No. 09-923

In the Supreme Court of the United States

MAHER ARAR, PETITIONER

v.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND THE OFFICIAL CAPACITY DEFENDANTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioner sued a number of federal officials under a *Bivens* theory of liability and the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note), seeking money damages arising from his detention in the United States and subsequent removal to Syria under provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. The questions presented are:

1. Whether the court of appeals erred in declining to create a *Bivens* remedy when the asserted claims implicate sensitive foreign-affairs and national-security matters, and when Congress did not provide for a damages remedy in the statutory scheme that governs judicial review of the issues raised in the complaint.

2. Whether the TVPA, which requires a showing that the defendant acted "under actual or apparent authority, or color of law, of any foreign nation," 28 U.S.C. 1350 note, applies to United States officials exercising authority under United States immigration law.

3. Whether the court of appeals erred in affirming the district court's dismissal of one of petitioner's claims without prejudice on the ground that the complaint failed sufficiently to allege the roles and identities of the various defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties, statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 09-923

MAHER ARAR, PETITIONER

v.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND THE OFFICIAL CAPACITY DEFENDANTS IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-194a) is reported at 585 F.3d 559. The panel opinion of the court of appeals (Pet. App. 195a-334a) is reported at 532 F.3d 157. The district court opinion (Pet. App. 335a-426a) is reported at 414 F. Supp. 2d 250.

JURISDICTION

The judgment of the en banc court of appeals was entered on November 2, 2009. The petition for a writ of certiorari was filed on February 1, 2010 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 26, 2002, petitioner, a dual citizen of Syria and Canada, sought to exit his flight from Tunisia via Switzerland and enter the United States at JFK Airport in New York.[1] When he presented his passport to an immigration inspector, petitioner was identified as a suspected associate of al Qaeda and detained. Pet. App. 11a; C.A. App. 88. Petitioner alleges that, during the first three days of his detention, officials ignored his requests to make a telephone call and see a lawyer. Pet App. 454a-455a.

On October 1, 2002, the Immigration and Naturalization Service (INS) initiated removal proceedings, charging petitioner with being subject to removal under 8 U.S.C. 1182(a)(3)(B)(i)(V) as a member of a terrorist organization. Pet. App. 12a-13a; C.A. App. 31, 88. The same day, petitioner was permitted to telephone his family. They immediately contacted the Canadian Consulate and retained an immigration attorney in New York. Pet. App. 12a.

On October 3, an official from the Canadian Consulate visited petitioner, who expressed concern that he would be removed to Syria. Pet App. 455a-456a. On October 4, petitioner designated Canada as the country to which he wished to be removed. On October 5, petitioner met with his immigration attorney. *Id.* at 12a. The next day, the INS District Director left a message for petitioner's attorney to inform her of INS's plan to question petitioner about any objection he might have to

---

[1] At JFK, petitioner planned to take a flight to Canada. Pet. App. 11a. As a matter of law, petitioner qualified as an applicant for admission to the United States when he arrived at the port of entry at JFK Airport. See 8 U.S.C. 1225(a)(1).

his removal to Syria. *Ibid.* Such questioning took place the same evening, and petitioner told the officials that he feared being tortured if he were removed to Syria. *Id.* at 457a.

On October 7, 2002, then-INS Regional Director J. Scott Blackman determined from classified and unclassified information that petitioner was "clearly and unequivocally" inadmissible under 8 U.S.C. 1182(a)(3)(B)(i)(V) as a member of al Qaeda. Pet. App. 13a; C.A. App. 87-88, 91. Concluding that "there are reasonable grounds to believe that [petitioner] is a danger to the security of the United States," *id.* at 92, Blackman ordered petitioner's removal pursuant to 8 U.S.C. 1225(c)(2)(B), which permits removal "without further inquiry or hearing by an immigration judge." C.A. App. 87-88, 108.

On October 8, 2002, the Acting Attorney General, Larry Thompson, exercised his discretionary authority under a provision of the INA authorizing the "Attorney General * * * [to] disregard" an alien's country designation if, *inter alia*, the Attorney General "decides that removing the alien to the country is prejudicial to the United States." 8 U.S.C. 1231(b)(2)(C)(iv); Pet. App. 13a. Petitioner was ordered removed to Syria on the basis that he was a "a subject, national, or citizen" of that country. 8 U.S.C. 1231(b)(2)(D). See *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 338-341 (2005). The Final Notice of Inadmissibility incorporated the INS Commissioner's "determin[ation] that [petitioner's] removal to Syria would be consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," which prohibits removal of any individ-

ual to any country where it is more likely than not that he or she would be tortured. C.A. App. 86; Pet App. 13a.

