No. 06-4216-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAHER ARAR,

Plaintiff-Appellant,
v.

JOHN ASHCROFT, formerly Attorney General; LARRY D. THOMPSON, formerly Deputy Attorney General, TOM RIDGE, Secretary of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, and UNITED STATES,

Defendants-Appellees.

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

BRIEF FOR DEFENDANT-APPELLEE JOHN ASHCROFT IN HIS INDIVIDUAL CAPACITY

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STATEMENT OF THE ISSUES

1. Whether Congress has determined that cabinet officers and others entrusted with responsibility for removing aliens under our immigration laws may be liable as actors under color of a foreign nation's law for that country's treatment of the alien following removal.

2. Whether the judicial review scheme Congress adopted for the removal of aliens, limiting judicial review to a circuit court of appeals, precluded the exercise of federal question jurisdiction by the District Court over plaintiff's foreign detention and foreign torture *Bivens* claims.

3. Whether a *Bivens* claim should be recognized for constitutional claims arising out of an alien's removal from the United States, where the remedy would intrude on the conduct of foreign relations left by the Constitution to the political branches and where Congress already has adopted a comprehensive scheme that both defines and restricts the remedies arising from an alien's removal.

4. Whether Arar's damages claims against the former Attorney General are barred by his qualified immunity from suit.

STATEMENT OF THE CASE AND FACTS

Mr. Ashcroft adopts the Statement of the Case and Statement of the Facts presented in the Briefs for the United States and Defendant-Appellee Larry D.

Thompson.

SUMMARY OF ARGUMENT

1. Arar's claim under the Torture Victim Protection Act ("TVPA"), *codified at* 28 U.S.C. §1350n., asserts that officials of the United States government who determined that his removal to Syria would not violate the Convention Against Torture[1] should be deemed to have acted under color of Syrian, not American law and made personally liable for his treatment by Syria.

By its plain language, the TVPA only provides private rights of action against those who act under the "authority, or color of law, of any foreign nation" and have "custody or physical control" over the person mistreated. TVPA §§2(a), 3(b)(1). The notion that United States officials discharging duties under our national law requiring contacts with a foreign nation – as our removal laws surely do – may be sued for acting under "color of the law" of that foreign country is a disquieting one. Private suits that render our government's officials liable for the acts of foreign states carry the threat of substantial mischief and interference with the conduct of international relations for our nation. Nothing in the TVPA or its legislative history gives any suggestion that Congress ever contemplated what

[1] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment ("CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); 23 I.L.M. 1027 (1984).

plaintiff seeks.

Inexplicably, nowhere in Arar's Brief is there any mention of the Act of Congress which the District Court held "militates against" the remedy he seeks under the TVPA – the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), *codified at* 8 U.S.C. 1231 n.[2] SPA36. The removal of an alien to a state where the person claims he will be tortured is governed by Article 3 of the CAT. But FARRA, not the TVPA, implemented Article 3. And FARRA provides *no* private cause of action but, instead, expresses Congress' intent to preclude collateral attacks on removal decisions through other remedies.

2. Statutes that vest judicial review of agency determinations in the courts of appeals "also preclude district courts from hearing claims" – including *Bivens*[3] claims – "that are 'inescapably intertwined' with review of such orders." *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 271 (2d Cir. 1999) ("*Merritt I*").

The jurisdictional issue arises from the judicial review scheme embodied in FARRA. Permitting judicial review only in a circuit court of appeals, FARRA closely parallels the judicial review provision under the Aviation Act that

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[2] FARRA, Pub. L. 105-277, div. G, Title XXII, 112 Stat. 2682-82 (Oct. 21, 1998), *codified at* 8 U.S.C. § 1231 n.

[3] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

"deprive[d] the district court of jurisdiction over Merritt's *Bivens* claims." 187 F. 3d at 270. With the multiple provisions of the Immigration and Nationality Act ("INA") channeling judicial review to the courts of appeals and thereby withdrawing the district courts' jurisdiction, the reasoning in *Merritt I* has even greater force here.

By their very terms, Arar's substantive due process foreign detention and foreign torture *Bivens* claims are "directed at the merits" of the determination to remove him to Syria and challenge "the motivations and actions,"187 F.3d at 270-72, of those officials who determined his removal was "consistent with the obligations of the United States under the Convention." FARRA §(c). Such claims may not be asserted where Congress has withdrawn a district court's general federal question jurisdiction. *See Calcano-Martinez v. INS*, 232 F.3d 328, 340-41 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001) (§1331 federal question jurisdiction stripped by INA jurisdiction channeling amendments).

3. The District Court appropriately declined to recognize a *Bivens* remedy for Arar's foreign detention and torture claims. The foreign policy and national security considerations that attend the removal of an alien to a foreign state are "special factors" that militate against a *Bivens* remedy for the alien's treatment by the removal country. *See Bivens*, 403 U.S. at 396-97. The Constitution reserves to

the Executive and Legislative Branches the duty and the competence to deal with issues of foreign policy and national security, including agreements with other nations to combat international terrorism. Intrusion into that realm by creating a *Bivens* remedy can disrupt important and delicate relations between the United States and the foreign nations involved in a particular removal, as well as chill other nations in their dealings with ours. Such a result could "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990).

Morever, the INA with all its attendant amendments serves as the quintessential "comprehensive federal statutory scheme for regulation of immigration and naturalization." *DeCanas v. Bica*, 424 U.S. 351, 353 (1976). Congress' adoption in recent years of "new (and significantly more restrictive)" provisions for judicial review in immigration matters hardly shows Congress is incapable of deciding whether those provisions should be supplemented by a damages remedy. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999) ("*American-Arab*"). To the contrary,"[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the

course of its administration, [the Supreme Court has] not created additional *Bivens* remedies." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

4. Finally, qualified immunity protects Attorneys General and other officers sued for carrying out statutory schemes adopted by Congress and requiring judgments infused with foreign relations concerns.

First, Mr. Ashcroft is sued, not because *he* approved the removal to Syria, *see* JA24¶15, but rather because he had "ultimate responsibility for the implementation and enforcement of United States immigration laws." JA23¶14. By itself, this is an attempt to impose respondent superior liability, which is not permitted.

Moreover, Arar asserts a substantive due process right that to date has not been extended to arriving aliens who are stopped at our borders. *See Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). Nor should this Court break new ground by applying state created danger precepts to removals to foreign states. The regulation of aliens and immigration is addressed by the Constitution, which vests plenary responsibility in the Legislative Branch. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Principles of judicial self-restraint where the Constitution places authority in the political branches militate against judicially supplementing what Congress has deemed appropriate.

Even if this Court disagrees, any decision extending substantive due process rights to aliens at our borders could not overcome Mr. Ashcroft's entitlement to qualified immunity. Arar has not cited to a single case in which either the Supreme Court or this Court has held that the Fifth Amendment precluded the removal of an alien stopped at our border to a country where he feared torture, much less a decision reached before Arar's removal. In fact, the dearth of authority found in Arar's brief makes it clear that such law has not been established in any sense at all – much less "'clearly established' in this 'more 'particularized' sense" that the Supreme Court requires. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citations omitted). To the contrary, as shown below, the case factually most analogous to Arar's decided before his removal squarely *rejected* the Fifth Amendment right he asserts here.

The District Court also properly dismissed Arar's domestic detention claim. Arar failed to make the allegations of personal involvement needed to state a claim against the persons he sued. Although given an opportunity to amend his pleadings, Arar refused. Qualified immunity doctrine contemplates that the person suing a government official will identify the conduct *of that defendant* on which the claim is based. *See Salim v. Proulx*, 93 F.3d 86, 90-91 (2d Cir. 1996).

Lastly, even assuming this Court decides that Congress meant to expose an

Attorney General executing the immigration laws of the United States to liability under the TVPA as an actor "under actual or apparent authority, or color of law, of any foreign nation," the novelty of such an interpretation warrants dismissal under the qualified immunity doctrine. *See Procunier v. Navarette*, 434 U.S. 555, 561 (1978).

STANDARD OF REVIEW

This Court reviews the District Court's dismissal *de novo*. *See Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005).

ARGUMENT

I. The TVPA Does Not Supplement the Removal Procedures Congress Adopted in FARRA.

Arar's first claim seeks to hold an Attorney General and other officials liable for exercising the judgment Congress reposed in them when it implemented Article 3 of the CAT through FARRA. By asserting a claim under the TVPA, Arar not only asks this Court to ignore FARRA, but also the limitations Congress imposed on the reach of the TVPA.

