that unconstitutional acts were occurring." *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (quoting *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)). The complaint alleges each defendant's respective contributory role in Arar's detention and mistreatment in the U.S., and in his removal for arbitrary detention and torture in Syria.

Under that Clause, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. at 535-36 (citing *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 n. 40, 674 (1977) (corporal punishment of student)); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-167, 186 (1963) (stripping citizenship of draft-evader); *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896) (hard labor for alien). Because "the nature . . . of commitment [must] bear some reasonable relation to the purpose for which the individual is committed," *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), immigration "detainees who have not been convicted of a crime [can]not be punished," *Turkmen*, 2006 WL 1662663, at * 32 (citing *Bell*, 441 U.S. at 537).

Treatment amounts to "punishment" when it is imposed for a punitive purpose or when it is not reasonably related to a legitimate purpose. *Bell*, 441 U.S. at 535. A court may infer punitive purpose through allegations regarding particular statements and conduct by defendants, including verbal abuse or threats. *Turkmen*, 2006 WL 1662663, at *33. As Arar was detained under the immigration law, that detention purpose must justify his treatment. The Supreme Court has explained:

> Loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less

> harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

Bell, 441 U.S. at 539 n.20. Under this standard, Arar's allegations undoubtedly state a due process violation claim, as he has alleged treatment that is not reasonably related to institutional security, and has raised an inference of punitive intent. *Turkmen*, 2006 WL 1662663, at *32-33; *see also Palmer v. Richards*, 364 F.3d 60 (2d Cir. 2004) (solitary confinement may implicate due process rights).

While defendants may offer legitimate explanations for the harsh treatment alleged by Arar at some point in the future, the distinction between legitimate and punitive conditions under these circumstances are "not amenable to resolution on a motion to dismiss." *Elmaghraby*, 2005 WL 2375202, at *16. For this reason, the District Court erred in requiring Arar to re-plead the fourth claim for relief.

In dismissing Arar's fourth claim, the District Court ignored the Bell standard applicable to substantive due process challenges to conditions of non-criminal detention. Instead, the District Court analyzed Arar's due process claims under the "gross physical abuse" standard referenced, but never adopted, by this Circuit. The Court did so by analogizing Arar's status to that of an excludable alien seeking entry into the U.S. SPA.78-82. But as noted above, *see* Section I(A)(3), while excludable aliens are not generally entitled to procedural due process in connection with their application for admission—because admission

itself is a discretionary benefit that does not implicate a liberty interest sufficient to trigger procedural due process—excludable aliens are entitled to the protection of substantive due process, particularly when held in custody and barred from leaving the U.S., as Arar was. The District Court erred in finding that excludable aliens are protected only from "gross physical abuse" because the entry-fiction doctrine does not erode the substantive due process rights to which aliens held in the U.S. are entitled.

C. Arar has Nonetheless Pleaded Gross Physical Abuse.

In any event, Arar's claims are adequate to state a claim for relief even under the "gross physical abuse" standard. In *Lynch*, for example, the Fifth Circuit upheld allegations of disproportionate and wanton treatment (like spraying detainees with high-pressure fire houses and beatings) but dismissed allegations of "mere threatening language." 810 F.2d at 1376. Arar has alleged purposeful and malicious deprivation of life's necessities, including food and sleep, along with humiliating and unnecessary strip searches and shackling, isolation from the outside world, threats and prolonged interrogation. A.29-33.

Having concluded that "the deprivations Arar alleged with respect to his treatment while in U.S. custody potentially concern the type of 'gross physical abuse' that could trigger a due process violation" SPA.81, the District Court failed to apply the liberal notice pleading standards to these facts. The complaint alleges,

as the District Court noted, abusive treatment which, if true (and it has to be assumed as true for this appeal), could "well violate the basic standards for a detainee in any context—civil, criminal immigration, or otherwise…" SPA.84.

Such disproportionate and degrading treatment cannot be squared with Arar's status as a civil-immigration detainee. Indeed, even the District Court recognized that Arar's allegations indicate he "was treated quite differently than the usual illegal alien" and characterized Arar's claims as "borderline as to whether they constitute a due process violation." SPA.81-82. Under notice pleading, claims that are "borderline" cannot be dismissed for failure to state a claim, as Rule 12(b)(6) dismissal is only appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). If this Court agrees with the District Court that Arar claims are "borderline," the appropriate remedy is not dismissal for re-pleading, but discovery. *Alston v. Parker*, 363 F.3d 229, 233 n.6 (3d Cir. 2004).