The final removal order, which includes the Convention Against Torture (CAT) determination, would have been subject to judicial review. See 8 U.S.C. 1252; Foreign Affairs Reform and Restructuring Act (FARR Act), Pub. L. No. 105-277, § 2242(b) and (d), 112 Stat. 2681-822; 8 C.F.R. 208.18(e)(1) (claims under Article 3 of the CAT may be raised "as part of the review of a final order of removal" under 8 U.S.C. 1252). No petition for review or habeas petition was ever filed.

On October 8, 2002, petitioner was flown to Jordan and handed over to Jordanian authorities, who delivered him to Syria. Pet. App. 14a. Petitioner claims that, while in Syria, he was subjected to harsh interrogation and torture by Syrian security officers. On October 20, 2002, the Canadian Embassy in Syria confirmed that petitioner was in Syria. While he was in that country, petitioner met with Canadian officials on seven occasions. *Id.* at 462a. On October 5, 2003, Syria released petitioner, and he went to Canada. *Id.* at 14a.

2. a. On January 22, 2004, petitioner filed a four-count civil complaint against current and former federal officials in the United States District Court for the Eastern District of New York.[2] Pet. App. 438a-472a. Count

[2] The complaint named as defendants former Regional Director Blackman, former INS Commissioner James Ziglar, former Deputy Attorney General Larry Thompson, and former INS District Director Edward McElroy, in their individual capacities; former Attorney General John Ashcroft and FBI Director Robert Mueller, in both their individual and official capacities; the Secretary of Homeland Security, and the Regional Director of Immigration and Customs Enforcement for the New York Region in their official capacities; and several unnamed employees of the FBI and INS in their individual capacities. C.A. App. 23-27.

One of the complaint alleged that defendants violated the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note), by conspiring with or aiding and abetting Syrian officials to bring about petitioner's torture in Syria. Counts Two and Three asserted that defendants violated petitioner's Fifth Amendment substantive due process rights by subjecting him to torture, coercive interrogation, and prolonged detention in Syria. Count Four alleged a Fifth Amendment substantive due process claim based on petitioner's detention and alleged deprivation of access to the courts while he was in the United States. Pet. App. 15a. The complaint sought declaratory relief, as well as compensatory and punitive damages from the individual defendants. *Id.* at 471a-472a.

b. Defendants moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. In addition, the United States made a formal assertion of the state-secrets privilege. The United States explained that Counts One, Two, and Three could not be litigated without disclosure of classified information and therefore must be dismissed. C.A. App. 126-138. That assertion was supported by unclassified declarations from then-Acting Attorney General James Comey and then-Secretary of Homeland Security Tom Ridge.[3] *Id.*

[3] Acting Attorney General Comey explained: "Litigating Counts I, II and III of plaintiff's complaint would necessitate disclosure of classified information, including: (1) the basis for the decision to exclude plaintiff from this country based on the finding that plaintiff was a member of * * * al Qaeda, * * * ; (2) the basis for the rejection of plaintiff's designation of Canada as the country to which plaintiff wished to be removed, * * * ; and (3) the considerations involved in the decision to remove him to Syria." C.A. App. 131-132. Mr. Comey further declared that "disclosure of the classified information used by government officials to reach each of the three noted decisions reason-

at 129-137. Both Acting Attorney General Comey and Secretary Ridge further supported the state-secrets privilege assertion in detailed classified declarations. *Id.* at 133, 136. The government offered to provide the district court with the classified declarations further supporting the assertion of the state-secrets privilege for its *ex parte*, *in camera* review. *Id.* at 127.

3. Without reaching the state-secrets privilege assertion or reviewing the classified declarations, the district court granted defendants' motions to dismiss. The court first held that petitioner's request for declaratory relief did not present a case or controversy because the only continuing injury petitioner identified was the bar on his reentering the United States. Pet. App. 352a-355a. The court explained that such an injury could not supply standing for prospective relief because it was a legal consequence of the removal order, which petitioner conceded he was not seeking to challenge. *Id.* at 354a-355a.

The district court next dismissed Count One, seeking relief under the TVPA, because the defendants acted under authority of United States law, not "under actual or apparent authority, or color of law, of any foreign nation." Pet. App. 367a, 371a-372a.

Turning to Counts Two and Three, the court declined to create a constitutional damages action against the defendants for petitioner's removal to and treatment in Syria. Recognition of a *Bivens* remedy was inappropriate, the court reasoned, "in light of the national-security concerns and foreign policy decisions at the heart of this case." Pet. App. 408a-414a. The court explained that

---

ably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States." *Id.* at 132.

"the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches." *Id.* at 413a.

