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APPENDIX A – ENTERED November 2, 2009.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 06-4216-cv

585 F.3d 559

Decided: November 2, 2009,
As Amended November 5, 2009.
As Amended December 23, 2009.

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of 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, and JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, United States,

Defendants-Appellees.

Arar's complaint alleges violations of the Torture Victim Protection Act ("TVPA") and the Fifth Amendment. The District Court dismissed the complaint. Id. at 287-88. A three-judge panel of this Court unanimously held that: (1) the District Court had personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar failed to state a claim under the TVPA; and (3) Arar failed to establish subject matter jurisdiction over his request for a declaratory judgment. Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008).

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States Attorney; Larry Lee Gregg, R. Joseph Sher, Dennis C. Barghaan, Assistant United States Attorneys; Mary Hampton Mason, Jeremy S. Brumbelow, U.S. Department of Justice, Civil Division, Torts Branch; Barbara L. Herwig, Robert M. Loeb, Michael Abate, U.S. Department of Justice, Civil Division, Appellate Staff, on the brief), for Defendant-Appellee John Ashcroft, the official capacity Defendants-Appellees, and the United States.

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Before: JACOBS, Chief Judge, McLAUGHLIN,* CALABRESI, CABRANES, POOLER, SACK,** SOTOMAYOR,*** PARKER, ** RAGGI, WESLEY,

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* Senior Circuit Judge McLaughlin was a member of the initial three-judge panel that heard this appeal and is therefore eligible to participate in in banc rehearing. See 28 U.S.C. § 46(c)(1).

** Senior Circuit Judges Calabresi, Sack, and Parker, who assumed senior status during the course of in banc proceedings, are entitled to participate pursuant to 28 U.S.C. § 46(c)(2).

*** The Honorable Sonia Sotomayor, who was originally a member of the in banc panel and who participated in oral argument, was elevated to the Supreme Court on August 8,

HALL, and LIVINGSTON, Circuit Judges. KATZMANN, Circuit Judge, took no part in the consideration or decision of the case.

JACOBS, C.J., filed the majority opinion in which MCLAUGHLIN, CABRANES, RAGGI, WESLEY, HALL, and LIVINGSTON, JJ., joined.

CALABRESI, J., filed a dissenting opinion in which POOLER, SACK, and PARKER, JJ., joined.

POOLER, J., filed a dissenting opinion in which CALABRESI, SACK, and PARKER, JJ., joined.

SACK, J., filed a dissenting opinion in which CALABRESI, POOLER, and PARKER, JJ., joined.

PARKER, J., filed a dissenting opinion in which CALABRESI, POOLER, and SACK, JJ., joined.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Trager, J.) dismissing Plaintiff-Appelant Maher Arar's complaint against the Attorney General of the United States, the Secretary of Homeland Security, the Director of the Federal Bureau of Investigation, and others, including senior immigration officials. Arar alleges that he was detained while changing planes at Kennedy Airport in New York (based on a warning from Canadian authorities that he was a

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2009.

member of Al Qaeda), mistreated for twelve days while in United States custody, and then removed to Syria via Jordan pursuant to an inter-governmental understanding that he would be detained and interrogated under torture by Syrian officials. The complaint alleges a violation of the Torture Victim Protection Act ("TVPA") and of his *Fifth Amendment* substantive due process rights arising from the conditions of his detention in the United States, the denial of his access to counsel and to the courts while in the United States, and his detention and torture in Syria.

The district court dismissed the complaint (with leave to re-plead only as to the conditions of detention in the United States and his access to counsel and the courts during that period) and Arar timely appealed (without undertaking to amend). *Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)*. A three-judge panel of this Court unanimously held that: (1) the District Court had personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar failed to state a claim under the TVPA; and (3) Arar failed to establish subject matter jurisdiction over his request for a declaratory judgment. *Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008)*. A majority of the panel also dismissed Arar's Bivens claims, with one member of the panel dissenting. Id. The Court voted to rehear the appeal in banc. We now affirm.

We have no trouble affirming the district court's conclusions that Arar sufficiently alleged per-

sonal jurisdiction over the defendants who challenged it, and that Arar lacks standing to seek declaratory relief. We do not reach issues of qualified immunity or the state secrets privilege. As to the TVPA, we agree with the unanimous position of the panel that Arar insufficiently pleaded that the alleged conduct of United States officials was done under color of foreign law. We agree with the district court that Arar insufficiently pleaded his claim regarding detention in the United States, a ruling that has been reinforced by the subsequent authority of *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Our attention is therefore focused on whether Arar's claims for detention and torture in Syria can be asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* ("Bivens").

To decide the Bivens issue, we must determine whether Arar's claims invoke Bivens in a new context; and, if so, whether an alternative remedial scheme was available to Arar, or whether (in the absence of affirmative action by Congress) "'special factors counsel[] hesitation.'" See *Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)* (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983))*. This opinion holds that "extraordinary rendition" is a context new to Bivens claims, but avoids any categorical ruling on alternative remedies--because the dominant holding of this opinion is that, in the context of ex-

traordinary rendition, hesitation is warranted by special factors. We therefore [*564] affirm. (The term "rendition" and its related usages are defined and discussed in the margin.[1])

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[1] The term "rendition" refers to the transfer of a fugitive from one state to another or from one country to another. See Black's Law Dictionary 1410 (9th ed. 2004) (defining "rendition" as "[t]he return of a fugitive from one state to the state where the fugitive is accused or was convicted of a crime"); see also Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.9(c) ("[I]nterstaterendition[ ] is specifically provided for in the United States Constitution. In order to implement the rendition clause, Congress enacted the Federal Rendition Act, which requires that the demanding state produce 'a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor.'" (footnotes omitted)). In the international context, "extradition" is a "distinct form of rendition" in which "one [country] surrenders a person within its territorial jurisdiction to a requesting [country] via a formal legal process, typically established by treaty between the countries." Cong. Research Serv., Renditions: Constraints Imposed by Laws on Torture 1 (2009); see also 1 Oppenheim's International Law §§ 415-16 (9th ed. 1996). Although most international renditions occur under a formal extradition treaty, renditions also occur outside the scope of extradition treaties, often as a matter of international comity. See 1 Oppenheim, supra, § 416; Cong. Research Serv., supra, at 1; see also *18 U.S.C. § 3181(b)* (permitting, "in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government"). The terms "'irregular rendition' and 'extraordinary rendition' have been used to refer to the *extrajudicial* transfer of a person from one [country] to another." Cong. Research Serv., supra, at 1; see also Black's Law Dictionary 1410 (9th ed. 2009) (defining "extraordinary rendition" as "[t]he transfer, without formal charges, trial, or court approval, of a

Our ruling does not preclude judicial review and oversight in this context. But if a civil remedy in damages is to be created for harms suffered in the context of extraordinary rendition, it must be created by Congress, which alone has the institutional competence to set parameters, delineate safe harbors,

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person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation"). As we understand and use the term here, "extraordinary rendition" does not, by itself, imply that a subject of extraordinary rendition will be treated as Arar alleges he was treated during and after the rendition alleged in this action.

The United States Department of State records that, between 1993 and 2001, "rendition" provided the means for obtaining custody of ten suspected terrorists and "extradition" applied to another four suspects. See U.S. Dep't of State, Patterns of Global Terrorism 2001, App. D: Extraditions and Renditions of Terrorists to the United States. Accordingly, the rendition of suspected terrorists outside the mechanisms established by extradition treaties--so-called extraordinary rendition--had been employed as a means of combating terrorists for nearly a decade prior to the events giving rise to this litigation. See John B. Bellinger III, Legal Adviser, U.S. Dep't of State, Letter to the Editor, Wall St. J., July 5, 2006, at A25 (discussing the renditions of suspected terrorists Ramzi Yousef and Mir Aimal Kansi to the United States and the rendition of Illich Ramirez Sanchez, also known as "Carlos the Jackal," by French authorities from the Sudan to France, "which was subsequently upheld by the European Commission on Human Rights"), reprinted in Digest of United States Practice in International Law 162-63 (Sally J. Cummings ed., 2006); see also Remarks of Condoleezza Rice, U.S. Sec'y of State (Dec. 5, 2005) ("For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice."), in Digest of United States Practice in International Law 100, 102 (Sally J. Cummings ed., 2005).

and specify relief. If Congress chooses to legislate on this [*565] subject, then judicial review of such legislation would be available.

Applying our understanding of Supreme Court precedent, we decline to create, on our own, a new cause of action against officers and employees of the federal government. Rather, we conclude that, when a case presents the intractable "special factors" apparent here, see supra at 36-37, it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress--and not for us as judges--to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation. Administrations past and present have reserved the right to employ rendition, see David Johnston, U.S. Says Rendition to Continue, but with More Oversight, N.Y. Times, Aug. 24, 2009, and not withstanding prolonged public debate, Congress has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence.

I

Arar's complaint sets forth the following factual allegations.

Arar is a dual citizen of Syria, where he was born and raised, and of Canada, to which his family immigrated when he was 17.

While on vacation in Tunisia in September 2002, Arar was called back to work in Montreal. His itinerary called for stops in Zurich and New York.

Arar landed at Kennedy Airport around noon on September 26. Between planes, Arar presented his Canadian passport to an immigration official who, after checking Arar's credentials, asked Arar to wait nearby. About two hours later, Arar was fingerprinted and his bags searched. Between 4 p.m. and 9 p.m., Arar was interviewed by an agent from the Federal Bureau of Investigation ("FBI"), who asked (inter alia) about his relationships with certain individuals who were suspected of terrorist ties. Arar admitted knowing at least one of them, but denied being a member of a terrorist group. Following the FBI interview, Arar was questioned by an official from the Immigration and Nationalization Service ("INS) for three more hours; he continued to deny terrorist affiliations.

Arar spent the night alone in a room at the airport. The next morning (September 27) he was questioned by FBI agents from approximately 9 a.m. until 2 p.m.; the agents asked him about Osama Bin Laden, Iraq, Palestine, and other things. That evening, Arar was given an opportunity to return voluntarily to Syria. He refused, citing a fear of torture,

and asked instead to go to Canada or Switzerland. Later that evening, he was transferred to the Metropolitan Detention Center ("MDC") in Brooklyn, where he remained until October 8.

On October 1, the INS initiated removal proceedings, and served Arar with a document stating that he was inadmissible because he belonged to a terrorist organization. Later that day, he called his mother-in-law in Ottawa--his prior requests to place calls and speak to a lawyer having been denied or ignored. His family retained a lawyer to represent him and contacted the Canadian Consulate in New York.

A Canadian consular official visited Arar on October 3. The next day, immigration officers asked Arar to designate in writing the country to which he would want to be removed. He designated Canada. On the evening of October 5, Arar met with his [*566] attorney. The following evening, a Sunday, Arar was again questioned by INS officials. The INS District Director in New York left a voicemail message on the office phone of Arar's attorney that the interview would take place, but the attorney did not receive the message in time to attend. Arar was told that she chose not to attend. In days following, the attorney was given false information about Arar's whereabouts.

On October 8, 2002, Arar learned that the INS had: (1) ordered his removal to Syria, (2) made a (re-

quired) finding that such removal would be consistent with Article 3 of the Convention Against Torture ("CAT"),[2] and (3) barred him from reentering the United States for five years. He was found inadmissible to the United States on the basis of *8 U.S.C. § 1182(a)(3)(B)(i)(V)*, which provides that any alien who "is a member of a terrorist organization" is inadmissible to the United States. The finding was based on Arar's association with asuspected terrorist and other (classified) information. Thereafter, Defendant J. Scott Blackman, an INS Regional Director, made a determination that Arar was clearly and unequivocally a member of Al Qaeda and inadmissible to the United States. A "Final Notice of Inadmissibility," dated October 8, and signed by Defendant Deputy Attorney General Larry Thompson, stated that Arar's removal to Syria would be consistent with the CAT, notwithstanding Arar's articulated fear of torture.

Later that day, Arar was taken to New Jersey, whence he flew in a small jet to Washington, D.C., and then to Amman, Jordan. When he arrived in

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[2] Article 3 of the Convention Against Torture "prohibits any state party to the Convention from expelling, returning or extraditing any person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, and provides that the determination of whether such grounds exist [must take] into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." *Tun v. INS, 445 F.3d 554, 566 (2d Cir. 2006)* (internal quotation marks, brackets, and ellipsis omitted).

Amman on October 9, he was handed over to Jordanian authorities who treated him roughly and then delivered him to the custody of Syrian officials, who detained him at a Syrian Military Intelligence facility. Arar was in Syria for a year, the first ten months in an underground cell six feet by three, and seven feet high. He was interrogated for twelve days on his arrival in Syria, and in that period was beaten on his palms, hips, and lower back with a two-inch-thick electric cable and with bare hands. Arar alleges that United States officials conspired to send him to Syria for the purpose of interrogation under torture, and directed the interrogations from abroad by providing Syria with Arar's dossier, dictating questions for the Syrians to ask him, and receiving intelligence learned from the interviews.

On October 20, 2002, Canadian Embassy officials inquired of Syria as to Arar's whereabouts. The next day, Syria confirmed to Canada that Arar was in its custody; that same day, interrogation ceased. Arar remained in Syria, however, receiving visits from Canadian consular officials. On August 14, 2003, Arar defied his captors by telling the Canadians that he had been tortured and was confined to a small underground cell. Five days later, after signing a confession that he had trained as a terrorist in Afghanistan, Arar was moved to various locations. On October 5, 2003, Arar was released to the custody of a Canadian embassy official in [*567] Damascus, and was flown to Ottawa the next day.

II

On January 22, 2004, Arar filed a four-count complaint in the Eastern District of New York seeking damages from federal officials for harms suffered as a result of his detention and confinement in the United States and his detention and interrogation in Syria. Count One of Arar's complaint seeks relief under the Torture Victim Protection Act ("TVPA"), *28 U.S.C. § 1350* note (a)(1) (the "TVPA claim"). Counts Two and Three seek relief under the *Fifth Amendment* for Arar's alleged torture in Syria (Count Two) and his detention there (Count Three). Count Four seeks relief under the *Fifth Amendment* for Arar's detention in the United States prior to his removal to Syria. Arar also seeks a declaratory judgment that defendants' conduct violated his "constitutional, civil, and human rights."

Defendants-Appellees moved to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)*, challenging personal jurisdiction over Defendants Ashcroft, Thompson, and Mueller and challenging subject-matter jurisdiction as to the claims alleging confinement and torture in Syria on the ground that they arise from an order of removal and are therefore subject to the jurisdictional bar of the Immigration and Nationality Act (see infra Part VI). It was also argued that Arar lacked standing to seek a declaratory judgment.

On February 16, 2006, the district court dismissed Counts One, Two, and Three with prejudice, and Count Four without prejudice. *Arar v. Ashcroft, 414 F. Supp. 2d 250, 287-88 (E.D.N.Y. 2006).* The district court also concluded that Arar lacked standing to bring a claim for declaratory relief. *Id. at 258-59.*

Arar elected not to re-plead Count Four, and on August 17, 2006, the district court entered judgment dismissing all of Arar's claims. Arar timely appealed. A divided three-judge panel of this Court affirmed on June 30, 2008. *Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008).* The Court voted to rehear the case in banc, and oral argument was heard on December 9, 2008.

III

We review de novo the district court's decision to grant a motion to dismiss. *In re NYSE Specialists Sec. Litig., 503 F.3d 89, 95 (2d Cir. 2007).* In so doing, we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff. *Roth v. Jennings, 489 F.3d 499, 501 (2d Cir. 2007)*; see also *Conyers v. Rossides, 558 F.3d 137, 143 (2d Cir. 2009).*

At the outset, we conclude (as the panel concluded unanimously) that Arar: (1) sufficiently alleged personal jurisdiction over the defendants, and

(2) has no standing to seek declaratory relief; in addition, because we dismiss the action for the reasons set forth below, we need not (and do not) reach the issues of qualified immunity or the state secrets privilege.

This opinion owes a debt to the panel opinions.

IV

The TVPA creates a cause of action for damages against any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." *28 U.S.C. § 1350* note (a)(1). Count One of Arar's complaint alleges that the defendants conspired with Jordanian and Syrian officials to have Arar tortured in direct violation of the TVPA.

[*568] Any allegation arising under the TVPA requires a demonstration that the defendants acted under color of foreign law, or under its authority. *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).* "In construing the term[] . . . 'color of law,' courts are instructed to look . . . to jurisprudence under *42 U.S.C. § 1983* . . . ." Id. (citing H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991) reprinted in 1992 U.S.C.C.A.N. 84, 87). Under *section 1983*, "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the au-

thority of state law.'" *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (quoting *United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941))*. The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be fairly attributed to the state. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)*. A federal officer who conspires with a state officer may act under color of state law, see *Beechwood Restorative Care Ctr. v. Leeds, 436 F.3d 147, 154 (2d Cir. 2006)*; but since "federal officials typically act under color of *federal* law," they are rarely deemed to have acted under color of state law. *Strickland ex rel. Strickland v. Shalala, 123 F.3d 863, 866 (6th Cir. 1997)* (emphasis in original).

Accordingly, to state a claim under the TVPA, Arar must adequately allege that the defendants possessed power under Syrian law, and that the offending actions (i.e., Arar'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. The complaint contains no such allegation. Arar has argued that his allegation of conspiracy cures any deficiency under the TVPA. But the conspiracy allegation is that United States officials encouraged and facilitated the exercise of power by Syrians in Syria, not that the United States officials had or exercised

power or authority under Syrian law. The defendants are alleged to have acted under color of federal, not Syrian, law, and to have acted in accordance with alleged federal policies and in pursuit of the aims of the federal government in the international context. At most, it is alleged that the defendants encouraged or solicited certain conduct by foreign officials. Such conduct is insufficient to establish that the defendants were in some way clothed with the authority of Syrian law or that their conduct may otherwise be fairly attributable to Syria. See, e.g., *Harbury v. Hayden, 444 F. Supp. 2d 19, 42-43 (D.D.C. 2006)*, aff'd on other grounds, *522 F.3d 413, 380 U.S. App. D.C. 388 (D.C. Cir. 2008)*. We therefore agree with the unanimous holding of the panel and affirm the District Court's dismissal of the TVPA claim.[3]

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[3] Judge Pooler relies on a line of *section 1983* cases explaining when and how private conduct can constitute state action, and then reasons by analogy to deem the defendants' conduct in this case to have arisen under foreign (Syrian) law. See Dissent of Judge Pooler at **8-9**. Under this theory, Judge Pooler would allow a person tortured abroad to sue an official of the United States government, who in the performance of her official duties, "encourage[d]," "facilitat[ed]," or "solicit[ed]" the mistreatment. Id. at **10**. Notably, she cites no authority for this remarkable proposition, which would 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. At least one commentator has proposed a legislative amendment to bring the law into line with what Judge Pooler thinks it is, or should be. See Richard Henry Seamon, U.S. Torture as a Tort, *37 Rutgers L.J. 715, 802, 804 (2006)* ("Under current law, U.S. officials can seldom be held civilly liable for torture . . . . Congress could amend the TVPA to extend the cause of action to the victims of torture inflicted under color of federal law.").

V [*569]

Count Four of the complaint alleges that the conditions of confinement in the United States (prior to Arar's removal to Syria), and the denial of access to courts during that detention, violated Arar's substantive due process rights under the *Fifth Amendment*. The District Court dismissed this claim-- without prejudice--as insufficiently pleaded, and invited Arar to re-plead the claim 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." *Arar, 414 F. Supp. 2d at 286, 287*. Arar elected (in his counsel's words) to "stand on the allegations of his original complaint."

On a motion to dismiss, courts require "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*; see also *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly, 550 U.S. at 555*. Broad allegations of conspiracy are insufficient; the plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord, 340 F.3d 105, 110 (2d Cir. 2003)* (internal quotation marks omitted) (addressing conspiracy claims under *42 U.S.C. § 1985*). Furthermore, a plaintiff in a Bivens action is required to al-

lege facts indicating that the defendants were personally involved in the claimed constitutional violation. See *Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981)*; see also *Thomas v. Ashcroft, 470 F.3d 491, 496 (2d Cir. 2006)*.

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. Given this omission, and in view of Arar's rejection of an opportunity to re-plead, we agree with the District Court and the panel majority that this Count of the complaint must be dismissed.

We express no view as to the sufficiency of the pleading otherwise, that is, whether the conduct alleged (if plausibly attributable to defendants) would violate a constitutionally protected interest.[4] To the extent that this claim may be deemed to be a Bivens-

[4] We need not, therefore, consider the panel's holding that Arar failed "to establish that he possessed any entitlement to a pre-removal hearing" or "to the assistance of counsel." *Arar, 532 F.3d at 187-88*.

type action, it may raise some of the special factors considered later in this opinion.

VI

Arar's remaining claims seek relief on the basis of torture and detention in Syria, and are cast as violations of substantive [*570] due process. At the outset, Defendants argue that the jurisdictional bar of the INA deprived the District Court of subject-matter jurisdiction over these counts because Arar's removal was conducted pursuant to a decision that was "at the discretion" of the Attorney General.

"[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S. Ct. 512, 96 L. Ed. 586 (1952).* Accordingly, the INA requires an alien to seek relief only through judicial review of a removal order in the appropriate court of appeals; it entirely forecloses judicial review of decisions of the Attorney General or the Secretary of Homeland Security specified by the INA to be

within the discretion of those officers. See *8 U.S.C. § 1252*.[5]

However, the application of the INA's jurisdictional bar is problematic in this case because the proceedings under the INA are alleged to have been irregular in several respects.

First, the complaint alleges that the government took the following actions that impaired Arar's timely ability to seek the judicial review normally afforded under the INA and to receive any meaningful relief: denying his requests to contact an attorney or his family; misleading his lawyer (after one was retained for him) as to his location and status, thereby frustrating any advocacy on his behalf; and serving the removal order on Arar en route to Am-

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[5] *8 U.S.C. § 1252(b)(9)* provides that "[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 . . . shall be available only in judicial review of a final order." *Subsection 1252(a)(5)*, in turn, states that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal." Finally, pursuant to *§ 1252 (a)(2)(B)*:

> [N]o court shall have jurisdiction to review . . .
>
> (ii) any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum].

man, when he no longer had access to his attorney and could not make use of the review process. The complaint also alleges that the government undertook extraordinary rendition in clear violation of the protections afforded aliens by the INA, suggesting that the government itself might not have viewed the INA as the real source of its removal authority in this context. However, mere allegations of obstruction generally do not circumvent a congressionally mandated remedial scheme. Otherwise, limitations on the jurisdiction of the district courts could easily be evaded and thwarted.

Second, although the INA governs the status of aliens in transit at United States airports, and clearly has a role in such circumstances, see *8 U.S.C. § 1182(d)(4)(C)*, this is not a typical immigration case according to the complaint: Arar took no step to enter or stay in this country; he was changing planes to go elsewhere, repeatedly expressed his desire to return to Canada, and was ticketed to Montreal. Even though this case does not present the familiar fact pattern of an alien trying to enter or remain in the United States, our immigration laws apply [*571] with equal force to aliens who seek admission to our country and to aliens whom the government seeks to keep out of our country.

In short, it is not clear that the INA's judicial review provisions govern circumstances of involuntary rendition such as those alleged here. Indeed, rendition may take place in circumstances that in no

way implicate United States immigration laws, such as when a person is detained abroad and rendered to some third country.

Finally, even if the INA's jurisdictional bar is surmounted and review not foreclosed, Arar has alleged circumstances that would have prevented him from obtaining review. If, as he alleges, he was served with the removal order while he was already en route to Amman, the INA could have afforded him no relief then (and can afford him no affirmative relief at this time in this case).

In any event, we need not decide the vexed question of whether the INA bar defeats jurisdiction of Arar's substantive due process claims, because we conclude below that the case must be dismissed at the threshold for other reasons.

VII

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*. The plaintiff in Bivens had been subjected to an unlawful, warrantless search which resulted in his arrest. *Bivens, 403 U.S. at 389-90*. The Supreme Court allowed him to state a

cause of action for money damages directly under the *Fourth Amendment*, thereby giving rise to a judicially-created remedy stemming directly from the Constitution itself. *Id. at 397*.

The purpose of the Bivens remedy "is to deter individual federal officers from committing constitutional violations." *Malesko, 534 U.S. at 70*. So a Bivens action is brought against individuals, and any damages are payable by the offending officers. *Carlson v. Green, 446 U.S. 14, 21, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*. Notwithstanding the potential breadth of claims that would serve that objective, the Supreme Court has warned that the Bivens remedy is an extraordinary thing that should rarely if ever be applied in "new contexts." See *Malesko, 534 U.S. at 69* (internal quotation marks omitted); *Schweiker v. Chilicky, 487 U.S. 412, 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*; see also *Dotson v. Griesa, 398 F.3d 156, 166 (2d Cir. 2005)* ("Because a Bivens action is a judicially created remedy . . . courts proceed cautiously in extending such implied relief . . . ."). In the 38 years 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, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*; and in the context of an *Eighth Amendment* violation by prison officials, *Carlson, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15*; see also *Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)* ("[I]n most instances we have found a Bivens remedy un-

justified."); *Malesko, 534 U.S. at 68* ("[W]e have consistently refused to extend Bivens liability to any new context or new category of defendants."). Since Carlson in 1980, the Supreme Court has declined to extend the Bivens remedy in any new direction at all. Among the rejected contexts are: violations of federal employees' *First Amendment* [*572] rights by their employers, *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*; harms suffered incident to military service, *United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987)*; *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*; denials of Social Security benefits, *Schweiker, 487 U.S. at 412*; claims against federal agencies, *FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)*; claims against private corporations operating under federal contracts, *Malesko, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*; and claims of retaliation by federal officials against private landowners, *Wilkie, 551 U.S. at 562.*

This case requires us to examine whether allowing this Bivens action to proceed would extend Bivens to a new "context," and if so, whether such an extension is advisable.

"Context" is not defined in the case law. At a sufficiently high level of generality, any claim can be analogized to some other claim for which a Bivens action is afforded, just as at a sufficiently high level of particularity, every case has points of distinction.

We construe the word "context" as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components.

The context of this case is international rendition, specifically, "extraordinary rendition." Extraordinary rendition is treated as a distinct phenomenon in international law. See supra note 1. Indeed, law review articles that affirmatively advocate the creation of a remedy in cases like Arar's recognize "extraordinary rendition" as the context. See, e.g., Peter Johnston, Note, Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States, *16 J.L. & Pol'y 357, 363 (2007)*. More particularly, the context of extraordinary rendition in Arar's case is the complicity or cooperation of United States government officials in the delivery of a non-citizen to a foreign country for torture (or with the expectation that torture will take place). This is a "new context": no court has previously afforded a Bivens remedy for extraordinary rendition.

Once we have identified the context as "new," we must decide whether to recognize a Bivens remedy in that environment of fact and law. The Supreme Court tells us that this is a two-part inquiry. In order to determine whether to recognize a Bivens remedy in a new context, we must consider: whether there is an alternative remedial scheme available to the plaintiff; and whether "'special factors counsel[]

hesitation'" in creating a Bivens remedy. *Wilkie, 551 U.S. at 550* (quoting *Bush, 462 U.S. at 378*).

VIII

There are several possible alternative remedial schemes here. Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration. The INA provides for review of final orders of removal, including review of the government's designation of a particular destination country and many (albeit not all) decisions of the Attorney General and the Secretary of Homeland Security. See *8 U.S.C. § 1252*; *Mendis v. Filip, 554 F.3d 335, 338 (2d Cir. 2009)*. Congress has supplemented this general remedial scheme with specific guidance for particular contexts by enacting (i) the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), *8 U.S.C. § 1231* note; see also *8 C.F.R. § 208.16(c)*; and (ii) the TVPA, which, as already discussed, provides no remedy to [*573] Arar. At the same time, Congress has expressly limited review of the removal of aliens who (like Arar) are removable for reasons related to national security. See *8 U.S.C. § 1225(c)*. Congress has also regularly modified the various review mechanisms to account for perceived difficulties and complications. See, e.g., REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546. In light of the complexity of the remedial scheme Congress has created

(and frequently amended), we would ordinarily draw a strong inference that Congress intended the judiciary to stay its hand and refrain from creating a Bivens action in this context. See *Wilkie, 551 U.S. at 554*; *Schweiker, 487 U.S. at 424-29*; *Bush, 462 U.S. at 388*.

We recognize, however, that any reliance on the INA as an alternative remedial scheme presents difficulties for the same reasons discussed in Part VI above. Arar has alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes. In the end, we need not decide whether an alternative remedial scheme was available because, "even in the absence of an alternative [remedial scheme], a Bivens remedy is a subject of judgment . . . [in which] courts must . . . pay particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie, 551 U.S. at 550* (internal quotation marks omitted).[6] Such special factors are clearly present in the new context of this case, and they sternly counsel hesitation.

IX

[6] Accordingly, we have no occasion to consider the panel's conclusion that the "review procedures set forth by the INA provide a convincing reason for us to resist recognizing a Bivens cause of action for Arar's claims." *Arar, 532 F.3d at 180* (internal quotation marks and citation omitted).

When the Bivens cause of action was created in 1971, the Supreme Court explained that such a remedy could be afforded because that "case involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens, 403 U.S. at 396*. This prudential limitation was expressly weighed by the Court in *Davis, 442 U.S. at 245-46*, and *Carlson, 446 U.S. at 18-19*, and such hesitation has defeated numerous Bivens initiatives, see, e.g., *Stanley, 483 U.S. at 683-84*; *Chappell, 462 U.S. at 304*; *Wilkie, 551 U.S. at 554-55*; *Dotson, 398 F.3d at 166-67*. Among the "special factors" that have "counsel[ed] hesitation" and thereby foreclosed a Bivens remedy are: military concerns, *Stanley, 483 U.S. at 683-84*; *Chappell, 462 U.S. at 304*; separation of powers, *United States v. City of Philadelphia, 644 F.2d 187, 200 (3d Cir. 1980)*; the comprehensiveness of available statutory schemes, *Dotson, 398 F.3d at 166*; national security concerns, *Beattie v. Boeing Co., 43 F.3d 559, 563 (10th Cir. 1994)*; and foreign policy considerations, *United States v. Verdugo-Urquidez, 494 U.S. 259, 274, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*.