D. Arar Has Satisfied the Notice Pleading Requirement of Alleged Interference with Access to Counsel or the Courts.

A central aspect of Arar's due process claims regarding his mistreatment within the U.S. concerns defendants' extensive efforts to bar him from access to a lawyer, and thereby, to the courts. As set forth in the Statement of Facts, defendants did everything they could do to block Arar from seeing a lawyer-from

denying his many requests to see a lawyer, to falsely telling him his lawyer had declined to participate in a hearing, to lying to his lawyer to keep her in the dark about his whereabouts until long after he had been whisked away in the dead of night to Syria. As the District Court found, this treatment effectively precluded Arar from filing suit to challenge his treatment while he was in the U.S. Arar was prevented from filing any grievance, including a petition for review of the final order of removal (8 U.S.C. § 1252(a)), an emergency petition for stay of removal, or a habeas corpus petition (28 U.S.C. § 2241) to challenge his detention and bring him before the courts, before being jetted away to Syria. Arar's independent due process and statutory rights to bring these petitions were prejudiced by defendants' denial of his access to counsel and the courts, preventing him from challenging his rendition.[23]

The District Court improperly dismissed Arar's access to counsel claim. It erroneously required Arar to "identify 'a separate and distinct right to seek judicial relief for some wrong.'" SPA.82 (citing *Christopher v. Harbury*, 536 U.S. 403,

---

[23] The District Court also erroneously ruled that Arar's "denial-of-access claim must concern more than his removal," or the "rendition aspect of the claim," because he is "not asserting any challenge to his removal as such." SPA.82. But while Arar could not in this action seek review of the removal order, he most assuredly challenges its validity, to the extent it was part and parcel of an unconstitutional scheme to subject him to torture and arbitrary detention abroad.

414-15 (2002)). *Christopher* does not apply here. In that case, the Court rejected plaintiff's claim that Government officials denied her access to the courts by deceiving her, resulting in her inability to bring an affirmative tort action. *Christopher*, 536 U.S. at 415, 419. The plaintiff in *Christopher* did not allege that defendants' deception deprived her of any constitutional or statutory rights.

Arar, however, alleges that defendants interfered with his ability to pursue, at a meaningful time, injunctive relief for the very constitutional violations for which he now seeks *Bivens* relief. Moreover, as an "immigration detainee," Arar has a Fifth Amendment due process right to have counsel (at his own expense).[24] *See Michel v. INS*, 206 F.3d 253, 258 (2d Cir. 2000); *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991); 8 U.S.C. §1362 (providing that in removal proceedings, the foreign national has the right to be represented, though at no expense to the Government); *see also,* 8 U.S.C. § 1225 (b)(1)(B)(iv); 8 C.F.R. § 235.3(b)(4)(i), (ii) (providing right to consult with persons of own choosing (and time to contact them), prior to "credible fear interview"). Unlike in *Christopher,* Arar was

---

[24] This Court has characterized the right to counsel for non-citizens in removal proceedings as fundamental, and has stated that the deprivation of that right may be a ground for reversal of a removal order. *See Waldron v. INS*, 17 F.3d 511, 517 (2d Cir. 1994) (an alien's right to counsel in removal proceedings is a "fundamental right derived from the Sixth Amendment right to counsel in criminal cases and the Fifth Amendment right to due process in civil cases, and enshrined in section 292 of the Act, 8 U.S.C. § 1362.")

prejudiced by the denial of his constitutionally guaranteed right to counsel, apart from the frustration of claims caused by defendants' denying him access to the courts. *See Turkmen,* 2006 WL 1662663, at *26.

Finally, defendants failed to adhere to the agency's own regulations, including a non-citizen's right to consultation, *see* 8 C.F.R. §235.3(b)(4)(i), (ii), which constitutes an independent violation under the *Accardi* doctrine, the judicially-developed rule ensuring fairness in administrative proceedings. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (deportation order vacated because procedure violated applicable controlling regulations); *see also Montilla*, 926 F.2d at 166-69. Defendants' actions therefore violated Arar's right to access to counsel and the courts.