A. Nothing in the TVPA's Language Nor its History Support Extending Liability to Those Acting under United States Law.

Arar's claim initially fails because his claim against United States officials do not satisfy the TVPA's definitional section. This issue arises because the

Senate conditioned its ratification of the CAT with express "understandings, which shall apply to the obligations of the United States under this Convention." Resolution of Ratification, 136 Cong. Rec. S10093 (daily ed. July 19, 1990) §II.

One understanding addressed the definition of torture under Article 1 of the CAT. As ratified, the definition "is intended to apply only to acts directed against persons in the offender's custody or physical control." *Id.* §II(1)(b). This definition is repeated in the TVPA, which necessarily only reaches conduct "directed against an individual in the offender's custody or control." TVPA §3(b)(1).

Although ultimately finding resolution of the issue unnecessary, the District Court was unpersuaded by Arar's argument that he remained in defendants' custody or control during his detention in Syria. SPA26-27. Assuming that "a higher official need not have personally performed or ordered the abuses in order to be held liable," S. Rep. 102-249, *7, "there is an obvious difference between the vertical control exercised by a higher official over his subordinates" and what occurs when an alien is removed to a foreign country. SPA27. In the former situation, the higher official has "authority and discretion" to order the release of a person in a subordinate's custody. *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 n.15 (D. Mass. 1995). In the latter, the relationship is that of two independent

sovereign states – here the United States and the Syrian Arab Republic – not supervisory official and subordinate.

The attempt to fit this case into the TVPA fails under another express limitation Congress adopted. "By its plain language," this Court has noted, "the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing 'under actual or apparent authority, or color of law, of any foreign nation.'" *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (quoting TVPA). The defendants are United States officials. Arar's own complaint concedes the basis for his claim against the Attorney General is Mr. Ashcroft's responsibility as the head of the Department of Justice, 28 U.S.C. §503, charged with the enforcement and implementation of "United States" law. JA23¶14. The determinations that led to Arar's removal all involved judgments Congress reposed in the Attorney General and subordinate officers of the Department of Justice[4]:

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[4] At the time germane to Arar's allegations, the Department of Justice included the INS. 8 U.S.C. §§1103(a), 1101(a)(34) (2002). With the creation of the Department of Homeland Security, INS ceased to exist. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). Many of the Attorney General's functions have been transferred to the Secretary for Homeland Security. 8 U.S.C. §1103. For the sake of clarity, references in this brief will be to the official who was entrusted with responsibility at the time of Arar's detention and removal.

- the judgment that Arar may be inadmissible (8 U.S.C. §1225(c)(1));
- the judgment that confidential information precluded a hearing before an immigration judge (§1225(c)(2)(B));
- the judgment that Arar's removal country designation should be disregarded (§1231(b)(2)(C));
- the judgment regarding an alternative removal country (§§1231(b)(2)(D, E));
- and the judgment that removal to Syria was consistent with the United States' obligations under the CAT (FARRA §(c)).

In each respect, Mr. Ashcroft and other Department officers were acting under United States law, carrying out responsibilities Congress placed upon them.

Plaintiff contends that the Attorney General of the United States and others nonetheless can be deemed to have acted under Syrian law through a theory of secondary liability. For this, Arar relies on language in the Senate and House Reports that courts look to principles of liability under our civil rights laws for guidance in construing "color of law." *See* H.R. Rep. 103-367(I), *5, 1992 U.S.C.C.A.N. 84, *87; S. Rep. 102-249, *7. Terms such as "color of law" do provide helpful guidance when foreign officials attempt to evade TVPA liability by arguing the unlawful nature of torture makes their conduct *ultra vires*. *Id.* Civil rights jurisprudence also provides guidance for resolving difficult issues of supervisory liability for torture under foreign law as well as the potential liability

of private parties acting in cooperation with the foreign government. "[P]laintiff's analogy to § 1983 ultimately fails," however. SPA35. It is one thing to apply these concepts in evaluating the responsibility and liability of officials acting within a body of national law and practice, but a wholly different set of factors must govern the evaluation of actors who do not share the same body of law and practice.

Our constitutional scheme vests authority over foreign affairs to the National Government. *See United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 318 (1936). And within that National Government, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Treating the Attorney General as an actor under the law of a foreign nation fundamentally ignores these tenets of our constitutional structure. Simply put, no legal legerdemain can hide the fact that the Attorney General acts under color of United States law, not foreign law, when he carries out his official responsibilities. *See Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D. D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005). *Cf. Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) (rejecting claim that former Secretary's foreign policy actions were ultra vires), *cert. denied*, 2007

WL 506059 (2007).

This distinction is more than semantic. Underlying his TVPA claim is Arar's allegation that there was an unlawful "agreement" between officials acting on behalf of the United States and the officials acting on behalf of two foreign states with regard to his removal to Syria. He alleges that Jordanian and Syrian officials were "directed" or "ordered" by United States officers, that defendants conspired with foreign officials, or aided and abetted in his torture by foreign sovereign states. JA38¶71. Jurisprudential precepts that animate our domestic tort law are ill-suited to fix relationships and understandings between two independent sovereign states:

> The issues federal officials confront when acting in the realm of foreign affairs may involve conduct and relations of an entirely different order and policy-making on an entirely different plane. In the realm of foreign policy, U.S. officials deal with unique dangers not seen in domestic life and negotiate with foreign officials and individuals whose conduct is not controlled by the standards of our society. The negotiations are often more delicate and subtle than those occurring in the domestic sphere and may contain misrepresentations that would be unacceptable in a wholly domestic context.

SA35-36.

Plaintiff's reliance on this Court's decision in *Kletshka v. Driver*, 411 F.2d 436 (2d Cir. 1969), for a contrary conclusion is misplaced. Although concluding in *Kletshka* that joint action between federal and state officials might subject the

former to §1983 liability, *id.* at 448-49, this Court subsequently and importantly declined to find state action liability for federal defendants where the interaction was one of "[c]ooperation between state and federal bureaucracies acting in their regulatory spheres . . . ."" *Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 154-55 (2d Cir. 2006) (citations omitted).[5] This Court's reasoning in *Beechwood* is even more compelling where, as here, there is interaction between independent sovereign states.

But more fundamentally, *Kletshka* may well be the proverbial old saw that still cuts, but was never designed to cut the type of wood presented here. Suits involving federal and domestic state actors do not present the separation of powers concerns that arise here, nor do they present a threat to the Executive's conduct of foreign affairs. But a finding by a United States court, a body of the National Government, that diplomatic interactions make United States officials actors under color of a *foreign* state's laws would be the occasion for "embarrassment of our government abroad" and disruption of our foreign relations with that and other foreign nations. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985)

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[5] *See also Case v. Milewski*, 327 F.3d 564, 567 (7th Cir. 2003) (plaintiff must show the state "cloaked" the federal defendants with state authority or establish a "conspiracy" by demonstrating that the federal and state actors "reached an understanding").

(quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)).[6] A fortiori, unimagined foreign affairs consequences could erupt from a holding that Syria "cloaked" senior United States officials with Syrian authority, *Case*, 327 F.3d at 567, or as Arar alleges, that Syrian officials were "ordered" or "directed" by the United States. JA38¶71. For good reason, the Supreme Court "not only [has] recognized the limits of [its] own capacity to 'determine[][sic] precisely when foreign nations will be offended by particular acts,' . . . but consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress . . . ." *Crosby v. Nat. Foreign Trade Counc.*, 530 U.S. 363, 386 (2000) (citation omitted); *see American-Arab*, 525 U.S. at 491; *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

This Court should expect that in the event senior policy making executive officials of the United States are held liable for acts of a foreign sovereign State – with all the potential for conflict with the President's own Article II responsibilities in the arena of foreign affairs – Congress will do so clearly. The Supreme Court's observation in an analogous context is equally apt here: "It

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[6] Should a foreign state seek to impose liability, civil or criminal, under its domestic law on United States officials under such a theory, diplomatic consequences are readily apparent. But Arar's theory – that United States officials acted under Syrian law – invites just such a result.

would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in the legislative history." *Sale v. Haitian Centers Counc., Inc.*, 509 U.S. 155, 177 (1993). By enacting the TVPA, Congress focused on those who act under color of a "foreign nation" – not those who act on behalf of the United States.

B. FARRA, Not the TVPA, Governs This Case.

The district court recognized that the TVPA cannot be considered in isolation. SPA29-31, 36.[7] Congress implemented the provision of the CAT regarding removal of a person to a country where he feared a likelihood of torture – the very conduct plaintiff alleges here – but it did so through FARRA rather than the TVPA. *See Wang v. Ashcroft*, 320 F.3d 130, 133, 140 (2d Cir. 2003).