Two principles emerge from this review of case law:

> "Special factors" is an embracing category, not easily defined; but it is limited in terms to factors that provoke "hesitation." While special factors should be substantial enough to justify the absence of a damages remedy for a [*574]

> wrong, no account is taken of countervailing factors that might counsel alacrity or activism, and none has ever been cited by the Supreme Court as a reason for affording a Bivens remedy where it would not otherwise exist.
>
> The only relevant threshold--that a factor "counsels hesitation"--is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.[7]

Judge Pooler labels these two principles "dicta," see Dissent of Judge Pooler at **2**, but they are not. They are integral to the holding in this in banc case, because we do not take account of countervailing factors and because we apply the standard we announce.

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[7] Judge Pooler labels these two principles "dicta," see Dissent of Judge Pooler at **2**, but they are not. They are integral to the holding in this in banc case, because we do not take account of countervailing factors and because we apply the standard we announce.

With these principles in mind, we adduce, one by one, special factors that bear upon the recognition of a Bivens remedy for rendition.

X

Although this action is cast in terms of a claim for money damages against the defendants in their individual capacities, it operates as a constitutional challenge to policies promulgated by the executive. Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them. A Bivens action is sometimes analogized to an action pursuant to *42 U.S.C. § 1983*, but it does not reach so far as to create the federal counterpart to an action under *Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. Here, we need not decide categorically whether a Bivens action can lie against policymakers because in the context of extraordinary rendition, such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation. Our holding need be no broader.

A. Security and Foreign Policy

The Executive has practiced rendition since at least 1995. See Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlan-

tic Relations: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 15 (2007) (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, CIA). Arar gives "the mid-1990s" as the date for the inception of the policy under which he was sent to Syria for torture. Pl. Maher Arar's Mem. of Law in Opp'n to Defs.' Invocation of the State Secrets Privilege, Mar. 14, 2005, at 6. A suit seeking a damages remedy against senior officials who implement such a policy is in critical respects a suit against the government as to which the government has not waived sovereign immunity. Such a suit unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers, and thereby elicits government funds for settlement. (Canada has already paid Arar $ 10 million.[8])

It is a substantial understatement to say that one must hesitate before extending [*575] Bivens into such a context. A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and ra-

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[8] See Press Release and Announcement, Stephen Harper, Prime Minister of Can. (Jan. 26, 2007), http://pm.gc.ca/eng/media.asp?id=1510; Ottawa Reaches $10M Settlement with Arar, CBC News, Jan. 26, 2007, http://www.cbc.ca/canada/story/2007/01/25/arar-harper.html.

tionale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns. It is clear from the face of the complaint that Arar explicitly targets the "policy" of extraordinary rendition; he cites the policy twice in his complaint, and submits documents and media reports concerning the practice. His claim cannot proceed without inquiry into the perceived need for the policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries.

The Supreme Court has expressly counseled that matters touching upon foreign policy and national security fall within "an area of executive action 'in which courts have long been *hesitant* to intrude'" absent congressional authorization. *Lincoln v. Vigil, 508 U.S. 182, 192, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)* (emphasis added) (quoting *Franklin v. Massachusetts, 505 U.S. 788, 819, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992)* (Stevens, J., concurring in part and concurring in the judgment)). It "has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive. . . . Thus, 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." *Dep't of Navy v. Egan, 484 U.S. 518, 529-30, 108 S. Ct. 818, 98 L.*

Ed. 2d 918 (1988) (emphasis added) (quoting *Haig v. Agee, 453 U.S. 280, 293-94, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981))*. This "hesita[tion]" and "reluctan[ce]" is counseled by:

> the constitutional separation of powers among the branches of government, see *United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 320-22, 57 S. Ct. 216, 81 L. Ed. 255 (1936)* (noting the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" and discussing the difficulties presented by congressional--let alone judicial-- involvement in such affairs), and the limited institutional competence of the judiciary, see *Boumediene v. Bush, 128 S. Ct. 2229, 2276-77, 171 L. Ed. 2d 41 (2008)* ("Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."); see also *Munaf v. Geren, 128 S. Ct. 2207, 2226, 171 L. Ed. 2d 1 (2008)* ("The Judiciary is not suited to [make] determinations [in the area of foreign affairs] that

> would . . . 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 any ally, and what to do about it if there is." (citation omitted)).

True, courts can--with difficulty and resourcefulness-- consider state secrets and even reexamine judgments made in the foreign affairs context *when they must*, [*576] that is, when there is an unflagging duty to exercise our jurisdiction. Otherwise:

> [T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored--their ability to produce what the Supreme Court has called in another context "embarrassment of our government abroad" through "multifarious pronouncements by various departments on one question." Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens'

> using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209, 248 U.S. App. D.C. 146 (D.C. Cir. 1985) (Scalia, J.) (quoting *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962))*. Absent clear congressional authorization, the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country's foreign policy. It does not matter for our purposes whether such consequences would flow from innocent interference or from deliberate manipulation. These concerns must counsel hesitation in creating a new damages remedy that Congress has not seen fit to authorize.

B. Classified Information

The extraordinary rendition context involves exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues. The sensitivities of such classified material are "too obvious to call for enlarged discussion." *Dep't of Navy, 484 U.S. at 529* (internal quotation marks omitted). Even the probing of these matters entails the risk that other countries will become less willing to cooperate with the United States in sharing intelligence resources to counter terrorism. "At its core," as the panel opinion observed, "this

suit arises from the Executive Branch's alleged determination that (a) Arar was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests." *Arar, 532 F.3d at 181*. To determine the basis for Arar's alleged designation as an Al Qaeda member and his subsequent removal to Syria, the district court would have to consider what was done by the national security apparatus of at least three foreign countries, as well as that of the United States. Indeed, the Canadian government--which appears to have provided the intelligence that United States officials were acting upon when they detained Arar--paid Arar compensation for its role in the events surrounding this lawsuit, but has *also* asserted the need for Canada itself to maintain the confidentiality of certain classified materials related to Arar's claims.[9]

C. Open Courts

Allegations of conspiracy among government agencies that must often work in secret inevitably implicate a lot of classified material that cannot be introduced into the public record. Allowing Arar's claims to proceed would very likely mean that some documents or information [*577] sought by Arar

[9] See Ottawa Trying to Hold Back Documents from Arar Inquiry, CBC News, Apr. 29, 2004, http://www.cbc.ca/canada/story/2004/04/29/arar040429.html.

would be redacted, reviewed in camera, and otherwise concealed from the public. Concealment does not bespeak wrongdoing: in such matters, it is just as important to conceal what has not been done. Nevertheless, these measures would excite suspicion and speculation as to the true nature and depth of the supposed conspiracy, and as to the scope and depth of judicial oversight. Indeed, after an inquiry at oral argument as to whether classified materials relating to Arar's claims could be made available for review in camera, Arar objected to the supplementation of the record with material he could not see. See Letter from David Cole, Counsel for Maher Arar (Dec. 23, 2008). After pointing out that such materials are unnecessary to the adjudication of a motion on the pleadings (where the allegations of the complaint must be accepted as true), Arar protested that any materials submitted ex parte and in camera would not be subject to adversarial testing and that consideration of such documents would be "presumptively unconstitutional" since they would result in a decision "on the basis of secret information available to only one side of the dispute."

The court's reliance on information that cannot be introduced into the public record is likely to be a common feature of any Bivens actions arising in the context of alleged extraordinary rendition. This should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings, a value incorporated into modern *First* and *Sixth Amendment* law. See *U.S. Const.*

amend. VI (guaranteeing the right to a "*public* trial" (emphasis added)); *Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984)* (noting that the *First Amendment* secures "a right of access to civil proceedings"). The risk of limiting access, of course, is that where a proceeding "has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).* "[T]he appearance of justice can best be provided by allowing people to observe" proceedings. *Id. at 572.* "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Id. This is especially true in the courts, where the guarantee of a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver, 333 U.S. 257, 270, 68 S. Ct. 499, 92 L. Ed. 682 (1948).*

Granted, there are circumstances in which a court may close proceedings to which a public right of access presumptively attaches. See *Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*; *United States v. Alcantara, 396 F.3d 189, 199-200 (2d Cir. 2005)*; *United States v. Doe, 63 F.3d 121, 127-28 (2d Cir. 1995).* And the problems posed

by the need to consider classified material are unavoidable in some criminal prosecutions and in other cases where we have a duty, imposed by Congress, to exercise jurisdiction. But this is not such a circumstance or such a case. The preference for open rather than clandestine court proceedings is a special factor that counsels hesitation in extending Bivens to the extraordinary rendition context.

XI

A government report states that this case involves assurances received from [*578] other governments in connection with the determination that Arar's removal to Syria would be consistent with Article 3 of the CAT. Office of Inspector General, Dep't of Homeland Sec., (Unclassified) The Removal of a Canadian Citizen to Syria 5, 22, 26-27 (2008).[10] This case is not unique in that respect. Cases in the context of extraordinary rendition are very likely to present serious questions relating to private diplomatic assurances from foreign countries received by federal officials, and this feature of such claims opens the door to graymail.

A. Assurances

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[10] We take judicial notice of the existence of this unclassified report and the scope of its contents, including the limited discussion of assurances. Notice is taken only that the report alleges that assurances were received, not as to the truth of that allegation or the reliability of those assurances.

The regulations promulgated pursuant to the FARRA explicitly authorize the removal of an alien to a foreign country following receipt from that country of sufficiently reliable assurances that the alien will not be tortured. See *8 C.F.R. § 208.18(c)*. Should we decide to extend Bivens into the extraordinary rendition context, resolution of these actions will require us to determine whether any such assurances were received from the country of rendition and whether the relevant defendants relied upon them in good faith in removing the alien at issue.

Any analysis of these questions would necessarily involve us in an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships. An investigation into the existence and content of such assurances would potentially embarrass our government through inadvertent or deliberate disclosure of information harmful to our own and other states.[11] Given the general allocation of authority over foreign relations to the political branches and the decidedly limited experience and knowledge of the federal judiciary regarding such matters, such an investigation

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[11] This risk is not necessarily abated by the undertakings of counsel. See, e.g., *United States v. Sattar, 395 F. Supp. 2d 79 (S.D.N.Y. 2005)* (denying attorney Lynne Stewart's motion for a judgment of acquittal following her conviction by a jury of, inter alia, conspiring to defraud the United States, conspiring to provide material support to carry out murder and kidnap in a foreign country, and making false statements).

would also implicate grave concerns about the separation of powers and our institutional competence. See, e.g., *Kiyemba v. Obama, 561 F.3d 509, 515, 385 U.S. App. D.C. 198 (D.C. Cir. 2009)* ("[S]eparation of powers principles . . . preclude the courts from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign."). These considerations strongly counsel hesitation in acknowledging a Bivens remedy in this context.

B. Graymail

As emphasized above, Arar invokes Bivens to challenge policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees. Such an extension of *Bivens* is without precedent and implicates questions of separation of powers as well as sovereign immunity. This, by itself, counsels hesitation; there is further reason to hesitate where, as in this case, the challenged government policies are the subject of classified communications: a possibility that such suits will make the government "vulnerable to 'graymail,' i.e., individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) [*579] out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations," or otherwise compromise foreign policy efforts. *Tenet v. Doe, 544 U.S. 1, 11, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005).* We cast no aspersions on Arar, or his lawyers; this

dynamic inheres in any case where there is a risk that a defendant might "disclose classified information in the course of a trial." *United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996)*. This is an endemic risk in cases (however few) which involve a claim like Arar's.

The risk of graymail is itself a special factor which counsels hesitation in creating a Bivens remedy. There would be hesitation enough in an ordinary graymail case, i.e., where the tactic is employed against the *government*, which can trade settlement cash (or the dismissal of criminal charges) for secrecy. See *Tenet, 544 U.S. at 11*; *Pappas, 94 F.3d at 799*. But the graymail risk in a Bivens rendition case is uniquely troublesome. The interest in protecting military, diplomatic, and intelligence secrets is located (as always) in the *government*; yet a Bivens claim, by definition, is never pleaded against the government. See, e.g., *Malesko, 534 U.S. at 70*. So in a Bivens case, there is a dissociation between the holder of the non-disclosure interest (the government, which cannot be sued directly under Bivens) and the person with the incentive to disclose (the defendant, who cannot waive, but will be liable for any damages assessed). In a rendition case, the Bivens plaintiff could in effect pressure the individual defendants until the *government* cries uncle. Thus any Bivens action involving extraordinary rendition would inevitably suck the government into the case to protect its considerable interests, and--if dis-

closure is ordered--to appeal, or to suffer the disclosure, or to pay.

This pressure on the government to pay a settlement has (at least) two further perverse effects. First, a payment from the Treasury tends to obviate any payment or contribution by the individual defendants. Yet, "[Bivens] is concerned solely with deterring the unconstitutional acts of individual officers" by extracting payment from individual wrongdoers. *Malesko, 534 U.S. at 71*. When the government elects to settle a Bivens case which is susceptible to graymail, the individual wrongdoer pays nothing and the deterrent effect is lost. Second, the individual defendant in such a case has no incentive to resist discovery that imperils government interests; rather, discovery induces the government to settle. So in the extraordinary rendition context, there is a risk (or likelihood) that the government effectively becomes the real defendant in interest, and the named defendants become proxies that the government cannot control. Precisely because Bivens has never been approved as a Monell-like vehicle for challenging government policies, this factor also counsels hesitation in extending a private damages action in this context.[12]

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[12] Judge Calabresi does not discount the risk of graymail; he just minimizes the harm, equating it with settlement pressures that routinely inhere in *section 1983* litigation. However, "graymail" is a term of art, signifying the use of military or intelligence information as hostage for payment of money or a plea bargain. The prospect of graymail does not induce Judge Calabresi to pause because he sees graymail as part of the "ju-

In the end, a Bivens action based on rendition is--in all but name--a claim [*580] against the government.[13] It is not for nothing that Canada (the government, not an individual officer of it) paid Arar $ 10 million dollars.

XII

In the small number of contexts in which courts have implied a Bivens remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. The guard who beat a prisoner should not have beaten him; the agent who searched without a warrant should have gotten one; and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes. This distinction may or may not amount to a special factor counseling hesitation in the implication

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dicial structures that *facilitate* the giving of compensation, at least to innocent victims . . . ." See Dissent of Judge Calabresi at **15**.

[13] It is telling that, according to the Deputy Assistant Attorney General, Mr. Arar and his attorney went to the United States Congress and requested--without success--that it "clarify the ambiguity [in this area] with legislation and . . . give [Mr. Arar] reparations." Transcript of Arar In banc Oral Argument at 49. Cf. 153 Cong. Rec. D1384-02 (Oct. 18, 2007); Matthew Jaffe, Congress Hears Testimony in Arar Torture Case, ABC News, Oct. 18, 2007, http://abcnews.go.com/Politics/story?id=3746371&page=1.

of a Bivens remedy. But it is surely remarkable that the context of extraordinary rendition is so different, involving as it does a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached.

Consider: should the officers here have let Arar go on his way and board his flight to Montreal? Canada was evidently unwilling to receive him; it was, after all, Canadian authorities who identified Arar as a terrorist (or did something that led their government to apologize publicly to Arar and pay him $ 10 million).

Should a person identified as a terrorist by his own country be allowed to board his plane and go on to his destination? Surely, that would raise questions as to what duty is owed to the other passengers and the crew.

Or should a suspected terrorist en route to Canada have been released on the Canadian border--over which he could re-enter the United States virtually at will? Or should he have been sent back whence his plane came, or to some third country? Should those governments be told that Canada thinks he is a terrorist? If so, what country would take him?

Or should the suspected terrorist have been sent to Guantanamo Bay or--if no other country

would take him--kept in the United States with the prospect of release into the general population? See *Zadvydas v. Davis, 533 U.S. 678, 699-700, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).*

None of this is to say that extraordinary rendition is or should be a favored policy choice. At the same time, the officials required to decide these vexed issues are "subject to the pull of competing obligations." *Lombardi v. Whitman, 485 F.3d 73, 83 (2d Cir. 2007).* Many viable actions they might consider "clash with other equally important governmental responsibilities." *Pena v. DePrisco, 432 F.3d 98, 114 (2d Cir. 2005)* (internal quotation marks omitted). Given the ample reasons for pause already discussed, we need not and do not rely on this consideration in concluding that it is inappropriate to extend Bivens to this context. Still, Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions--which are directly related to the security of the population and the foreign affairs of the country--should [*581] be subjected to the influence of litigation brought by aliens.

XIII

All of these special factors notwithstanding, we cannot ignore that, as the panel dissent put it, "there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security." *Arar, 532*

F.3d at 213 (Sack, J., concurring in part and dissenting in part). Where does that leave us? We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition. By the same token, we can easily locate that competence, expertise, and responsibility elsewhere: in Congress. Congress may be content for the Executive Branch to exercise these powers without judicial check. But 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. Once Congress has performed this task, *then* the courts in a proper case will be able to review the statute and provide judicial oversight to the "Executive and Legislative decisions [which have been made with regard] to the conduct of foreign relations and national security."[14]

Judge SACK's dissent deems "artificial" our characterization of the new Bivens context in this case as "entirely one of 'international rendition, specifically extraordinary rendition.'" See Dissent of Judge Sack at **34**. We would have thought it would be common ground that the context of this appeal is extraordinary rendition. Judge Sack, however, recon-

[14] Dissents by their nature express views that are not the law. These dissenting opinions contain words and passages that are emotional and (in our respectful view) overwrought. Accordingly, there is no need for extended engagement. A brief survey will suffice.

ceives the context, at some points characterizing the constitutional tort as encompassing only those events that occurred within the United States while at other points requiring that the entire narrative be considered as a seamless whole, JFK to Syria. Compare id. at **34** with id. at **36-37**. But this case is emphatically and obviously about extraordinary rendition (and its alleged abuse), as is elsewhere acknowledged in the opinions of Judge Calabresi and Judge Parker. See Dissent of Judge Calabresi at **15**; Dissent of Judge Parker at **2**.

As to the extraordinary rendition context, Judge Sack (joined by all dissenters) makes the following constructive (and telling) concessions: "It is difficult to deny the existence of 'special factors counseling hesitation' in this case[,]" Dissent of Judge Sack at **47**; "It . . . may be that to the extent actions against 'policymakers' can be equated with lawsuits against policies, they may not survive Iqbal[,]" id. at **49**; and, "We share what we think to be the majority's intuition that this case would likely turn largely, if not entirely, on decisions of national security and diplomacy . . . [,]" id. at **56**.

Judge CALABRESI's dissent urges that we forgo considering whether specific factors counsel hesitation under Bivens so that we could instead remand to see whether the case might eventually be dismissed as unmanageable under the state secrets privilege--which Judge Calabresi seems equally to disapprove. See Dissent of Judge Calabresi at **13**

(state secrets privilege is the subject of "significant criticism, much of it warranted"). Thus Judge Calabresi professes hesitance to "hesitate" with respect to Bivens, as well as skepticism of the state secrets privilege. In doing so, he avoids fully endorsing either of the primary potential resolutions of this appeal, and hardly makes a choice at all. Even so, the authority cited by Judge Calabresi, which suggests deciding whether a claim is stated before doing Bivens analysis, is inapposite. Judge Calabresi fails to consider that application of the state secrets privilege is often performed witness-by-witness; question-by-question; page-by-page; paragraph-by-paragraph--and can take years. It is not judicial activism to hesitate before requiring such an exercise in circumstances in which a Bivens claim may not lie. In any event, the state secrets doctrine has roots in separation of powers principles, and is not itself devoid of constitutional implications. See *Dep't of Navy v. Egan, 484 U.S. 518, 527, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988)* ("The authority to protect [information related to national security] falls on the President as head of the Executive Branch and as Commander in Chief."); *El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007)* ("Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.").

Id.

[*582] CONCLUSION

For the reasons stated above, the judgment of the District Court is affirmed. The panel opinion is hereby vacated. CALABRESI, POOLER, SACK, and PARKER, Circuit Judges, dissent. Each joins fully in all the dissenting opinions, but each writes separately to emphasize particular aspects of these dissents.

Sack, Circuit Judge, joined by Judges Calabresi, Pooler, and Parker, concurring in part and dissenting in part.

The opinion of the en banc majority[1] departs from the opinion of the panel majority in two important and salutary respects.

First, the Court now explicitly acknowledges that "this is not a typical immigration case." Supra at **[24]**. We would prefer that the Court concede that this is not an immigration case at all -- it is about the alleged unconstitutional treatment of an alien suspected of terrorism -- but we welcome the resulting decision not to dismiss Arar's claims as jurisdictionally barred by the Immigration and Nationality Act ("INA"), see supra at **[23]**, and not to rely, in the Court's Bivens analysis, upon the INA's remedial scheme and the well nigh unlimited executive power that the INA bestows, see supra at **[31]**. Compare

[1] Judges Straub and Sotomayor voted in the en banc poll but do not participate in deciding the case en banc because Judge Straub took senior status prior to the en banc hearing and Judge Sotomayor has been elevated to the Supreme Court. Judge Katzmann recused himself from both the poll and the en banc hearing. Senior Judge McLaughlin, as a member of the original panel, has participated in the en banc consideration. Judge Calabresi participated in the en banc hearing, but has taken senior status since the argument. The author of this opinion has also taken senior status since the hearing, but was a member of the panel that heard the appeal and therefore, like Judge McLaughlin, would have been able to have participated in the en banc hearing in any event. Judge Lynch, who joined the Court since the argument, has not participated in these proceedings.

Arar v. Ashcroft, 532 F.3d 157, 169-71 & n.10, 179-81 (2d Cir. 2008) ("Arar Panel Op.").

In its second departure from the panel decision, the Court declines to hold that if, as Arar alleges, government conduct "denied [him] effective access to consular assistance, the courts, his lawyers, and family members in order to effectuate his removal to Syria," Arar's constitutional rights would not have thereby been violated. Supra at **[20]** (internal quotation marks omitted); compare *Arar Panel Op., 532 F.3d at 184-89*. We agree with this approach too. Indeed, we think both of these departures are significant enough in themselves to have rendered the unwieldy and often wasteful en banc process worthwhile here.

We disagree, however, with the majority's continued insistence that Arar cannot employ a Bivens remedy to seek compensation for his injuries at the hands of government agents. The majority reaches that conclusion by artificially dividing the complaint into a domestic claim that does [*583] not involve torture -- viz., "[Arar's] claim regarding detention in the United States," supra at **[6]** -- and a foreign claim that does -- viz., "[Arar's] claims for detention and torture in Syria," id. The majority then dismisses the domestic claim as inadequately pleaded and the foreign claim as one that cannot "be asserted under Bivens" in light of the opinion's "dominant holding" that "in the context of involuntary rendi-

tion, hesitation is warranted by special factors." Supra at **[6-7]**.

In our view, even treating Arar's claim for mistreatment while in United States custody and denial of access to United States counsel and United States courts as, arguendo, a claim that is entirely isolated from the remainder of Arar's allegations, it was adequately pleaded in his highly detailed complaint.

As we will explain, however, the complaint's allegations cannot properly be divided into claims for mistreatment in the United States and "claims for detention and torture in Syria." Arar's complaint of mistreatment sweeps more broadly than that, encompassing a chain of events that began with his interception and detention at New York's John F. Kennedy Airport ("JFK") and continued with his being sent abroad in shackles by government agents with the knowledge that he would likely be tortured as a result. Viewed in this light, we conclude that Arar's allegations do not present a "new context" for a Bivens action.

And even were it a new context, we disagree with what appears to be the en banc majority's test for whether a new Bivens action should be made available: the existence vel non of "special factors counselling hesitation." First, we think heeding "special factors" relating to secrecy and security is a form of double counting inasmuch as those interests are

fully protected by the state-secrets privilege. Second, in our view the applicable test is not whether "special factors" exist, but whether after "paying particular heed to" them, a Bivens remedy should be recognized with respect to at least some allegations in the complaint. Applying that test, we think a Bivens remedy is available.

We hasten to add that under the proper formulation of the test, we might well agree with the en banc majority that a Bivens action is not available in the context of an alien's "claims for detention and torture in Syria." But, as we will explain, Arar's allegations are not so limited.

Our overriding concern, however, is with the majority's apparent determination to go to whatever length necessary to reach what it calls its "dominant holding": that a Bivens remedy is unavailable. Such a holding is unnecessary inasmuch as the government assures us that this case could likely be resolved quickly and expeditiously in the district court by application of the state-secrets privilege.

What is at stake on this appeal is not whether Arar will, through this litigation, obtain compensation for the injury he suffered as a result of the malfeasance of employees of the United States. In light of the many hurdles he would have to surmount,[2] he

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[2] See, e.g., *Arar Panel Op., 532 F.3d at 193* et seq. (Sack, J., concurring in part and dissenting in part) ("Arar partial panel dissent").

would be extremely unlikely to do so. Rather, the question for the Court is, and has from the outset been, the manner by which that likely result will (or will not) be reached. We fear that the majority is so bound and determined to declare categorically that there is no Bivens action in the present "context," that it unnecessarily makes dubious law.

[*584] For those reasons, we respectfully dissent.[3]

I. Arar's Allegations

The majority's recitation of the facts, see supra **[8-13]**, is generally accurate, but anodyne. A complete assessment of the majority opinion and the implications of the Court's decision is not possible without a fuller account of the troubling allegations contained in Arar's complaint.

"Because this is an appeal from a dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)*, we view the allegations of the complaint in the light most fa-

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[3] We do not dissent from the majority's conclusions as to personal jurisdiction. The author of this opinion, as a member of the panel that originally heard this appeal, concurred in the panel opinion's conclusion that relief under the Torture Victim Protection Act is unavailable to Arar. Having reviewed the arguments to the contrary stated in Judge Pooler's partial dissent, infra, for the reasons stated in it, he now agrees that the relief under the Act is available to Arar. Inasmuch as the en banc Court now holds that it is not available, however, this opinion accepts its unavailability as a matter of law for the purposes of the Bivens analysis that follows.

vorable to appellant." *Paycom Billing Servs. v. MasterCard Int'l, Inc., 467 F.3d 283, 285 (2d Cir. 2006)*. The district court's opinion carefully and fully sets forth Arar's allegations. See *Arar v. Ashcroft, 414 F. Supp. 2d 250, 252-57 (E.D.N.Y. 2006)*. We adhere to that account nearly verbatim. [4]

A. Arar's Apprehension, Detention, and Forcible Transportation to Syria

Arar, who is in his thirties, is a native of Syria. He immigrated to Canada with his family when he was a teenager. He is a dual citizen of Syria and Canada. He resides in Ottawa. (*Arar, 414 F. Supp. 2d at 252*.)

In September 2002, while vacationing with his family in Tunisia, he was called back to work by his employer[5] to consult with a prospective client. He purchased a return ticket to Montreal with stops[6] in Zurich and New York. He left Tunisia on September 25, 2002. (Id.)

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[4] Citations to the district court opinion appear in parentheses. The footnotes and subheadings are ours.

[5] Arar was employed by a privately held Massachusetts-based developer and supplier of software for technical computing. See Compl. P 12.

[6] That is, changes of plane.

On September 26, 2002, Arar arrived from Switzerland at JFK to catch a connecting flight to Montreal. Upon presenting his passport to an immigration inspector, he was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." Compl. Ex. D (Decision of J. Scott Blackman, Regional Director) at 2. He was interrogated by various officials for approximately eight hours.[7] The officials asked Arar if he had contacts with terrorist groups, which he categorically denied. Arar was then transported to another site at JFK, where he was placed in solitary confinement. He alleges that he was transported in chains and shackles and was left in a room with no bed and with lights on throughout the night. (*Arar, 414 F. Supp. 2d at 253*.)

The following day, starting at approximately 9:00 a.m., two FBI agents interrogated Arar for about five hours, asking him questions about Osama bin Laden, Iraq, and Palestine. Arar alleges that the agents yelled and swore at him throughout the interrogation. They ignored his repeated [*585] requests to make a telephone call and see a lawyer. At 2:00 p.m. that day, Arar was taken back to his cell, chained and shackled, and provided a cold McDonald's meal -- his first food in nearly two days. (Id.)

That evening, Arar was given an opportunity to voluntarily return to Syria, but refused, citing a

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[7] According to the complaint, on that day, Arar was questioned first by an FBI agent for five hours, Compl. P 29, then by an immigration officer for three hours, id. P 31.

fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a "special interest" in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center ("MDC") in Brooklyn, New York,[8] where he was strip-searched and placed in solitary confinement. During his initial three days at MDC, Arar's continued requests to meet with a lawyer and make telephone calls were refused. (Id.)

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[8] This is the same federal prison in which, less than a year earlier, Javaid Iqbal was allegedly mistreated. Iqbal, a Muslim inmate accused of conspiracy to defraud the United States and fraud with identification and held post-9/11 in the MDC, allegedly suffered "unconstitutional actions against him in after separation from the general prison population." *Iqbal v. Hasty, 490 F.3d 143, 147, 148 n.1 (2d Cir. 2007).* We held, with respect to Iqbal's subsequent Bivens action, that such treatment was not protected, as a matter of law, by the doctrine of qualified immunity. *Id. at 177-78.* The Supreme Court subsequently reversed that judgment and remanded, holding that the complaint was insufficiently pleaded as to two high-ranking official defendants. See *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952, 173 L. Ed. 2d 868 (2009).* On September 29, 2009, the remaining parties in Iqbal filed a document in this Court stipulating that the appeal was to be "withdrawn from active consideration before the Court . . . because a settlement has been reached in principle between Javaid Iqbal and defendant United States." Iqbal v. Hasty, No. 05-5768-cv (2d Cir. Sept. 30, 2009), "Stipulation Withdrawing Appeal from Active Consideration" dated September 29, 2009.

On October 1, 2002,[9] the Immigration and Naturalization Service ("INS") initiated removal proceedings against Arar, who was charged with being temporarily inadmissible because of his membership in al-Qaeda, a group designated by the Secretary of State as a foreign terrorist organization. Upon being given permission to make one telephone call, Arar called his mother-in-law in Ottawa, Canada. (Id.)

Upon learning of Arar's whereabouts, his family contacted the Office for Consular Affairs ("Canadian connection with his confinement under harsh conditions . . . Consulate")[10] and retained an attorney, Amal Oummih, to represent him. The Canadian Consulate had not been notified of Arar's detention. On October 3, 2002, Arar received a visit from Maureen Girvan from the Canadian Consulate, who, when presented with the document noting Arar's inadmissibility to the United States, assured Arar that removal to Syria was not an option. On October 4, 2002, Arar designated Canada as the country to which he wished to be removed. (Id.)