The district court also dismissed Count Four, concerning petitioner's detention in the United States, on the ground that the complaint failed to "adequately detail which defendants directed, ordered and/or supervised the alleged violations." Pet. App. 423a. Although the court dismissed this claim without prejudice and offered petitioner the opportunity to replead, *ibid.*, petitioner chose not to do so and instead asked the court to enter final judgment, which it did. C.A. Special App. 92-93; Pet. App. 20a.

4. A panel of the Second Circuit affirmed. Pet. App. 195a-275a. The panel unanimously upheld the district court's decision that petitioner lacked standing to pursue declaratory relief. *Id.* at 269a-272a. The panel also unanimously agreed with the district court that petitioner failed to state a claim under the TVPA because the allegations in his complaint were insufficient to show that defendants acted "under color of foreign law." *Id.* at 232a-235a.

A majority of the panel affirmed the dismissal of the *Bivens* claims. The majority reasoned that, as a general matter, recognition of a *Bivens* action for claims of unlawful removal would be inconsistent with Congress's decision to create carefully delineated statutory mechanisms for judicial review of removal decisions. Pet. App. 242a-245a. The panel also agreed with the district court that the foreign policy and national security implications of this action constitute "special factors" counseling against creation of a *Bivens* remedy. *Id.* at 245-254. With respect to petitioner's allegations of pre-re-

moval mistreatment in United States custody, the majority concluded that petitioner had failed to state a claim under the Due Process Clause. *Id.* at 254-269.

Judge Sack dissented in part. Pet. App. 276a-334a. He concluded that petitioner's allegations in Counts Two, Three, and Four "adequately allege[] a violation of his substantive due process rights," *id.* at 311a, and that a *Bivens* action should lie in the context of petitioner's claims. *Id.* at 313a-331a.

5. The court of appeals heard the case en banc and again affirmed. Pet. App. 1a-194a. In an opinion by Chief Judge Jacobs, a seven-member majority agreed with the unanimous panel as well as the district court in holding that petitioner failed to state a claim under the TVPA because none of the defendants acted under color of foreign law. *Id.* at 17a-19a. The court further held that "special factors" strongly counseled against the judicial creation of a *Bivens* damages remedy in this context. *Id.* at 25a-52a. In particular, the court explained that "[a]bsent clear congressional authorization," providing a damage action here would, *inter alia*, "offend the separation of powers and inhibit this country's foreign policy." *Id.* at 38a. The court reasoned that "if Congress wishes to create a remedy for individuals like Arar, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded." *Id.* at 50a. The court also held that petitioner's allegations about the denial of access to the courts while he was detained in the United States were insufficiently specific to survive a motion to dismiss, and it reaffirmed the panel's ruling that petitioner had not established a proper basis for declaratory relief. *Id.* at 16a-17a, 20a-22a.

Judges Calabresi, Pooler, Sack and Parker each filed dissenting opinions. Pet. App. 54a-194a.

ARGUMENT

The nature of petitioner's factual allegations and the tenor of his petition warrant a clarification of the scope of the issues before this Court. This case does not concern the propriety of torture or whether it should be "countenance[d]" by the courts. Pet. 14. Torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. *See* 18 U.S.C. 2340A. The President has stated unequivocally that the United States does not engage in torture. See May 21, 2009 Remarks by the President on National Security; cf. Exec. Order No. 13,491, § 3, 74 Fed. Reg. 4894 (Jan. 22, 2009) (directing that individuals detained during armed conflict "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture))."

This case instead presents three narrow questions. First, petitioner argues (Pet. 11-26) that the court of appeals erred in refusing to recognize a *Bivens* claim and applied an incorrect standard for determining whether "special factors" counsel against judicial creation of such a remedy. Second, he contends (Pet. 26-30) that the defendants were acting under color of Syrian law when they ordered his removal to that country, and therefore that the court of appeals should have upheld his claim under the TVPA. And third, petitioner argues (Pet. 30-34) that the court erroneously affirmed the district court's ruling that he insufficiently pleaded his due

process claim based on his detention and alleged denial of access to courts in the United States. The court of appeals was correct in rejecting each of those contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review therefore is unwarranted.

1. Petitioner renews his challenge to the district court's ruling, which was affirmed by both the panel and en banc court of appeals, that a judicially created money-damages remedy is inappropriate for his substantive due process claims concerning his detention and treatment in Syria. That challenge does not implicate any conflict among the courts of appeals, and contrary to petitioner's contention, the analysis in the decision below is consistent with the approach this Court has prescribed. There is no reason for this Court to review the en banc court of appeals's application of settled principles to the particular facts of this case.

a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1947 (2009). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—deci-

sions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly* v. *Scott*, 434 F.3d 287, 290 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 547 U.S. 1168 (2006). See *Iqbal*, 129 S. Ct. at 1948 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"); cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases").