FARRA establishes "the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . . ." TVPA §(a). Regulations promulgated pursuant to FARRA permit the Attorney General or his designee to consider assurances from a

[7] The district court also concluded that the TVPA was not available to aliens. SPA28-29. Mr. Ashcroft did not urge that position.

foreign government that an alien will not be tortured. 8 C.F.R. §§208.17(f), 208.18(c).[8] Regulations also permit the removal of alien terrorists as long as the United States' international obligations under the CAT are satisfied. *Id.* §208.18(d).

Significantly, Congress did *not* provide a private cause of action in FARRA. Congress precluded one:

> Notwithstanding any other provision of law, . . . nothing in this section [this note][sic] shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section [this note][sic], or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act. (8 U.S.C. §1252).

FARRA §(d). The absence of a private damages remedy in the very statute Congress adopted to address removals where there are torture claims, the District Court rightly noted, "casts important light on the reach" of the TVPA. SPA31.

By attempting to bring his case under the TVPA, Arar seeks to obfuscate the obvious. The nature of his case against United States officials is not about torture by United States officials – but about removal to a foreign state where he assertedly was tortured by foreign officials acting under color of foreign law.

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[8] At the time of Arar's removal, the Attorney General's authority could be delegated only to the Deputy Attorney General and the Commissioner, INS. *See* 8 C.F.R. §208.18(c)(2).

Congress' unwillingness to provide a damages remedy when it had the opportunity to do so should be respected. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution."). The absence of FARRA from Arar's brief speaks for itself.

II. The District Court Lacked Jurisdiction over Arar's Foreign Detention and Foreign Torture Claims.

Arar also seeks damages from Mr. Ashcroft under a novel extension of the *Bivens* doctrine. Before considering plaintiff's arguments that the District Court erred in dismissing these claims, this Court first must resolve a threshold question of whether the lower court had jurisdiction over these claims

A. The Judicial Review Scheme Congress Adopted Channels Review to the Courts of Appeals and Affirmatively Withdraws Jurisdiction from the District Courts.

The starting point in *Merritt I* was the judicial review scheme Congress adopted with the Aviation Act, 49 U.S.C. §46110(a). So here, the inquiry into whether federal question jurisdiction existed to entertain a *Bivens* action that supplements FARRA must begin with the comprehensive remedial scheme Congress created in adopting the INA, particularly through the amendments accomplished by the Illegal Immigration Reform and Immigrant Responsibility

Act ("IIRIRA"), 110 Stat. 3009-546 (1996); the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, 119 Stat. 231; and FARRA itself.

1. Directly relevant to Arar's foreign torture and foreign detention substantive due process claims is FARRA. The crux of Arar's claim is that his transport to Syria in execution of a final order of removal violated Article 3 of the CAT. JA24-26¶¶17-19.

At the time of Arar's removal, Congress vested discretion in the Attorney General to select the country of designation for executing the final order. 8 U.S.C. §1231(b)(2)(C). FARRA limited that discretion and precluded removal of an alien to a country where there are substantial grounds he would be faced with torture. FARRA §(a). The regulations permit removal where assurances are received that the alien will be treated humanely by the receiving country. 8 C.F.R. §208.18(c). Persons deemed alien terrorists still have FARRA protection. However, Congress directed "[t]o the maximum extent consistent with the obligations of the United States under the Convention," such persons "shall [be] exclude[d]" from the protection of FARRA's implementing regulations." FARRA §(d); *see also* 8 C.F.R. §208.18(d).

By asserting that those responsible for removing him to Syria should be liable for his foreign detention and foreign torture, Arar's *Bivens* claims

necessarily asked the District Court "to consider or review" the responsible officials' "application" of FARRA's policy in his case – precisely what Congress has precluded. FARRA §(d).[9] Like the Aviation Act considered in *Merritt I*, judicial review of any "determination made with respect to the application of the policy" adopted in FARRA was confined to the circuit courts of appeals, as part of the review of a final order of removal under §1252(a).[10] FARRA §(d). Standing alone, subsection (d) leaves no room for jurisdiction over a related *Bivens* action.[11] And indeed, the lack of jurisdiction for a *Bivens* action is reinforced by §1231, ito which FARRA is appended, that nothing in that section "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." §1231(h).

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[9] While FARRA requires in nondiscretionary language that removals of alien terrorists be consistent with the obligations of the United States under the CAT, the judgments as to whether a country's assurances are "sufficiently reliable," 8 C.F.R. §208.18(c)(2), given relationships with a government, country conditions, or other circumstances, necessarily involve a qualitative evaluation of facts – as do judgments as to whether a person poses a security threat, upon consideration of classified and unclassified material.

[10] In security cases, the Attorney General or his designee makes the determination. 8 U.S.C. §1225(c)(2)(B); *see also* 8 C.F.R. §208.18(b)(3)(ii)(C).

[11] The district court's habeas review was not foreclosed by IIRIRA. *INS v. St. Cyr*, 533 U.S. 289, 309 (2001).

2. Other provisions of the INA reinforce FARRA's preclusion of jurisdiction.

a. Although a host of jurisdiction restricting provisions exist in the INA, central to this construct of review is what the Supreme Court memorably has dubbed an "unmistakable 'zipper' clause." *American-Arab*, 525 U.S. at 483. Section 1252(b)(9) channels into the courts of appeals exclusive judicial review "of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter . . . ."[12] The impact of this section on a district court's federal question jurisdiction under §1331 was recognized in *Calcano-Martinez,* 232 F.3d at 340-41:

> Before INA 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate court" jurisdiction over claims "arising from any action take or proceeding brought to remove an alien," all challenges are channeled into one petition.

Because removal transports the alien to another country, the selection of the removal country necessarily "arises from" an action taken to effect removal.

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[12] Arar was ordered removed under 8 U.S.C. §1225(c), which falls within that subchapter, 8 U.S.C. §§1151-1379.

§1252(b)(9).[13]

Section 1252(b)(9), thus, reinforces the basic judicial review scheme of the INA that claims arising out of agency actions do not belong in district court.

b. This also is seen in 8 U.S.C. §1252(g), which withdraws a district court's jurisdiction to entertain "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to . . . execute removal orders . . . . ." Where a case challenges one of those discrete events, including "action" to "execute removal orders," judicial review is limited to the circuit courts of appeals. *Id.*; *see American-Arab*, 525 U.S. at 487.

Removal proceedings were initiated against Arar pursuant to §1225(c) for being inadmissible under 8 U.S.C. §1182(a)(3)(B)(i)(V) as a member of a foreign terrorist organization and a person who presented a "danger to the security of the United States." JA92. An alternative country was designated to effect his removal under §1231(b). Accepting Arar's allegations, the decision that is the subject of his second and third claims was "removing Mr. Arar to Syria" ostensibly for the purpose of his detention and torture by Syrian officials. JA33¶48. This act of executing the decision to remove Arar to Syria undergirds both his foreign-

[13] The country selection "decision tree" created by §1231(b)(2) articulates a series of discretionary considerations for sending an alien to different countries under differing circumstances.

grounded substantive due process claims. Like *American-Arab*, Arar's *Bivens* challenge to his removal and the designation of Syria "arise from" the execution of a removal order and "falls squarely within §1252(g) . . . and nothing elsewhere in §1252 provides for jurisdiction." *American-Arab*, 525 U.S. at 487.

c. Section 1252(a)(2)(B)(ii) also is pertinent to Arar, who complains that his preferred designation, Canada or Switzerland, improperly was disregarded. JA30¶35. This section not only constrains review in the district courts, §1252(a)(2)(B)(ii) provides that "no court shall have jurisdiction to review" a broad range of decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ." *Id.*[14]

The statutory "decision tree,"[15] provides that the Attorney General "*may* disregard" an alien's country designation, *inter alia*, if "removing the alien to the country is prejudicial to the interests of the United States." §1231(b)(2)(C)(iv)

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[14] The reference to "subchapter" in §1252(a)(2)(B)(ii) is to Subchapter II of Chapter 12 of Title 8, §§1151-1379.

[15] 8 U.S.C. §1231(b)(2)(A). Arar is deemed an "other" alien, whose removal is governed by §1231(b), because he was removed pursuant to §1225(c) instead of removal proceedings before an immigration judge under §1229a.

(emphasis added).[16] Among the countries the alien then may be removed to are those where he "is a subject, national, or citizen." §1231(b)(2)(D).