On October 5, 2002, Arar had his only meeting with counsel. The following day, he was taken in chains and shackles to a room where approximately seven INS officials questioned him about his reasons for opposing removal to Syria. His attorney was not provided advance notice of the interrogation, and

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[9] I.e., five days after Arar's arrival in the United States.

[10] The consulate is in New York City.

Arar further alleges that U.S. officials misled him into thinking his attorney had chosen not to attend. During the interrogation, Arar continued to express his fear of being tortured if [*586] returned to Syria. At the conclusion of the six-hour interrogation, Arar was informed that the officials were discussing his case with "Washington, D.C." Arar was asked to sign a document that appeared to be a transcript. He refused to sign the form. (*Id. at 253-54.*)

The following day, October 7, 2002, attorney Oummih received two telephone calls informing her that Arar had been taken for processing to an INS office at Varick Street in Manhattan, that he would eventually be placed in a detention facility in New Jersey, and that she should call back the following morning for Arar's exact whereabouts. However, Arar alleges that he never left the MDC and that the contents of both of these phone calls to his counsel were false and misleading. (*Id. at 254.*)

That same day, October 7, 2002, the INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is "clearly and unequivocally" a member of al-Qaeda and, therefore, "clearly and unequivocally inadmissible to the United States" under *8 U.S.C. § 1182(a)(3)(B)(i)(V).* See Compl. Ex. D. at 1, 3, 5. Based on that finding, Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." Id. at

6 (brackets in original). (*Arar, 414 F. Supp. 2d at 254.*)

At approximately 4:00 a.m. on October 8, 2002, Arar learned that, based on classified information, INS regional director Blackman had ordered that Arar be sent to Syria and that his removal there was consistent with Article Three of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). Arar pleaded for reconsideration but was told by INS officials that the agency was not governed by the "Geneva Conventions" and that Arar was barred from reentering the country for a period of five years and would be admissible only with the permission of the Attorney General. (Id.)

Later that day, Arar was taken in chains and shackles to a New Jersey airfield, where he boarded a small jet airplane bound for Washington, D.C. From there, he was flown to Amman, Jordan, arriving there on October 9, 2002. He was then handed over to Jordanian authorities, who delivered him to the Syrians later that day. At this time, U.S. officials had not informed either Canadian Consulate official Girvan or attorney Oummih that Arar had been removed to Syria. Arar alleges that Syrian officials refused to accept Arar directly from the United States. (Id.)

Arar's Final Notice of Inadmissability ("Final Notice") ordered him removed without further in-

quiry before an immigration judge. See Compl. Ex. D. According to the Final Notice: "The Commissioner of the Immigration and Naturalization Service has determined that your removal to Syria would be consistent with [CAT]." Id. (brackets in original). The Final Notice was dated October 8, 2002, and was signed by Deputy Attorney General Larry Thompson. After oral argument in the district court on the defendants' motions to dismiss, in a letter dated August 18, 2005, counsel for Arar said that Arar had received the Final Notice within hours of boarding the aircraft taking him to Jordan. (*Arar, 414 F. Supp. 2d at 254.*)

B. Arar's Detention in Syria

During his ten-month period of detention in Syria, Arar alleges, he was placed in a "grave" cell measuring six feet long, seven feet high, and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch"). The cell was damp and cold, contained very little light, and [*587] was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria. (Id.)

During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips, and lower back with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, his face, and the back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings, and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity. (*Id. at 255.*)

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As support for this allegation, Arar notes that the interrogations in the United States and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, Arar alleges, the Syrian officials supplied U.S. officials with all information extracted from Arar; Arar cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the United States that it extracted from

him. See Compl. Ex. E (January 21, 2004 transcript of CBS's Sixty Minutes II: "His Year In Hell"). (Id.)

C. Arar's Contact with the Canadian Government While Detained in Syria

The Canadian Embassy contacted the Syrian government about Arar on October 20, 2002, and the following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar. (Id.)

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave. (Id.)

Five days later, Arar was brought to a Syrian investigation branch, where he was forced to sign a confession stating that he had participated in terrorist training in Afghanistan even though, Arar states, he has never been to Afghanistan or participated in any terrorist activity. Arar was then taken to an overcrowded Syrian prison, where he remained for six weeks. (Id.)

On September 28, 2003, Arar was transferred back to the Palestine Branch, where he was held for one week. During this week, he heard other detain-

ees screaming in pain and begging for their torture to end. (Id.)

On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus. He was flown to Ottawa [*588] the following day and reunited with his family. (Id.)

Arar contends that he is not a member of any terrorist organization, including al-Qaeda, and has never knowingly associated himself with terrorists, terrorist organizations, or terrorist activity. Arar claims that the individual about whom he was questioned was a casual acquaintance whom Arar had last seen in October 2001. He believes that he was removed to Syria for interrogation under torture because of his casual acquaintance with this individual and others believed to be involved in terrorist activity. But Arar contends "on information and belief" that there has never been, nor is there now, any reasonable suspicion that he was involved in such activity. Compl. P 2. (*Arar, 414 F. Supp. 2d at 255-56* (footnote omitted).)

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist, and is having trouble finding employment due to his reputation and inability to travel in the United States. (*Id. at 256.*)

D. U.S. Policy Relating to Interrogation of Detainees by Foreign Governments

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of "extraordinary rendition," according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The extraordinary rendition policy involves the removal of "non-U.S. citizens detained in this country and elsewhere and suspected -- reasonably or unreasonably -- of terrorist activity to countries, including Syria, where interrogations under torture are routine." Compl. P 24. Arar alleges on information and belief that the United States sends individuals "to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies." Id. The complaint further alleges that federal officials involved with extraordinary rendition "have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed." Id. The complaint also alleges that the United States involves Syria in its extraordinary rendition program to extract counter-terrorism information. (*Arar, 414 F. Supp. 2d at 256.*)

This extraordinary rendition program is, Arar alleges, not part of any official or declared U.S. public policy; nevertheless, it has received extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Arar details a number of articles in the mainstream press recounting both the incidents of this particular case and the extraordinary rendition program more broadly. These articles are attached as Exhibit C of his complaint. (*Id. at 256-57.*)

Arar alleges that the defendants directed the interrogations in Syria by providing information about Arar to Syrian officials and receiving reports on Arar's responses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating, and torturing Arar. Arar argues in the alternative that, at a minimum, the defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria. (*Id. at 257.*)

E. Syria's Human Rights Record

Arar's claim that he faced a likelihood of torture in Syria is supported by U.S. State [*589] Department reports on Syria's human rights practices. See, e.g., Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2004 Country Reports on Human Rights Practices (Re-

leased February 28, 2005) ("2004 Report"). According to the State Department, Syria's "human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . includ[ing] the use of torture in detention, which at times resulted in death." Id. at 1. Although the Syrian constitution officially prohibits such practices, "there was credible evidence that security forces continued to use torture frequently." Id. at 2. The 2004 Report cites "numerous cases of security forces using torture on prisoners in custody." Id. Similar references throughout the 2004 Report, as well as State Department reports from prior years, are legion. See, e.g., Compl. Ex. A (2002 State Department Human Rights Report on Syria). (*Arar, 414 F. Supp. 2d at 257.*)[11]

F. The Canadian Government Inquiry

On September 18, 2006, a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Commission"), established by the government of Canada to investigate the Arar affair, issued a three-volume report. See Arar Commission, Report of the Events Relating to Maher Arar (2006) ("Commission Report").[12] A press release

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[11] The district court's description of the facts as alleged in the complaint ends here.

[12] On October 23, 2007, this Court granted Arar's motion to take judicial notice of the Report insofar as its existence and the scope of its contents were concerned, but denied the motion insofar as it may have sought judicial notice of the facts

issued by the Commission summarized: "**On Maher Arar** the Commissioner [Dennis O'Connor] comes to one important conclusion: 'I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.'" Arar Commission, Press Release, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case (Sept. 18, 2006) (boldface in original), available at http://www.ararcommission.ca/eng/ReleaseFinal-Sept 18.pdf (copy on file with the Clerk of Court). On January 26, 2007, the Office of the Prime Minister of Canada issued the following announcement:

> Prime Minister Stephen Harper today released the letter of apology he has sent to Maher Arar and his family for any role Canadian officials may have played in what happened to Mr. Arar, Monia Mazigh and their family in 2002 and 2003.
>
> "Although the events leading up to this terrible ordeal happened under the previous government, our Government will do everything in its power to ensure that the issues raised by Commissioner O'Connor

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asserted in the report. But cf. supra at **[4-5]** (employing the report as the source for facts relating to Canadian involvement in the Arar incident).

are addressed," said the Prime Minister. "I sincerely hope that these actions will help Mr. Arar and his family begin a new and hopeful chapter in their lives."

Canada's New Government has accepted all 23 recommendations made in Commissioner O'Connor's first report, and has already begun acting upon them. The Government has sent letters to both the Syrian and the U.S. governments formally objecting to the treatment of Mr. Arar. Ministers Day and MacKay have also expressed Canada's concerns on this important issue to their American [*590] counterparts. Finally, Canada has removed Mr. Arar from Canadian lookout lists, and requested that the United States amend its own records accordingly.

The Prime Minister also announced that Canada's New Government has successfully completed the mediation process with Mr. Arar, fulfilling another one of Commissioner O'Connor's recommendations. This settlement, mutually agreed upon by all parties, ensures that Mr. Arar and his family will obtain fair compensation, in the amount of $ 10.5 million, plus legal costs, for the ordeal they have suffered.

Office of the Prime Minister, Press Release, Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), available at http://pm.gc.ca/eng/ media.asp?id=1509 (last visited July 15, 2009); see also Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, *75 Geo. Wash. L. Rev. 1333, 1339-40 (2007).*

II. The Dismissal of the Fourth Claim for Relief

The fulcrum of the en banc majority's analysis is its conclusion that this appeal requires us to decide whether "to devise a new Bivens damages action" under *Wilkie v. Robbins, 551 U.S. 537, 127 S. Ct. 2588, 2597, 168 L. Ed. 2d 389 (2007).* See supra at **[6]**. But the majority can characterize Arar's action as "new" only by isolating and eliminating the domestic aspects of the case. It does so in part by affirming the district court's dismissal of Arar's "Fourth Claim for Relief, (*Fifth Amendment*: Substantive Due Process -- Domestic Detention)" on the ground that the claim was insufficiently pleaded. See supra at **[19-21]**. We think that ruling to be incorrect.

With respect to the conditions of confinement aspect of this claim, the district court concluded that Arar was entitled to *Fifth Amendment* substantive due process protection and that his rights in that respect could have been violated by "the deprivations

Arar alleges with respect to his treatment while in U.S. custody." *Arar, 414 F. Supp. 2d at 286*. We agree, and the majority does not decide otherwise. Supra at **[21]**. With respect to the access to counsel and the courts aspect of the claim, the district court concluded that Arar would be able to state a claim for interference "with his access to courts in part by [government officials] lying to his counsel," if he could "identify 'a separate and distinct right to seek judicial relief for some wrong.'" *Arar, 414 F. Supp. 2d at 285* (quoting *Christopher v. Harbury, 536 U.S. 403, 414-15, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002))*. We agree here, too, and the majority does not decide otherwise.

But the district court nonetheless dismissed the Fourth Claim for Relief without prejudice. On pain of forfeiture of the claims, it required Arar (1) with respect to the mistreatment claim, to "name those defendants that were personally involved in the alleged unconstitutional treatment," and, (2) with respect to the denial of access claim, to replead "without regard to any [underlying] rendition claim," in light of the court's conclusion that no Bivens action was available with respect to such a claim, and, because it was unclear to what underlying relief Arar was denied access, "identify[ing] the specific injury he was prevented from grieving." *Arar, 414 F. Supp.*

2d at 287-88. Arar declined to replead,[13] rendering the dismissal final.

The majority affirms the dismissal of the fourth claim partly "in view of Arar's rejection of an opportunity to re-plead." Supra at **[21]**. While we do not read that as a suggestion that this claim has been waived on appeal, we note that any such suggestion would be incorrect. We may review the entire judgment. See, e.g., *Kittay v. Kornstein, 230 F.3d 531, 541 n.8 (2d Cir. 2000)* ("[A] disclaimer of intent to amend the complaint renders the District Court's judgment final and allows review of the dismissal in this Court."); *Festa v. Local 3 Int'l Brotherhood of Elec. Workers, 905 F.2d 35, 36-37 (2d Cir. 1990)* (per curiam); *Conn. Nat'l Bank v. Fluor Corp., 808 F.2d 957, 960-61 (2d Cir. 1987)*.

[*591]

A. Specification of Defendants' Acts and Conspiracy Allegations

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[13] Following the district court's dismissal of the fourth claim without prejudice and dismissal of the first three claims with prejudice, Arar moved for certification of a final judgment on the first three claims to enable him to appeal them immediately. See *Arar v. Ashcroft, No. CV-04-0249 (DGT), 2006 U.S. Dist. LEXIS 45550, 2006 WL 1875375 (E.D.N.Y. July 5, 2006)*. The district court denied the motion. See id. Arar then declined to replead the fourth claim, apparently in order to obtain this Court's early review of the dismissal of the first three claims, cf. id.

The majority affirms the dismissal of the Fourth Claim for Relief on the ground that Arar's complaint does not "specify any culpable action taken by any single defendant" and fails to allege a conspiracy. Supra at **[21]**. We disagree with each of these rationales.

Arar should not have been required to "name those defendants [who] were personally involved in the alleged unconstitutional treatment." *Arar, 414 F. Supp. 2d at 287*. In actions pursuant to *42 U.S.C. § 1983*, which are "analog[s]" of the less-common Bivens action, *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)* (citation omitted), we allow plaintiffs to "maintain[] supervisory personnel as defendants . . . until [they have] been afforded an opportunity through at least brief discovery to identify the subordinate officials who have personal liability." *Davis v. Kelly, 160 F.3d 917, 921 (2d Cir. 1998)* (citing Second Circuit authority).

> Similarly, courts have rejected the dismissal of suits against unnamed defendants described by roles . . . until the plaintiff has had some opportunity for discovery to learn the identities of responsible officials. Once the supervisory officer has inquired within the institution and identified the actual decision-makers of the challenged action, those officials may then submit affidavits based on their personal knowledge of the circumstances.

Id. (citations omitted). It should not be forgotten that the full name of the Bivens case itself is *Bivens v. Six **Unknown Named Agents** of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* (emphasis added).[14]

To be sure, the Supreme Court has recently set a strict pleading standard for supervisory liability claims under Bivens against a former Attorney General of the United States and the Director of the FBI." See *Iqbal, supra.* We do not think, however, that the Court has thereby permitted governmental actors who are unnamed in a [*592] complaint automatically to escape personal civil rights liability. A plaintiff must, after all, have some way to identify a defendant who anonymously violates his civil rights. We doubt that Iqbal requires a plaintiff to obtain his abusers' business cards in order to state a civil rights claim. Put conversely, we do not think that Iqbal im-

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[14] The Supreme Court explained: "The agents were not named in petitioner's complaint, and the District Court ordered that the complaint be served upon "those federal agents who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the [petitioner]." App. 3. Five agents were ultimately served." *Id. at 390 n.2*; see also Bivens, Brief for Respondent at *2 n.1, 1970 WL 116900 ("The apparent contradiction in the title of this case -- "Unknown Named" -- arises from the fact that after petitioner filed his complaint, the United States Attorney supplied the clerk of the court with the agents' names. However, as the summonses and their returns indicate, only five agents are apparently involved (App. 5-24), rather than six as stated in the case title.")

plies that federal government miscreants may avoid Bivens liability altogether through the simple expedient of wearing hoods while inflicting injury. Some manner of proceeding must be made available for the reasons we recognized in Davis.

Whether or not there is a mechanism available to identify the "Doe" defendants, moreover, Arar's complaint does sufficiently name some individual defendants who personally took part in the alleged violation of his civil rights. The role of defendant J. Scott Blackman, formerly Director of the Regional Office of INS, for example, is, as reflected in the district court's explication of the facts, see *Arar, 414 F. Supp. 2d at 252-54*, set forth in reasonable detail in the complaint.[15] So are at least some of the acts of

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[15] The complaint alleges, inter alia:

> Early on October 8, 2002, at about 4 a.m., Mr. Arar was taken in chains and shackles to a room where two INS officials told him that, based on Mr. Arar's casual acquaintance with certain named individuals, including Mr. Almalki as well as classified information, Defendant Blackman, Regional Director for the Eastern Region of Immigration and Naturalization Services, had decided to remove Mr. Arar to Syria. Without elaboration, Defendant Blackman also stipulated that Mr. Arar's removal would be consistent with Article 3 of CAT. . . . (A copy of Defendant Blackman's decision is attached as Exhibit D [to the complaint]). Compl. P 47.

the defendant Edward J. McElroy, District Director of the INS.[16]

The majority also asserts that Arar does no more than "allege[] (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." Supra at **[21]**. But as indicated above, such an identification of the unnamed defendants by their "roles" should be sufficient to enable a plaintiff to survive a motion to dismiss, and subsequently to use discovery to identify them. And while the majority is correct that the complaint does not utter the talismanic words "meeting of the minds" to invoke an agreement among the defendants, see supra at **[21]**, it is plain that the logistically complex concerted action allegedly taken to detain Arar and then transport him abroad implies an alleged agreement by government actors within the United States to act in concert.

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[16] The complaint alleges, inter alia:

> The only notice given [Arar's counsel prior to his interrogation late on the evening of Sunday, October 6, 2002] was a message left by Defendant McElroy, District Director for Immigration and Naturalization Services for New York City, on [counsel's] voice mail at work that same [Sunday] evening. [She] did not retrieve the message until she arrived at work the next day, Monday morning, October 7, 2002 -- long after Mr. Arar's interrogation had ended. Compl. P 43.

C. Dismissal of Claims of Denial of Access to Courts and Counsel

With respect to the dismissal of Arar's claim for "interfere[nce] with his access to lawyers and the courts" while he was incarcerated by United States officials, Compl. P 93, we think the district court erred here, too. An access to courts claim requires the pleading of (1) a "nonfrivolous, arguable underlying claim" that has been frustrated by the defendants' actions, and (2) a continued inability to obtain the relief sought by the underlying claim. *Christopher, 536 U.S. at 415-16* (internal quotation marks omitted). The district court decided that Arar failed [*593] to plead with sufficient "precis[ion]" the existence of a sought-for underlying claim for relief, *Arar, 414 F. Supp. 2d at 286*, which means it decided that, for purposes of *Federal Rule of Civil Procedure 8*,[17] the defendants were not put on notice of the exis-

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[17] That rule provides:

> Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
>
> *Fed. R. Civ. P. 8(a).*

tence of such a claim. See *Christopher, 536 U.S. at 416* ("Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations . . . sufficient to give fair notice to a defendant.").

But taking the allegations in the complaint as true, as we must, the complaint clearly implies the existence of an underlying claim for relief under CAT. The defendants can hardly argue that under Arar's assertions, which we take to be true, they lacked notice of such a claim, since the complaint says that it was they who first notified Arar about it: Arar alleges that on October 8, 2002, "two INS officials told him that . . . Defendant Blackman . . . had decided to remove [him] to Syria," and "Defendant Blackman also stipulated that [such action] would be consistent with Article 3 of CAT." Compl. P 47. Indeed, the complaint alleges that Arar asked defendants for reconsideration of that decision -- i.e., relief from it -- in light of the prospect of torture in Syria, but the officials said that "the INS is not governed by the 'Geneva Conventions.'"

Id.

Insofar as the district court's requirement that Arar "articulate more precisely the judicial relief he was denied," *Arar, 414 F. Supp. 2d at 286*, related to its holding that "Bivens did not extend a remedy to Arar for his deportation to Syria," id., we disagree for the reasons set forth below. Insofar as the district

court thought Arar's underlying CAT claim would have been frivolous, it was mistaken. Cf. *Ramsameachire v. Ashcroft, 357 F.3d 169, 184 (2d Cir. 2004)* (pursuant to the CAT, the United States may not remove an alien to a country if "'it is more likely than not that he or she would be tortured if removed to [that country]'" (quoting *8 C.F.R. § 208.16(c)(2)*)).

Nor was CAT the only relief Arar was denied. As the government pointed out at oral argument, "th[e] decision [in *Michael v. INS, 48 F.3d 657 (2d Cir. 1995)*,] shows that in extraordinary cases, and no one can dispute that this is an extraordinary case, the plaintiff could have filed a habeas [petition] and sought a stay pursuant to the All Writs Act." Tr. at 82 (Cohn).[18]

Contrary to the district court's ruling, then, Arar's complaint put the defendants on notice of claims seeking relief to bar his removal that were frustrated by the defendants' actions. Whatever the ultimate merits of those claims, they would not have been "frivolous." And absent a remedy for the rendition and torture themselves -- the district court, and the majority, of [*594] course, conclude there is none -- no contemporaneous legal relief is now possible

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[18] In response to a question by the Chief Judge as to what cognizable allegations might be made in such a habeas petition, the government said, "Your Honor, I'm not going to speak for what a judge might or might not have said, but in his habeas position and his petition for a stay he could say, look, things are moving quickly, I'm afraid they're going to send me to Syria, don't let that happen." Tr. 84; see also id. at 85.

except through the access to courts and counsel claim. See generally Br. of Amici Norman Dorsen et al. at 12-14. The Fourth Claim for Relief therefore states a sufficient due process access claim.

D. Sufficient Pleading under Iqbal

More generally, we think the district court's extended recitation of the allegations in the complaint makes clear that the facts of Arar's mistreatment while within the United States -- including the alleged denial of his access to courts and counsel and his alleged mistreatment while in federal detention in the United States -- were pleaded meticulously and in copious detail. The assertion of relevant places, times, and events -- and names when known -- is lengthy and specific. Even measured in light of Supreme Court case law post-dating the district court's dismissal of the fourth claim, which instituted a more stringent standard of review for pleadings, the complaint here passes muster. It does not "offer[] 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).* Nor does it "tender[] 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting *Twombly, 550 U.S. at 557*). Its allegations of a constitutional violation are "'plausible on [their] face.'" Id. (quoting *Twombly, 550 U.S. at 555*). And, as we have explained, Arar has pled "factual content that allows the court to draw the reasonable inference

that the defendant[s] [are] liable for the misconduct alleged." Id. (quoting *Twombly, 550 U.S. at 556*). We would therefore vacate the district court's dismissal of the Fourth Claim for Relief.

III. The Majority's Interpretation of the Second and Third Claims for Relief

Having thus decided, mistakenly we think, that Arar's Fourth Claim for Relief has failed, our colleagues leap to the conclusion that what remains -- the allegations contained in what Arar's complaint styles as the Second and Third Claims for Relief -- relates only to the legal implications of the international and foreign elements of the defendants' behavior. See supra at **[21]** ("Arar's remaining claims seek relief on the basis of torture and detention in Syria . . . ."). Even were we to agree with the majority's view that the Fourth Claim for Relief warranted dismissal, we would still not concur in its crabbed interpretation of Arar's complaint in light of the facts alleged in it.

"[W]e may not affirm the dismissal of [a] complaint because [it has] proceeded under the wrong theory 'so long as [it has] alleged facts sufficient to support a meritorious legal claim.'" *Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 89 (2d Cir. 2000)* (plurality opinion of Pooler, J.) (quoting *Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41, 46 (2d Cir. 1997))*, cert. denied, *534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001).* "'Factual allegations

alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert v. Carovano, 851 F.2d 561, 571 n.3 (2d Cir. 1988)* (en banc)); see also *Newman v. Silver, 713 F.2d 14, 15 n.1 (2d Cir. 1983)* ("[T]he nature of federal pleading . . . is by statement of claim, not by legal theories.").[19] [*595] And we are required to read those factual allegations as a whole. See *Shapiro v. Cantor, 123 F.3d 717, 721 (2d Cir. 1997)*; see also *Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1252 n.11 (11th Cir. 2005)* (per curiam), cert. denied, *549 U.S. 1032, 127 S. Ct. 596, 166 L. Ed. 2d 431 (2006)*; *Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000).*

Although Arar pled in his Fourth Claim for Relief what he denominated as a separate "Claim" on the subject of "Domestic Detention," including allegations about unconstitutional conditions of confinement and denial of access to courts and counsel, the complaint as a whole makes broader allegations of mistreatment while within the borders of the United States. According to the complaint: (1) Arar was apprehended by government agents as he sought to

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[19] The Federal Rules of Civil Procedure instruct that "[p]leadings must be construed so as to do justice." *Fed. R. Civ. P. 8(e).* Wright and Miller's treatise counsels that "[t]his provision is not simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004). "One of the most important objectives of the federal rules is that lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn." Id.

change planes at JFK; (2) he was not seeking to enter the United States; (3) his detention was for the purpose of obtaining information from him about terrorism and his alleged links with terrorists and terrorist organizations; (4) he was interrogated harshly on that topic -- mostly by FBI agents -- for many hours over a period of two days; (5) during that period, he was held incommunicado and was mistreated by, among other things, being deprived of food and water for a substantial portion of his time in custody; (6) he was then taken from JFK to the MDC in Brooklyn, where he continued to be held incommunicado and in solitary confinement for another three days; (7) while at the MDC, INS agents sought unsuccessfully to have him agree to be removed to Syria because they and other U.S. government agents intended that he would be questioned there along similar lines, but under torture; (8) U.S. officials thwarted his ability to consult with counsel or access the courts; and (9) thirteen days after Arar had been intercepted and incarcerated at the airport, defendants sent him against his will to Syria, where they allegedly intended that he be questioned under torture and while enduring brutal and inhumane conditions of captivity. This was, as alleged, all part of a single course of action conceived of and executed by the defendants in the United States in order to try to make Arar "talk."

It may not have been best for Arar to file a complaint that structures his claims for relief so as to charge knowing or reckless subjection to torture,

coercive interrogation, and arbitrary detention in Syria (the second and third claims) separately from charges of cruel and inhuman conditions of confinement and "interfere[nce] with access to lawyers and the courts" while in the United States (the fourth claim). But such division of theories is of no legal consequence. "'Factual allegations alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert, 851 F.2d at 571 n.3*). The assessment of Arar's complaint must, then, take into account the entire arc of factual allegations that it contains -- his interception and arrest; his interrogation, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C. and forced transfer to Syrian authorities for further detention and questioning under torture. Such attention to the complaint's factual [*596] allegations, rather than its legal theories, makes perfectly clear that the remaining claims upon which Arar seeks relief are not limited to his "detention or torture in Syria," supra at **[6]**, but include allegations of violations of his due process rights in the United States. The scope of those claims is relevant in analyzing whether a Bivens remedy is available.

IV. The "Context" in Which a Bivens Remedy Is Sought

The majority's artificial interpretation of the complaint permits it to characterize the "context" of Arar's Bivens action as entirely one of "international rendition, specifically, 'extraordinary rendition.'" Supra at **[32]**; see also id. ("Extraordinary rendition is treated as a distinct phenomenon in international law."). This permits the majority to focus on the part of the complaint that presents a "new context" for Bivens purposes. But when the complaint is considered in light of all of Arar's allegations, his due process claim for relief from his apprehension, detention, interrogation, and denial of access to counsel and courts in the United States, as well as his expulsion to Syria for further interrogation likely under torture, is not at all "new."

A. Bivens and Its Progeny

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*. Bivens permitted "a victim of a *Fourth Amendment* violation by federal officers [to] bring suit for money damages against the officers in federal court." Id. The Supreme Court has

been reluctant, as the majority correctly observes, to "extend" Bivens liability further. See, e.g., *Wilkie, 127 S. Ct. at 2597*. The Court has done so only twice -- in the contexts of "an implied damages remedy under the *Due Process Clause of the Fifth Amendment*" in *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, and under "the *Cruel and Unusual Punishments Clause of the Eighth Amendment*" in *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). Malesko, 534 U.S. at 67*; see also *Wilkie, 127 S. Ct. at 2597-98*. But we must ask whether we should "devise a new Bivens damages action," *Wilkie, 127 S. Ct. at 2597*, only if the asserted action is, indeed, new. And a new Bivens action is not being sought unless the plaintiff is asking the court to "extend Bivens liability to a[] new context or new category of defendants." *Malesko, 534 U.S. at 68*.

B. The New Category of Defendants Test

The majority does not suggest that Arar's Bivens claim fails because it is against a new category of defendants. The Bivens remedy was devised to supply relief for constitutional torts by federal agents and officials. See *Malesko, 534 U.S. at 70*.

C. The New Context Test

The questions, then, are whether we are facing a "new context," or considering recognizing "a new Bivens damages action," questions that are complicated by the fact that the meaning that the Supreme

Court has ascribed to those terms is less than clear. Compare *Malesko, 534 U.S. at 67* (noting that Bivens was extended to "a new right of action" in Davis v. Passman, in which the Court "recognized an implied damages remedy under the *Due Process Clause of the Fifth Amendment*" (emphasis added)), [*597] with *id. at 68* (describing *Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*, as presenting a "new context[]" in which the plaintiffs sought damages under the *Due Process Clause* for errors made by federal officials "in the[] handling of [their] Social Security applications" (emphasis added)).