Indeed, in the four decades "since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis* v. *Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson* v. *Green*, 446 U.S. 14 (1980)." Pet. App. 26a-27a; see also *Western Radio Servs. Co.* v. *USFS*, 578 F.3d 1116, 1119 (9th Cir. 2009), cert. denied, No. 09-772 (May 3, 2010). "Since *Carlson*" was decided 30 years ago, this Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68.

Thus, this Court has instructed that when there is "any alternative, existing process for protecting" the plaintiff's interests, such an established process implies that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007). Even where there is no such alternative process, an implied remedy is still disfavored, and courts must make an assessment "appropriate for a common-law tribunal" about whether such judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation." *Id.* at 550.

b. Applying those standards, the court of appeals correctly affirmed the district court's refusal to recognize a *Bivens* claim on the ground that special factors presented by the unique circumstances of this case counsel hesitation in creating a private damages remedy.

As the en banc majority observed, the damages claims petitioner sought to assert arising from his removal to Syria implicate significant national security concerns. See Pet. App. 35a. Such claims "would necessarily require an exploration of the intelligence relied upon by the officials charged with implementing our foreign and national security policies, the confidential communications between the United States and foreign powers, and other classified or confidential aspects of those policies, including, perhaps, whether or not such policies even exist." *Id.* at 249a.[4]

---

[4] The Second Circuit characterized this case as one involving "extraordinary rendition." Pet. App. 7a. Petitioner was removed not through "extrajudicial" channels but under the authority of the federal immigration laws. *Id.* at 8a n.1. The question of characterization is not material to the issues before this Court, however, because the private damages claims petitioner seeks to assert implicate the same sensitive consider-

Adjudication of a *Bivens* claim in these circumstances would also call upon the courts to review sensitive intergovernmental communications, second-guess whether Syrian officials were credible enough for United States officials to rely on them, and assess the credibility of any information provided by foreign officials concerning petitioner's likely treatment in Syria, as well as the motives and sincerity of the United States officials who concluded that petitioner could be removed to Syria consistent with Article 3 of the CAT. See Pet. App. 33a-49a; see also C.A. App. 131-132. Judicial inquiry into these types of intergovernmental communications could deter other countries from engaging in dialogue with United States officials. See Pet. App. 410a ("[G]overnments that do not wish to acknowledge publicly that they are assisting us would certainly hesitate to do so if our judicial discovery process could compromise them."). The courts below therefore properly concluded that "litigation of this sort would interfere with the management of our country's * * * relations with foreign powers and affect our government's ability to ensure national security." *Id.* at 249a-250a.

The "special factors" analysis in the decision below accords with the general principle that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).[5] In some excep-

---

ations whether the underlying conduct is termed an "extraordinary rendition" or an immigration removal based on national security grounds.

[5] See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893) (the Constitution commits "the entire control of international relations" to

tional instances, not involving money damages, courts are required by the Constitution or a clear grant of authority from Congress to adjudicate matters directly pertaining to foreign affairs or national security. See, *e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723 (2008); *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006). The general rule, however, as this Court explained in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), is that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

The decision below is also consistent with decisions of other courts of appeals addressing proposed *Bivens* claims implicating similar separation-of-powers concerns. Courts have repeatedly rejected *Bivens* relief when adjudicating a money-damages claim would intrude on the conduct of foreign affairs or the protection of national security. See, *e.g.*, *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) ("[F]ederal courts cannot fashion a *Bivens* action when 'special factors' counsel against

---

the political Branches); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (foreign policy matters are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility."); *Schneider* v. *Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policy-making."), cert. denied, 547 U.S. 1069 (2006); *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (refusing to adjudicate claim that bombing of Cambodia during the Vietnam conflict required separate Congressional authorization), cert. denied, 416 U.S. 936 (1974); *DaCosta* v. *Laird*, 448 F.2d 1368 (2d Cir. 1971) (court was not competent to judge significance of mining and bombing of North Vietnam's harbors and territories for purposes of determining whether Congressional authorization was required), cert. denied, 405 U.S. 979 (1972).

doing so * * * . The danger of obstructing U.S. national security policy is one such factor."), cert. denied, 130 S. Ct. 1013 (2009); *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) ("if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"), cert. denied, 129 S. Ct. 2825 (2009); *Beattie* v. *Boeing Co.*, 43 F.3d 559, 563-566 (10th Cir. 1994) ("The unreviewability of the security clearance decision is a 'special factor counselling hesitation,' which precludes our recognizing a *Bivens* claim."), cert. denied, 514 U.S. 1127 (1995); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (refusing to recognize a *Bivens* action against "military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."). As this Court has recognized, that the decision at issue is entrusted by the Constitution to the discretion of Congress or the Executive is an important factor counseling hesitation. Cf. *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987) ("The special facto[r] that counsel[s] hesitation is * * * the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.") (brackets in original); *Chappell* v. *Wallace*, 462 U.S. 296, 301-304 (1983) (declining to imply *Bivens* remedy against military officers by enlisted personnel in part because the Constitution vests principal responsibility for military matters in Congress and the President).