The determination that an alien is a member of an international terrorist organization is an appropriate factor for consideration in determining a removal country and securing that country's agreement to accept him. *See Turkmen v. Ashcroft*, 2006 WL 1662663 (E.D.N.Y., *39 (on appeal). In this regard, Congress reposed broad discretion in the Attorney General in removing arriving aliens who present security concerns.[17] Where an immigration officer "suspects" an alien "may be inadmissible" on security grounds, §1225(c)(1), the officer "shall" order the alien be removed, subject to review by the Attorney General. §1225(c)(1)(A).

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[16] As this Court wrote in *Doherty v. Meese*, 808 F.2d 938, 943 (2d Cir. 1986):

> Such a decision must be based on an analysis of the impact of a particular deportation on United States[] interests viewed as a whole by a politically responsible officer. There are no statutory guidelines regarding what quality or quantity of prejudice to United States interests is necessary, or even what constitutes "interests." The requisite judgment requires an essential political determination. This is underlined by the fact that such a judgment inevitably affects United States relations with other nations.

Doherty involved an alien terrorist who challenged the Attorney General's rejection of his designation of the country of deportation.

[17] Whether "there are reasonable grounds to believe that the alien is a danger to the security of the United States." §1231(b)(3)(B)(iv), is not the subject of precise legislative standards.

As long as the Attorney General "is *satisfied* on the basis of confidential information that the alien is inadmissible" for specified reasons, "the Attorney General *may* order [an] alien removed without further inquiry or hearing by an immigration judge." §1225(c)(2)(B) (emphasis added).[18]

While FARRA's mandate is undisturbed by §1252(a)(2)(B)(ii), insofar as Arar complains about not being sent to his preferred designations or about the determination as to membership in a terrorist organization, Congress has foreclosed any judicial review.

3. Congress again amended §1252 with the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, § 106(b), 119 Stat. 231, §106. A petition for review now is the "sole and exclusive" means for review of CAT claims, and habeas review no longer is available. §1252(a)(4); *see also* §1252(b)(2)(B) (preserving review of constitutional claims and questions of law on petition for review). Significantly, these provisions apply to "cases in which the final administrative order of removal" was issued "before, on, or after the date of the enactment of this division." Real ID Act, §106(b). This reinforces the conclusion that federal question jurisdiction to review removal decisions made under FARRA is lacking.

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[18] *See* 8 C.F.R. §235.8(b)(1) (delegating Attorney General's authority).

B. The District Court Lacked Federal Question Jurisdiction to Entertain a *Bivens* Action Challenging the Application of FARRA.

The presence of a judicial review scheme that places review in the courts of appeals is the starting point of the jurisdictional inquiry. In *Merritt I*, an action against those who investigated an incident that led to plaintiff's suspension as a pilot, this Court held that the district court lacked federal question jurisdiction to entertain a *Bivens* action:

> Although Merritt styles this claim in constitutional terms, he ultimately challenges the manner in which the officials conducted themselves during and after the June 24 incident, and disputes the ALJ's factual conclusion that he bore responsibility for an ill-considered decision to take off.

187 F.3d at 271; *see also Merritt v. Shuttle, Inc.*, 245 F.3d 182, 189 (2d Cir. 2001) ("*Merritt II*"). Finding his due process claim "'inescapably intertwined' with review of the revocation order,'" plaintiff's *Bivens* action was "an improper collateral attack on the FAA order." *Merritt I*, 187 F.3d at 270-71 & n.4.

The District Court found this reasoning inapt, notwithstanding the INA's judicial review construct and the various provisions withdrawing jurisdiction from the district courts. The Court disagreed that the order of removal to Syria lies at the core of this case in view of Arar's allegations of improper purpose that he was

removed to Syria for torture. SPA40-41.[19] There is no support, however, for the proposition that the existence of federal question jurisdiction *vel non* turns on a plaintiff 's allegations of improper purpose. To the contrary, a *Bivens* action that challenges the "circumstances" surrounding an agency decision and "the motivations and actions of those who allegedly engineered" that decision is precisely the type of action that was "properly preempted" by the Aviation Act's analogous judicial review scheme in *Merritt I*. 187 F.3d at 272.

The district court also expressed concern that there must be jurisdiction to entertain a *Bivens* action that "is apparently Arar's sole remaining avenue for legal challenge." SPA21, 18. However, plaintiff did not file a post-removal petition, nor as the District Court noted did he seek habeas review [20] or seek an emergency petition for review for stay of removal.[21] SPA66n.12. That these avenues were not sought does not mean meaningful opportunity for review would not have been

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[19] The district court erred in viewing this case as alleging "a conspiracy by defendants to detain [Arar] without formal charges . . . ." SPA42. Mr. Arar was charged "formally" pursuant to §1225(c). JA88.

[20] By the time of Arar's detention, courts had recognized that habeas review survived IIRIRA. *St. Cyr*, 533 U.S. at 309; *see also Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1014-16 (9th Cir. 2000) (recognizing habeas jurisdiction to review denial of a CAT claim); *Wang*, 320 F.3d at 139-43.

[21] *Cf. Michael v. INS*, 48 F.3d 657, 661 (2d Cir. 1995) (granting pre-final order of removal stay under prior law).

available in the courts.[22]

But more importantly, the perceived inadequacy of judicial review procedures in one circumstance is not the basis for assuming federal question jurisdiction when Congress has provided, as in *Merritt I*, that judicial review only may be had at the court of appeals. Although *Bivens* may be a court-made remedy, it is for Congress and not the courts to decide whether jurisdiction should reside in the district courts, in the appellate courts, or in no court at all; and courts may not "'transcend that jurisdiction'" Congress has supplied. *See Finley v. United States*, 490 U.S. 545, 548-49 (1973) (quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807)(Marshal, C.J.). In view of the judicial review scheme Congress adopted, federal question jurisdiction to supplement that review in the courts of appeals was

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[22] This is not to suggest that Arar would have been successful had he sought review, only that procedural avenues existed for him to bring the matter before a court. In this regard, although plaintiff contends officers (and notably, *not* Mr. Ashcroft) obstructed his counsel's efforts to contact him, his complaint acknowledges that he met with his attorney and, by that time, had a copy of the I-147 – charging him with being an alien terrorist and giving him until October 6, in which to respond to the allegations – and was aware that Syria was being considered as the removal country. JA31-32¶¶40, 42. Arar did not provide a written statement or any additional information in response to the charges. JA89. Mr. McElroy attempted to contact Arar's counsel the evening of the 6th, but only was able to leave a message at her work number. JA32¶43. Counsel was called twice the following day by an unnamed INS officer, but she erroneously was advised that Arar had been taken to another location for processing and transfer to a New Jersey facility. JA32-33¶¶43, 46.

lacking.

III. The District Court Correctly Determined That No *Bivens* Action Should Be Recognized for Arar's Foreign Detention and Torture Claims.

Since the Supreme Court first decided *Bivens*, the Court has extended that holding only twice and has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001). Because the power to imply a new action for damages is not expressly granted to the Judiciary by Congress, courts exercise that power, if at all, only with great caution. *Id.* at 68-70.

The District Court correctly determined that "special factors counseled hesitation" in creating a *Bivens* action with respect to Arar's foreign detention and foreign torture claims. SPA70-77. Three considerations compelled the district court's conclusion that no damages remedy should be recognized in this case: *first*, while Congress had legislated extensively with respect to the protections and remedies to be afforded to aliens claiming to have been (or to reasonably apprehend that they would become) torture victims, Congress had withheld "any explicit grant of a private cause of action" to persons like Arar; *second*, the Constitution reserves to the Executive and Legislative Branches the duty – and the competence – to deal with issues of national security and foreign policy, and any

intrusion by the Judicial Branch into that realm creates the risk of disrupting important and delicate relations between foreign nations and the United States; and *third*, "judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States, especially in circumstances involving countries that do not accept our nation's values or may be assisting those out to destroy us." SPA74.

And while the District Court concluded otherwise, SPA68-70, the comprehensive mix of administrative and judicial remedies found in the INA, coupled with Congress' express preclusion of jurisdiction to create other judicial remedies outside the structure of the INA, constitute a separate factor counseling hesitation, which independently precludes Arar's second and third claims.

A. The "Special Factors" Inquiry First Asks Whether Congress Is Better Situated to Determine the Propriety of a Private Remedy.

Arar and supporting amici contend that a party claiming that his or her rights under the Constitution have been infringed by a federal officer is entitled to an action for damages essentially as a "default option." But that proposition has not found favor in the Supreme Court. In the first decision allowing such an action, the Supreme Court recognized that an action for damages would not be

appropriate where there were "special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; *cf. Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.37 (1982) (observing "it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong).