If the alleged facts of Arar's complaint were limited to his claim of "extraordinary rendition" to, and torture in, Syria -- that is, limited to his allegations that he was transported by the United States government to Syria via Jordan pursuant to a conspiracy or other arrangement among the countries or their agents and mistreated in Syria as a result -- as the majority would have it, then we might well agree that we are dealing with a "new context." But, as we have explained, the complaint is not so limited. Incarceration in the United States without cause, mistreatment while so incarcerated, denial of access to counsel and the courts while so incarcerated, and the facilitation of torture by others, considered as possible violations of a plaintiff's procedural and substantive due process rights, are hardly novel claims, nor

do they present us with a "new context" in any legally significant sense.[20]

We have recognized implied Bivens rights of action pursuant to the *Due Process Clause*, so Arar's claims for relief are not new actions under Bivens in that sense. A deprivation of procedural due process rights can give rise to a Bivens claim under our case law. See, e.g., *Tellier v. Fields, 280 F.3d 69, 80-83 (2d Cir. 2000)*. And while we do not appear to have squarely considered whether a Bivens action may lie for alleged violations of substantive due process rights, our cases imply that it can be. In *Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007)*, rev'd in part on

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[20] In one sense, every case presents a new context, in that it presents a new set of facts to which we are expected to apply established law. But a new set of facts is not ipso facto a "new context." We do not decide, based on the difference in factual setting alone, whether or not it is a good idea to allow a plaintiff to avail him or herself of a well-established remedy such as that afforded by Bivens. This is illustrated by cases involving legal contexts where Bivens is well-established, in which courts do not conduct a fresh assessment as to whether a Bivens action is available based on the facts of each case. See, e.g., *Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)* (Bivens action for *Fourth Amendment* violation); *McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)* (Bivens action for *Eighth Amendment* violation), superseded by statute on other grounds as stated in *Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)*; *Castro v. United States, 34 F.3d 106 (2d Cir. 1994)* (*Fourth Amendment*); *Armstrong v. Sears, 33 F.3d 182 (2d Cir. 1994)* (same); *Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994)* (same); see also *Hallock v. Bonner, 387 F.3d 147 (2d Cir. 2004)* (same), rev'd on other grounds, sub nom *Will v. Hallock, 546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*.

other grounds sub nom *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, for example, we considered a Bivens action brought on, inter alia, a *Fifth Amendment* substantive due process theory. The plaintiff alleged physical mistreatment and humiliation, as a Muslim prisoner, by federal prison officials, while he was detained at the MDC. After concluding, on interlocutory appeal, that the defendants were not entitled to qualified immunity, we returned the matter to the district court for further proceedings. We did not so much as hint either that a Bivens remedy was unavailable or that its availability would constitute an unwarranted extension of the Bivens doctrine.[21] *Iqbal, 490 F.3d at 177-78.*

[*598] In other cases we have apparently assumed Bivens remedies were available for substantive due process claims. See *Thomas v. Ashcroft, 470 F.3d 491, 497 (2d Cir. 2006)* (reversing district court's dismissal of Bivens action for violation of plaintiff's *Fifth Amendment* substantive due process rights while detained at the MDC); *Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000)* (dismissing, on

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[21] Shortly after we decided Iqbal, the Supreme Court made clear that by appealing from the district court's denial of qualified immunity, the defendants placed within our jurisdiction the question of "the recognition of the entire cause of action." *Wilkie, 127 S. Ct. at 2597 n.4.* The district court in Iqbal had specifically rejected the defendants' argument that a Bivens action was unavailable. *See Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 U.S. Dist. LEXIS 21434, at *44-*45, 2005 WL 2375202, at *14 (E.D.N.Y. Sept. 27, 2005).* Thus, had we thought that no Bivens action was available, we had the power to resolve Iqbal's claims on that basis.

qualified immunity grounds, plaintiff's Bivens claim for, inter alia, substantive due process violations, without questioning whether a cause of action was available); *Li v. Canarozzi, 142 F.3d 83 (2d Cir. 1998)* (affirming judgment following jury verdict for defendants in Bivens action based on allegations of physical assault by guards at the federal Metropolitan Correctional Center in New York City, although not explicitly on substantive due process grounds); *Ayeni v. Mottola, 35 F.3d 680, 691 (2d Cir. 1994)* (apparently assuming that Bivens remedy was available for substantive due process claim, but deciding that it could not be pursued because the claim in issue was covered by the more particular provisions of the *Fourth Amendment*, for which a Bivens action was permitted), abrogated on qualified immunity grounds, *Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).*

Indeed, even the most "international" of Arar's domestic allegations -- that the defendants, acting within the United States, sent Arar to Syria with the intent that he be tortured -- present no new context for Bivens purposes. Principles of substantive due process apply to a narrow band of extreme misbehavior by government agents acting under color of law: mistreatment that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi v. Whitman, 485 F.3d 73, 79 (2d Cir. 2007)* (internal quotation marks omitted). Sending Arar from the United States with the intent or understanding that he will be tortured in Syria

easily exceeds the level of outrageousness needed to make out a substantive due process claim.

Although the "shocks the conscience" test is undeniably "vague," see *Estate of Smith v. Marasco, 430 F.3d 140, 156 (3d Cir. 2005)*; *Schaefer v. Goch, 153 F.3d 793, 798 (7th Cir. 1998)*, "[n]o one doubts that under Supreme Court precedent, interrogation by torture" meets that test, *Harbury v. Deutch, 233 F.3d 596, 602, 344 U.S. App. D.C. 68 (D.C. Cir. 2000)*, rev'd on other grounds sub nom *Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*;[22] see also *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)* (holding that the forcible pumping of a suspect's stomach to obtain evidence to be used against him was "too close to the rack and the screw to permit of constitutional differentiation"); *Palko v. Connecticut, 302 U.S. 319, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937)* (noting that the *Due Process Clause* must at least "give protection against torture, physical or mental"), overruled [*599] on other grounds, *Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*; *Brown v. Mississippi, 297 U.S. 278, 285-86, 56 S. Ct. 461, 80 L. Ed. 682 (1936)* ("Because a state may dispense with a jury trial, it does not follow

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[22] The D.C. Circuit in Harbury concluded that the interrogation in question did not violate the Constitution because it occurred entirely abroad. See *Harbury, 233 F.3d at 602-04* (relying upon *United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)).*

that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.").[23]

To be sure, Arar alleges not that the defendants themselves tortured him; he says that they "outsourced" it.[24] But we do not think that the question whether the defendants violated Arar's substantive due process rights turns on whom they selected to do the torturing,[25] or that such "outsourcing"

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[23] The full quotation is:

> [T]he freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.

Brown, 297 U.S. at 285-86.

[24] "[R]endition -- the market approach -- outsources our crimes, which puts us at the mercy of anyone who can expose us, makes us dependent on some of the world's most unsavory actors, and abandons accountability. It is an approach we associate with crime families, not with great nations." Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 388 (2008). "[O]ne could get the worst of both worlds: national responsibility for acts as to which the agents we have empowered are unaccountable." Id. at 387.

[25] "I do not think that whether the defendants violated Arar's *Fifth Amendment* rights turns on whom they selected to do the torturing: themselves, a Syrian Intelligence officer, a

somehow changes the essential character of the acts within the United States to which Arar seeks to hold the defendants accountable.

We think that Arar states a substantive due process claim under either of two theories of substantive due process liability: "special relationship liability" or "state-created-danger liability," *Benzman v. Whitman, 523 F.3d 119, 127 (2d Cir. 2008)* (internal quotation marks omitted). Under the latter doctrine, the defendants can be held liable for "tak[ing] an affirmative act that creates an opportunity for a third party to harm a victim (or increases the risk of such harm)." *Lombardi, 485 F.3d at 80*. Under the former, Arar was owed "an affirmative duty" by the defendants to protect him from harm by Syrian agents in light of the fact that the government took him "into its custody and h[eld] him there against his will." *Matican v. City of New York, 524 F.3d 151, 155-56 (2d Cir.)* (citations, internal quotation marks, and footnotes omitted), cert. denied, *129 S. Ct. 636, 172 L. Ed. 2d 611 (2008)*.

In sum, we do not view the current action as presenting a "new context" in any relevant sense. We therefore do not think we must decide whether "to devise a new Bivens damages action." *Wilkie, 127 S. Ct. at 2597*, here.

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warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles." Arar partial panel dissent at 205.

V. Devising a New Bivens Damages Action

Even apart from our disagreement with the majority that Arar's claims present a new context in which to extend Bivens liability, we are puzzled by the majority's analysis as to whether to do so. Having decided that the issue for our consideration is whether a Bivens action should be [*600] permitted in what it has concluded is a new context, the majority engages in a two-part inquiry: "whether there is an alternative remedial scheme available to the plaintiff; and whether 'special factors counsel[] hesitation' in creating a Bivens remedy." Supra at **[33]** (quoting *Wilkie, 127 S. Ct. at 2598*).

Our colleagues wisely decline to decide the first issue, whether an alternative remedial scheme is available, partly because they conclude that this is not an immigration case (or, at least, not a "typical" one), see supra at **[28]**, and partly because "Arar has alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes," supra at **[35]**; see also supra at **[27]**. This is significant inasmuch as the Supreme Court has observed that it has recognized "new" Bivens actions precisely, inter alia, "to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *Malesko, 534 U.S. at 70* (emphasis omitted).

The majority moves on to the second prong of the test, concluding that "special factors are clearly present in the new context of this case, and they sternly counsel hesitation." Supra at **[35-36]**. We think it unfortunate that the majority concludes that Arar should be afforded no Bivens right of action in light of such "special factors." We quarrel not only with their conclusion, but also the majority's apparent treatment of the existence vel non of "special factors counseling hesitation" as the determinative legal standard for whether an extension of Bivens is warranted. Setting aside for the moment our view that many of the "special factors" cited by the majority are not properly considered to be such, we think it mistaken to preclude Bivens relief solely in light of a citation or compilation of one or more purported examples of such "special factors."

A. "Special Factors" As a Standard

The majority is not altogether clear in conveying its understanding of the legal significance of a finding that "special factors counseling hesitation," "sternly" or otherwise, are present. The majority acknowledges that "[h]esitation is a pause, not a full stop, or an abstention; and to counsel is not to require," supra at **[37]**, but it also states that countervailing factors are not considered, and that no such factors have "ever been cited by the Supreme Court as a reason for affording a Bivens remedy where it would not otherwise exist," id. What we are left with is an implication that the presence of "spe-

cial factors counseling hesitation" in fact does require a "full stop, or an abstention." We disagree. It seems to us that the existence of such "special factors" alone does not compel a conclusion that a Bivens action is unavailable.

When the words "special factors counseling hesitation" were first uttered by the Supreme Court, in Bivens itself, the Court asserted that there is a general rule "that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens, 403 U.S. at 396* (internal quotation marks omitted). The Court then said: "The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress," citing cases in which the general rule had not been applied.[26] Id. The Bivens Court's [*601] observation that there was no cause for hesitation, and its simultaneous recognition in the case before it of a private right of action did not imply, however -- as the majority seems to -- that if there had been reason to

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[26] The Court referred by way of example to its previous decisions in *United States v. Standard Oil Co., 332 U.S. 301, 311, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947)*, in which it had concluded that the government had no implied right of action against a company that had allegedly injured a soldier because it trenched upon "federal fiscal policy" particularly delegated to Congress, and *Wheeldin v. Wheeler, 373 U.S. 647, 83 S. Ct. 1441, 10 L. Ed. 2d 605 (1963)*, in which the Court found no private right of action under federal law where the defendant's acts were not asserted to violate the plaintiff's constitutional rights and were governed by state law

hesitate, then the Court, ipso facto, would not have recognized a right of action.[27]

The Supreme Court has not told us that "special factors counseling hesitation" are to be understood to prohibit a private right of action. In Wilkie, for example, the Court noted that deciding "whether to recognize a Bivens remedy may require two steps," the second of which asks that the court "pay[] particular heed . . . to any special factors counselling hesitation," id., *127 S. Ct. at 2598* (emphasis added). And the Court, in *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*, relied upon by the Wilkie Court in this regard, similarly observed that "[i]n the absence of . . . a congressional directive [that a right of action lies], the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id. at 378* (emphasis added).

"[H]eed" means "[c]lose attention" or "notice." American Heritage Dictionary of the English Language 813 (4th ed. 2000). To "pay heed," then, means "to notice," it does not mean "to be governed by."

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[27] This appears to reflect a classic logical fallacy, "denial of the antecedent," which mistakes a necessary condition for a sufficient one. E.M. Adams, The Fundamentals of General Logic 164 ("The truth of the premises does not require the truth of the conclusion. This means that denying the antecedent is an invalid form of the simple conditional argument.").

The majority tells us that "'[h]esitation' is 'counseled' whenever thoughtful discretion would pause even to consider." Supra at **[37]**. If the existence of "special factors counseling hesitation" were determinative of the existence of a right of action, the bar to declining to allow a new Bivens claim would be less than "remarkably low." Id. It would be chimerical.

It is difficult to deny the existence of "special factors counseling hesitation" in this case. We have been "hesitating" -- in order to deliberate in light of those factors -- for nearly two years. While the time we have taken to consider "special factors" strongly indicates that they counsel hesitation, it cannot follow that having hesitated, we must therefore halt, and dismiss the Bivens complaint.[28]

B. The Special Factors Identified by the Majority

The "special factors" cited by the majority fall into one of two general categories: those involving security, secrecy, and confidentiality, [*602] and

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[28] Such a test would be reminiscent of Leo Tolstoy's brother's perhaps apocryphal challenge to Tolstoy to stand in a corner and not think of a white bear. See, e.g., Aylmer Maude, The Life of Tolstoy: First Fifty Years (Dodd, Mead and Co. 1910) 19 ("[T]here was also a certain Fanfaronof Hill, up which [my brother] said he could lead us, if only we would fulfil all the appointed conditions. These were: first, to stand in a corner and not think of a white bear. I remember how I used to get into a corner and try (but could not possibly manage) not to think of a white bear.").

those involving other policy considerations. We turn to the latter category first, briefly summarizing each factor as the majority describes it and then setting forth our view of the factor's weight.

1. Factors not involving secrecy or security. This action asks for damages, but it functionally "operates as a constitutional challenge to the policies promulgated by the executive." Supra at **[38]**. We should hesitate to allow such an action to proceed because to do so would tacitly "decide," id., that Bivens can subject federal officers to the kind of enterprise liability that was established for actions under *42 U.S.C. § 1983* by *Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*, but has not been established for Bivens actions.

This paraphrase sets forth the strongest argument ("factor"), we think, for denying a Bivens remedy to Arar. After Iqbal, it would be difficult to argue that Arar's complaint can survive as against defendants who are alleged to have been supervisors with, at most, "knowledge" of Arar's mistreatment. See *Iqbal, 129 S. Ct. at 1949*; see also *id. at 1955* (Souter, J., dissenting). And to the extent that the United States remains a defendant, perhaps it should be dismissed for want of possible liability under Bivens too. But that does not dispose of the case against the lower-level defendants, such as Blackman, McElroy, and the Doe defendants, who are al-

leged to have personally undertaken purposeful unconstitutional actions against Arar.

It also may be that to the extent actions against "policymakers" can be equated with lawsuits against policies, they may not survive Iqbal either. But while those championing Arar's case may in fact wish to challenge extraordinary rendition policy writ large, the relief Arar himself seeks is principally compensation for an unconstitutional implementation of that policy. That is what Bivens actions are for.

> Actions for damages against federal officers "who implement" rendition "policy" implicate sovereign immunity concerns, by "influenc[ing] government policy, prob[ing] government secrets, invad[ing] government interests, enmesh[ing] government lawyers, and . . . elicit[ing] government funds for settlement." Supra at **[39]**.
>
> Recognizing a Bivens action for Arar would entail a judicial "assessment of the validity and rationale" of rendition, which "directly affect[s] significant diplomatic and national security concerns." Supra at **[40]**. The concern here is in part one of separation of powers, see supra at **[41]**, and in part one of institutional incompetence, see supra at **[41]**.

Aside from diplomatic and national security considerations, which we address below, this consideration applies to all civil rights actions. Bivens by its nature implicates "government interests," enmeshes government lawyers, and elicits government funds for settlement. Bivens by its nature authorizes courts to invalidate exercises in executive power. A Bivens action, like any other civil rights action, is an attempt to hold members of the executive accountable for their allegedly unconstitutional acts, through the courts. If these "special factors" were persuasive grounds on which to deny Bivens actions, they would not only not be permitted in new contexts, they would not be permitted at all.

Similarly, insofar as this Bivens action may influence executive policy, we doubt [*603] that that should be a factor "counseling hesitation" either. Civil rights actions influence policy: They make it more costly for executive officers to violate the Constitution. That is their point. See *Wyatt v. Cole, 504 U.S. 158, 161, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992)* ("The purpose of *§ 1983* is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

Finally, the majority suggests that "[i]n the small number of contexts in which courts have implied a Bivens remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which

officers should have pursued," a "distinction [the majority says] may or may not amount to a special factor counseling hesitation in the implication of a Bivens remedy." Supra at **[54]**. It should be noted to the contrary that in the two Supreme Court decisions that did "extend" a Bivens remedy in a "new context," such identification was anything but "easy." *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*, involved the line between constitutional and unconstitutional medical treatment and medical facilities in prisons, whose management the Supreme Court has found "peculiarly within the province and professional expertise of corrections officials" -- and thus outside of the competence of judges -- and instructed courts to "ordinarily defer to [prison officials'] expert judgment," *Pell v. Procunier, 417 U.S. 817, 827, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974)*. And *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, addressed the line between constitutional and unconstitutional discrimination in public employment, which the Court later observed raises issues requiring "decisions [that] are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," *Engquist v. Or. Dep't of Agric., 128 S.Ct. 2146, 2154, 170 L. Ed. 2d 975 (2008)*.

The factors relied upon by the majority that do not relate to secrecy or security therefore do not appear to us to counsel strongly against recognition of a Bivens remedy here.

2. Factors involving secrecy or security. The other "special factors" cited by the majority focus our attention on the ability of the executive to conduct the business of diplomacy and government in secret as necessary and to protect public and private security. It is beyond dispute that the judiciary must protect that concern. See, e.g., *Doe v. CIA, 576 F.3d 95 (2d Cir. 2009)*. But inasmuch as there are established procedures for doing just that, we think treating that need as giving rise to "special factors counseling hesitation" is an unfortunate form of double counting. The problem can be, should be, and customarily is, dealt with case by case by employing the established procedures of the state-secrets doctrine, see id.; see also section VI, below, rather than by barring all such plaintiffs at the courtroom door without further inquiry.

C. Factors Weighing in Favor of a Bivens Action

At least some factors weigh in favor of permitting a Bivens action in this case. We assume, as we are required to, that Arar suffered a grievous infringement of his constitutional rights by one or more of the defendants, from his interception and detention while changing planes at an international airport to the time two weeks [*604] later when he was sent off in the expectation -- perhaps the intent and expectation -- that he would be tortured, all in order to obtain information from him. Breach of a constitutional or legal duty would appear to counsel

in favor of some sort of opportunity for the victim to obtain a remedy for it. Justice Harlan's landmark concurrence in Bivens explains:

> The [government's] arguments for a more stringent test to govern the grant of damages in constitutional cases [than that governing a grant of equitable relief] seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests . . . . To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But it must also be recognized that the *Bill of Rights* is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to [the plaintiff's constitutional] legal interests than with respect to interests protected by federal statutes.

Bivens, 403 U.S. at 407 (Harlan, J., concurring) (citation and footnote omitted).

And more generally, Bivens should be available to vindicate *Fifth Amendment* substantive due process rights such as those asserted here. As Judge Posner wrote for the Seventh Circuit with respect to a Bivens action:

> [I]f ever there were a strong case for "substantive due process," it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the *Fourth Amendment* -- as no one doubts -- and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the *Eighth Amendment* -- as no one doubts -- it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process.

Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989), cert. denied, *493 U.S. 1026, 110 S. Ct. 733, 107 L. Ed. 2d 752 (1990)*; [29] accord *Magluta v. Samples, 375*

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[29] Although there is some disagreement in the Circuits regarding precisely when, following arrest, abuse of detained persons is to be analyzed under principles of substantive due process, we think Judge Posner's comment as to why those principles must apply at some point is insightful and remains

F.3d 1269 (11th Cir. 2004) (reversing district court's dismissal of pretrial detainee's Bivens action alleging unconstitutional conditions of confinement at federal penitentiary in violation of the *Due Process Clause of the Fifth Amendment*); *Cale v. Johnson, 861 F.2d 943, 946-47 (6th Cir. 1988)* (concluding that "federal courts have the jurisdictional authority to entertain a Bivens action brought by a federal prisoner, alleging violations of his right to substantive due process"), abrogated on other grounds, *Thaddeus-X v. Blatter, 175 F.3d 378, 387-88 (6th Cir. 1999)*; see also *Sell v. United States, 539 U.S. 166, 193, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003)* (Scalia, J., dissenting) (observing that "a [Bivens] action . . . is available to federal pretrial detainees challenging the conditions of their confinement" [*605] (citing *Lyons v. U.S. Marshals, 840 F.2d 202 (3d Cir. 1988))*.[30]

A federal inmate serving a prison sentence can employ Bivens to seek damages resulting from mistreatment by prison officials. *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*. It would be odd if a federal detainee not charged with

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valid.

[30] While cases permitting pretrial detainees to bring Bivens actions for violations of their substantive due process rights support the availability of a Bivens action here, Arar's substantive due process claim should not be evaluated under the standard for assessing the claims of persons who, unlike Arar, were detained pretrial rather than for the purpose of interrogation.

or convicted of any offense could not bring an analogous claim.[31]

Finally, a factor counseling recognition of a Bivens action is that Arar has no other remedy for the alleged harms the defendant officers inflicted on him. Cf. *Malesko, 534 U.S. at 70* ("In 30 years of Bivens jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.").

VI. The State-Secrets Privilege

A. Resolution on State-Secrets Grounds

If we have not been fully persuasive in arguing that a Bivens remedy should not be denied in this case, we hope we have made it abundantly clear that the question is a complex and difficult one. And

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[31] We have not been asked by the parties to examine the possibility that Arar has pled facts sufficient to raise a claim under theories other than substantive due process -- such as under the *Fourth Amendment*, the *self-incrimination clause of the Fifth Amendment*, or even the *Eighth Amendment*. Because this is an appeal from a dismissal on the facts pleaded in the complaint under *Rule 12(b)(6)*, we think that even if this Court were to consider such an alternate theory and conclude that it was valid, the case would be subject to remand to the district court for further proceedings on that theory.

that underlies our principal cause for dissent. We think it improper for the Court to take the twisting road to a categorical conclusion that no plaintiff has a private right of action in these circumstances and circumstances like them, when, by a brief order, we could take steps that would likely permit the case to be resolved on its particular facts without new and strained declarations of law.

The majority makes a thinly veiled reference to the recognition of a Bivens action as "alacrity or activism." Supra, at **[37]**. The irony of its making that assertion while reaching out unnecessarily to decide a difficult issue related to separation of powers principles should not be lost. Activism in the defense of "liberty," we gather, is no vice.

"The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991).* "In some cases, the effect of an invocation of the privilege may be so drastic as to require dismissal," as when a "proper assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim." *Id. at 547.* We share what we think to be the majority's intuition that this case would likely turn largely, if not entirely, on decisions of national security and diplomacy that the executive branch has already assured us it has good reason to keep out of public view.

[*606] Indeed, the government, while arguing before us en banc seeking affirmance on the Bivens issue, could hardly have been clearer:

> [I]t seems like at the core of your concerns and perhaps your colleagues' concerns is you don't have more information. And that might be the result of the fact that the district court did not rule on the state secrets issue, so all the classified declarations are not in the record, and if this court felt it could not address our Bivens special factors argument at this stage, and I think it can . . . then I respectfully suggest this court do a limited remand for the district court to review the state secrets issue. The government would have to update the declarations, because much time has passed, but allow the government to do that, have the district court rule on the state secrets issues and then this Court could have this declaration before it if it thought it needed to do that.

Tr. 58-59 (Cohn). And:

> Your Honor, if this Court is talking simply about a limited remand, to send this case back simply for the limited purpose of the district court examining the state secrets issue first [if the court won't ad-

> dress Bivens otherwise], I think there's a lot of sense to that, your Honor.

Id. at 62-63 (Cohn).

Recognizing that the government, like Arar and his counsel, would prefer a ruling on the merits, we nonetheless think we should be taking the government up on its alternate suggestion. Doing so would likely allow us to avoid giving sweeping answers to difficult questions of law that we are not required to ask. And it would, by well-established procedure, address what the majority cites as additional "special factors counseling hesitation" in recognizing a Bivens right of action. In particular, the majority notes these "factors":

> Judicial consideration of the issues relating to rendition involves particular "sensitivities" because of the need to discover much "classified material," supra at **[43]**, including those relating to "the national security apparatus of at least three foreign countries, as well as that of the United States," supra at **[44]**.
>
> "Cases in the context of extraordinary rendition are very likely to present serious questions relating to private diplomatic assurances from foreign countries . . ., and this feature of such claims opens the door to graymail." Supra at **[48]**; see also supra at **[51]** ("The risk of graymail

> is itself a special factor which counsels hesitation in creating a Bivens remedy.").

These are "factors" that the state-secrets privilege was designed to address.[32]

We are not without precedent here -- similar both factually and procedurally. In *El-Masri v. United States, 479 F.3d 296 (4th Cir.)*, cert. denied, *552 U.S. 947, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007)*, the issue was an alleged "special rendition" by U.S. agents of a German citizen from Macedonia to a U.S.-controlled prison in Afghanistan for the purpose of abusive interrogation. The plaintiff had brought suit, inter alia, pursuant to Bivens, for violation of his due process rights against former CIA director George Tenet, among others. The Fourth Circuit explained:

> [*607] The United States intervened as a defendant in the district court, asserting that El-Masri's civil action could not proceed because it posed an unreasonable risk that privileged state secrets would be disclosed. By its Order of May 12, 2006, the district court agreed with the position

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[32] Our discussion is limited to the government's invocation of the state-secrets privilege in the context of civil litigation. The protection of state secrets in the course of a criminal prosecution would likely raise many different and difficult issues in light of, among other things, the defendant's rights under the *Fifth* and *Sixth Amendments*.

> of the United States and dismissed El-Masri's Complaint.

Id. at 299-300. The district court, in summarizing its order, had said, "It is important to emphasize that the result reached here is required by settled, controlling law."[33] *El-Masri v. Tenet, 437 F. Supp. 2d 530, 540 (E.D. Va. 2006)*. The Fourth Circuit agreed and affirmed. *El-Masri, 479 F.3d at 300*. [34]

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[33] The district court's full statement bears repeating:

> It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity of his factual allegations; they may be true or false, in whole or in part. Further, it is also important that nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.

Tenet, 437 F. Supp. 2d at 540-41.

[34] We cite El-Masri not to endorse its conclusions, but as evidence that the procedures to be applied here are not in any sense novel.

The majority cites the possibility of "graymail" as a "special factor counseling hesitation." But as another decision of the Fourth Circuit points out, the state-secrets privilege protects this interest too, by "provid[ing] a necessary safeguard against litigants presenting the government with a Hobson's choice between settling for inflated sums or jeopardizing national security." *Sterling v. Tenet, 416 F.3d 338, 344 (4th Cir. 2005).*[35]

In Arar's case, the government followed essentially the same procedure as it had in El-Masri. The district court here (prior to the district court and court of appeals decisions in El-Masri) decided the case on Bivens grounds instead. We think that to have been mistaken.

B. Shortcomings of a State-Secrets Resolution

We discussed the state secrets doctrine in some detail in *Doe, 576 F.3d at 101-05* (describing, inter alia, the emergence of the doctrine in and after *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)).* We are not oblivious to the criticism to which it has been subject. There has been considerable debate about it, see, e.g., Robert

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[35] Cf. *Bivens, 403 U.S. at 410* (Harlan, J., concurring) ("I simply cannot agree with my Brother BLACK that the possibility of 'frivolous' claims -- if defined simply as claims with no legal merit -- warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.").

M. Chesney, Enemy Combatants After Hamdan v. Rumsfeld: State Secrets and the Limits of National Security Litigation, *75 Geo. Wash. L. Rev. 1249, 1263-1308 (2007)* ("Enemy Combatants"); Carrie Johnson, "Handling of 'State Secrets' At Issue," Washington Post, Mar. 25, 2009, at A1, which has been stoked by the recent surfacing of the now-declassified Air Force accident report that [*608] was the subject of Reynolds, see Barry Siegel, Claim of Privilege 205-10 (2008). [36]

But this controversy has centered on the extent of the judiciary's role in making the determination of the legitimacy of the claim of privilege and the

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[36] There have been assertions that the state-secrets invocation in Reynolds, in which the modern form of doctrine was first set forth, was a cover-up of government misfeasance, not an attempt to protect legitimate state secrets. See, e.g., Barry Siegel, Claim of Privilege at 205-10; *Herring v. United States, No. A 03 Civ. 5500 (LDD), 2004 U.S. Dist. LEXIS 18545, at *6-*7, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004)*; but see *Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005)* (deciding, after review of the report, that the government's "assertion of military secrets privilege for [the] accident report [in Reynolds] . . . was [not a] fraud upon the court"), cert. denied, *547 U.S. 1123, 126 S. Ct. 1909, 164 L. Ed. 2d 685 (2006)*. The government has recently implemented procedures that heighten the standard governing what information can be protected under the privilege and create multiple levels of oversight requiring that a State Secrets Review Committee, an Assistant Attorney General, the Deputy Attorney General, and the Attorney General approve the assertion of the privilege before the government attempts to invoke it any particular case. See Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), available at http://www.justice.gov/opa/documents/state-secret-privileges.pdf.

consequences of the government's refusal to produce subpoenaed material necessary to the prosecution of the plaintiff's claim. See, e.g., Enemy Combatants, *75 Geo. Wash. L. Rev. at 1288*.[37] No one can seriously doubt the need for a mechanism by which the government can effectively protect its legitimate military and diplomatic secrets. The question is whether

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[37] Questions that have been raised include: Did the Reynolds dissenters, and the Third Circuit and Eastern District of Pennsylvania before them, see *Reynolds v. United States, 192 F.2d 987, 990 (3d Cir. 1951)*, have the better of the argument when concluding that the judicial role is not fully exercised in any case without an in-chambers, ex parte review of the allegedly privileged material? Cf. State Secret Protection Act of 2009, H.R. 984, 111th Cong. § 5(a) ("Once the Government has asserted the privilege . . . the court shall undertake a preliminary review of the information the Government asserts is protected by the privilege . . . ."); State Secrets Protection Act, S. 417, 111th Cong. § 2 (2009) (providing that, absent certain exceptions "the United States shall make all evidence the United States claims is subject to the state secrets privilege available for the court to review, consistent with [specified requirements], before any hearing conducted under this section"). Should the monetary loss occasioned as the result of the invocation of the privilege fall invariably and exclusively on plaintiffs? See Enemy Combatants, *75 Geo. Wash. L. Rev. at 1312-13*. How finely grained a showing should be required before an action is dismissed in light of a successful state-secrets invocation? See Editorial, The State-Secrets Privilege, Tamed, N.Y. Times, Apr. 30, 2009, at A26 (opining on what it characterized as "the affront to civil liberties and the constitutional separation of powers in the Justice Department's argument that the executive branch is entitled to have lawsuits shut down whenever an official makes a blanket claim of national security"); see also msnbc.com, "Full transcript of President Barack Obama's news conference, Apr. 29, 2009," http://www.msnbc.msn.com/id/30488052// (The President: "I actually think that the state secret doctrine should be modified. I think right now it's overbroad.").

those procedures now in place best balance the need for secrecy with competing values and interests. The critics do not, we think, seek to avoid at all cost and in all circumstances the ability of the government to protect state-secrets in civil litigation or the possibility that some such litigation will ultimately be resolved as a result.