Petitioner argues (Pet. 11-12) that none of these considerations counsel against recognition of a *Bivens* remedy because the same considerations would also be implicated if petitioner had sought review of his removal through existing channels. As explained below, how-

ever, the existence of specific mechanisms for judicial review that do not include a private damages remedy is a reason for courts to avoid creating such a remedy, not an argument in favor of such relief. See pp. 19-22, *infra*. In any event, petitioner's argument rests on an erroneous premise. Although appellate courts routinely consider CAT Article 3 claims in their administrative review of removal orders, courts ordinarily do not delve into Executive Branch communications with foreign officials or second-guess sensitive determinations made on the basis of those communications. Indeed, this Court's reasoning in *Munaf* makes clear that courts are not well equipped to conduct that sort of inquiry. See *Munaf* v. *Geren*, 128 S. Ct. 2207, 2225-2226 (2008) ("The Judiciary is not suited to second-guess * * * determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is.") (citation omitted). The overwhelming majority of immigration-review cases raising a CAT claim are adjudicated in immigration courts (and reviewed in the courts of appeals) based on country reports and other administrative record material that is compiled in accordance with the statutory review scheme and incorporates no Executive Branch dialogue with foreign officials.[6]

---

[6] Petitioner cites (Pet. 12 n.6) *Khouzam* v. *Attorney General of the United States*, 549 F.3d 235 (3d Cir. 2008), for the proposition that courts review CAT Article 3 claims despite foreign policy and national security implications. But the Third Circuit recognized that such review—in that case, of a Secretary of Homeland Security determination

c. In addition to challenging the court of appeals' application of the "special factors" analysis, petitioner attacks (Pet. 15-20) the court of appeals' formulation of that doctrine, contending that the court articulated a "virtually irrebuttable presumption against *Bivens* actions" that is inconsistent with this Court's cases. Pet. 15. That characterization of the decision below is incorrect, and in any event, the proper formulation of the *Bivens* standard is neither squarely presented here nor appropriate for review at this time.

Petitioner contends that the court erred by considering only those factors that counsel against a *Bivens* claim and refusing to consider factors favoring such relief. Pet. 15. But that is not an accurate description of the court's analysis. The principal argument in favor of *Bivens* relief in this case is the same as in almost all others in which a plaintiff seeks recognition of such a claim: in the absence of a judicially created money-damages remedy, the plaintiff will not receive any monetary compensation for his injury from the claimed constitutional violation and the alleged misconduct will go under-de-

---

to terminate a deferral of removal based upon diplomatic assurances—raised the prospect of the court delving into questions such as "whether the assurances were given in good faith; the country's record of torture; the country's record of complying with previous assurances; whether there will be a mechanism to verify compliance with the assurances; the identity and position of the official relaying the assurances; and the incentives and capacity of the country to comply with the assurances." *Id.* at 251-252. The court also recognized that some of these inquiries "may lack judicially discoverable and manageable standards." *Ibid.* In the end, the court did not authorize judicial assessment of such assurances, but instead remanded the matter to the assigned administrative tribunal, the BIA, to "ensure that Khouzam is afforded due process before he may be removed on the basis of diplomatic assurances." *Id.* at 259.

terred. See *Davis,* 442 U.S. at 245 ("For Davis, as for Bivens, 'it is damages or nothing.'") (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)). The court of appeals did not ignore that factor; indeed, it held that any special factors counseling hesitation must be sufficiently weighty to "justify the absence of a damages remedy for a [constitutional violation]." Pet. App. 31a-32a. The court's reasoning simply reflects the fact that, by its nature, the inquiry into whether "special factors counsel hesitation" focuses on reasons why courts should *not* create a non-statutory remedy despite the general considerations that may favor such relief. The court was therefore correct in stating that, in the "special factors" analysis, "no account is taken of countervailing factors that might counsel alacrity or activism." *Ibid.*