IV. ARAR'S ONGOING HARM WARRANTS DECLARATORY RELIEF.

The District Court found that Arar lacks standing for declaratory relief because any judgment granting declaratory relief would not likely redress any ongoing injury, including his ability to re-enter the U.S. SPA.19-20. But if Arar prevails on his constitutional claims, the removal order would be expunged as null and void, thereby lifting the current barrier to re-entry into the U.S. Where there is a "substantial controversy, between parties of adverse legal interests, of sufficient immediacy and reality," a declaratory judgment may properly issue. *See Md. Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The substantial and

ongoing harm still suffered by Arar meets the standard of "sufficient immediacy and reality" for declaratory relief. *Id*.

This Court has recognized that the bar to reentry is a collateral consequence of a removal order sufficient to sustain a case or controversy, *Swaby v. Ashcroft*, 357 F.3d 156, 159-61 (2d Cir. 2004), thereby justifying relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. "Even if the plaintiff's primary injury has been resolved, the collateral consequences doctrine serves to prevent mootness when the violation in question may cause continuing harm and the court is capable of preventing such harm." *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998).

Arar is suffering ongoing legal disability due to defendants' unlawful actions in removing him. 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 he] will be subject to arrest, removal and possible criminal prosecution." 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. A.23.

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) ("[Plaintiff's] inability to reenter and reside legally in the United States with his family is a collateral consequence of his deportation because it is clearly a concrete disadvantage imposed as a matter of law"). Arar's injuries are also "fairly ... trace[able] to the challenged conduct of the defendant[s], and not...the result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Defendants detained Arar for the purpose of removing him to Syria for arbitrary detention and interrogation under torture; they did not detain him *for the purpose of* determining his admissibility into the U.S. A.20, 28. Therefore his removal, and the consequent re-entry bar, were unlawful.[25]

---

[25] Furthermore, Arar is not simply challenging an immigration decision. He is seeking a declaration that his domestic detention and transfer to Syria for the purposes of arbitrary detention and interrogation under torture were unlawful and unconstitutional. A.21-22, 28, and he has alleged severe emotional distress, damage to his reputation, and resulting economic loss, A.38-42, all of which are concrete injuries that would be redressed at least in part by a declaration that his treatment by the U.S. was unlawful and unconstitutional. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980) ("It is indisputable that commitment to a mental hospital 'can endanger adverse social consequences to the individual' and that '[whether] we label this phenomena 'stigma' or chose to call it something else . . . we recognize

Finally, a favorable decision will redress the harm (in part) by allowing Arar to re-apply for admission, and that in itself is sufficient to provide redress from his current legal burden. Declaratory relief would also alleviate some of his mental suffering and the reputational harm caused by his being falsely labeled as a member of al-Qaeda and transferred to Syria for interrogation under torture. Denying Arar declaratory relief is therefore legal error.

CONCLUSION

Appellant Arar respectfully requests this Court vacate the District Court's Order.

Date: New York, New York
December 12, 2006

Respectfully submitted,

DLA PIPER US LLP

By: /s/ Sarah J. Sterken

Robert F. Fink
Stanley McDermott III
Joshua A. Sohn
Sarah J. Sterken
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 335-4500

---

that it can occur and that it can have a very significant impact on the individual.'") (citations omitted).

Maria Couri LaHood
Barbara J. Olshansky
David Cole
William Goodman
Katherine Gallagher
Jules Lobel
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel. (212) 614-6430

Co-counsel for Plaintiff-Appellant
Mahar Arar

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

I, Sarah J. Sterken, hereby certify that the foregoing appellate brief complies with the requirements of F.R.A.P. 32(a)(7) and contains 13,602 words including footnotes according to the word count of the word processing system used to prepare it.

/s/ Sarah J. Sterken
Sarah J. Sterken

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

CASE NAME: Arar v. Ashcroft

DOCKET NUMBER: 06-4216-cv

I, Douglas P. Duzant, certify that I have scanned for viruses the PDF version of the

____X___ Appellant's Brief

_____ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

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

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

Symantec AntiVirus version 10.0 was used.

_____
Douglas P. Duzant

Date: December 12, 2006