The "special factors" analysis presents no question as to the relative "merits of a particular remedy" compared with other alternatives. *Bush v. Lucas*, 462 U.S. 367, 380 (1983). This Court must not ask whether a private damages remedy against officials individually is an effective or appropriate mechanism to complete a remedial scheme as compared with other alternatives. Rather, the issue to be resolved is "the question of who should decide whether such a remedy should be provided" – Congress with its broad legislative fact-finding and policy making capabilities or a court, constrained by the case or controversy presented in the single case at bench. *Id.*

Bush involved the issue whether a federal employee could bring a *Bivens* action against his superiors, contending that an adverse personnel action was in violation of the First Amendment. The Court declined to authorize such a cause of action, noting that Congress, not the Court, was in the best position to decide whether the public interest would be served by allowing a new species of litigation

over federal personnel matters, especially given the history of congressional action in that area. *Id.* at 388-90.

In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court again found that "special factors" – there the unique nature of the military, as well as the Constitution's express assignment to Congress of the plenary authority over the military, and Congress' enactment of a multifaceted system of military justice that did not include private damages actions – precluded the recognition of a *Bivens* action by an enlisted sailor claiming that his naval superiors had engaged in invidious racial discrimination. In explaining its holding in *Chappell*, the Court later pointed out that central to its conclusion was the "insistence . . . with which the Constitution confers authority over the Army, Navy and militia on the political branches." *United States v. Stanley*, 483 U.S. 669, 681-82 (1987). It was that, the Court explained, which "counsels hesitation in our creation of damages remedies in this field." *Ibid.*

Similarly, in *Chilicky*, 487 U.S. at 418, the Court refused to create a damages action in favor of a claimant for Social Security disability benefits who claimed he had been deprived of his benefits in violation of his due process rights. Noting that "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages

against the officers responsible for the violation" the Court held that "when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 421-23. Moreover, the Court emphasized that "the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme [does not] imply that the statute has provided 'no remedy' for the constitutional wrong at issue." *Id.* at 427-28 (emphasis in original). Nor, the Court held, does the absence of any provision for an award of consequential damages render an otherwise comprehensive statutory scheme somehow inadequate and authorize the recognition of a supplemental remedy in the form of a *Bivens* action. Rather, such decisions are committed to the Congress; once Congress has acted, the courts should not "revise and extend" Congress' handiwork. *Id.* at 428-29.

This Court too has applied the analysis required by *Bush* and *Chilicky* to hold *Bivens* actions precluded in varying contexts. In *Sugrue v. Derwinski*, 26 F.3d 8, 11-13 (2d Cir. 1994), this Court declined to supplement the comprehensive remedial scheme available to veterans injured while in service by recognizing an action for damages against officials of the Department of Veterans Affairs who

make benefits decisions, even in the face of a claimed violation of the Fifth Amendment's due process and takings clauses. Similarly, in *Dotson v. Griesa*, 398 F.3d 156 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 2859 (2006), this Court declined to supplement the few remedies available under the Civil Service Reform Act and the Judiciary's own administrative procedures to resolve EEO complaints to a Probation Officer allegedly discharged in violation of the Equal Protection Clause. That the officer had no judicial remedy at all did not compel the conclusion that a *Bivens* action should be created, nor even that an equitable action was available. *Id.* at 160, 165-77. Rather, this Court held that "it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying *Bivens* actions." *Id.* at 166-67.

Recently, in *Hudson Valley Black Press v. IRS*, 409 F.3d 106 (2d Cir. 2005), this Court held that no *Bivens* remedy should be implied in favor of a taxpayer who claimed that intrusive and injurious tax audits were undertaken in retaliation for speech protected by the First Amendment, reasoning: "Congress has designed a complex and comprehensive administrative scheme that provides various avenues of relief for aggrieved taxpayers." *Id.* at 113. Here, too, the absence of any provision providing a damages remedy for the aggrieved taxpayer did not

compel the Judiciary to supplement Congress' remedial scheme.

The hallmarks of the presence of "special factors counseling hesitation," then, are the presence of a complex and integrated statutory scheme governing a subject of special and particular significance to the political branches, which creates both obligations and remedies – often in a subject area such as the raising of revenue, or the governance of the military forces, or, as in this case, our national security and international relations as they are affected by our immigration policies (which itself is an area committed to Congress by the Constitution). Where Congress has established such a structure, it is not for the courts to supplement Congress' legislative judgment.

B. In the Absence of Explicit Direction from Congress, Judges Should Not Permit Damages Actions Against Federal Officials in the Context of National Security and International Relations.

The authority the Constitution reposes in the Legislative Branch regarding the military was the "special factor" that argued against a *Bivens* remedy in *Chappell*. This case involves the special competence the Constitution reposes in the political branches over immigration, international relations and national security. U.S. CONST. Art. I, §8, cl.4. Similarly, the Constitution confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense. *Id.* Art. II, §2. Indeed, the Court has noted that

the Constitution establishes that the President is the "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). "As to these areas of Art. II duties," the Supreme Court concluded, "the courts have traditionally shown the utmost deference to Presidential responsibilities." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

The District Court recognized that Arar's claims in this case involve international relations, foreign affairs, and the national defense. "[T]here is a fundamental difference between courts evaluating the legitimacy of actions taken by federal officials in the domestic arena and evaluating the same conduct when taken in the international realm." SPA74. The District of Columbia Circuit confronted this issue in *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). In that case, plaintiffs, children of a Chilean general and his estate brought suit against the United States and a former National Security Advisor to the President, for their role in the general's death during course of his kidnapping by plotters of 1970 Chilean government coup. *Id.* at 191-92. The court noted that

> the subject matter of the instant case involves the foreign policy decisions of the United States. In 1970, at the height of the Cold War, officials of the executive branch, performing their delegated functions concerning national security and foreign relations, determined that it was in the best interest of the United States to take

> such steps as they deemed necessary to prevent the establishment of a government in a Western Hemisphere nation that in the view of those officials could lead to the establishment or spread of communism as a governing force in the Americas. This decision may have been unwise, or it may have been wise. The political branches may have since rejected the approach, or not. In any event, that decision was classically within the province of the political branches, not the courts.

Id. at 195. In this case, as in *Schneider*, "[r]esolving the present lawsuit would compel the court, at a minimum, to determine whether actions or omissions by an Executive Branch officer in the area of foreign relations and national security were 'wrongful' under tort law." *Id.* at 196-97. As the District Court concluded:

> whether the policy be seeking to undermine or overthrow foreign governments, or rendition, judges should not, in the absence of explicit direction by Congress, hold officials who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law.

SPA76.

Mr. Ashcroft does not suggest that *Bivens* remedies are foreclosed whenever a case involves national security interests. The District Court was right in rejecting a *Bivens* remedy here, however, because foreign relations and national security go to the heart of the remedy Arar seeks. The *Bivens* action would compel the Court to undertake inquiries insensitive to the needs of foreign relations, including reviewing the determination that Arar was a security threat to

the United States, a determination predicated on classified information and, according to the claims of state secrets privilege in this case, one fraught with national security and foreign diplomacy concerns. Resolution of Arar's allegations that Syrian officials were "ordered" or "directed" by the United States similarly would compel a court to intrude on any contacts between this Government, Jordan, Syria, and possibly other governments. JA38¶71.

The selection of a country of destination also implicates our relations with foreign powers and often requires consideration of changed circumstances. *See Jama v. ICE*, 543 U.S. 335, 348 (2005). This is no more evident than when our country receives reliable assurances that the receiving country will give humane treatment and not torture an alien asserting CAT protection, *see* 8 C.F.R. §§208.18(c-d), and a court later is asked to evaluate those assurances and determine whether the country giving them should have been trusted.[23] Such an inquiry not only intrudes upon the Executive's role in foreign affairs but risks embarrassment to our government in dealings with foreign governments, *see Sanchez-Espinoza*, 770 F.2d at 226, 217, but also is disruptive to the conduct of

[23] This concern is not merely academic, as the Attorney General's recent testimony before the Senate Judiciary Committee Oversight Hearing (Jan. 18, 2007) reflects. Given the state secrets privilege assertions here, national security concerns constrain Mr. Ashcroft in defending the action to remove plaintiff during the former Attorney General's stewardship of the Department.

diplomacy with affected states and others whose assistance and support might be sought in matters affecting our nation's interests. *See Verdugo-Urquidez*, 494 U.S. at 273-74.