Petitioner also faults the court of appeals for stating that the threshold for declining to recognize a *Bivens* remedy on the basis of "special factors" is "remarkably low." Pet. 20. That statement appears consistent with this Court's repeated emphasis that implied causes of action are disfavored and its refusal to recognize a new *Bivens* claim in the last three decades. See pp. 10-12, *supra*. But in any event, the court of appeals' characterization of the "special factors" threshold is not properly presented here. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citation omitted). The court concluded that the special factors counseling hesitation in this case were compelling, and its decision therefore plainly did not turn on the minimum requirements for rejecting a *Bivens* action on such grounds. See, *e.g.*, Pet. App. 34a ("It is a substantial understatement to say that one must hesitate before extending

Bivens into such a context."); *id.* at 38a (concluding that national security "concerns must counsel hesitation in creating a new damages remedy that Congress has not seen fit to authorize."); *id.* at 44a ("These considerations strongly counsel hesitation."). Even if the question of the "special factors" threshold were properly presented, moreover, review of that question would not be warranted now. Less than three years ago, in *Wilkie*, this Court addressed and applied the standards that inform the creation of *Bivens* relief. 551 U.S. at 549-568. No conflict among the courts of appeals about "special factors" analysis has arisen in the wake of that decision, and there is thus no need for this Court to revisit the issue at this time.

d. This Court's review of the "special factors" analysis in the decision below would be inappropriate for an additional reason. As noted above, the fact that there is "'any alternative, existing process for protecting' the plaintiff's interests * * * [implies] that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and freestanding remedy in damages.'" *Western Radio Servs. Co.*, 578 F.3d at 1120 (quoting *Wilkie*, 551 U.S. at 550, 554). In this context, Congress has devised a statutory scheme governing judicial review of the core issues raised by petitioner's complaint, and that scheme leaves no room for a freestanding, judicially created damages action of the kind petitioner seeks to pursue.

The INA states that, except as provided in that statute, federal courts lack jurisdiction to review "any action taken or proceeding brought to remove an alien." 8 U.S.C. 1252(b)(9). As amended in 2005, the INA explicitly directs that claims concerning CAT Article 3 may be presented only through a petition for review of

a final order of removal, "[n]otwithstanding any other provision of law (statutory or nonstatutory)." 8 U.S.C. 1252(a)(4). Similarly, the FARR Act limits judicial enforcement of CAT Article 3. See FARR Act § 2242(d), 112 Stat. 2681-822 ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under [the CAT] or this section, or any other determination made with respect to the application of the policy set forth * * * except as part of the review of a final order of removal").

Congress's refusal to provide for additional relief outside these prescribed channels cannot be deemed an "oversight." *Hudson Valley Black Press* v. *IRS*, 409 F.3d 106, 110 (2d Cir. 2005). To the contrary, Congress has repeatedly addressed the appropriate mechanisms for judicial review in this area without enacting a private damages remedy. When the Senate provided its advice and consent to ratification of the CAT in 1990, it specified that Articles 1 through 16 of the CAT were not self-executing, with the result that those provisions are not privately enforceable in United States courts. 136 Cong. Rec. 36,198 (1990); see *Wang* v. *Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). When Congress enacted the FARR Act in 1998, it limited judicial consideration of claimed violations of Article 3 of the CAT to "the review of a final order of removal." FARR Act § 2242(d). And when it passed the REAL ID Act in 2005, Congress reemphasized that "[n]otwithstanding any other provision of law (statutory or nonstatutory), * * * a petition for review filed with an appropriate court of appeals * * * shall be the sole and exclusive means for judicial review of any cause or claim under [CAT Article 3]." 8 U.S.C. 1252(a)(4).

These provisions reflect Congress's clear intent to provide a single avenue for "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. 1252(b)(9). Those tightly circumscribed provisions cannot be squared with judicial creation of the private damages claims set forth in petitioner's complaint. Counts Two and Three of that complaint amount to a wide-ranging collateral challenge to petitioner's removal and the CAT Article 3 determination concerning whether it was more likely than not that he would be tortured in Syria. Similarly, the conduct for which petitioner seeks damages in those counts consists entirely of "action[s] taken or proceeding[s] brought to remove an alien." *Ibid.* Wholly apart from the "special factors" on which the en banc court of appeals relied in rejecting petitioners' claims, therefore, *Bivens* relief would be inconsistent with the existing remedies that Congress has prescribed. For that additional reason, review of the court of appeals' special factors discussion is unwarranted.