C. The Majority's Objections

The majority has two objections to a state-secrets resolution.

First, it hints that we have an "unflagging" obligation to address the Bivens issue before turning to the question of state secrets. See supra at **[39]** ("True, courts can -- with difficulty and resourcefulness -- consider state secrets and even reexamine judgments made in the foreign affairs context when we must, that is, when there is an unflagging duty to exercise our jurisdiction." (emphasis in original)). We highly doubt the jurisprudential necessity of addressing a broader, more difficult Bivens question when this case [*609] might be resolved on its facts by application of well-established state-secrets procedures. As the panel majority pointed out, non-merits dispositions do not require a predicate decision on subject-matter jurisdiction:

> The Supreme Court has, on several occasions, recognized that a federal court has leeway to choose among threshold

> grounds for denying audience to a case on the merits. . . . [A] federal court that dismisses on non-merits grounds before finding subject-matter jurisdiction makes no assumption of law-declaring power that violates separation of powers principles.

See *Arar, 532 F.3d at 172* (internal quotation marks, citations, and ellipses omitted). The Supreme Court acted similarly in Iqbal, assuming the viability of a Bivens action in order to decide the case on the basis of pleading and supervisory liability. See *Iqbal, 129 S. Ct. at 1948*.

Second, the majority professes concern about the "[t]he court's reliance on information that cannot be introduced into the public record," which the Court says "is likely to be a common feature of any Bivens actions arising in the context of alleged extraordinary rendition." Supra at **[42]**. The majority thinks that this concern "should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings." Supra at **[42-43]**.

"'A trial is a public event. What transpires in the court room is public property.'" *Richmond Newspapers v. Virginia, 448 U.S. 555, 574 n.9, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)* (plurality opinion) (quoting *Craig v. Harney, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947))*. We applaud the majority's recognition of the fundamental importance of

the principle that the courts are presumed to be open. See supra at **[44]**; and see, e.g., *Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982)*. It respects this Circuit's history of meticulously guarding constitutional protection for "access to the courts" in the sense of the ability of a citizen to see and hear, and in that way to participate in, the workings of the justice system.[38] See, e.g., *Huminski v. Corsones, 396 F.3d 53, 56 (2d Cir. 2005)*; *Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004)*; *ABC, Inc. v. Stewart, 360 F.3d 90 (2d Cir. 2004)*; *United States v. Graham, 257 F.3d 143 (2d Cir. 2001)*; *Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16 (2d Cir. 1984)*, cert. denied, *472 U.S. 1017, 105 S. Ct. 3478, 87 L. Ed. 2d 614 (1985)*; *Joy v. North, 692 F.2d 880 (2d Cir. 1982)*. But it follows not at all, we think, from the presumption of openness however gauged that the open nature of the federal courts is properly weighed as a factor in the Bivens analysis.

The presumption of openness is just that, a presumption. In can be, and routinely is, overcome. We regularly hear, on the basis of partially or totally sealed records, not only cases implicating national

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[38] This is "access to courts" in a sense quite different from the "access to courts" argument made by Arar referring to the frustration of his ability to seek relief from the judiciary. Cf. *Huminski v. Corsones, 386 F.3d 116, 145 n.30 (2d Cir. 2004)* (distinguishing between a litigant's due process right of access and the press and public's right of access under the *First Amendment*).

security or diplomatic concerns, see, e.g., *Doe, 576 F.3d 95*; *In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh, 552 F.3d 93 (2d Cir. 2008)*, cert. denied, *129 S. Ct. 2778, 174 L. Ed. 2d 273 (2009)*, but those involving criminal defendants' cooperation with prosecutors, see, e.g., *United States v. Doe, 314 F. App'x 350 (2d Cir. 2008)* (summary order), [*610] other criminal matters, see, e.g., *U.S. v. Silleg, 311 F.3d 557, 560 (2d Cir. 2002)*, probation department reports, upon which federal criminal sentences are to a significant extent typically based, see, e.g., *United States v. Parnell, 524 F.3d 166, 168 n.1 (2d Cir. 2008)* (per curiam); *United States v. Molina, 356 F.3d 269, 275 (2d Cir. 2004)*, child welfare, see, e.g., *Sealed v. Sealed, 332 F.3d 51 (2d Cir. 2003)*, trade secrets, see, e.g., *In re Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994)*, and any manner of other criminal and civil matters. Hardly a week goes by, in our collective experience, in which some document or fact is not considered by a panel of this Court out of the public eye.

We accommodate the public interest in proceedings before federal courts by rigorously adhering to the presumption of openness, but the presumption is often overcome. The majority's notion that because the presumption is likely to be overcome in a particular species of case we should therefore foreclose a remedy or otherwise limit our jurisdiction in order to accommodate the public suspicion of secrecy, is misconceived. Denying relief to an entire class of persons with presumably legitimate claims in part because

some of their number may lose in proceedings that are held in secret or because secrets may cause some such claims to fail, makes little sense to us. It could work endless mischief were courts to turn their backs on such cases, their litigants, and the litigants' asserted rights. We are not aware of any other area of our jurisprudence where the ability to overcome the presumption of openness has been relied upon to deny a remedy to a litigant. We do not think it should be here.

CONCLUSION

For the foregoing reasons and to the extent indicated, we respectfully dissent.

BARRINGTON D. PARKER, Circuit Judge, joined by Judges CALABRESI, POOLER, and SACK, dissenting:

I join Judge Sack's, Judge Pooler's, and Judge Calabresi's opinions in full. My point of departure from the majority is the text of the Convention Against Torture, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 2, cl. 2, December 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 ("Convention Against Torture"). Because the majority has neglected this basic commitment and a good deal more, I respectfully dissent.

Maher Arar credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest. He also credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress. *See 8 U.S.C. § 1252(a)(2)(D)* (providing for judicial review of constitutional claims or questions of law raised by an order of removal).

While I broadly concur with my colleagues who dissent, I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts. The majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security. Its approach distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in [*611] these arenas. To my mind, the most depressing aspect of the majority's opinion is its sincerity.

A primary theme of the majority's approach is deference to executive authority, especially in a time of national unrest, turmoil, or danger. The conduct of foreign policy and the maintenance of national security are surely executive and legislative powers. Yet those powers are not limitless. The bounds in both wartime and peacetime are fixed by the same Constitution. *See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21, 18 L. Ed. 281 (1866).* Where appropriate, deference to the coordinate branches is an essential element of our work. But there is, in my view, an enormous difference between being deferential and being supine in the face of governmental misconduct. The former is often necessary, the latter never is. At the end of the day, it is not the role of the judiciary to serve as a help-mate to the executive branch, and it is not its role to avoid difficult decisions for fear of complicating life for federal officials. Always mindful of the fact that in times of national stress and turmoil the rule of law is everything, our role is to de-

fend the Constitution. We do this by affording redress when government officials violate the law, even when national security is invoked as the justification. *See U.S. Const. art. I, § 9, cl. 2*; *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952).*

Notably, the majority opinion does not appear to dispute the notion that Arar has stated an injury under the *Fifth Amendment of the Constitution*. That is heartening, because, by any measure, the notion that federal officials conspired to send a man to Syria to be tortured "shocks the conscience." *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952).* What is profoundly disturbing, however, is the Court's pronouncement that it can offer Arar no opportunity to prove his case and no possibility of relief. This conclusion is at odds with the Court's responsibility to enforce the Constitution's protections and cannot, in my view, be reconciled with *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, which remains good law to this day. *See also Davis v. Passman, 442 U.S. 228, 248-49, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (declaring *Bivens* remedy for alleged *Fifth Amendment* violations). The majority is at odds, too, with our own State Department, which has repeatedly taken the position before the world community that this exact remedy is available to tor-

ture victims like Arar.[1] If the Constitution ever implied a damages remedy, this is such a case -- where executive officials llegedly blocked access to the remedies chosen by Congress in order to deliver a man to known torturers.

The Court's hesitation today immunizes official conduct directly at odds with the express will of Congress and the most basic guarantees of liberty contained in the Constitution. By doing so, the majority risks a government that can interpret the law to suits its own ends, without scrutiny. *See* Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Jan. 9, 2002, in The Torture Papers: The Road to Abu Ghraib 38 (Karen J. Greenberg & [*612] Joshua L. Dratel eds., 2005); *The Federalist No. 48*, at 281 (James Madison) (Clinton Rossiter ed., 1961) (warning against the "tyrannical concentration of all the powers of government in the same hands"). Contrary to the majority, I believe that the Constitution affords Arar a remedy should he prove his sobering allegations, and that his case should be permitted to proceed.

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[1] *See* United States Written Response to Questions Asked by the United Nations Committee Against Torture, P 5 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm; United States Report to the United Nations Committee Against Torture, PP 51 (bullet-point 5), 274, U.N. Doc. CAT/C/28/Add/5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

I

The majority discovers myriad reasons to "hesitate" in the face of Arar's complaint that federal officials conspired to send him to Syria to be tortured. Its principal reason, however, is that permitting such an action "would have the natural tendency to affect diplomacy, foreign policy and the security of the nation." **Maj. Op. at 38**. This view of the separation of powers, which confines the courts to the sidelines, is, in my view, deeply mistaken; it diminishes and distorts the role of the judiciary especially during times of turmoil.

When presented with an appropriate case or controversy, courts are entitled -- indeed obliged -- to act, even in instances where government officials seek to shield their conduct behind invocations of "national security" and "foreign policy." *See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)*; *Reid v. Covert, 354 U.S. 1, 23-30, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957)*; *Youngstown, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417. Compare Ex parte Quirin, 317 U.S. 1, 19, 63 S. Ct. 2, 87 L. Ed. 3 (1942)* (observing the "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty"), *with* **Maj. Op. at 42** (suggesting that Arar's allegations do not trigger the Court's "unflagging duty to exercise [its] jurisdiction"). This authority derives directly from the Constitution and goes hand

in hand with the responsibility of the courts to adjudicate all manner of cases put before them.

The active management of foreign policy and national security is entrusted to the executive and legislative branches. *See* U.S. Const. art. I, § 8; Art. II, § 2. But this does not mean that executive and legislative officials are left to adhere to constitutional boundaries of their own accord, without external restraint. That is the job of the courts. As Madison declared when he introduced the *Bill of Rights* to Congress:

> If [these amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 *Annals of Cong.* 439 (Joseph Gales ed., 1834). The Constitution established three co-equal branches of government, each operating as a check upon the others. In this way, the separation of powers was designed as a limiting principle of government -- not to silence any one branch, as the majority implies here, but to enlist each as "a sentinel over the public

rights." *The Federalist No. 51*, at 290 (James Madison) (Clinton Rossiter ed., 1961).

The majority treats the separation of powers as a reason for the Court to abstain in this case -- in reality, it is precisely the opposite. The executive's core responsibility for foreign policy does not negate the judiciary's duty to interpret and enforce constitutional limits. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." [*613] *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934)*; *Boumediene v. Bush, 128 S. Ct. 2229, 2246, 171 L. Ed. 2d 41 (2008)*. One branch impermissibly intrudes upon another not when it fulfills its prescribed role but when it seeks to exercise authority assigned to its coordinate branches. *See Youngstown, 343 U.S. at 587-89* (holding that the President had exceeded his executive powers when he assumed the "law making power" entrusted to "Congress alone in both good and bad times"); *Bowsher v. Synar, 478 U.S. 714, 726, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986)* (holding that Congress may not remove executive officers except by impeachment); *The Federalist No. 47*, at 270-71 (James Madison) (Clinton Rossiter ed., 1961) ("[W]here the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted."). The defendants before us could, of course, be fully exonerated in the end, but it is the Court's

role to determine the legality of their actions for itself.

In this case, Arar does not ask the Court to assume any executive functions -- to dispatch diplomatic representatives, negotiate treaties, or oversee battlefield decisions. Likewise, the suit does not implicate his release or rescue from Syrian custody. Rather, Arar asks the Court to perform a core judicial function: To interpret the laws and Constitution as they apply to detailed allegations of official misconduct on American soil. And he petitions for a familiar judicial remedy: money damages. *See Bivens, 403 U.S. at 395*. Such a suit does not represent judicial interference in executive functions, as the majority would have it, but rather an effort to keep executive power within constitutional limits. *See Buckley v. Valeo, 424 U.S. 1, 121, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)* (recognizing that each branch necessarily participates in the affairs of the others); *Mistretta v. United States, 488 U.S. 361, 380-81, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)*. Respectfully, I believe the majority's deference dissolves the very protections and liberties that the separation of powers was intended to guarantee.

II

The Supreme Court has repeatedly made clear that the separation of powers does not prevent the judiciary from ruling on matters affecting national security, and that the courts are competent to under-

take this task. *See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 535, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in establishing procedures for designating enemy combatants); *New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971)* (holding that asserted military interests could not justify prior restraint of the press); *Youngstown, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417*; *Ex parte Quirin, 317 U.S. at 19*.[2]

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[2] In *Little v. Barreme, 6 U.S. (2 Cranch) 170, 179, 2 L. Ed. 243 (1804)*, for example, the Supreme Court found a naval captain "answerable in damages" for his unlawful seizure of a Danish trading ship, even where a Presidential order appeared to authorize the seizure. The Court did not hesitate, as here, to address the legality of the President's order or the seizure itself. "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If thosè instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution." *Id. at 170*; *see also Talbot v. Seeman, 5 U.S. (1, 2 L. Ed. 15 Cranch) 1 (1801)* (determining the legality of the navy's capture of foreign merchant vessel during undeclared conflict with France); *The Prize Cases, 67 U.S. (2 Black) 635, 17 L. Ed. 459 (1862). Ex parte Milligan, 71 U.S. (4 Wall.) 2, 18 L. Ed. 281 (1866)*, rejected the government's claim that civil war authorized the executive branch to act as "supreme legislator, supreme judge, and supreme executive." William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 121 (1998) (quoting the government's brief in *Milligan*). "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan, 71 U.S. at 120-21.*

[*614] Courts routinely handle classified materials and exercise judgment about both the credibility and legal significance of the security interests asserted by the government. *See* Foreign Intelligence Surveillance Act of 1978 (FISA), *50 U.S.C. §§ 1801-1811*, *1821-29*, *1841-46*, *1861-62 (2006)*; Freedom of Information Act (FOIA), *5 U.S.C. § 552(a)(4)(B)* & *(b)(1) (2006)*; *amended* by Open FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2142, 2184 (2009) Classified Information Procedures Act (CIPA), 18 U.S.C. App. III §§ 1-16; *Boumediene v. Bush, 128 S. Ct. 2229, 2261, 171 L. Ed. 2d 41 (2008)* ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."); *United States v. United States District Court (Keith), 407 U.S. 297, 320, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)* ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."). These cases belie the majority's notion that the courts lack authority or competency to assess Arar's claims. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin, 287 U.S. 378, 401, 53 S. Ct. 190, 77 L. Ed. 375 (1932)).*

The courts have a duty to scrutinize unilateral assertions of security and secrecy because the government's account has, in many of these cases, been overblown. Recent disclosures suggest that the mili-

tary secrets so fiercely guarded in *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* -- the Supreme Court's seminal state secrets case -- may well have posed no threat to national security. *See Herring v. United States, 2004 U.S. Dist. LEXIS 18545, 2004 WL 2040272, at *5 (E.D. Pa. Sept. 10, 2004)*, *aff'd*, *424 F.3d 384 (3d Cir. 2005)* (finding no deliberate fraud upon the court, but noting "the apparent dearth of sensitive information in the accident investigation report and witness statements"); Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 166-69 (2006).

A similar truth has emerged from the Pentagon Papers case, *New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971)*. Although the government argued to the Supreme Court that publication posed a "grave and immediate danger to the security of the United States," former Solicitor General Griswold has since acknowledged that the executive's primary concern was "not with national security, but rather with governmental embarrassment." Erwin N. Griswold, Secrets Not Worth Keeping, Wash. Post, Feb. 15, 1989, at A25; *cf.* Office of the Attorney General, Mem. on Policies and Procedures Governing Invocation of the State Secrets Privilege 2 (Sept. 23, 2009) (issuing revised guidelines and clarifying that the Department of Justice "will not defend an invocation of the [state secrets] privilege in order [*615] to . . . prevent embarrassment to a person, organization, or

agency of the United States government"). The appropriate tools for evaluating national security concerns are already firmly established in our law -- namely, the state secrets privilege and CIPA. They do not require wholesale abstention by the courts.

Indeed, a number of cases in which courts have acceded in this way, relying on bald appeals to national security, have proven deeply troubling in retrospect. The Supreme Court's decisions upholding convictions under the Sedition Act of 1918 are regarded as indefensible today. *See Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470, 17 Ohio L. Rep. 26, 17 Ohio L. Rep. 149 (1919)*; *Debs v. United States, 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566, 17 Ohio L. Rep. 1 (1919)*; *Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919)*; *Morse v. Frederick, 551 U.S. 393, 442, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007)* (Stevens, J., dissenting) (observing that Justice Holmes' dissent in *Abrams* has "emphatically carried the day"). More recently, the dire warnings issued to justify the indefinite detention of enemy combatants and forestall further court review have also drawn stern rebuke. In *Padilla v. Hanft, 432 F.3d 582, 584-587 (4th Cir. 2005)*, the Fourth Circuit observed that the government had "steadfastly maintain[ed] that it was imperative in the interest of national security" to hold Padilla in military custody for three and a half years. Yet officials abruptly changed course on the doorstep of Supreme Court review, seeking to move Padilla into criminal custody, at a "substantial cost to the

government's credibility before the courts." *Id. at 584. See also* Brief for Respondents, *Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* (No. 03-6696) (arguing that military necessity required Hamdi's indefinite detention, yet releasing him to Saudi Arabia seven months later).

Finally, contrary to the majority's suggestion, the courts require no invitation from Congress before considering claims that touch upon foreign policy or national security. *See* **Maj. Op. at 10-11, 42-43, 57**. In fact, the Supreme Court has demonstrated its willingness to enter this arena against the express wishes of Congress. In *Boumediene v. Bush, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008)*, the Supreme Court rebuffed legislative efforts to strip the courts of jurisdiction over detainees held at Guantanamo Bay. It held that the writ of habeas corpus extended to the naval base, and that neither Congress nor the executive branch could displace the courts without formally suspending the writ. Importantly, it did so despite the fact that this exercise of judicial power plainly affected the executive's detention of hundreds of enemy combatants and a centerpiece of the war on terror. The Court recognized that habeas proceedings "may divert the attention of military personnel from other pressing tasks" but refused to find these concerns "dispositive." *Id. at 2261*. Scores of decisions have since followed this lead. *See, e.g., Al Rabiah v. United States, 2009 U.S. Dist. LEXIS 88936, 2009 WL 3048434 (D.D.C. Sept. 17, 2009)*; *Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. 2009)*. Courts

cannot blithely accept every assertion of national security at face-value, and they are entitled to enforce constitutional limits by scrutinizing such claims.

III

Although Arar credibly alleges mistreatment in both the United States and Syria, the circumstances of his detention on American soil are summarily excluded from the majority's *Bivens* analysis. Instead, the Court concludes that Arar has not pleaded these allegations with the factual detail required by *Bell Atlantic Corp.* [*616] *v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). See* **Maj. Op. at 23-24**. Consequently, it dismisses Claim Four and proceeds as though the challenged conduct is strictly extraterritorial.[3] This conclusion

[3] The majority identifies extraordinary rendition as the context for Arar's *Bivens* claims, a label that reduces the complaint to the fact of his transfer to Syria. *See* **Maj. Op. at 8, 32-33**. In doing so, the majority largely disregards the events both before and after Arar's transfer that are part and parcel of his claim for relief. Arar does not merely allege that he was rendered to Syria without process, but that he was first detained in the United States for twelve days, during which time he was held in harsh and punitive conditions, coercively interrogated, and deliberately denied access to counsel, his consulate, and the courts by American officials. *See* Compl. PP 2, 4, 32-49, 91-93. Moreover, the purpose and culmination of this mistreatment was not simply Arar's removal from the United States. Rather, American officials allegedly set out to render him to Syria either intending or knowing that Arar would be tortured there, and aided this abuse by providing information to his captors. *See id*. PP 55-57. One hopes that all extraordinary rendition is

goes far beyond any pleading rule we are bound to apply, and it is inconsistent with both *Rule 8 of the Federal Rules of Civil Procedure* and recent Supreme Court decisions.

Even after *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*, which dismissed discrimination claims against policymakers on account of inadequate pleading, Claim Four readily exceeds any measure of "plausibility." Claim Four seeks to hold Defendants John Ashcroft, Larry Thompson, Robert Mueller, James Ziglar, J. Scott Blackman, Edward McElroy, and John Does 1-10 responsible for the extreme conditions under which Arar was held in the United States.[4] While the majority finds that Arar failed to allege the requisite "meeting of the minds" necessary to support a conspiracy, *see* **Maj. Op. 24**, it ignores the fact that Arar pleaded multiple

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not for the purpose of torture; certainly, this abuse is not one of the attributes that the majority attaches to that label. *See* **Maj. Op. at 9-10 n.1**. All told, extraordinary rendition is the method by which Arar was transferred to Syria, but it hardly captures the constitutional injuries described in his complaint.

[4] At the time of Arar's detention, Defendant Ashcroft was Attorney General of the United States; Defendant Thompson was Deputy United States Attorney General; Defendant Robert Mueller was the Director of the Federal Bureau of Investigation (FBI); Defendant Ziglar was Commissioner of the Immigration and Naturalization Service (INS); Defendant Blackman was Regional Director of the INS for the Eastern District; Defendant McElroy was District Director for the INS for the New York City District; and John Does 1-10 were federal law enforcement agents employed by the FBI or INS. *See* Compl. PP 14-22.

theories of liability. Formal conspiracies aside, he also alleges that the defendants commonly aided and abetted his detention and removal -- that is, that the defendants were personally involved in his mistreatment both in the United States and abroad. *See Hayut v. State Univ. of New York, 352 F.3d 733, 753 (2d Cir. 2003)* (A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or (4) deliberate indifference to the rights of others); *Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 254 (2d Cir. 2001).*

In support of his claim for mistreatment and due process violations while in American custody, Arar includes factual allegations that are anything but conclusory. Indeed, he provides as much factual support as a man held incommunicado could reasonably be expected to offer a court at this stage. The complaint alleges that Defendant McElroy was personally involved [*617] in Arar's failure to receive the assistance of counsel. *See* Compl. P 43. It alleges that Defendants Blackman and Thompson personally approved Arar's expedited transfer from the United States to Syria, implicating these officials in his inability to access the courts. *Id.* PP 15, 47-48. And it recounts statements by Arar's American interrogators that they were discussing his situation with "Washington D.C." *Id.* P 45; *see also* Dep't of Homeland Security, Office of the Inspector General, The

Removal of a Canadian Citizen to Syria ("OIG Report") at 11 (reporting that DOJ and INS officials in Washington, D.C. learned of Arar's apprehension on the evening of Thursday, September 26, 2002, 12 days before he was rendered to Syria via Jordan). More broadly, Arar details the harsh conditions under which he was held, including shackling, strip searches, administrative segregation, prolonged interrogation, and a near communications blackout. *See id.* PP 29-47. Notably, these are not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 129 S. Ct. at 1949.* They easily satisfy the requirements of both *Iqbal* and also *Rule 8*, whose "short and plain statement" remains the baseline for notice-pleading. *See Fed. R. Civ. P. 8(a)(2).*

Moreover, as *Iqbal* made clear, plausibility is "context-specific," requiring the reviewing court "to draw on its experience and common sense." *Iqbal, 129 S. Ct. at 1950.* There, the Supreme Court rejected Iqbal's discrimination claims against high-ranking federal officials because his complaint lacked sufficient factual allegations supporting the inference of discriminatory intent. *Id. at 1952.* Central to the majority's decision was the fact that these officials faced a devastating terrorist attack "perpetrated by 19 Arab Muslim hijackers." *Id. at 1951.* Against this backdrop, the majority found Iqbal's claim overwhelmed by the "obvious alternative explanation" -- that his arrest stemmed from a "nondiscriminatory intent to detain aliens . . . who had po-

tential connections to those who committed terrorist acts." *Id. at 1951* (quoting *Twombly, 550 U.S. at 567*). Apparently having their own views about the defendants' state of mind, the majority simply found Iqbal's discrimination claim incredible.

Plausibility, in this analysis, is a relative measure. Allegations are deemed "conclusory" where they recite only the elements of the claim. They become implausible when the court's commonsense credits far more likely inferences from the available facts. *See Harris v. Mills, 572 F.3d 66, 71-72 (2d Cir. 2009)*. Plausibility thus depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations. *See Iqbal, 129 S. Ct. at 1947-52*. As *Rule 8* implies, a claim should only be dismissed at the pleading stage where the allegations are so general, and the alternative explanations so compelling, that the claim no longer appears plausible. *See Fed. R. Civ. P. 8(a)*; *Twombly, 550 U.S. at 556* (requiring simply "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claims).

Arar's claim readily survives this test, particularly in light of the Court's obligation to "draw[] all reasonable inferences in the plaintiff's favor" on a motion to dismiss. *See Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*. The notion that high-ranking government officials like Defendants Ashcroft and Mueller were personally involved

in setting or approving the conditions under which suspected terrorists would be held on American soil -- and even oversaw [*618] Arar's detention and removal -- is hardly far-fetched. Arar's arrival at JFK airport was a significant event in September 2002, triggering all manner of security responses. *See, e.g.*, Compl. P 45; OIG Report at 11, 15 (citing "high-level interest in Arar in Washington, DC"); *id.* at 30 n.31 (describing the four-vehicle convoy in which Arar was transported, including nine INS officers equipped with their service weapons, Remington 870 shotguns, M-4 rifles, helmets, and ballistic vests). The fact that Arar was covertly transferred to Syria, by itself, indicates involvement at the highest levels of government.

In contrast to *Iqbal*, it is the alternative here that is difficult to fathom. To think that low-level agents had complete discretion in setting the conditions for holding a suspected member of al Qaeda defies commonsense. It requires the Court to believe that, while high-level officials were involved in arranging Arar's removal to Syria -- a premise the majority does not question[5] -- they were oblivious to the particulars of his detention. The majority was, of course, bound to credit all reasonable inferences from

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[5] Likewise, the majority finds these very same allegations sufficient for purposes of personal jurisdiction, as did the panel. *See* **Maj. Op. at 19**; *Arar v. Ashcroft, 532 F.3d 157, 173-75 (2d Cir. 2008)* (panel op.) (applying identical personal involvement standard in considering personal jurisdiction and finding it met).

the allegations in the complaint, understanding that their factual basis would be thoroughly tested in discovery. *See Twombly, 550 U.S. at 555* (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"). The inference that, in 2002, high-level officials had a role in the detention of a suspected member of al Qaeda requires little imagination.

Further, unlike *Iqbal*, Arar's due process claims do not ask the Court to speculate about the mental state of government officials. Rather, Claim Four rests on objective factors -- the conditions of confinement and his access to the courts -- that are independent of motive. *Compare Iqbal, 129 S. Ct. at 1948* (claim of invidious discrimination requires the plaintiff to "plead and prove that the defendant acted with discriminatory purpose"), *with Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir.1995)* (government conduct that is "arbitrary, conscience-shocking, or oppressive in a constitutional sense" violates substantive due process). The complaint contains more than sufficient factual allegations detailing these deprivations. *See* Compl. PP 27-49.

Finally, it should not be lost on us that the Department of Homeland Security's Office of Inspector General has itself confirmed the broad contours of Arar's mistreatment, producing a lengthy report on the conditions of his detention in American custody. *See* OIG Report. This report provides a powerful indication of the reliability of Arar's factual alle-

gations at this stage.[6] Plainly, the majority has read the OIG report, even citing it for limited purposes in its opinion. *See* **Maj. Op. at 48**. It is difficult, then, to comprehend how the majority can ignore the report's findings and conclusions in assessing the basic plausibility of Arar's fourth claim.

Ultimately, it is unclear what type of allegations to overcome a motion to dismiss by high-level officials could ever satisfy the majority. In refusing to credit Arar's allegations, the majority cites the complaint's use of the "passive voice" in [*619] describing some of the underlying events. *See* **Maj. Op. at 25**. This criticism is odd because the occasional use of the passive voice has not previously rendered pleadings defective, particularly where the defendants' roles can be easily ascertained from the overall complaint. *See* Compl. PP 14-22; *Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555, 561 (2d Cir. 1985)* ("It is elementary that, on a motion to dismiss, a complaint must be read as a whole, drawing all inferences favorable to the pleader.") (citations omitted). Specifically, the majority faults Arar for not pinpointing the individuals responsible for each event set out in the complaint and for failing to particularize more fully when and with whom they conspired. The irony involved in imposing on a plaintiff -- who was held in solitary confinement and then

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[6] In *Iqbal*, the Supreme Court looked beyond the complaint to a wider factual context in assessing plausibility. *See 129 S. Ct. at 1951-52.*

imprisoned for ten months in an underground cell -- a standard so self-evidently impossible to meet appears to have been lost on the majority.

The flaws in the majority's approach are not unique to Arar, but endanger a broad swath of civil rights plaintiffs. Rarely, if ever, will a plaintiff be in the room when officials formulate an unconstitutional policy later implemented by their subordinates. Yet these closeted decisions represent precisely the type of misconduct that civil rights claims are designed to address and deter. *See Carlson v. Green, 446 U.S. 14, 21, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*. Indeed, it is this kind of executive overreaching that the *Bill of Rights* sought to guard against, not simply the frolic and detour of a few "bad apples." The proper way to protect executive officials from unwarranted second-guessing is not an impossible pleading standard inconsistent with *Rule 8*, but the familiar doctrine of qualified immunity.

Even if the majority finds that Arar's factual allegations fall short of establishing the personal involvement of Defendants Ashcroft and Mueller, they plainly state a claim against defendants such as Thompson, Blackman, McElroy, and John Doe FBI and ICE agents. *See* Compl. PP 43, 47-48, 55. The direct involvement of these defendants is barely contested by the appellees and barely mentioned by the majority. For this reason alone, there is no legal justification for the majority to dismiss Claim Four outright.