Finally, this lack of any particular expertise of judges in matters "so exclusively entrusted to the political branches" has pragmatic consequences. *Harisiades v.Shaughnessy*, 342 U.S. 580, 588-89 (1952). Where judges lack the "ability to define the line between appropriate and inappropriate conduct," qualified immunity provides insufficient protection to officials charged with responsibility for the foreign affairs and national security consequences of removal decisions. SPA75. An erroneous assessment on the part of a single judge can have unsettling and even dangerous consequences for our foreign relations, including efforts to achieve multinational cooperation in halting international terrorism. *Id.*

C. Special Factors Preclude Recognizing a Private Damages Remedy That Alters the Remedial Scheme Congress Adopted in FARRA and the INA.

In this case, special factors must counsel hesitation in allowing a *Bivens* action to proceed in the context of sensitive, discretionary decisions in the area of national security and international relations that are taken under the INA, including FARRA. No *Bivens* remedy should be created here, where Congress has

taken great pains to expressly delineate the scope of review of specific immigration decisions.

In another section of this Brief, we demonstrated that the INA is a comprehensive and carefully-constructed scheme for determining who may enter the United States and under what circumstances they may do so. Congress has established an all-encompassing set of standards and procedures governing admission to, and removal from, the United States. Congress has also carefully crafted the remedies it determined to have been appropriate for claims of constitutional, statutory, and regulatory violation in the administration of the INA, specifying when and how judicial review would be available. *See, e.g.*, 8 U.S.C. §1225(a)(2) (stowaways to be "removed upon inspection"); §1225(b)(1)(A)(i) (arriving aliens without entry papers or with fraudulent papers to be removed "without further hearing or review"); §1225(b)(1)(A)(ii), (1)(B) (asylum interviews to be offered to eligible aliens subject to expedited removal); §1225(b)(1)(C) (hearings available for aliens claiming permanent resident or refugee status); §1225(b)(2) (referring certain applicants for admission for hearings under 8 U.S.C. §1229a) and, most pertinent to this case, §1225(c) (governing removal of aliens inadmissible on security and related grounds) and FARRA §(c-d) (removal of aliens asserting CAT claims). Congress has specified

in the INA the types of judicial review available to those aggrieved by Executive Branch determinations in immigration matters, and it has not provided aliens with a claim for money damages against individual immigration officers.

In *Bush*, the Court acknowledged that the Legislative Branch "may inform itself through factfinding procedures such as hearings that are not avilable to courts." 462 U.S. at 389. The Court also accorded significance to the fact that Congress *had* being legislating in regards to civil service benefits and procedures for over a century. *Id.* at 384-85 & n.25. If anything, the history of immigration policy reflects even more frequent and comprehensive legislative initiatives (indeed, IIRIRA alone demonstrates this, *see St. Cyr*, 533 U.S. at 292) – often with the benefit of testimony from former Attorney General Ashcroft and some of the very officials who are defendants here. *See* Testimony of Attorney General John Ashcroft (Sept. 24, 2001), 2001 WL 1132414 (F.D.C.H.).

What the Supreme Court taught in *Bush* is that such a carefully constructed legislative scheme should not be disturbed. If new remedies are warranted, Congress has demonstrated that it is more than capable of making the judgment Arar asks this Court to make. In this case, then, as in *Bush*, *Schweiker*, *Sugrue*, *Dotson*, and *Hudson Valley*, the Court is confronted with administrative decisions by senior officials of the Executive Branch under a comprehensive statutory

scheme adopted "with careful attention to conflicting policy considerations" by the Congress dealing with a subject matter about which the Constitution itself assigns special competence and responsibility to the political Branches. *Bush*, 462 U.S. at 388.

The amendments wrought by the Real ID make a petition for review the "sole and exclusive means for judicial review" of claims under the CAT "[n]otwithstanding any other provision of law, statutory or nonstatutory" and, further, that such review encompasses review of constitutional claims. §§1252(a)(4), (a)(2)(D). These provisions, which Congress has made applicable here as noted above, leave no room for doubt that Congress "has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course" in the administration of the INA's elaborate scheme. *Chilicky*, 487 U.S. at 423. Under such circumstances, this Court should not disturb or augment Congress's carefully-crafted scheme by implying a *Bivens* damages action against officials responsible for administering and enforcing the provisions of the Immigration and Nationality Act.

IV. Even If Plaintiff Had Viable TVPA or *Bivens* Claims, Qualified Immunity Bars Arar's Action.

Although the District Court found it unnecessary to reach the issue, the Supreme Court repeatedly has held that officials enjoy qualified immunity from suit unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). Underlying this immunity is a recognition that damages actions "can entail substantial social costs" and "unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Harlow*, 457 U.S. at 807.

Qualified immunity requires a two-pronged analysis. First, one must ask whether the facts, viewed in the light most favorable to the plaintiff, demonstrate a constitutional violation by the government officer who is sued. *See Saucier v. Katz*, 533 U.S. 194, 199 (2001). If that hurdle is surpassed, the inquiry proceeds to a determination as to whether the particular right in question was "clearly established." As to the latter, the inquiry must be approached not from a general, but rather a particular perspective. *See Anderson*, 483 U.S. at 640.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct

was unlawful *in the situation he confronted*." *Saucier,* 533 U.S. at 202 (emphasis added). The importance of this particularized inquiry recently was underscored in the Court's opinion in *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004), where the Court sustained an officer's entitlement to qualified immunity where the reasonableness of her conduct was fact dependent and the decisional law when she acted did not "squarely govern[]" her actions.[24]

A. Plaintiff Does Not Allege Personal Involvement by the Former Attorney General.

One important component of the qualified immunity doctrine is that "[b]ecause the doctrine of respondent superior does not apply in *Bivens* actions, a plaintiff must allege that the individual defendant was personally involved in the constitutional violation." *Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006); *see also Salim*, 93 F.3d at 90-91.[25] To this end, this Court has recognized the

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[24] The Ninth Circuit in *Brosseau* found "fair warning in the general tests" established for use of deadly force. 543 U.S. at 199. *Cf. Back v. Hastings on Hudson Free Sch. Dist.*, 365 F.3d 107, 129 (2d Cir. 2004). The Court summarily reversed the decision below "to correct a clear misapprehension of the qualified immunity standard" following *Hope v. Pelzer*, 536 U.S. 730 (2002). 543 U.S. at 198 n.3. Only in "an obvious case" will such decision 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199.

[25] As noted in Part IV(D), qualified immunity also applies to statutory claims. *See Procunier*, 434 U.S. at 561 (remedial statutes imposing damages liability on government officers should not be interpreted as "intending wholesale revocation of the common-law immunity afforded government officials").

"critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted." *Wynder v. MacMahon*, 360 F.3d 73, 80 (2d Cir. 2004). The importance of this requirement is apparent, for the absence of allegations of personal involvement fails even to demonstrate a district court's personal jurisdiction over the defendant where, as in the case of Mr. Ashcroft, there is no allegation that he lived or personally acted within New York. *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981).

The jurisprudential reasons supporting a requirement that personal involvement be pled are at their apex in cases seeking monetary relief against high-ranking government officials such as the former Attorney General of the United States, a cabinet officer who headed a major department of government with nationwide responsibilities. *See Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) (noting "sound reasons" for requiring those suing government officers to "state a claim in terms of facts rather than conclusions"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Over a century ago, the Supreme Court articulated the dangers involved in allowing respondeat superior liability:

Competent persons could not be found to fill positions . . . if they knew they

> would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge.

Robertson v. Sichel, 127 U.S. 507, 515 (1888); *see Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *Leonhard v. United States*, 633 F.2d 599, 621 n.30 (2d Cir. 1980).

This has significance for the qualified immunity inquiry here because the "Statement of Facts" in Arar's complaint is devoid of any factual allegation that the Attorney General had any role in the events giving rise to his claims. JA27-37¶¶ 23-67. Arar's factual statement before this Court similarly does not even mention the former Attorney General in any way. BR5-14.[26] Rather, Arar bases his complaint against Mr. Ashcroft on the allegation that he bore the "ultimate responsibility for the implementation and enforcement of United States immigration laws." JA23¶14. Put simply, Arar's claim against the former Attorney General is nothing short than an attempt to impose individual capacity liability because of a "mere linkage" in the chain of command, something this Court has consistently rejected. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.

[26]The District Court's factual discussion, which, it claimed, was "taken from the complaint, attached exhibits, or documents referred to in the complaint and are presumed true for the limited purposes of these motions to dismiss," SPA2, is similarly devoid of any mention of former Attorney General Ashcroft. SPA2-14.