Petitioner contends (Pet. 11-15) that the existing statutory scheme does not counsel against recognition of his *Bivens* claim because, he asserts, the defendants intentionally obstructed his ability to pursue it. As an initial matter, it is not clear that petitioner lacked all recourse through the congressionally prescribed channels. Then-existing law permitted the filing of a habeas action seeking petitioner's release in advance of the removal decision. *Michael* v. *INS*, 48 F.3d 657, 661 (2d Cir. 1995) (granting stay of removal in habeas case filed before the removal order became final); cf. *INS* v. *St. Cyr*, 533 U.S. 289, 309 (2001). In addition, petitioner's

counsel could have sought review of the removal order even after petitioner was removed from the United States. See *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009) (noting that, effective April 1, 1997, Congress repealed the provision that had barred petitions for review filed after removal).

More important, even if petitioner's premise were correct, this Court has made clear that when Congress establishes a comprehensive framework of administrative or judicial review, a court should not imply an additional non-statutory damages remedy against individual officials even when a claimed constitutional injury would "go unredressed" within that statutory scheme. *Chilicky*, 487 U.S. at 424-425 (*Bivens* remedy unavailable even though no money damage remedy was available for the alleged constitutional violation under the statutory review scheme). There is no circuit conflict concerning that legal proposition that would warrant this Court's review.

e. Contrary to the assertions of petitioner and his *amici*, judicial refusal to create a private cause of action in this context "does not leave the executive power unbounded." *Schneider* v. *Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005), cert. denied, 547 U.S. 1069 (2006). While the aggrieved party may have no private remedy for money damages, "[i]f the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Ibid.* Far more important than the vagaries of implied actions for money damages is a range of positive law. As noted above, the government has condemned torture in the strongest terms and adopted various measures to ensure that it does not occur. See p. 9, *supra.* This case simply does

not involve any broad issue concerning torture, but instead presents only the narrow question whether courts should create a private damages remedy when Congress has not seen fit to do so and when such a remedy would raise serious separation-of-powers concerns. This Court's review of that limited issue is unwarranted.[7]

2. The court of appeals correctly affirmed the dismissal of petitioner's claim under the TVPA, and the court's decision does not implicate any conflict of authority.

a. The TVPA creates liability only for defendants who act "under actual or apparent authority, or color of law, of any foreign nation." TVPA, § 2(a), 106 Stat. 73. See H.R. Rep. No. 367, 102d Cong., 1st Sess. 7 (1991) (TVPA creates liability for "any person who, under the authority of any foreign nation, tortures or extrajudicially kills any person"). The defendants in this case were acting under color of United States law, not the law of Syria, Canada, or any other foreign nation. Indeed, petitioner's own complaint repeatedly alleges that the defendants' actions were taken "under color of law and their authority as federal officers." Pet. App. 467a, 468a, 469a.

---

[7] Petitioner contends (Pet. 19) that the Second Circuit should have considered that "the State Department has officially represented" that the United States provides "remedies for torture by federal officials through *Bivens* actions." But the State Department identified *Bivens* as only one of "various avenues for seeking redress" and cautioned that the application of *Bivens* relief depended "on the location of the conduct, the actor, and other circumstances." United States Dep't of State, *United States Written Response to Questions Asked by the United Nations Committee Against Torture* 10 (April 28, 2006), http://www.state.gov/documents/organization/68662.pdf. That statement is entirely consistent with the denial of *Bivens* relief in the particular circumstances of this case.

There is nothing in the text or legislative history of the TVPA to suggest that the Act applies to the conduct of federal officials taken under the color of federal law. In signing the law, the President formally expressed the view that it would not extend to such conduct.[8] And as the district court noted, it is significant that when Congress created a damages remedy in the TVPA, it did not extend that remedy to the conduct of United States officials acting under color of United States law, nor did it provide any monetary damages remedy when it enacted the FARR Act to implement the CAT prohibition on removal of an individual to a country where it is more likely than not that he will be tortured. See Pet. App. 409a.

Petitioner's allegation that his removal resulted from a conspiracy between United States and foreign officials does not convert the defendants into agents of the Syrian government. See *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) ("Dr. Kissinger was most assuredly acting pursuant to U.S. law * * * , despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law."), aff'd on other grounds, 412 F.3d 190 (D.C. Cir. 2005). To sustain a TVPA claim, petitioner was required to "adequately allege that the defendants possessed power un-

[8] See Statement By President George Bush Upon Signing H.R. 2092, 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 12, 1992) ("I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions. Because the Act permits suits based only on actions 'under actual or apparent authority, or color of law, of any foreign nation,' I do not believe it is the Congress' intent that H.R. 2092 should apply to United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States law.").

der Syrian law, and that the offending actions (*i.e.*, [petitioner's] removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power." Pet. App. 18a. As the unanimous panel explained, "[t]he complaint contains no such allegation." *Ibid*. The court of appeals therefore correctly held that the alleged conduct did not fall within the scope of the TVPA.[9]

b. The court of appeals' dismissal of petitioner's TVPA claim does not conflict with the decision of any other court of appeals. Indeed, in every case in which a federal official has been sued under the TVPA for actions taken within the scope of his office, courts have held that the TVPA does not apply. *See Schneider*, 310