IV

When the full range of alleged mistreatment is considered, Arar's injuries hardly constitute a "new" context for *Bivens* claims, and I agree with both Judge Sack's and Judge Pooler's careful analyses. This Court has repeatedly assumed that *Bivens* extends to substantive due process claims and provides a damages remedy to other detainees illegally injured by executive officials or their agents. *See Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*; *Thomas v. Ashcroft, 470 F.3d 491, 497 (2d Cir. 2006)*; *Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000)*. Our State Department is of the same view, having assured the United Nations' Committee Against Torture that a *Bivens* remedy is available to torture victims. *See* United States Written Response to Questions Asked by the United Nations Committee Against Torture, P 5 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm.[7]

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[7] Responding to the Committee's question, "What guarantees and controls does [the United States] have to ensure the monitoring of the activities of law enforcement officials in prisons and other detention centres . . . under its jurisdiction or de facto control," the State Department acknowledged among other remedies: "Suing federal officials for damages under provisions of the U.S. Constitution for 'constitutional torts,' *see Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, and *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*."

[*620] Even if Arar's case were viewed as a new context, the "special factors" cited by the majority do not justify denying him relief because they are not "special." They largely duplicate concerns -- like state secrets, sovereign immunity, and qualified immunity -- amply addressed by other doctrines at the Court's disposal. *See Davis v. Passman, 442 U.S. 228, 246, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (refusing to hesitate where special factors were "coextensive with the protections afforded by the *Speech or Debate Clause*"). My colleagues make these arguments in greater detail, cataloging the flaws in the majority's *Bivens* analysis. I write to emphasize the heightened need for a *Bivens* remedy in cases such as this where executive officials have deliberately thwarted the remedies provided by Congress and obstructed access to the courts. Arar's claims in this regard supply an exceptionally compelling justification for affording a *Bivens* remedy, going well beyond the allegations that gave rise to *Bivens* in the first place.

The judicial role recognized in *Bivens* reflects an important institutional balance -- one closely aligned with separation of powers. *Bivens* offers Congress the first opportunity to fashion a remedy for invasions of individual rights protected by the Constitution. However, when a legislative judgment is lacking, *Bivens* permits the courts to use their common-law powers to fill crucial gaps and provide redress in appropriate instances. This line of cases thus instructs the courts to tread lightly where Con-

gress has spoken, presuming that in those instances constitutional interests have been adequately addressed by the legislative branch. *See Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)* ("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.").

On the other hand, where no legislative remedy exists, *Bivens* reaffirms the courts' power to ensure that individuals can obtain relief for constitutional injuries. The courts, within this framework, provide a forum of last resort; through *Bivens*, they stand behind constitutional guarantees neglected by the political branches. *Compare Bivens, 403 U.S. at 410* (Harlan, J., concurring) (implying a remedy where constitutional injury would otherwise go unredressed), *with Bush v. Lucas, 462 U.S. 367, 388, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)* (denying *Bivens* remedy in light of the "elaborate remedial system" established by Congress).

Even so, this remedy is constrained by "special factors" that counsel hesitation even in the "absence of affirmative action by Congress." *Bivens, 403 U.S. at 396*. The Supreme Court has never provided an exhaustive definition of these special factors, and

existing precedent offers only a few data-points. [8] But it has [*621] nonetheless indicated that this analysis should "weigh [] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Wilkie v. Robbins, 551 U.S. 537, 554, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)*. In *Wilkie*, for example, the factor that ultimately counseled hesitation was the difficulty of distinguishing unconstitutional conduct from lawful government activity. *Id. at 555-61*. In earlier cases, involving claims by military personnel, the Supreme Court cited Congress' plenary authority "To make Rules for the Government and Regulation of the land and naval Forces," and its adoption of the Uniform Code of Military Justice. *See Chappell v. Wallace, 462 U.S. 296, 301-03, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)* (citing *U.S. Const. art. I, § 8, cl. 12-14*; *10 U.S.C. § 938*); *see also United States v. Stanley, 483 U.S. 669, 683-84, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987)*. Where Congress, pursuant to this authority, had established a parallel system of military discipline, the

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[8] While the majority pointedly notes that the Supreme Court has only agreed to extend a Bivens remedy three times since 1971, it has only rejected such claims based on special factors on three occasions over that same period. *See Wilkie v. Robbins, 551 U.S. 537, 554, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)*; *United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987)*; *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*. In every other case, the Court has determined that the remedial scheme established by Congress displaces a judicial remedy -- a finding that the majority does not purport to make here. Moreover, even in *Chappell*, the Supreme Court relied in part on the alternative remedial scheme provided in the Uniform Code of Military Justice.

Court declined to interfere in the relationship between enlisted personnel and their commanding officers. *See Chappell, 462 U.S. at 304*. "Special factors," then, must be regarded as a prudential limitation: One that considers the suitability of money damages for the particular constitutional injuries alleged, together with the availability of other relief.[9] *See Davis, 442 U.S. at 245* (finding "special concerns" overcome by impossibility of equitable relief and appropriateness of damages remedy).

So limited, *Bivens* is an infrequent remedy, but it is a vitally necessary one. In laying out the *Bivens* remedy, the Supreme Court recognized that "[t]he very essence of civil liberty certainly consists

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[9] The special factors analysis considers the wisdom and effectiveness of one particular remedy -- the recovery of money damages from individual federal officers. This determination is separate and distinct from (1) a court's capacity to assess the right in question; and (2) its power to afford relief of any kind. In particular, if a court would be entitled to provide injunctive or habeas relief for the same or similar claims, it cannot treat the special factors analysis as a proxy for justiciability, the political question doctrine, or the separation of powers. Indeed, if other forms of relief would be available, these potential obstacles to the court's jurisdiction have already been dispatched and they may not be smuggled in a second time through the back door. Yet the majority does precisely this, relying on a host of "special factors" that simply repeat concerns accounted for elsewhere in our law. *See* **Maj. Op. at 38-50** (treating as special factors separation of powers, sovereign immunity, state secrets and classified information, and diplomatic assurances). In reality, it is a much more modest inquiry. The special factors analysis must focus on why money damages -- as opposed to other forms of available relief -- might be inappropriate or undesirable.

in the right of every individual to claim the protection of the laws." *Butz v. Economou, 438 U.S. 478, 485, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)* (quoting *Bivens, 403 U.S. at 395, 397)*; *see also Davis, 442 U.S. at 241* ("[T]he judiciary is clearly discernible as the primary means through which these rights may be enforced."). It was this principle, in the face of "the most flagrant abuses of official power," that prompted the Court to afford a damages remedy. *Bivens, 403 U.S. at 410* (Harlan, J., concurring). *Bivens* thus reflects the courts' role as an independent source of protection, applying the damages remedy as a form of individual relief and official accountability.

This prerogative is consistent with the constitutional plan. With its built-in limitations, *Bivens* has never represented a formidable expansion of judicial power. [*622] The doctrine, it must be remembered, does not create any new rights; it provides a mechanism for enforcing existing constitutional rights when no other avenue exists. "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*; *see also Bivens, 403 U.S. at 395* ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

Against this backdrop, the majority sets out to narrow *Bivens* to the point of vanishing. The majority's test would not just eliminate a *Bivens* remedy in Arar's case, but in almost all cases. According to the majority, "'[h]esitation' is 'counseled' whenever thoughtful discretion would pause even to consider," and "no account is taken of countervailing factors." *See* **Maj. Op. at 37**. But because "thoughtful" people, by definition, always "pause to consider," this approach would foreclose a damages remedy on account of the most fleeting and superficial of concerns. And it would permit courts to ignore completely, as the majority opinion itself does, the gravity of the constitutional injuries alleged. As the Court admits, this dramatic recasting of *Bivens* is unnecessary to support its holding. ***Id.* at 38** (expressing the view that Arar's action "would have the natural tendency to affect diplomacy, foreign policy and the security of the nation," and therefore the Court's holding "need be no broader"). The standard described by the majority misstates the law and, for the reasons surveyed here, significantly weakens the courts' ability to redress constitutional injuries.

V

Arar's claims, in fact, go beyond the usual imperatives for a *Bivens* remedy. His complaint offers an exceptionally compelling basis for relief, one that the majority repeatedly sidesteps: The charge that government officials actively obstructed Arar's access to the courts, violating core procedural due process

rights. *See Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000)* (assuming that a *Bivens* action exists for procedural due process claim by detainee). Any court should be deeply disturbed by such allegations, especially those backed by the factual detail presented here. *Cf. Valverde v. Stinson, 224 F.3d 129, 133-34 (2d Cir. 2000)* (finding AEDPA statute of limitations equitably tolled where prison officials intentionally obstructed habeas petitioner's ability to file his petition by confiscating his legal papers). Yet the majority's wholesale dismissal of claims relating to Arar's detention in the United States - for insufficient pleading, as described above -- allows it to avoid any meaningful engagement with these allegations.

Normally, as we have seen, when Congress legislates in a particular area, a *Bivens* action is not appropriate. In particular, the division of labor outlined in *Bivens* contemplated two scenarios: (1) Where Congress has selected a remedy for constitutional injuries, the courts should defer to its legislative wisdom; (2) Where Congress has not considered a remedy, however, a court must use its "judgment about the best way to implement a constitutional guarantee." *Wilkie, 551 U.S. at 550*; *see Bivens, 403 U.S. at 396-97*. However, Arar's case fits neither situation. Instead, the allegations are that any remedy provided by Congress and the Constitution was purposefully foreclosed by executive officials.

When it comes to torture, Congress has spoken loudly and clearly. *Title 18, Section 2441* [*623]

makes it a felony punishable by life imprisonment to commit, or conspire to commit, "an act specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control for the purpose of obtaining information or a confession." *See also 18 U.S.C. § 2340A*. Arar's transfer to Syria was allegedly designed to skirt the congressional prohibition on torture by outsourcing this form of interrogation. Moreover, in order to seamlessly accomplish this transfer, officials had to ignore or evade a number of other congressional dictates: An immigration policy that bars the removal of any person to a country where he will likely be tortured, and the INA's judicial review provision. *See* Convention Against Torture, December 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, *implemented by* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G., Tit. XXII, § 2242, 112 Stat. 2681-822 (codified at *8 U.S.C. § 1231*); *8 U.S.C. § 1252(a)(2)(D)*; *see also Tun v. INS, 445 F.3d 554, 566 (2d Cir. 2006)*. Finally, officials' actions also foreclosed Arar's opportunity to seek habeas relief under *28 U.S.C. § 2241* and the Constitution, a remedy that the government itself concedes should have been available to Arar.

In bare terms, the complaint alleges that executive officials set out to circumvent and undercut the powers of both the legislative and judicial branches. Under these circumstances, the usual justifications for hesitation in applying *Bivens* are simply not present. When, as here, the executive branch

takes measures incompatible with the express or implied will of Congress, its "power is at its lowest ebb." *Youngstown, 343 U.S. at 637 (1952)* (Jackson, J., concurring). Factors that might otherwise counsel hesitation disappear where executive officials have sought to nullify the remedies chosen by Congress. In these cases, courts owe the executive branch little deference. Instead, the courts' provision of a substitute remedy is an undertaking not simply "appropriate for a common-law tribunal" but essential for the rule of law. *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).* Since the majority fails in these responsibilities, I respectfully dissent.

POOLER, Circuit Judge, joined by Judges Calabresi, Sack, and Parker, dissenting.

I agree with the well-reasoned dissents of my colleagues and join their opinions in full. I write separately to note that the majority's opinion in this troubling and unusual case should not be misread as adopting a new framework for determining whether to recognize a Bivens claim, and to explain why I do not agree that Arar's TVPA claim should be dismissed.

I. Bivens

At first glance, it might seem that the majority's reasoning with respect to Arar's Bivens claim proceeds in two simple steps: (1) Arar's claim presents a new context for a Bivens action,[1] and (2) special factors counsel hesitation before recognizing a Bivens remedy. But a closer reading of the majority opinion reveals far more than a mere hesitation to extend Bivens to a new context in light of special factors. Because the majority's holdings bear no relation to its new statements of Bivens principles, those remarks are dicta. Moreover, any such simplistic framework would be contrary to the Supreme Court's Bivens decisions, which require that courts consider [*624] reasons both for and against recognizing the remedy.

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[1] I do not agree with the majority's conclusion that Arar's case presents a new context for a Bivens action for the reasons stated in Judge Sack's dissent.

The Supreme Court has held that we must engage in the following analysis in considering whether to recognize Bivens action:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and free-standing remedy in damages. But even in the absence of an alternative, a Bivens remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)).* After sidestepping the question of existing remedies, Maj. Op. at **33-36**, the majority states that the remainder of inquiry can be reduced to the question of whether there any special factors to consider. Id. at **35-36**

The majority begins by observing that the Supreme Court has extended Bivens twice but refused to extend Bivens seven times, as if this empirical disfavor could save courts the trouble of engaging in

"the kind of remedial determination that is appropriate for a common-law tribunal." *Wilkie, 551 U.S. at 550*.[2] Notwithstanding the Supreme Court's reluctance to extend Bivens in recent years, it has not overruled Bivens, nor has it overruled the decisions extending Bivens to new contexts in *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* and *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*, nor has it ever held that "Bivens and its progeny should be limited to the precise circumstances that they involved." *Wilkie, 551 U.S. at 568* (Thomas, J., concurring) (quotation marks omitted). Thus, the majority must distinguish Bivens, Davis, and Green's cases from Arar's.

To do so, the majority points to "special factors" that counsel hesitation. The majority observes, in dicta, two "principles" emerging from the case law on Bivens. First, where special factors counseling hesitation exist, "no account is taken of countervailing factors." Maj. Op. at **37**. Notwithstanding this new principle, the majority concludes that it "cannot ignore that, as the panel dissent put it, 'there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security.'" Id. at **56-57** (quoting *Arar v. Ashcroft, 532 F.3d 157, 213 (2d Cir. 2008)* (Sack, J., dissenting in part)). And the majority rec-

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[2] Recently, in dicta, the Supreme Court explained that its "reluctan[ce]" to extend Bivens stems from the fact that "implied causes of action are disfavored." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009).*

ognizes that prudential considerations play into the Bivens analysis, considering, for example, whether a Bivens action in Arar's context would have a deterrent effect. Id. at **52**. Ultimately, therefore, the majority has not adopted any new principle of disregarding countervailing factors.

Second, the majority proclaims that the threshold for determining whether a factor "'counsels hesitation' is remarkably low.'" Maj. Op. at **37**. The majority explains that "'[h]esitation' is 'counseled' whenever thoughtful discretion would pause even to [*625] consider." Id. I find this statement somewhat inscrutable, but I do not take the majority to mean that Bivens should not be extended anytime a special factor deserves any degree of consideration. Insofar as the majority intends to lower the bar for special factors, its remarks are dicta. These remarks bear no relation to the majority's holding that extension of Bivens to Arar's context is not "advisable," id. at **32**, because separation of powers, institutional competence, and other factors "sternly" counsel hesitation. Id. at **36**. Indeed, the majority's opinion devotes twenty pages to its stern assessment of special factors, id. at **36-56**, including the fear that "actual terrorists" could win damages awards, placing courts in the position of funding terrorism, id. at **53 n.12**; that the government will be "graymail[ed]" into settling cases to prevent disclosure of classified information, id. at **51-54**; and that other countries will be "less willing to cooperate with the United States in shar-

ing intelligence resources to counter terrorism," id. at **43**.

Apart from being dicta, these remarks represent a misreading of Supreme Court precedent. Wilkie exhorts that we pay heed to special factors counseling hesitation while exercising the type of remedial judgment appropriate for a common law tribunal - "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." *551 U.S. at 554* (citing *Bush, 462 U.S. at 378*). In the exercise of remedial judgment, we should not consider only those factors that militate in favor of one side of the argument. We must be mindful of a wide range of prudential concerns. See, e.g, *id. at 550* (holding that "any free-standing damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee"); *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)* (considering whether extension of Bivens would "deter individual federal officers . . . from committing constitutional violations"). The majority cannot overrule Wilkie's holding that we must make "the kind of remedial determination that is appropriate for a common-law tribunal," *551 U.S. at 550*, by replacing that phrase with ellipses when quoting the case, see Maj. Op. at **35**.

Were the majority's dicta the rule, there would be no explanation for the Supreme Court's decision

in Bivens in the first place. Surely there were special factors that would have counseled hesitation -- the drain on the public fisc, the strain on judicial resources, the hindrance to law enforcement personnel whose efforts had to be diverted to defending lawsuits for damages. Without pausing to consider these factors, the Bivens Court held that a damages remedy was necessary to enforce the *Fourth Amendment*. *Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397-98, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*. Moreover, were the majority's dicta correct, it would be impossible to make heads or tails of *Davis v. Passman, supra*. In that case, the Court extended Bivens to a claim for employment discrimination in violation of the equal protection component of the *Fifth Amendment's Due Process Clause* against a member of Congress. The Court recognized a Bivens remedy despite pausing to give thoughtful consideration to the argument that Passman's status as a member of Congress, "counsel[ed] hesitation." *442 U.S. at 246*. The Court also noted the risk of "deluging federal courts with claims" and the scarcity of judicial resources, but did not find these special factors sufficiently persuasive to overwhelm Davis's need [*626] for a remedial mechanism. *Id. at 248* (quotation marks omitted).

The absence of other remedies for a constitutional violation may be a reason for creating a new cause of action. *Wilkie, 551 U.S. at 554* (considering, at the second step of the analysis, the inadequacy of existing remedies). Thus, the Supreme Court has

recognized a Bivens remedy where, for the plaintiff, it was "damages or nothing." *Davis, 442 U.S. at 245* (quoting *Bivens, 403 U.S. at 410* (Harlan, J., concurring in judgment)). "'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Bivens, 403 U.S. at 397* (quoting *Marbury v. Madison, 5 U.S. 137, 1 Cranch (5 U.S.) 137, 2 L. Ed. 60 (1803))*. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id. at 392* (quoting *Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946))*. In Davis, the Court held, "unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *442 U.S. at 242*.

The majority "avoids any categorical ruling on alternative remedies," in favor of its "dominant holding" on special factors. Maj. Op. at 8.[3] I have

[3] By abandoning the panel majority's holding that the INA is an alternative existing remedy that precludes Bivens relief, the majority has avoided any implication that well-established Bivens actions for immigrants alleging *Fourth* and *Eighth amendment* violations are without basis. And, by abandoning the holding that it could not take as true Arar's "unverified" allegations of official obstruction of his right to challenge

searched the majority's opinion for a subordinate and non-categorical ruling on alternative remedies, and I have found none. This is for good reason. The majority recognizes that "Arar has alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes." Id. at **35**. This makes Arar's case unlike those in which the Court refused to imply a Bivens remedy upon concluding that Congress had already established a remedial scheme covering the field. See, e.g., *Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*; *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*. Where defendants blocked a plaintiff's access to the remedies established by Congress, foreclosing a Bivens remedy eliminates any judicial review. See *Rauccio v. Frank, 750 F. Supp. 566, 571 (D. Conn. 1990)*; *Grichenko v. U.S. Postal Serv., 524 F. Supp. 672, 676-77 (E.D.N.Y. 1981)*. This result thwarts Congress's will and abdicates the judicial role. The majority errs in failing to take account of this consideration in its assessment of special factors.

In cases in which the Court declined to extend Bivens, it did not resolve the issue simply by observing that it had to pause to consider special factors. Rather, the Court declined to extend Bivens because factors related to institutional competence and separation of powers strongly counseled hesitation. For

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the CAT determination, the opinion avoids the implication that Bivens claimants face a heightened pleading standard.

example, in *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*, the Court declined to create a damages remedy for alleged racial discrimination by military officers because [*627] "[t]he need for . . . a special and exclusive system of military justice[] is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting," *id. at 300*, and the creation of a Bivens remedy by the federal courts "would be plainly inconsistent with Congress' authority in this field" under Article 1 of the Constitution, *id. at 304*.

Ultimately, the majority concludes that the Constitution provides Arar no remedy for this wrong, that the judiciary must stay its hand in enforcing the Constitution because untested national security concerns have been asserted by the Executive branch. For the reasons stated herein and in Judge Sack's dissenting opinion, I would hold the Arar should have a Bivens remedy -- to reinforce our system of checks and balances, to provide a deterrent, and to redress conduct that shocks the conscience. I understand the majority's opinion today to be a result of its hyperbolic and speculative assessment of the national security implications of recognizing Arar's Bivens action, its underestimation of the institutional competence of the judiciary, and its implicit failure to accept as true Arar's allegations that defendants blocked his access to judicial processes so that they could render him to Syria to be tortured,

conduct that shocks the conscience and disfigures fundamental constitutional principles. This is a hard case with unique circumstances. The majority's disappointing opinion should not be interpreted to change Bivens law.

II. TVPA

I cannot join the Court in concluding that the facts of Arar's complaint are insufficient to state a claim under the TVPA. Section 2(a) of the TVPA provides that a defendant is liable only if he acted under "actual or apparent authority, or color of law, of any foreign nation . . ." *28 U.S.C. 1350* (note). In construing this requirement, we look "to principles of agency law and to jurisprudence under *42 U.S.C. § 1983*." *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)*. Under *Section 1983*, "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (quotation marks omitted).

I agree with the majority that there is no litmus test for determining whether a *Section 1983* defendant is acting under color of state law. Maj. Op. at **21** ("The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be fairly

attributed to the state." (citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001))*. This is a wise departure from the test set forth by the panel opinion, which interpreted *Section 1983* case law to require that when the defendant is a federal official, he must be under the "control or influence" of the state actor to act under color of state law. *Arar, 532 F.3d at 175-76*. Our Circuit has consistently recognized several bases for liability under *Section 1983*, "control or influence" being just one:

> For the purposes of *section 1983*, the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" [*628] to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Indep. Group Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (per curiam) (quoting *Brentwood Acad., 531 U.S. at 296*). As the majority now recognizes, "[a] federal officer who conspires

with a state officer may act under color of state law." Maj. Op. at **21** (citing *Beechwood Restorative Care Ctr. v. Leeds, 436 F.3d 147, 154 (2d Cir. 2006)).*

The majority concludes that Arar's pleading was deficient because he alleged only that "United States officials encouraged and facilitated the exercise of power by Syrians in Syria," not that defendants possessed power under Syrian law which they used to remove him to Syria to be tortured. Maj. Op. at **21-22**. I disagree. In the *Section 1983* context, the Supreme Court has held that private individuals may be liable for joint activities with state actors even where those private individuals had no official power under state law. *Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).* In Sparks, the private individuals conspired with a state judge to enjoin the plaintiff's mining operation. The Court held:

> [T]o act 'under color of' state law for *§ 1983* purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of *§ 1983* actions.

Id.; see also *Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 315 (2d Cir. 2007)* (Korman, J., con-

curring in part). Arar alleges that U.S. officials, recognizing that Syrian law was more permissive of torture that U.S. law, contacted an agent in Syria to arrange to have Arar tortured under the authority of Syrian law. Specifically, Arar alleges that U.S. officials sent the Syrians a dossier containing questions, identical to those questions he was asked while detained in the U.S., including one about his relationship with a particular individual wanted for terrorism. He also alleges the Syrian officials supplied U.S. officials with information they extracted from him, citing a public statement by a Syrian official. Assuming the truth of these allegations, defendants' wrongdoing was only possible due to the latitude permitted under Syrian law and their joint action with Syrian authorities. The torture may fairly be attributed to Syria.

Because the majority's holding in this case is not required by controlling law from the *Section 1983* context,[4] the decision must turn on the unique features of this case - brought under the TVPA alleging joint action by federal agents with Syrian officials. The majority cites *Harbury v. Hayden, 444 F. Supp. 2d 19, 42-43 (D.D.C. 2006)*, aff'd on other grounds, *522 F.3d 413, 380 U.S. App. D.C. 388 (D.C. Cir. 2008)*. In that case, as well as one other, district judges concluded that U.S. officials pursuing federal

[4] Because the majority's holding turns on the unique aspects of Arar's claim under the TVPA, it does not limit the range of conduct for which non-state actors can be held liable under *Section 1983*.

policy under federal statutes act under color of U.S., not foreign, law. Id. (holding that CIA officers cooperating with the Guatemalan military acted under color of U.S. law because they were "within the scope of [*629] their employment serving the United States" and "carrying out the policies and directives of the CIA"); *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, 366 U.S. App. D.C. 408 (D.C. Cir. 2005)*. But the majority does not adopt this questionable reasoning -- that a federal official can act under color of only one sovereign's authority at a time. The majority simply observes that because "federal officials typically act under color of federal law, they are rarely deemed to have acted under color of state law." Maj. Op. at **21** (quotation marks omitted).

Rather, where the alleged torture was carried out by foreigners in a foreign land, the majority draws a line between the actual exercise of power under foreign law and the encouragement, facilitation, or solicitation of that exercise of power. Id. at **21-22**. This distinction is unprincipled. Under agency law, "when two persons engage jointly in a partnership for some criminal objective, the law deems them agents for one another. Each is deemed to have authorized the acts and declarations of the other undertaken to carry out their joint objective." *United*

States v. Russo, 302 F.3d 37, 45 (2d Cir. 2002). It is of no matter that only one member of the conspiracy carried out the torture. If we carry the majority's logic to its extreme, federal agents "could never be responsible for torture inflicted under color of foreign law, even if they were in the room with the foreign torturers orchestrating the techniques." Arar Reply Br. at 36.[5]

Under *Section 1983*, non-state actors who willfully participate in joint action with state officials, acting under state law, themselves act under color of state law. By analogy, under the TVPA, non-Syrian actors who willfully participate in joint action with Syrian officials, acting under Syrian law, themselves act under color of Syrian law. In *Aldana v. Del Monte Fresh Produce, 416 F.3d 1242, 1249, 1265 (11th Cir. 2005)*, the Eleventh Circuit sustained a TVPA claim where plaintiffs alleged that a U.S. corporation "hir[ed] and direct[ed] its employees and/or agents," including a Guatemalan mayor, "to torture the Plaintiffs and threaten them with death." *416 F.3d at 1265*. The allegation that the corporation participated in joint action with the Guatemalan official

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[5] The majority's perplexing statement that if a federal official were found to be acting under color of foreign law, it "would render a U.S. official an official of a foreign government," Maj. Op. at **22-23 n.3**, is simply incorrect. A private actor is not transformed into a state official merely because he acted under color of state law, see *Dennis, 449 U.S. at 27-28 (1980)*, and there is no reason that this would be the case in the analogous TVPA context.

was sufficient.[6] I see no principled reason to apply different rules to the TVPA context than the *Section 1983* context, to federal agent defendants than corporate defendants, or to actors in the United States than actors on foreign soil.[7] Arar alleges that defendants, [*630] acting in concert with Syrian officials, interrogated him through torture under color of Syrian law, which they could not have accomplished under color of U.S. law alone.

Thus, I cannot agree that the panel correctly determined the TVPA question on the "color of law" question.

I must therefore respectfully dissent.

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[6] Although the question in Aldana was whether violence by a private security force involved "state action," and not whether the U.S. corporation was acting in Guatemala under color of U.S. or Guatemalan law, in the *Section 1983* context, the two inquiries are interchangeable. See, e.g., *Lugar v. Edmondson Oil Co., 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*; see also *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1264 (11th Cir. 2009)*.

[7] Because plaintiffs must meet a plausibility standard for claims against federal officials under *Ashcroft v. Iqbal, supra*, I am not concerned that subjecting federal officials to liability under the TVPA would open the floodgates to a wave of meritless litigation. But see *Hayden, 444 F. Supp. 2d at 41*.

CALABRESI, Circuit Judge, joined by Judges Pooler, Sack, and Parker, dissenting.

I respectfully dissent. I join Judge Sack's, Judge Parker's, and Judge Pooler's dissenting opinions in full. But, because I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own, ". . . more in sorrow than in anger." *Hamlet*, act 1, sc. 2.

My colleagues have already provided ample reason to regret the path the majority has chosen. In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the TVPA and of § 1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person--whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law--is effectively left without a U.S. remedy. *See especially* dissenting opinion of Judge Parker.

All this, as the other dissenters have powerfully demonstrated, is surely bad enough. I write to discuss one last failing, an unsoundness that, although it may not be the most significant to Maher Arar himself, is of signal importance to us as federal judges: the majority's unwavering willfulness. It has

engaged in what properly can be described as extraordinary judicial activism.[1] It has violated long-standing canons of restraint that properly must guide courts when they face complex and searing questions that involve potentially fundamental constitutional rights. It has reached out to decide an issue that should not have been resolved at this stage of Arar's case. Moreover, in doing this, the court has justified its holding with side comments (as to other fields of law such as torts) that are both sweeping and wrong. That the majority--made up of colleagues I greatly respect--has done all this with the best of intentions, and in the belief that its holding is necessary in a time of crisis, I do not doubt. But this does not alter my conviction that in calmer times, wise people will ask themselves: how could such able and worthy judges have done that?

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I focus first on the willful reaching out to decide a hard constitutional question. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we

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[1] I use this much abused phrase "judicial activism," in its literal sense, to mean the unnecessary reaching out to decide issues that need not be resolved, the violation of what Chief Justice Roberts called "the cardinal principle of judicial restraint--if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. U.S. DEA, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004)* (Roberts, J., concurring).

ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v.* [*631] *McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944)*. The Supreme Court long ago made clear that it would not--and that we should not--"pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. TVA, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936)* (Brandeis, J., concurring); *see also, e.g., Alexander v. Louisiana, 405 U.S. 625, 633, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972)* ("[W]e follow our usual custom of avoiding decision of constitutional issues unnecessary to the decision of the case before us."); *Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 49 L. Ed. 482 (1905)* ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). We ourselves have described this canon of constitutional avoidance as "axiomatic," *Allstate Ins. Co. v. Serio, 261 F.3d 143, 149 (2d Cir. 2001)*, and have long allowed it to "dictate[]" our decisions in appropriate circumstances. *Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975)*.[2]

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[2] There is also a canon that courts should not lightly find legislation to be unconstitutional. *See, e.g., Clark v. Suarez Martinez, 543 U.S. 371, 381-82, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005)*. That canon is of great importance, and is related to but separate from the canon to which I am referring. *See id. at 381*. It derives from the so-called "majoritarian difficulty," the fact that courts are, generally, not representative bodies. *See* Alexander M. Bickel, *The Least Dangerous Branch* 16-17 (2d ed.