2003); *see also Black v. United States*, 534 F.2d 524, 527 (2d Cir. 1976).[27]

This deficiency also is apparent with Arar's domestic detention allegations (Count IV), which the Court found "do not adequately detail" the basis for his claim against Mr. Ashcroft or any other defendant. SPA31. Arar's response is left to a footnote, cast in purely conclusory terms: "The complaint alleges each defendant's respective contributory role in Arar's detention and mistreatment in the U.S." BR46n.22. But nowhere in his brief does Arar cite to the averments of his complaint that purportedly detail "each defendant's respective contributory role" in the relevant conduct, *id.*, let alone explain – through this Court's precedents – how such allegations state a claim upon which relief can be granted against any particular defendant. By itself, this provides sufficient ground to affirm the District Court, especially where plaintiff declined to take the opportunity afforded him to amend his pleading. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("[A]n argument made only in a footnote [is] inadequately raised for appellate review.").

B. Qualified Immunity Bars Any Foreign Detention and Foreign Torture Substantive Due Process Bivens Claims.

Turning to Arar's foreign detention and foreign torture claims, this Court

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[27] Arar alleges that it was then-Acting Attorney General Thompson who signed the order removing him to Syria. JA33¶48.

should decline to define substantive due process standards that amplify on the judgment expressed by the political branches, acting in the realm of immigration and foreign affairs, in adopting FARRA and its regulations. But even if this Court disagrees and extends constitutional protection to persons as plaintiff, that result was hardly clearly established when FARRA's procedures were applied to this plaintiff's removal.

1. Removing Arar under FARRA Did Not Violate Any Substantive Due Process Right.

Arar's first two *Bivens* claims assert an unprecedented theory of constitutional liability – that an inadmissible alien, who stands at our shores, enjoys substantive due process protection under the Fifth Amendment not to be removed to his native country. JA38-41¶¶77-89. Arar does not contend that he was tortured by officials of the United States in territory over which our nation possesses sovereignty. He contends that he was tortured in a foreign land by officials of a completely separate sovereign. Consistent with the Supreme Court's admonitions concerning the limited reach of what has become known as "substantive" due process, courts have repeatedly rejected attempts to extend such protections to inadmissible aliens such as Arar for conduct that occurs abroad. *See Verdugo-Urquidez*, 494 U.S. at 273-74.

"Substantive due process" analysis must begin with a careful description of the asserted right, for "'[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1993)). And given that the Constitution itself vests the political branches with plenary authority over issues of immigration to the political branches, see U.S. Const. art. I, § 8, such notions of "self-restraint" are undeniably at their zenith in the area admission and removal of aliens. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.").

As Arar's own brief recognizes, his constitutional theory faces two immediate difficulties given the extant state of the law: (1) his purported torture occurred not in the United States, but in the territory of a foreign sovereign; and (2) as an inadmissible alien detained at the border, the Supreme Court's jurisprudence places him virtually outside of any constitutional protection. As to the first, in *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950), the Supreme Court rejected extraterritorial application of the Fifth Amendment. In "emphatic[ally]" affirming that holding in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-

74 (1990), the Court explained that to hold otherwise "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."

With regard to the second, the Supreme Court recognized that the detention of an alien seeking entry does "not affect[] an alien's status; he is treated as if stopped at the border"– a status that "deprives him of any statutory or constitutional right."[28] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Id.* at 212 (citation omitted); *see also Correa*, 901 F.2d at 1171 n.5 ("Other than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional protection." (citations omitted); *Boumediene v. Bush*, 2007 WL 506581, at *5-7 (D.C.Cir. Feb. 20, 2007).

Only a year before Arar's removal, the Supreme Court once again recognized that the "distinction between an alien who has effected entry into the

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[28] The district court's contrary conclusion that "Arar was *not* seeking admission," SPA48 (emphasis in original), overlooks §1225(a)(1). That section provides that an alien "present in the United States," including one who arrives at a "designated port of arrival," is deemed "an applicant for admission." *Id.*; *see also* 8 C.F.R. §1.1(q). By traveling on a plane with a stopover within the United States, Arar was seeking admission.

United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Landon v. Plasencia,*, 459 U.S. 21, 32 (1982).[29] At the time of Arar's detention and removal, the most recent statement from the Supreme Court on an arriving alien's entitlement to substantive due process rights left *Mezei* intact. Indeed, more recently a sister Court of Appeals has concluded that "an alien has no constitutional substantive due process right not to be removed from the United States, nor a right not to be removed from the United States to a particular place." *Enwonwu v. Gonzales*, 438 F.3d 22, 29 (1st Cir. 2006).

It is against this contrary decisional backdrop that the Court must evaluate Arar's claim to substantive due process rights as an arriving and inadmissible alien determined to be a member of a foreign terrorist organization. Justice Frankfurter, writing for the Court in *Rochin v. California*, 342 U.S. 165, 170, 172 (1952), emphasized that "due process of law [is not] a matter of judicial caprice," explaining: "We may not draw on our merely personal and private notions and disregard the limit that bind judges in their judicial function." As a consequence,

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[29] Although physically within the United States, Arar (much less than *Mezei*) had not "developed substantial connections with this country" to receive constitutional protections. *Verdugo-Urquidez*, 494 U.S. at 271.

courts have looked outside the individual judicial experience to ground notions of substantive due process. Most fundamentally, where the Constitution speaks to a matter, the Supreme Court therefore has refused to extend substantive due process rights. *See Graham v. Connor*, 490 U.S. 386 (1989) (refusing to expand the substantive due process doctrine to a situation governed by the Fourth Amendment).

Arar's substantive due process claims, similarly, must be analyzed against the scheme of separated powers at the heart of our constitutional government. In other contexts, the Court has analyzed issues with reference to "our constitutional heritage and structure," *Harlow*, 457 U.S. at 813 n.20; *Fitzgerald*, 457 U.S. at 748, and this is no less true with substantive due process. *See Lawrence v. Texas*, 539 U.S. 558, 570 (2003). In the same manner, here, the *structure* of the Constitution must be considered, no less than its individual guarantees. *See, e.g., Graham*, 490 U.S. at 395.

The Constitution, itself, places the regulation of aliens squarely within the authority of the political branches, and they have exercised that authority. U.S. CONST. art. I, § 8. Congress has enacted comprehensive laws regarding aliens and, more to the point, with the adoption of FARRA has addressed the issue of removal of aliens to countries where they may be tortured. Regulations have been

promulgated by the Executive pursuant to FARRA to govern the precise situation this case involves.

Arar's invocation of substantive due process in regard to his removal to Syria, then, should be rejected. To expand the doctrine of substantive due process, one that supplements FARRA with judicially defined standards, inappropriately second guesses the political judgments of the political branches. *See Mezei*, 345 U.S. at 222 (Jackson, J., dissenting) (noting "[s]ubstantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances."); *see also Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (Frankfurter, J.).

Arar's reliance on the evolving "state created danger" doctrine begs the essential question of whether the courts should subject removals to substantive due process oversight, where Congress has enacted the procedures that body deems appropriate through FARRA and the Executive has promulgated regulations pursuant to Congress' mandate. Particularly, courts should not "expand the contours of our immigration statutes and regulations, including the regulations implementing the CAT" with domestic law precepts, for:

Despite the fact that Congress could reasonably choose to incorporate novel

> developments in our case law, "these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress."

Kamara v. Attorney General, 420 F.3d 202, 218 (3d Cir. 2005); *accord Enwonwu*, 438 F.3d at 30.

In the end, the Supreme Court has been hesitant about extending the nebulous concept of substantive due process into new areas, especially those in which the political branches of government are granted near plenary authority by both the Constitution itself and our system of laws. *See Fiallo*, 430 U.S. at 792. Indeed, even in an arena that did not raise such sensitive separation of powers concerns, the Supreme Court explained that in determining what the Constitution requires, courts should defer to the judgments rendered by professionals in a specific field. *See Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982). By ratifying the CAT, implementing that treaty through FARRA, and by promulgating regulations pursuant to the authority FARRA provided, the political branches of government – the "professionals" to whom such matters are entrusted in our constitutional system – have made a determination about what standards should govern removal of aliens such as plaintiff.

As noted earlier, Congress has vested much discretion in those charged with

removing aliens. Indeed, Congress *mandated* that persons who present a security threat to the United States should be "exclude[d]" from the protections in FARRA's regulations to "the maximum extent consistent with the obligations of the United States under the Convention." FARRA §(d); *see also* 8 C.F.R. §208.18(d). Where the "guideposts for responsible decision-making in this unchartered area are scarce and open-ended," the Supreme Court teaches that courts should be "reluctant to expand the concept of substantive due process." *Collins*, 503 U.S. at 125. As its sister circuits have done, this Court should not through judicially adopted substantive due process doctrine substitute its judgment for that of the Congress. *Fiallo*, 430 U.S. at 798.