[9] Petitioner relies (Pet. 28-29) on decisions addressing liability under 42 U.S.C. 1983, contending by analogy that "willful participation in joint action" between the United States and a foreign country is the only showing necessary to sue federal officials under the TVPA. Pet. 27 (quoting *Dennis* v. *Sparks*, 449 U.S. 24 (1980)). As the court of appeals noted, that is "remarkable" proposition, which would effectively "render a U.S. official an official of a foreign government when she deals with that foreign state on matters involving intelligence, military, and diplomatic affairs." Pet. App. 19a n.3. Even in the Section 1983 context, courts have held that "[b]ecause federal officials typically act under color of *federal* law, they are rarely subject to liability under § 1983." *Strickland ex rel. Strickland* v. *Shalala*, 123 F.3d 863, 866 (6th Cir. 1997). Courts applying Section 1983 "focus on the actual nature and character" of the challenged conduct in evaluating whether a federal official can be deemed to have acted under state law. *Strickland*, 123 F.3d at 866. Here, at all times, the individual defendants were acting within the scope of their employment as officials of the United States and were carrying out the immigration laws and policies of the United States. The "nature and character" of their conduct was thus distinctly federal; at no time were they "clothed with the authority of [Syrian] law." *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)).

F. Supp. 2d at 267; *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 41-43 (D.D.C. 2006), aff'd on other grounds, 522 F.3d 413 (D.C. Cir. 2008); *Gonzalez-Vera* v. *Kissinger*, No. CIV. A. 02-02240, 2004 WL 5584378, *8-10 (D.D.C. Sept. 17, 2004) aff'd on other grounds, 449 F.3d 1260 (D.C. Cir. 2006), cert. denied, 549 U.S. 1206 (2007). The cases cited by petitioner as creating a conflict (Pet. 27-28) are inapposite because they do not involve suits under the TVPA against federal officials acting under federal law. Thus, there is no split of authority requiring this Court's review.

3. Petitioner argues (Pet. 30-34) that the court of appeals erred in affirming the dismissal of petitioner's substantive due process claim alleging denial of access to court while he was detained in the United States.[10] The district court dismissed that count without prejudice as insufficiently pleaded and invited petitioner to replead it in order to "articulate more precisely the judicial relief he was denied" and to "name those defendants that were personally involved in the alleged unconstitutional treatment." Pet App. 20a. Petitioner elected (in his counsel's words) to "stand on the allegations of his original complaint." *Ibid.*

Petitioner now presents a factbound challenge to the district court's conclusion that his broad allegations of conspiracy were insufficient. Both the panel and en banc court of appeals reviewed the district court's reasoning and correctly upheld it. As the court of appeals explained:

---

[10] In his petition, as in his en banc brief, petitioner does not contend that defendants violated a right of access to counsel. The panel majority noted that because he was an unadmitted alien, petitioner had neither a constitutional nor statutory right to counsel. Pet. App. 256a-263a.

> Arar alleges that "Defendants"—undifferentiated—"denied Mr. Arar effective access to consular assistance, the courts, his lawyers, and family members" in order to effectuate his removal to Syria. But he fails to specify culpable action taken by any single defendant, and does not allege the "meeting of the minds" that a plausible conspiracy claim requires. He alleges (in passive voice) that his requests to make phone calls "were ignored," and that "he was told" that he was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed.

Pet. App. 21a. Given these omissions, and in view of petitioner's rejection of an opportunity to replead with more detail, the court of appeals did not err in affirming the dismissal of this claim.

Petitioner's claim was properly dismissed for an additional reason. To state an access-to-court claim, a plaintiff "must identify a 'nonfrivolous,' 'arguable' underlying claim" that was lost due to the alleged obstruction. See *Christopher* v. *Harbury*, 536 U.S. 403, 415 (2002). The existence of such an underlying claim "is an element that must be described in the complaint." *Ibid.* Petitioner failed to identify such a claim in Count Four of his complaint, even after the district court invited him to replead that count. Instead, he merely alleged in conclusory fashion that he was unable to "petition the courts for redress of his grievances." Pet. App. 471a. Under *Harbury*, that pleading failure by itself was fatal to this claim and further supports the decision below.

Finally, petitioner's factbound argument about the sufficiency of his allegations in Count Four, which has been reviewed on three different occasions, presents no

issue of significance or circuit conflict that would warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys

MAY 2010