The question that today's majority elects to decide implicates this fundamental principle. This is because the existence *vel non* of a claim meriting a *Bivens* remedy, in the absence of any congressionally mandated relief, is a matter of constitutional interpretation. As early as *Bivens* itself, the Supreme Court made clear that the cause of action it recognized arose "under" the Constitution. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).* As Justice Harlan said in his influential concurrence in *Bivens*, "the source of the legal interest" protected by any *Bivens* action is "the Federal

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1986) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . . .") The canon at issue in this case is different, however, and demands, more broadly, that unnecessary constitutional decisions not be made, *whichever way they would come out.* It is expressed in a large variety of rules, a few of which are listed in one Supreme Court decision:

> constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; *in advance of the necessity of deciding them*; in broader terms than are required by the precise facts to which the ruling is to be applied; *if the record presents some other ground upon which the case may be disposed of*; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549, 569, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947) (emphasis added).

Constitution itself"; "the Constitution is in the relevant sense a source of legal protection for the 'rights' enumerated therein." *Id. at 402 n.3* (Harlan, J., concurring). And even the majority here describes *Bivens* as "a judicially-created remedy *stemming directly from the Constitution itself*." Maj. Op. at **30** (emphasis added).[3]

I recognize that this question--the constitutional status of *Bivens* actions--is one [*632] that has vexed some in academia. But as is often the case, what can be layered with mystery in the pages of a law review is, in practice, fairly simple. When a court concludes that a *Bivens* action is appropriate, it is holding that, on the then-present state of the law, the Constitution requires the court to create a remedy. As even the staunchest critics of *Bivens* recognize, a holding that a particular constitutional right implies a remedy "can presumably not even be repudiated by Congress." *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)* (Scalia, J., concurring). While Congress can vitiate the need for a judicially created *Bivens* rem-

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[3] *Cf. Fine, 529 F.2d at 71, 76 (2d Cir. 1975)* (declining to decide the "difficult and troublesome constitutional questions" in a *Bivens-like* claim against a municipality "founded directly upon the *Fourteenth Amendment*"); *Brault v. Town of Milton, 527 F.2d 730, 738 (2d Cir. 1975)* (en banc) (assuming, without deciding, that a claim against a municipality "can be founded directly on the *Fourteenth Amendment*," but finding "discussion of other possible barriers on [the plaintiff's] road to relief . . . superfluous" because the allegations in the complaint were insufficient).

edy by providing an "alternative . . . process for protecting the [constitutional] interest," *Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)*,[4] it cannot overturn a holding that *some* remedy is necessary.[5] This is the essence of a

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[4] For this reason, were there a majority finding that Arar could bring a TVPA action, as Judge Pooler, in her dissenting opinion, powerfully argues he should be able to do, then of course there might well be an "alternative, existing process," *Wilkie, 551 U.S. at 550*, in which case a *Bivens* action might not lie under the well-established rule that such a remedial scheme may obviate the need for a *Bivens* action. Because of the majority's holding that the TVPA does not apply, however, I need not reach this question. A more complicated issue, which I also don't need to reach, is whether compensation by a *foreign* government can constitute an alternative redress, because of which, on the very particular facts of this case, a *Bivens* action might not lie. But no one has discussed or argued that in any way, and since it is not an easy issue, I see no need to delve into it further.

[5] The first step of the two-part analysis laid out in *Wilkie* is itself an instance of constitutional avoidance. Where a congressionally created process adequately protects a constitutional right, there is no need to determine whether the Constitution requires a remedy. *See Bush v. Lucas, 462 U.S. 367, 378 n.14, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)* ("We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate." (citation omitted)).

By contrast, the Supreme Court, acting prudentially, has denied *Bivens* claims due to "special factors" only in quite particular circumstances implicating substantial constitutional questions. First, it has done so in response to an exclusive textual commitment of authority to another branch. *See United*

constitutional holding, and hence one directly subject to the avoidance canon.[6]

And while there are, of course, situations in which a court must or should put aside the practice of avoiding constitutional questions, as when its jurisdiction under Article III is in doubt, *see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*, none of them apply here. The existence *vel non* of a *Bivens* action is not a jurisdictional prerequisite that must be resolved first. If this was ever in doubt, it has been re-

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States v. Stanley, 483 U.S. 669, 681-82, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (holding that no *Bivens* action lay because of "explicit constitutional authorization for *Congress* 'to make Rules for the Government and Regulation of the land and naval Forces'" and "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches" (quoting *U.S. Const. Art. I, § 8, cl. 14*)); *Chappell v. Wallace, 462 U.S. 296, 300-02, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)* (same); *cf. Davis v. Passman, 442 U.S. 228, 246, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* ("[A]lthough a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the *Speech or Debate Clause*."). Second, it has done so where the Constitution did not provide a workable standard for distinguishing constitutional conduct from unconstitutional conduct. *See Wilkie, 551 U.S. at 555-61*.

[6] While the methodology that courts apply in determining whether or not a constitutional right presupposes some implied remedy is that of "a common-law tribunal," *Bush, 462 U.S. at 378*, that fact in no way diminishes the status of the ultimate holding, up or down, as a constitutional interpretation.

solved by *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)*, which makes clear that a court can "assume, without deciding, that [a] claim is actionable under *Bivens*" and then dismiss a case on non-jurisdictional grounds.

That avoiding difficult constitutional questions like those before us is the proper [*633] course was made clear by the Supreme Court in *Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*. In that case, the only issue before the Supreme Court was whether Harbury's *Bivens* action for denial of access to courts could proceed. *Id. at 412*. Justice Souter (for eight members of the Court) wrote that whether this *Bivens* action lies would require an inquiry that raises

> concerns for the separation of powers in trenching on matters committed to the other branches. *Since the need to resolve such constitutional issues ought to be avoided where possible, the [courts] should . . . as soon as possible in the litigation [determine] whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted*.

Id. at 417 (emphasis added). The Court, in other words, said we must first decide if there are *non-Bivens* grounds for resolving the dispute, and only

then address the constitutional issues raised by *Bivens* actions.[7] This practice, the Court stated, comports with "the obligation of the Judicial Branch to avoid deciding constitutional issues needlessly." *Id.* The Court then proceeded to examine closely the cause of action that Harbury claimed to have lost through the defendants' behavior, determined that it was insufficient to justify relief, and, on that non-constitutional basis, dismissed Harbury's claim. *Id. at 418.*

The implications for Arar's case could hardly be more manifest. The national security concerns that the majority relies upon in its special factors analysis are precisely those that the Supreme Court said must be avoided in *Harbury*. And in such circumstances, it is our job to put "the trial court . . . in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated." *Id. at 417.* For reasons that will be clear soon enough, it may well be that, on remand, this case would, for non-constitutional reasons, "fail to state a claim on which relief could be granted." *Id.*

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[7] To be sure, the Supreme Court noted that the defendants in *Harbury* "did not challenge below the existence of a cause of action under *Bivens*," and accordingly it did not express an opinion on the question or use the "special factors" terminology. *Harbury, 536 U.S. at 412 n.6.* But the constitutional question before us, of the balancing of two constitutional interests, one an individual right and one a matter of national security and separation of powers, is the same one as was avoided in *Harbury*.

at 417. That being so, the Supreme Court has told us, we must avoid constitutional pronouncements.

For this Court to go out of its way to decide on *Bivens* grounds when it is not necessary is, therefore, a reaching out of a particularly dangerous sort, regardless of what conclusion the Court comes to on the [*634] *Bivens* question.[8] If--as I would if I had to face the question--we were to decide that *Bivens* applies, then some remedy would be necessary regardless of Congress's preference. If, as the majority chooses to do, we rule that *Bivens* does not apply, we have said that, in a wide variety of cases, the Constitution fails to give protection. Both positions require a parsing of the Great Charter. When such a decision cannot be avoided, so be it: we do our job. But where it can be avoided, it should be.

The fact that the majority *wishes* to call the propositions holding is instructive, however. If the propositions are *holding* then they would eliminate virtually all *Bivens* actions in this circuit. And they would do so despite the assertions, elsewhere in the

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[8] At footnote 7, the majority disputes Judge Pooler's statement that the propositions in the accompanying text are dicta. *See* Maj. Op. at **37**. The majority then seeks to characterize those propositions as holdings. But whether something is holding or dicta is an objective fact and does not depend on how it is characterized either by a majority or by a dissent. It is what it is regardless of what one calls it. To paraphrase my professor Fleming James, "You can call it Thucydides or you can call it mustard plaster, but it is [dicta or holding] just the same."

majority opinion, that recognizing a *Bivens* action in this extraordinary case would be uniquely dangerous. The majority's desire to make a "holding" of such breadth, as to a question entailing constitutional interpretation, in a case which, as I argue, could likely be resolved on other grounds, displays a truly extraordinary degree of willfulness and activism.

II

So, how might the *Bivens* issue have been avoided? As Judge Sack explains in his eloquent dissent, this might be done through first examining the significance of the state secrets privilege to this case.[9] That privilege has long required dismissal in those rare cases where national security interests so drastically limit the evidence that can be introduced as to deprive either a plaintiff or a defendant of an opportunity to make its case. *See, e.g., Zuckerbraun*

[9] At footnote 14, the majority states that the state secrets privilege, despite its common law origin, is not devoid of constitutional implications. *See* Maj. Op. at **58-59**. That may well be. But that fact in no way means that decisions as to the applicability of a particular claim of the privilege entail constitutional interpretations. The existing common law privilege more than covers whatever the Constitution requires. The proper analogy is quite simple. If Congress were to pass a statute, akin to *§ 1983*, giving broad cause of action to those injured by federal officials, decisions under that statute would not normally involve constitutional interpretations. And this would be so even though, in the absence of such a statute, a *Bivens*, constitutional claim, might lie. The same is so with respect to applications of the common law state secrets privilege. As an excuse for the majority's violation of the canon of constitutional avoidance this argument does not make it to first base.

v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991); *see also United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)*; *El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007)* ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."). In a case such as this, where the Government asserts that the plaintiff's claim implicates vital national secrets, we must, before we move to the merits, examine the consequences of our duty to guard against any potentially harmful disclosures.

The majority obviously shares our concerns about the protection of state secrets, as virtually every "special factor" identified in the majority opinion concerns classified [*635] material. But, as Judge Sack says, this amounts to double-counting of the Government's interest in preserving state secrets. *See* dissenting opinion of Judge Sack at **52**. We *already* possess a well-established method for protecting secrets, one that is more than adequate to meet the majority's concern.[10] Denying a *Bivens* remedy because state secrets might be revealed is a bit

[10] Indeed, if anything, existing doctrine may be *too* solicitous of the need for secrecy, if the many critics of the *Reynolds* line are correct. *See infra* Part IV. But while there is widespread concern that the doctrine may be overused, it is hard to find any commentators who think that state secrets are inadequately protected under current law.

like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures.

Even more mystifying is the majority's insistence that it is respecting "[t]he preference for open rather than clandestine court proceedings." Maj. Op. at **47**. How, exactly, does the majority promote openness by shaping a constitutional decision around the fact that state secrets might be involved in a claim? The state secrets doctrine is undoubtedly in tension with the public right of access to the courts, but the majority's approach is more opaque than any state secrets resolution. When a court properly applies the state secrets doctrine, the case at bar will proceed only if the alleged state secrets are not vital to a claim or defense, so there should be little fear that a substantive holding will ultimately turn on secret material. By contrast, consider the harm done to the openness of the court system by what the majority does here. It bars any action in the face of what we are required to assume are outrageous constitutional violations, and it does so simply because state secrets *might possibly* be involved, without having a court look into that very question. As a result, even if the Government's claimed need for secrecy turned out to be wholly illusory, there would be no recourse! Indeed, even if the Government declassified every document relating to this case, even if all four countries involved announced that they had nothing to hide and that Arar's claim should proceed so that

they could be exonerated, there would be no open judicial testing of Arar's allegations. Which approach should give us more cause to hesitate?

The majority further errs in its use and abuse of other fields of law. In trying to find "special factors" that could justify barring a *Bivens* claim (but do not depend on "state secrets") the majority points to two issues that arise in *every* tort suit against a government official. If they are valid here they would appear to counsel "hesitation" in (and, under the majority's reasoning, seemingly preclude) every *Bivens* action. First, the majority warns that "[t]he risk of graymail . . . counsels hesitation in creating a *Bivens* remedy." Maj. Op. at **51**. Because the risk of unwarranted and dangerous disclosure is so high, the Government will be pressured into settling meritless cases. Second, as a consequence of such graymail, the Government, rather than individual defendants, would wind up paying off claims. *See* Maj. Op. at **52**. Because these possibilities are "an endemic risk in cases (however few) which involve a claim like Arar's," the majority concludes, they make *Bivens* actions particularly inappropriate. Maj. Op. at **51**.

But both of these issues--the risk of graymail and the disjunction between individual defendants and an indemnifying government--are present in *every* tort suit against a government agent, not just the [*636] relatively "few" cases involving extraordi-

nary rendition for the purposes of torture.[11] Taking the latter point first, both state and federal officers are almost universally indemnified by the State if they lose tort suits. In *Bivens* cases, the federal government "indemnifies its employees against constitutional tort judgments or settlements (in the rare instances in which a *Bivens* claim results in a monetary liability) and takes responsibility for litigating such suits." Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, *88 Geo. L.J. 65, 76 (1999)*. Indeed, "[a]s a practical matter . . . indemnification is a virtual certainty." *Id. at 77*. Similarly, as is widely understood,"a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment. So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably." John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, *84 Va. L. Rev. 47, 50 (1998)* (citation omitted). So the majority's point proves far too much: if a *Bivens* action is inappropriate where the individual defendants' pocketbooks are not ultimately at risk, then *Bivens* actions are *always* inappropriate. And while the majority could be right that, as a policy matter, tort suits against financially indifferent defendants are unwise, who are we as federal appellate judges to say

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[11] That is, except to the extent "state secrets" are involved. And to the extent they are, as already discussed, the state secrets privilege is more than sufficient to preclude graymail.

that *what is standard tort law in every state in the nation*, and what has been repeatedly approved by the Supreme Court and every federal circuit, *is fatally unacceptable.*

As to graymail, defendants in civil suits are always subject to pressures to settle, yet this has never been considered a reason to bar categorically a type of suit against government officials. Is the desire to avoid the revelation of state secrets (a desire that is already fully accommodated by the state secrets doctrine) so different from the desire to avoid, for example, devastating reputational injury, which will often drive a state or federal entity's response to a suit? How is the hassle attendant on a claim like Arar's--the "enmesh[ing of] government lawyers" and the "elicit[ing of] government funds for settlement," Maj. Op. at **39**--so much worse here than it is in the types of suits that every state has chosen to permit and that all three branches of the federal Government have accepted since *Bivens* was issued almost 40 years ago?[12]

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[12] On the subject of graymail, something must be said in response to the majority's remarkable insinuation that Canada has been the victim of graymail at Arar's hands. Maj. Op. at **53-54**. ("It is not for nothing that Canada (the government, not an individual officer of it) paid Arar $ 10 million dollars."). The Canadian government decided on its own accord to initiate an inquiry into its role in Arar's treatment, an investigation that operated independently of Arar's suits. That inquiry was "specifically precluded from making any findings (or even assessments) as to whether the Government of Canada would be civilly liable to Mr. Arar." *Report of the Events Relating to Maher Arar: Analysis & Recommendations*, Commission of Inquiry into

[*637] These, then, are the majority's determinative "special factors": a mix of risks that are amply addressed by the state secrets doctrine and policy concerns that inhere in all *Bivens* actions and in innumerable every-day tort actions as well.[13] This maladaptation of a *Bivens* analysis, as far as I can tell, is motivated by a belief that the majority's hold-

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the Actions of Canadian Officials in Relation to Maher Arar 362 (Sept. 18, 2006). It had no power to recommend payment, but instead just expressed the facts surrounding Arar's treatment, spelling out Canada's conduct vis-a-vis Arar in hundreds of pages of detail. The Canadian government considered that report and decided to compensate and apologize to Arar. In other words, Canada voluntarily established a commission the entire purpose of which was to determine and discuss publicly what the Canadian government did to Arar; it then assessed those facts and concluded that it should negotiate a settlement with him and formally apologize for the role of Canadian officials. Many lessons could be drawn from this process for the American response to allegations like Arar's, but one thing quite clearly cannot be said: that what happened in Canada is tantamount to graymail.

[13] My fellow dissenters have said all that needs to be said about the majority's insistence that Arar's action is "a constitutional challenge to policies promulgated by the executive" and that *Bivens* actions cannot proceed where they "affect diplomacy, foreign policy and the security of the nation." Maj. Op. at **38**. And as to the ominous-sounding warning that "[s]uch a suit unavoidably influences government policy" and "invades government interests," Maj. Op. at **39, I** would not think that an unconstitutional course of government action is shielded from scrutiny merely because it can be described as a "policy" or "interest." If the DEA had a "policy" of conducting warrantless home searches, would we hesitate to influence it? *See Bivens, 403 U.S. at 389-90*. If corrections officials acted on an "interest" in denying their inmates medical care, would we hesitate to invade it? *See Carlson v. Green, 446 U.S. 14, 16, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*.

ing is necessary to protect our nation's security. But, as I have already said, that worthy concern both can be and should be protected by already existing ordinary law and not by reaching out and potentially warping the Constitution.

III

The state secrets doctrine has recently come in for significant criticism, much of it warranted. In particular, many commentators--not to mention the Obama administration and a Ninth Circuit panel--have suggested that outright dismissal of a case on state secrets grounds should be disfavored. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1006 (9th Cir. 2009)*, *amended at 579 F.3d 943*, *reh'g en banc granted by No. 08-15693, 586 F.3d 1108, 2009 U.S. App. LEXIS 23595*; *Policies and Procedures Governing Invocation of the State Secrets Privilege*, Memorandum from the Attorney Gen. to Heads of Exec. Dep'ts and Agencies (Sept. 23, 2009), *available at* http://www.usdoj.gov/opa/documents/state-secret-priviliges.pdf. There is much to these concerns. But I would note three reasons that a threshold dismissal for want of evidence due to the existence of state secrets (if that were eventually determined necessary) would be preferable to the constitutional holding made today. And this would be so, I suggest, quite apart from the importance of adhering to the canon of constitutional avoidance.

First, a dismissal because a party simply cannot (for reasons of state secrets) proffer necessary evidence says nothing about the merits of the underlying claim.[14] While this may be deeply unfair to a party who has been grievously injured (as we must assume Arar was), it, at least, does no damage to the legal standards by which other parties' claims are judged.

Second, a routine practice of first considering state secrets avoids the risk of a certain type of Government gamesmanship. If the Government has the option of seeking a state secrets dismissal both before *and* after a decision on some open question, then it has the ability to moot unfavorable rulings. Consider the strategy [*638] in this case. The Government's initial filing before the District Court sought a state secrets dismissal. In its brief for this *en banc* hearing, however, *after* it had won a favorable substantive ruling from the District Court and the panel, the Government did not mention any interest in a remand for a state secrets dismissal.[15] It seems more than likely that, had the District Court or the panel found *against* the Government on the *Bivens*

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[14] The fact that a claim involves an open and plausible constitutional question should be no bar to a state secrets ruling. As in *Iqbal*, a court can simply "assume, without deciding, that [plaintiff's *Bivens*] claim is actionable" and determine whether a case must be dismissed even on the legal theory most favorable to the plaintiff. *Iqbal, 129 S. Ct. at 1948.*

[15] At oral argument, however, the Government did indicate that it could accept such a remand.

question, the Government would be arguing to us that the opinion below should be vacated pending a state secrets determination. To be sure, a party has no obligation to fire all of its guns at once when a single argument can shoot a claim down. And I do not mean to imply any devious motive on the part of the Government in this case in particular. But there is no reason to structure our law to facilitate such conduct.

Third, and most important, a holding that Arar, *even if all of his allegations are true*, has suffered no remediable constitutional harm *legitimates* the Government's actions in a way that a state secrets dismissal would not. The conduct that Arar alleges is repugnant, but the majority signals--whether it intends to or not--that it is not *constitutionally* repugnant. Indeed, the majority expressly states that the legal significance of the conduct Arar alleges is a matter that should be left entirely to congressional whim. *See* Maj. Op. at **56-57**. While a state secrets dismissal would similarly move the locus of redress to the political branches, it would do so not by holding that the harm done to Arar is of no concern to the judiciary or to the Constitution. It would do so, instead, by acknowledging an institutional limitation--due to the presence of state secrets--that is independent of the merits of Arar's claim and would, thereby, invite other branches to look into those possible merits.

This leads to my final point. Whether extraordinary rendition is constitutionally permissible is a question that seems to divide our country. It seems to me obvious, however, that regardless of the propriety of such renditions, an issue on which I won't hide my strong feelings, mistakes *will* be made in its operation. And *more* obvious still is that a civilized polity, when it errs, admits it and seeks to give redress. In some countries, this occurs through a royal commission. In the United States, for better or worse, courts are, almost universally, involved. This being so, and regardless of whether the Constitution itself requires that there be such redress, the object must be to create and use judicial structures that *facilitate* the giving of compensation, at least to innocent victims, while protecting from disclosure those facts that cannot be revealed without endangering national security. That might well occur here through the application of a sophisticated state secrets doctrine.[16] It [*639] does not occur when, at the

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[16] Consider the closing remarks of Judge 16 Ellis in his state secrets dismissal of Khaled El-Masri's similar allegations:

> It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. . . . [P]utting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a

outset, Arar's claims--though assumed true and constitutionally significant--are treated as lacking any remedy. And this is just what today's unfortunate holding does. It hampers an admission of error, if error occurred; it decides constitutional questions that should be avoided; it is, I submit, on all counts, utterly wrong. I therefore must regretfully, but emphatically, dissent.

> result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.

El-Masri v. Tenet, 437 F. Supp. 2d 530, 540-41 (E.D. Va. 2006).

APPENDIX B - ENTERED June 30, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 06-4216-cv

532 F.3d 157

November 9, 2007, Argued
June 30, 2008, Decided

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, formerly Attorney General of the United States; LARRY D. THOMPSON, formerly Deputy Attorney General; TOM RIDGE, as Secretary of State of Homeland Security; J. SCOTT BLACKMAN, as 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; UNITED STATES OF AMERICA,

Defendants-Appellees.

Before: MCLAUGHLIN, CABRANES, and SACK, *Circuit Judges*.

Plaintiff, a dual citizen of Syria and Canada, who alleges that he was mistreated by U.S. officials in the United States and removed to Syria with the knowledge or intention that Syrian authorities would interrogate him under torture, brought an action against the United States and various U.S. officials pursuant to the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"), and the Fifth Amendment to the U.S. Constitution. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and several of the individual defendants also moved to dismiss the complaint for lack of personal jurisdiction. In addition, the United States asserted the state-secrets privilege with respect to information at the core of plaintiff's claims. The United States District Court for the Eastern

District of New York (David G. Trager, *Judge*) granted defendants' motion to dismiss without reaching the issues raised by the assertionof the state-secrets privilege by the United States. We likewise evaluate the claims presented under applicable law and because those claims do not survive that review, we do not consider whether the assertion of the state-secrets privilege by the United States compels the dismissal of this action; nor need we determine on this appeal whether, as defendants contend, the Immigration and Nationality Act forecloses the litigation in federal district court of plaintiff's removal-related claims. With respect to the other jurisdictional questions raised on this appeal, we conclude that (1) the allegations set forth in plaintiff's complaint are sufficient, at this early stage of the litigation, to establish personal jurisdiction over defendants not resident in New York, but (2) plaintiff has not established federal subject matter jurisdiction over his claim for declaratory relief. Furthermore, we hold that (3) plaintiff's allegations do not state a claim against defendants for damages under the TVPA and (4) in light of the determinations of Congress and precedents of the Supreme Court and our Court, we cannot judicially create a cause of action for damages under the Fifth Amendment, for Arar, pursuant to the doctrine of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Affirmed. Judge Sack concurs in part and dissents in part in a separate opinion.

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Nancy Morawetz, New York University School of Law, New York, NY, *for Amicus Curiae U.S. and Canadian Scholars, supporting Plaintiff-Appellant.*

Bridget Arimond, Center for International Human Rights, Northwestern University School of Law, Chicago, IL, *for Amicus Curiae Center for International Human Rights of Northwestern University School of Law, supporting Plaintiff- Appellant.*

[*162] JOSE A. CABRANES, *Circuit Judge.*

On September 26, 2002, plaintiff-appellant Maher Arar, a dual citizen of Syria and Canada, and the subject of a U.S. government "lookout," J.A. 88, was detained by U.S. authorities at John F. Kennedy International airport in New York City ("JFK Airport") while en route from Tunisia to Montreal. On October 7, 2002, J. Scott Blackman, then the U.S. Immigration and Naturalization Service ("INS") Regional Director for the Eastern Region, determined, based on a review of classified and unclassified information, that Arar was a member of Al Qaeda and therefore inadmissible to the United States. Pursuant to this determination, Blackman signed an order authorizing Arar to be removed to Syria "without further inquiry before an immigration judge, in accordance with [*8 U.S.C. § 1225(c)(2)(B)* and *8 C.F.R. § 235.8(b)*]." *Id.* at 86.

In February 2004, the Canadian Government convened an official commission ("the Commission") to look into "the actions of Canadian officials in relation to" Arar's detention in the United States, his eventual removal to Syria, and his subsequent detention by Syrian authorities. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations 11-12 (2006) ("Canadian Commission, Analysis and Recommendations") (describing the scope of the inquiry). The Commission determined that Canadian officials had "requested" that American authorities create lookouts for Arar and his wife, had described Arar to American authorities as an "Islamic Extremist individual[] suspected of being linked to the Al Qaeda terrorist movement," and had provided American authorities with information derived from their investigations of Arar. *Id.* at 13. The Commission further determined that "[i]t [wa]s very likely that, in making the decisions to detain and remove Mr. Arar, American authorities relied on information about Mr. Arar provided by the [Royal Canadian Mounted Police]." *Id.* at 14. Accordingly, the Commission recommended that Canadian authorities consider granting Arar's request for compensation from the Canadian government. *Id.* at 369. In January 2007, the Canadian government entered into a settlement agreement with Arar, whereby he received compensation of 11.5 million Canadian dollars (approximately $9.75 million, at the time) in exchange for withdrawing a lawsuit against the Canadian government. *See* Ian Austen, *Canada Will Pay*

$9.75 Million to Man Sent to Syria and Tortured, N.Y. Times, Jan. 27, 2007, at A5.[1]

On January 22, 2004, shortly before the initiation of the Canadian inquiry, Arar filed this civil action against Blackman, former U.S. Attorney General John Ashcroft, FBI Director Robert Mueller, former Acting Attorney General Larry D. Thompson, former INS Commissioner James W. Ziglar, INS District Director Edward J. McElroy, the Secretary of Homeland Security, the Regional Director [*163] of Immigration and Customs Enforcement for the New York Region, and several unnamed employees of the FBI and INS.[2] Arar alleges that these individuals mistreated him while he was in the United States and then removed him to Syria with the knowledge or intention that he would be detained and tortured there.

Count one of Arar's complaint requests relief under the Torture Victim Protection Act, *28 U.S.C. §*

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[1] We do not adopt or otherwise endorse the findings of the Commission. Our reference to the existence of these findings is consistent with our order of October 23, 2007, in which we granted Arar's motion to take judicial notice of the existence of the report and scope of its contents but declined to take judicial notice of the findings set forth therein.

[2] Arar sues Thompson, Ziglar, Blackman, McElroy and the Doe defendants in their individual capacities. He sues Ashcroft and Mueller in both their individual and official capacities His complaint names the Secretary of Homeland Security and the Regional Director of Immigration and Customs Enforcement in their official capacities only.

1350 note ("TVPA"). Counts two and three request relief under the *Fifth Amendment to the U.S. Constitution* for Arar's alleged torture (Count two) and detention (Count three) in Syria. Count four requests relief under the *Fifth Amendment to the U.S. Constitution* for events alleged to have occurred while Arar was detained in the United States. With respect to relief, Arar seeks a declaratory judgment that defendants' conduct violated his "constitutional, civil, and international human rights," as well as compensatory and punitive damages for the statutory and constitutional violations alleged in the complaint. Compl. 24.

In a memorandum and order dated February 16, 2006, the United States District Court for the Eastern District of New York (David G. Trager, *Judge)* dismissed Counts one through three of Arar's suit, pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, for failure to state a claim upon which relief can be granted. *See Arar v. Ashcroft, 414 F. Supp. 2d 250, 287-88 (E.D.N.Y. 2006)*. The District Court dismissed Count four without prejudice, pursuant to *Rule 12(b)(2)*, for lack of personal jurisdiction over the individual defendants. Upon receiving notice that Arar had elected not to amend his complaint to cure the jurisdictional defects found by the District Court, the Clerk of Court entered judgment dismissing the action with prejudice on August 17, 2006. Arar now brings this appeal.

Arar's suit implicates several questions of first impression for our Court. One threshold question presented on this appeal is whether, as defendants contend, the Immigration and Nationality Act ("INA"), *8 U.S.C. § 1101 et seq*. deprived the District Court of subject matter jurisdiction over the claims raised in Counts two and three of Arar's complaint. The adjudication of this question is, for the reasons set forth below, *see infra* at 169-73, particularly difficult in light of the record before us. However, because we are compelled to dismiss these claims on the basis of other threshold--that is, non-merits--grounds, we need not determine whether the INA did, in fact, strip the District Court of subject matter jurisdiction to hear Arar's removal-related claims.

We must therefore determine (1) whether the district court had personal jurisdiction over the individual defendants; (2) whether Arar's allegation that U.S. officials conspired with Syrian authorities to torture him states a claim against the U.S. officials under the TVPA; (3) whether to create a judicial damages remedy, pursuant to *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, for Arar's claims that U.S. officials (a) removed him to Syria with the knowledge or intention that he would be detained and tortured there and (b) mistreated him while he was detained in the United States; and finally, (4) whether Arar may seek a declaratory judgment that defendants' actions violated his constitutional rights.

For the reasons that follow, we conclude that under the precedents of the Supreme Court and our Court: (1) Arar has made a [*164] *prima facie* showing sufficient to establish personal jurisdiction over Thompson, Ashcroft, and Mueller at this early stage of the litigation; (2) Count one of Arar's complaint must be dismissed because Arar's allegations regarding his removal to Syria do not state a claim against defendants under the TVPA; (3) Counts two and three of Arar's complaint, which envisage the judicial creation of a cause of action pursuant to the doctrine of *Bivens,* must also be dismissed because (a) the remedial scheme established by Congress is sufficient to cause us to refrain from creating a free standing damages remedy for Arar's removal-related claims; and (b) assuming for the sake of the argument that the existence of a remedial scheme established by Congress was insufficient to convince us, "special factors" of the kind identified by the Supreme Court in its *Bivens* jurisprudence counsel against the judicial creation of a damages remedy for claims arising from Arar's removal to Syria; (4) Count four of Arar's complaint must be dismissed because Arar's allegations about the mistreatment he suffered while in the United States do not state a claim against defendants under the *Due Process Clause of the Fifth Amendment*; and (5) Arar has not adequately established federal subject matter jurisdiction over his request for a judgment declaring that defendants acted illegally by removing him to Syria so that Syrian authorities could interrogate him under torture.