2. Plaintiff's Removal Did Not Violate Any Clearly Established Law.

In *Mitchell v. Forsyth*, 472 U.S. 534, 531-33 (1985), the Supreme Court sustained an Attorney General's entitlement to qualified immunity – after finding that the Court itself previously had reserved decision on the underlying constitutional question; that Congress had left the question legislatively unresolved; and unpublished *district court* decisions (although not in the Circuit in which the case at bar arose) had accepted the government's view that its conduct was constitutional.

Mr. Ashcroft's claim to qualified immunity is considerably stronger. Prior

decisions of the Supreme Court have rejected exterritorial extension of the Fifth Amendment to those outside our borders and determined that persons such as Arar have no greater status. And the year before plaintiff's arrival and removal, the Supreme Court in *Zadvydas*, 533 U.S. at 693-94, declined to consider whether *Mezei* had been undermined. Congress has addressed Arar's situation, through FARRA. And two years before Arar's removal, a Circuit Court of Appeals in a published decision found *Eisentrager* and *Verdugo-Urquidez* binding and held that the Fifth Amendment has no extraterritorial application. *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002). This decision, moreover, came against a factual background which is most "closely related" to Arar's claims her. SPA61.[30]

The "clearly established" inquiry must be approached from a *particularized* perspective. *Brosseau*, 543 U.S. at 199. As the District Court noted, the courts "federal courts have not fully fleshed out the contours" of the right Arar alleges the former Attorney General violated, SPA80, a recognition that is truly the *sine*

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[30] As in *Forsyth*, the qualified immunity inquiry should not be limited to decisions only of the Circuit in which the challenged conduct occurred, especially in view of the uniquely nationwide legal responsibilities of the Attorney General. See 28 U.S.C. §§511-13, 515-19. *Cf. Poe v. Leonard*, 282 F.3d 1223, 142 n.15 (2d Cir. 2002) (noting "[i]t is unclear the extent to which we may rely on the case law of other circuits to determine whether the law was clearly established").

qua non of the qualified immunity doctrine. *See Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003). Indeed, a particularized inquiry leads to the conclusion the clearly established law rendered it obvious that Arar did *not* enjoy the constitutional rights he claims at the time of the events in question.

This certainly finds support in the decision in *Harbury*. Additionally, any reasonable official who confronted this issue, *see id.* at 196, would acknowledge the Supreme Court's opinions in decisions such as *Mezei* that an inadmissible alien who has not entered the United States (such as Arar) enjoys only that protection provided by Congress, as well as this Court's own decision in *Correa*, 901 F.2d at 1171 n.5). Even assuming *Harbury*, *Eisentrager*, *Mezei*, and *Verdugo-Urquidez* all were distinguishable, that alone only demonstrates a legal backdrop that was "clouded" and not clearly established. *See Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 43 (D.D.C. 2006); *see also id.* at 43 n.17 (also noting uncertainty over whether alien terrorists may be treated as enemy aliens).[31] And Arar can cite to no court of appeals decision that has accepted the application of the "state created danger" theory in the removal context, either at the time of Arar's removal

[31] Plaintiffs' reliance on decisions that *postdate* his removal, *see* BR35 (citing *Rasul v. Bush*, 542 U.S. 466 (2004), have no bearing in determining the state of the law when he was removed. *See Brosseau*, 543 U.S. at 200 n.4.

or since. Indeed, the two appellate courts that have analyzed the question "in the situation" confronted here, *see Saucier*, 533 U.S. at 201, have rejected Arar's interpretation. *See Kamara*, 420 F.3d at 216-17; *Enwonwo*, 438 F.3d at 30-31.

Even for those courts that question the continued validity of *Mezei*, *Eisentrager*, and other decisions noted above, the threshold issue whether the Fifth Amendment applies at all to aliens stopped at our borders was "open at the time" officials removed Arar. *Forsyth*, 472 U.S. at 535. That is sufficient to cloak the former Attorney General with qualified immunity as a matter of law. *Id.*

C. Qualified Immunity Bars Plaintiff's Domestic Detention Substantive Due Process Claim.

Arar's fourth and final claim is that his detention in the United States ran afoul of substantive due process guarantees. JA4¶91. As discussed above, the district court dismissed this claim for the absence of factual allegations that "adequately detail" his claims against the specific individuals sued. SPA31. Though given an opportunity to replead, Arar declined; and that alone warrants affirmance.

Instead of addressing this fundamental issue, Arar focuses on the merits of his substantive due process claim. But any review of this Circuit's jurisprudence provides that the only possible substantive due process right Arar might have

enjoyed was – as the District Court ultimately identified – to be free from "gross physical abuse." *Correa*, 901 F.2d at 1171 n.5.

Arar also faults the District Court's dismissal of his access to counsel and the courts claim.[32] Although he contends that he was prevented from seeking habeas relief or stay relief from this Court, the District Court merely noted that such relief was not sought. SPA66n.12. Nor does he suggest that he lacked the information his counsel might have used to seek habeas relief or sought a pre-final order stay of removal from this Court – the termination that he was an alien terrorist subject to the expedited removal proceedings of §1225(c) and the possibility he would be removed to Syria, where he was born and remained a citizen.

But more to the point, what the District Court did was dismiss his claim with leave to amend to "articulate more precisely the judicial relief he was denied." SPA82. This was nothing more than a straight-forward application of

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[32] Removal proceedings are civil and not subject to the Sixth Amendment, *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 1992); and as noted above, the law is unsettled as to whether aliens deemed outside our borders as Arar have any Fifth Amendment due process rights. *See Brosseau*, 543 U.S. at 202. The statutes Arar cites provide access to counsel in immigration proceedings before an Immigration Judge, 8 U.S.C. §1362, and prior to an asylum "credible fear" interview." §1225(b)(1)(B)(iv). But Arar's designation as an alien terrorist placed him outside such proceedings, *see* §1225(c), and he never sought asylum.

Supreme Court law, that the right of access to the courts is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut our of court." *Christopher v. Harbury*, 536 U.S. at 415. Accordingly, at a minimum, the cause of action, or defense, that allegedly was lost "is an element that must be described in the complaint." *Id.* at 414. His casual argument that *Harbury* has no relevance here should be rejected. BR51.[33] Arar's claim that he was denied his right to petition "for redress of grievances," JA43¶93, did not meet the Supreme Court's requirement, and his choice to forego an opportunity to replead bars any argument now that the District Court erred in entering judgment against him (at Arar's own request).

But as noted above, these issues are secondary to plaintiff's failure to allege Mr. Ashcroft's personal involvement in the conditions of his domestic detention, and this Court should sustain the District Court's dismissal of claim 4.

D. Qualified Immunity Bars Any TVPA Claim.

An official's entitlement to qualified immunity is not limited to constitutional claims. The Supreme Court has instructed that "government

[33] Contrary to Arar's argument that *Harbury* only involved the loss of an affirmative tort action, plaintiff there argued that she lost an opportunity to seek emergency relief that would have provided her with information that could have saved her husband's life. 536 U.S. at 418-20 & n.23.

officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818 (citation omitted). The point was repeated by the Court in *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984): "[O]fficials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages."

An application of the TVPA to United States officials must overcome the plain language of the statute. Arar does not plead that the Attorney General acted otherwise than under color of United States law. Yet, the TVPA imposes personal liability only upon individuals acting "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2, 102 Stat. at 73. That this standard reaches the conduct of United States government officials is anything but "clearly established" today, *Harlow*, 457 U.S. at 818, even were this Court to hold the TVPA applicable in this case. Much less was plaintiff's novel interpretation of the TVPA clearly established in October 2002 – especially given the absence of any remedy in the statute that expressly governs removals where a CAT claim is asserted, FARRA.

CONCLUSION

The judgment below should be affirmed dismissing this action against John Ashcroft.

Respectfully submitted,

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CERTIFICATE OF COMPUTER VIRUS DETECTION

Pursuant to Local Rule 32(a)(1)(E), the undersigned counsel for the Respondent hereby certifies that the electronic version of the instant memorandum has been scanned for computer viruses using "OfficeScan" virus software, and the software has not detected any computer viruses.

_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, the undersigned counsel for the Respondent hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,997 words in this brief.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2007, I filed and served the foregoing brief by causing an original and fourteen copies to be delivered to the Court via first-class mail (and e-mail delivery) and to counsel of record via first-class mail (and e-mail delivery):

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