In the circumstances presented, we need not consider the issues raised by the assertion of the state-secrets privilege by the United States--particularly, whether the exclusion of information pursuant to the privilege might result in the dismissal of certain of Arar's claims.

We do not doubt that if Congress were so inclined, it could exercise its powers under the Constitution to authorize a cause of action for money damages to redress the type of claims asserted by Arar in this action. The fact remains, however, that Congress has not done so. Instead, it has chosen to establish a remedial process that does not include a cause of action for damages against U.S. officials for injuries arising from the exercise of their discretionary authority to remove inadmissible aliens. We are not free to be indifferent to the determinations of Congress, or to ignore the Supreme Court's instructions to exercise great caution when considering whether to devise new and heretofore unknown, causes of action.

Judge Sack concurs in part and dissents in part. Specifically, Judge Sack agrees with the majority that (1) Arar has made a *prima facie* showing sufficient to establish personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar's allegations regarding his removal to Syria do not state a claim against defendants under the TVPA; and (3) Arar has not adequately established federal subject matter jurisdiction over his request for a judgment de-

claring that defendants acted illegally by removing him to Syria so that Syrian authorities could interrogate him under torture.

Unlike the majority, however, judge Sack would accept Arar's invitation to judicially create a new *Bivens* remedy and would permit Arar's claims for monetary damages to go forward based on his view that (1) the context giving rise to Counts two and three of Arar's complaint--the detention and deportation of a suspected terrorist pursuant to the discretion conferred on the Attorney General--raises no "'special factors' counsel[ing] against the application of *Bivens," see* Dissent 212; and (2) the constitutional rights that Arar's complaint invokes are sufficiently broad and "clear" that Arar may state a *Bivens* claim based on the conditions of his detention [*165] within the United States, *see id.*at 215. The analysis by which judge Sack reaches these conclusions is, in our view, undermined by contradictory assertions and misstatements of the law. We highlight three prominent examples here. First, Judge Sack's opinion does not grapple with the complicated legal questions arising from the extraterritorial application of the U.S. Constitution: it casts the challenged actions "as perpetrated by U.S. agents entirely within the United States," *id.*at **[48 at n.33],** but then looks to Arar's alleged torture by *Syrian authorities in Syria* as the basis for Arar's *Fifth Amendment* claim, *id.* at **[29-30]** (observing that "interrogation by torture" undoubtedly "shocks the conscience" and that "whether the defendants violated

Arar's *Fifth Amendment* rights" does not turn on *who Arar claims* committed the torture or *where Arar claims* the torture took place). Second, despite recognizing that Arar's *Fifth Amendment* claim is based on allegations that Arar was *removed from the United States in order to be tortured in Syria,* Judge Sack nevertheless concludes that Arar's suit involves no "questions of law and fact ... arising from any action taken or proceeding brought *to remove an alien from the United States," 8 U.S.C. § 1252(b)(9)* (emphasis added)--thereby avoiding the difficult question of whether *§ 1252(b)(9)* stripped the District Court of subject matter jurisdiction to hear Arar's removal-related claims. *See* Dissent **[45 n. 31].** Third, Judge Sack takes the position that "[t]he assessment of Arar's alleged complaint must take into account the entire arc of factual allegations that Arar makes," *id.*at [27], but criticizes the majority for considering, when evaluating Arar's *Bivens* claim, "the *fact-specific* 'context' of Arar's treatment," *id.* at **[40].**

Such is the freedom enjoyed by the writer of a dissenting opinion. Those charged with rendering decisions that carry the force of law have no such freedom, however. Our task is to deliver a reasoned opinion that conforms to the precedents of the Supreme Court and our Court; we have done so here. We agree, of course, with judge Sack's view that threats to the nation's security do not allow us to jettison principles of "simple justice and fair dealing." *Id.* at **[55]** But these parlous times of national challenge can no more expand the powers of the judiciary

than they can contract the rights of individuals. The creation of civil damage claims is quintessentially a legislative function, and the protection of national security and the conduct of foreign affairs are primarily executive. Whatever the emotive force of the dissent's characterization of the complaint, we cannot disfigure the judicial function to satisfy personal indignation.

I. Background

A. **Facts alleged**

Arar's complaint, which is unverified,[3] sets forth the following relevant factual allegations. On September 26, 2002, U.S. immigration officials detained Arar at JFK Airport while he was transferring flights on his way from Tunisia to Montreal. He remained in U.S. custody for twelve days. For most of this time, he was held at the Metropolitan Detention Center ("MDC") in Brooklyn, NY. Arar claims that on the evening of September 26, he was "placed [*166] in solitary confinement" in a room with no bed and with lights that were left on all night. Compl. P 32. On the morning of September 27, he was alleg-

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[3] Judge Sack characterizes "[t]he fact that Arar did not choose to verify his complaint ... [as] irrelevant." Dissent **[2 n.3]** As set forth below, this fact determines whether the complaint itself may serve as evidence in support of the allegations made therein--an issue that, in turn, bears on whether the INA's jurisdiction-stripping provisions deprived the District Court of subject matter jurisdiction over Arar's removal-related claims. *See infra* **[18-20]**

edly questioned by FBI agents who ignored his requests to see a lawyer or make a telephone call. Arar alleges that his requests to see a lawyer or make a telephone call were also ignored between September 27 and October 1.

On October 1, Arar was presented with a document stating that the INS had determined that he was a member of Al Qaeda and was therefore inadmissible to the United States; he was then permitted to make a telephone call to his family, who retained a lawyer on his behalf. The complaint further alleges that Arar met his lawyer at the MDC on the evening of October 5; that, after this meeting, on the evening of Sunday, October 6, defendant McElroy left a message notifying Arar's lawyer that the INS wished to question Arar further; that INS officials then immediately proceeded to question Arar, having falsely told him that his lawyer had chosen not to be present; that, on the following day, INS officials falsely informed Arar's lawyer that Arar had been transferred from the MDC to an unidentified detention facility in New Jersey when, in fact, Arar was still being held at the MDC; and that on October 8, defendant Thompson signed an order authorizing Arar's removal.

The complaint further alleges that, although Arar had designated Canada as the country to which he wished to be removed, on October 8, 2002, U.S. officials caused him to be transported from the MDC to New Jersey, where he was flown to Washington

D.C.; and from Washington D.C. to Amman, Jordan, where Jordanian authorities turned him over to Syrian military officials. Syrian authorities allegedly kept Arar in custody for approximately twelve months; initially subjected him to "physical and psychological torture"--including regular beatings and threats of severe physical harm; and confined him throughout this time in an underground cell six feet long, seven feet high, and three feet wide. *Id.* PP 51-58.

Arar alleges, "[o]n information and belief," that he was removed to Syria pursuant to the U.S. government's "extraordinary rendition" policy, with the knowledge or intention that Syrian officials would extract information from him through torture. *Id.* P 57. He further alleges, "[o]n information and belief," that defendants provided Syrian authorities with information about him, suggested subjects for Syrian authorities to interrogate him about, and received "all information coerced from [him] during [these] interrogations." *Id.* PP 55-56. Thompson, "as Acting Attorney General," is alleged "[o]n information and belief" to have signed the order authorizing Arar's removal to Syria. *Id.* P 48.

B. Procedural history

On January 24, 2005, the United States formally asserted the state-secrets privilege over information relating to Counts one through three of

Arar's complaint. Specifically, the United States explained:

> Litigating [Arar's claims] would necessitate disclosure of classified information, including: (1) the basis for the decision to exclude [Arar] from [the United States] based on the finding that [he] was a member of . . . al Qaeda . . . ; (2) the basis for the rejection of [Arar's] designation of Canada as the country to which [he] wished to be removed . . .; and (3) the considerations involved in the decision to remove [Arar] to Syria.

J.A.131-32,135-36. Shortly thereafter, all defendants moved to dismiss Arar's claims against them. They contended, among other things, that Counts one [*167] through three of Arar's complaint should be dismissed because the assertion of the state-secrets privilege by the United States prevented them from introducing evidence required to present a meaningful defense.[4] Blackman, Ziglar, McElroy, Thompson,

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[4] In *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)*, we observed that, "[o]nce properly invoked, the effect of the [state-secrets] privilege is to exclude [privileged] evidence from the case." *Id. at 546*. Thus, although a plaintiff's complaint may "state a claim for relief under notice pleading rules," the plaintiff may not be able to obtain "access to evidence necessary ... to state a prima facie claim." *Id. at 547*. Under such circumstances, "dismissal is probably most appropriate under *Rule 56* on the ground that plaintiff, who bears the burden of proof, lacks sufficient evidence to carry that burden." *Id.*

Ashcroft, and Mueller further contended that Arar had not alleged sufficient personal involvement to state a claim against them in their individual capacities. Thompson, Ashcroft, and Mueller contended, moreover, that they were not subject to personal jurisdiction in New York.

In a memorandum and order filed on February 16, 2006, the District Court, without reaching the issues raised by the assertion of the state-secrets privilege by the United States, dismissed Counts one through three of Arar's complaint with prejudice and Count four without prejudice. With respect to Count one, the District Court concluded that Arar's allegations did not state a claim against defendants under the TVPA. *See414 F. Supp. 2d at 287*. With respect to Counts two and three, it concluded that "special factors" of the kind identified by the Supreme Court counseled against the extension of a *Bivens* remedy, under the *Fifth Amendment*, for Arar's alleged injuries. *Id. at 281-83*. With respect to Count four, involving Arar's allegations about mistreatment while in U.S. custody, the District Court determined that Arar had stated a claim under the *Fifth Amendment*, *id. at 286*, that defendants were not entitled to qualified immunity, *id. at 286*, but that Arar had not alleged sufficient personal involvement by the defendant officials to sue them in their individual capacities--let alone to establish personal jurisdiction over those defendants domiciled outside New York, *id.* Arar declined to replead Count four of his complaint. Accordingly, on August 17, 2006, the

Clerk of Court entered a final judgment dismissing Arar's complaint with prejudice. This timely appeal followed.

On October 23, we directed the parties to submit letter briefs on the question of "whether, and to what extent, the assertion of the state-secrets privilege by the United States could foreclose our ability to adjudicate claims arising from Counts one through three of the complaint." The United States, in its letter brief, maintained that "[t]his Court can and should affirm the [D]istrict [C]ourt's judgment without reaching the [issues raised by the United States's assertion of the] state-secrets privilege," U.S. Letter Br. 8; but that, "if this Court were to reverse the dismissal of claims 1, 2, or 3, the [D]istrict [C]ourt would then be required to determine on remand whether any reinstated claim could proceed notwithstanding the assertion of the state-secrets privilege," *id.* (internal quotation marks omitted). Arar, in his letter brief, "agree[d] with the United States that this Court can and should resolve the pending appeal without considering the state[-]secrets privilege," Pl.'s Letter Br. 1, on the understanding that, if he prevailed in our Court, the District Court could conduct the necessary "case-specific inquiries [regarding the state-secrets privilege] ... on remand," *id.* at 5.

[*168] Therefore, with the agreement of the parties, we evaluate the claims presented under applicable law before considering whether the assertion

of the state-secrets privilege by the United States requires dismissal of this action.

II. Discussion

We review de novo a district court's grant of a motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim. *See, e.g., In re NYSE Specialists Securities Litigation, 503 F.3d 89, 95 (2d Cir. 2007).* In doing so, we "accept[] as true the material facts alleged in the complaint and draw[] all reasonable inferences in [the] plaintiff['s] favor." *See Iqbal v. Hasty, 490 F.3d 143, 152 (2d Cir. 2007)* (internal quotation marks omitted), *cert. granted sub nom., Ashcroft v. Iqbal*, 76 U.S.L.W. 3417, 2008 WL 336310 (U.S. June 16, 2008) (No. 07-1015). Defendants also challenged, pursuant to *Rule 12(b)(1)*, the District Court's subject matter jurisdiction over Arar's removal-related claims and, pursuant to *Rule 12(b)(2)*, its personal jurisdiction over Ashcroft, Thompson and Mueller. We begin our analysis with a consideration of these threshold issues.

A. Subject matter jurisdiction

A federal court has subject matter jurisdiction over a cause of action only when it "has authority to adjudicate the cause" pressed in the complaint. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 1188, 167 L. Ed. 2d 15 (2007).* Determining the existence of subject matter jurisdiction is a threshold inquiry, *see id.,* and a

claim is "properly dismissed for lack of subject matter jurisdiction under *Rule 12(b)(1)* when the district court lacks the statutory or constitutional power to adjudicate it," *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*. When jurisdiction is challenged, the plaintiff "bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists," *APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003)* (internal quotation marks omitted); *see also Aurecchione v. Schoolman Transp. Sys., 426 F.3d 635, 639 (2d Cir. 2005)*, and the district court may examine evidence outside of the pleadings to make this determination, *see Makarova, 201 F.3d at 113*. Accordingly, "'[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.'" *Potter, 343 F.3d at 623* (quoting *Shipping Fin. Servs. Corp v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998))*.[5] When considering a district court's adjudication of such a motion, we review its factual findings for clear error and its legal conclusions de novo. *See id. at 623-24*; *Aurecchione, 426 F.3d at 638*.

Defendants challenge, on statutory grounds, the District Court's subject matter jurisdiction over Counts two and three of Arar's complaint--the *Bivens* claims arising from his overseas detention and al-

[5] Accordingly, Judge Sack is plainly incorrect to assert that the allegations set forth in Arar's complaint "must be treated as established facts for present purposes." Dissent **[25].**

leged torture.[6] Specifically, they contend that Congress (1) explicitly foreclosed judicial review of the Attorney General's discretionary decisions when carrying out removal-related duties and (2) created an alternative forum to litigate other removal-related [*169] claims, thereby excepting them from the federal question jurisdiction of the district courts. Arar responds that his attempts to avail himself of that alternative forum were thwarted by defendants and that if he is unable to litigate this action in federal district court, he will have no forum whatsoever to press his constitutional claims.

The Supreme Court has observed that construing a statute to "preclude judicial consideration . . . of . . . an important question of law . . . would raise serious constitutional questions." *INS v. St. Cyr, 533 U.S. 289, 314, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)* (offering this observation in the context of a petition for writ of habeas corpus); *see also Webster v. Doe, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988)* (noting that a "'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (quoting *Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, 106 S. Ct. 2133, 90 L. Ed. 2d 623 & n.12 (1986))*; *Calcano-Martinez, 232 F.3d at 340*. Accordingly,

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[6] Defendants do not challenge the District Court's subject matter jurisdiction over Counts two and three on Article III grounds. We agree that the requirements of Article III have been met with regard to these counts.

"where Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." *Webster, 486 U.S. at 603* (noting, with approval, the Court's earlier observations to this effect in *Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975)* and *Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974)).*

(1)

As an initial matter, defendants question whether any federal court has jurisdiction to review these *Bivens* claims, noting that the INA affords the Attorney General and his delegates discretion to send a removable alien to a country other than the country he has designated, *8 U.S.C. § 1231(b)(2)(C)*,[7] and insulates from review actions taken pursuant to that discretionary authority, *id. § 1252(a)(2)(B)(ii)*.[8] *See, e.g.,* Ashcroft Br. 23-25 (invoking *8 U.S.C. § 1231(b)(2)(C)* and *§ 1252(a)(2)(B)(ii)* in support of the

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[7] *Section 1231* provides, in relevant part, that "[t]he Attorney General may disregard" an alien's designation of the country to which he wishes to be removed if, among other things, "the government of the country is not willing to accept the alien into the country," *id. § 1231(b)(2)(C)(iii)* or "the Attorney General decides that removing the alien to the country is prejudicial to the United States," *id. § 1231(b)(2)(C)(iv).*

[8] *Section 1252(a)(2)(B)(ii)* states, in relevant part, that "no court shall have jurisdiction to review ... any ... decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified ... to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum]."

proposition that "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").

Congress has indeed declined to vest the federal courts with jurisdiction to review discretionary decisions of the Attorney General other than the granting or denial of asylum. *See8 U.S.C. § 1252(a)(2)(B)(ii)*; *Camara v. Dep't of Homeland Sec., 497 F.3d 121, 124 (2d Cir. 2007)*; *Atsilov v. Gonzales, 468 F.3d 112, 115 (2d Cir. 2006)* (noting that the INA "negates our jurisdiction to review a 'decision or action of the Attorney General . . . the authority for which is specified ... to be in the discretion of the Attorney General" (quoting *8 U.S.C. § 1252(a)(2)(B)(ii)*) (first alteration in original)). Congress has, however, in *8 U.S.C. § 1252(a)(2)(D)*, authorized the "appropriate court of appeals" [*170] to consider "constitutional claims or questions of law raised upon a petition for review filed . . . in accordance with [the judicial review provisions of the INA]." *See, e.g., Xiao Ji Chen v. U.S. Dept. of Justice, 471 F.3d 315, 329 (2d Cir. 2006)*. This provision indicates that Congress did not intend to preclude our consideration of removal-related claims that raise questions of law or allege constitutional violations, so long as they are properly before this Court.

(2)

As a secondary matter, defendants contend that, even if Arar has raised constitutional claims, such claims were not properly before the District Court; and therefore, are not properly before us on appeal. Specifically, they assert that INA places removal-related claims beyond the reach of a district court's federal question jurisdiction by creating an alternative--and exclusive--mechanism for resolving those claims.[9] Pursuant to *8 U.S.C. § 1252(b)(9)*, "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" are channeled into a judicial review scheme providing that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal," *8 U.S.C. § 1252(a)(5)*. *See also id. § 1231* note (providing for claims relating to 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" to be brought under the judicial review scheme established by *section 1252*); *Calcano-Martinez v. INS., 232 F.3d 328, 340 (2d Cir. 2000)*

[9] *See* Ashcroft Br. 22 ("[Under] the basic judicial review scheme of the INA[,] ... claims arising out of agency actions do not belong in district court."); Thompson Br. 16-17; Mueller Br. 1 n.1 (joining in co-defendants' arguments); Blackman Br. 27 (same); McElroy Br. 25 (same); Ziglar Br. 21 (same).

(noting that the judicial review provisions of the INA provide for "exclusive appellate court" jurisdiction over removal-related claims). Defendants urge that Arar's *Bivens* claims related to his alleged detention and torture in Syria "aris[e] from [the] action taken . . . to remove [Arar] from the United States," *8 U.S.C. § 1252(b)(9)*, and therefore can be reviewed only by petition to the appropriate court of appeals--not by a federal district court.

Federal district courts, like other Article III courts, are "courts of limited jurisdiction ... [that] possess only that power authorized by [the] Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (internal quotation marks omitted). We have previously observed that "statutes . . . that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inextricably intertwined' with review of such orders." *Merritt v. Shuttle, Inc. 245 F.3d 182, 187 (2d Cir. 2001)*. In doing so, however, we have noted that "the test for determining whether [a statute vesting exclusive jurisdiction in the courts of appeals] precludes a district court from hearing a particular claim is . . . whether the claim 'could and should have been' presented to and decided by a court of appeals." *Id. at 188* (quoting *City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 339, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958))*.

Arar contends that he could not have presented his claims through the procedure [*171] set forth in *section 1252*. He alleges that defendants intentionally prevented him from pursuing the INA's judicial review provisions by denying him access to counsel, concealing his location from his lawyer, and removing him, in secret, before his lawyer could file a petition with our Court. While we are not obliged to assume the truth of these allegations when evaluating whether a claim should be dismissed for lack of subject matter jurisdiction, *see Makarova, 201 F.3d at 113*, we will do so here for the sole purpose of considering whether Arar's allegations, if true, would compel a determination that the District Court had subject matter jurisdiction.

There is authority for the proposition that official obstruction similar to that alleged by Arar may (1) excuse a plaintiff's failure to comply with a filing deadline, *see, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)* (equitable tolling), or (2) bar a defendant from asserting certain defenses, such as failure to exhaust administrative remedies, *see, e.g., Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004)* (equitable estoppel). However, Arar has set forth no authority--and we are aware of none--for the proposition that allegations of *past* interference permit a plaintiff to avoid a congressionally mandated remedial scheme altogether. In other words, it appears that no court has yet considered whether official misconduct of the sort alleged by Arar may vitiate Congress's determination

that a federal district court is not the appropriate forum for litigating claims arising from an order of removal.

That we are asked to decide this issue on the basis of allegations set forth in an unverified complaint heightens our hesitation. While a verified complaint made "under oath about a matter within [the plaintiff's] knowledge," *Doral Produce Corp. v. Paul Steinberg Assoc., 347 F.3d 36, 39 (2d Cir. 2003)*, constitutes evidence in support of the facts alleged in the complaint, *see Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995)*, "[a]n ordinary or unverified complaint," such as the one filed by Arar in this litigation, "may not constitute [such] evidence," 11 James Wm. Moore et al., *Moore's Federal Practice § 56.14* (3d ed. 2007). Permitting a plaintiff to circumvent a congressionally mandated remedial scheme by alleging in an unverified complaint--perhaps on nothing more than information and belief--that government officials blocked access to the relevant forum would permit widespread evasion of the administrative mechanisms that Congress has established for challenging agency action: mechanisms that include judicial review by the court of appeals. It is, after all, the prerogative of Congress to determine the jurisdiction of the district courts, and we are loath to permit those determinations to be so easily thwarted.[10]

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[10] The partial dissent concludes that "[b]ecause Arar, is not challenging his removal order," the jurisdiction-stripping provisions of the INA "do[] not apply." Dissent **[45 n.31]** We disagree. As the dissent itself acknowledges, although Arar

[*172] **(3)**

Because we affirm the District Court's dismissal of Counts two and three of Arar's complaint on the basis that a judicial damages remedy is not authorized by *Bivens* and its progeny, *infra* **[30-37],** we need not determine whether the INA deprived the District Court of subject matter jurisdiction over Arar's removal-related *Bivens* claims.

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does not directly challenge his order of removal, the circumstances of his removal serve as a factual predicate for the claims set forth in counts two and three of Arar's complaint. *Id.* at 204 (expressing the view that "[t]he assessment of Arar's alleged complaint must take into account the entire arc of factual allegations that Arar makes--his interception and arrest; his questioning, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK Airport in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C., and forced transfer to Syrian authorities for further detention and questioning under torture"). The INA clearly provides that "[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 under this subchapter* shall be available only in judicial review of a final order under this section." *8 U.S.C. § 1252(b)(9)* (emphasis added). In light of these clear instructions from Congress, the District Court's jurisdiction to hear this matter cannot be resolved as easily as the dissent might wish. *Cf. Ruhrgas AG, 526 U.S. at 583* ("For a court to pronounce upon the merits when it has no jurisdiction to do so ... is for a court to act *ultra vires.")* (ellipsis added, internal quotation marks and modifications omitted).

The Supreme Court has, on several occasions, recognized that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping, 549 U.S. 422, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007)* (quoting *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999))*. As the Court has explained: "Jurisdiction is vital only if the court proposes to issue a judgment on the merits." *Id. at 1191-92* (internal quotation marks and brackets omitted). Accordingly, a federal court "that dismisses on ... non-merits grounds ... before finding subject-matter jurisdiction[] makes no assumption of law-declaring power that violates ... separation of powers principles." *Ruhrgas AG, 526 U.S. at 584* (internal quotation marks omitted); *see also id. at 585* (noting that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, *see Moor v. County of Alameda, 411 U.S. 693, [715-16, 93 S. Ct. 1785, 36 L. Ed. 2d 596] (1973)*, or abstain under *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*, without deciding whether the parties present a case or controversy, *see Ellis v. Dyson, 421 U.S. 426, [433-34, 95 S. Ct. 1691, 44 L. Ed. 2d 274] (1975)*").

In *Tenet v. Doe, 544 U.S. 1, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005)*, the Court held that it could dismiss a suit pursuant to *Totten v. United States, 92*

U.S. 105, 23 L. Ed. 605 (1876) (precluding suits arising from a secret espionage agreement between the plaintiff and the United States), without first determining whether the district court had subject matter jurisdiction over the claims in question. *See Tenet, 544 U.S. at 6-7 n.4.* The Court reasoned that the issue of whether to entertain the plaintiffs' claim was, like *Younger* abstention or prudential standing, "the sort of 'threshold question . . . [that] may be resolved before addressing jurisdiction." *Id.* The Court also observed that "[i]t would be inconsistent with the unique and categorical nature of . . . a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry--to first allow discovery or other proceedings in order to resolve the jurisdictional question." *Id.*

Whether Arar's suit was appropriately before the District Court undeniably raises complicated questions of law. In addition, we have concluded that, in light of the Supreme Court's *Bivens* jurisprudence, we are required to dismiss Counts two and three of Arar's complaint as a threshold matter, without considering the merits of the claims raised in those counts. *See* [*173] *infra,* **[30-37].** Accordingly, we need not decide whether the INA placed Arar's removal-related *Bivens* claims beyond the reach of the District Court's general federal question jurisdiction. *Cf. Sinochem, 127 S. Ct. at 1194* (If ... a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground.... But where ...

jurisdiction is difficult to determine, and [other] considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.").

B. Personal jurisdiction over Ashcroft, Thompson, and Mueller

The requirement that federal courts have personal jurisdiction over the litigants before them arises from "an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (quoting *Int'l Shoe Co. v. Washington, 326 U.S. 310, 318, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945))*. "In order to survive a motion to dismiss for lack of personal jurisdiction [pursuant to *Rule 12(b)(2)*], a plaintiff must make a *prima facie* showing that jurisdiction exists." *Thomas v. Ashcroft, 470 F.3d 491, 495 (2d Cir. 2006)*. A federal court's jurisdiction over non-resident defendants is governed by the law of the state in which the court sits--including that state's long-arm statute--to the extent this law comports with the requirements of due process. *See Henderson v. INS, 157 F.3d 106, 123 (2d Cir. 1998)*. Under New York's long-arm statute, "a court may exercise jurisdiction over a non-domiciliary who 'in person or through an agent . . . commits a tortious act within the state' so long as the cause of action arises from that act." *Iqbal, 490 F.3d at 177* (quoting *N.Y. C.P.L.R. 302(a)(2)*).

Defendants Ashcroft, Thompson, and Mueller contend that Arar has failed to make a sufficient showing of their personal involvement in the tortious conduct he alleges. Accordingly, they urge that the claims brought against them be dismissed for lack of personal jurisdiction.

As we recently observed, personal jurisdiction cannot be predicated solely on a defendant's supervisory title; "[r]ather, a plaintiff must show that a defendant personally took part in the activities giving rise to the action at issue." *Iqbal, 490 F.3d at 177* (internal citation and quotation marks omitted). In *Iqbal,* we considered the related questions of whether the plaintiff had pleaded sufficient personal involvement of the defendants to (1) defeat a qualified immunity defense and (2) establish personal jurisdiction over the defendants. *Id.* We addressed first the question of what a plaintiff must allege to overcome a supervisor's assertion of qualified immunity on a *Rule 12(b)(6)* motion to dismiss, holding that the allegations must suggest that the supervisory official:

> (1) directly participated in the violation [of his constitutional rights], (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to

> act on information that constitutional rights were being violated.

Id. at 152; *see also id. at 157-58* (requiring a plaintiff who seeks to establish personal involvement by a defendant official "to amplify [his] claim with some factual allegations in those contexts where such [*174] amplification is needed to render the claim plausible").[11]

The complaint at issue in *Iqbal* set forth the "time frame and place" of the acts alleged to have violated the plaintiff's constitutional rights, *id. at 166*; alleged that these violations arose from "policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11," *id. at 175-76*; and further alleged that various federal officials, including Ashcroft and Mueller, had "condoned" these policies, *id. at 165*.

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[11] The Supreme Court has recently granted certiorari in *Iqbal* for the purpose of considering (1) the appropriate pleading standard when a plaintiff seeks to state an individual-capacity claim, pursuant to *Bivens,* against "a cabinet-level officer or other high-ranking official" and (2) "[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Petition for a Writ of Certiorari, *Ashcroft v. Iqbal*, 2008 WL 336225 (U.S. Feb. 6, 2008), *cert. granted,* 76 U.S.L.W. 3417, 2008 WL 336310 (U.S. June 16, 2008) (No. 07-1015).

We noted that the plaintiff's allegations, "although not entirely conclusory, suggest that some of the [p]laintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement." *Id. at 158*. At the same time, we found it

> plausible to believe that senior officials of the Department of justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies.

Id. at 166. Taking into account the preliminary stage of that litigation and the Supreme Court's recent clarification of the standard applicable to *Rule 12(b)(6)* motions to dismiss, *see Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, we concluded that the factual circumstances described in the plaintiff's complaint were sufficiently "plausible" to defeat the defendants' assertion of qualified immunity for lack of personal involvement, *id. at 166*.

Turning to the related question of whether the district court had personal jurisdiction over the defendants, we concluded in *Iqbal* that if a plaintiff has pleaded personal involvement sufficient to defeat a qualified immunity defense, that would also "sufficel]

to establish personal jurisdiction." *Iqbal, 490 F.3d at 177*.

The plausibility standard applicable to a *Rule 12(b)(6)* motion to dismiss is, of course, distinct from the *prima facie* showing required to defeat a *Rule 12(b)(2)* motion to dismiss for lack of personal jurisdiction. *See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 196-98 (2d Cir. 1990).* However, because our inquiries into the personal involvement necessary to pierce qualified immunity and establish personal jurisdiction are unavoidably "intertwin[ed]," *Iqbal, 490 F.3d at 177*, we now consider whether, in light of the considerations set forth in *Iqbal's* qualified immunity 'analysis, Arar has made a *prima facie* showing that personal jurisdiction exists.

As with the complaint in *Iqbal,* Arar's complaint states the time frame and place of the acts alleged to have violated Arar's rights; alleges that these violations arose from policies providing for the removal of non-U.S. citizens "suspected ... [*175] of terrorist activity" to countries where they could be interrogated under torture, *see* Compl. P 24; and further alleges that defendants "directed, ordered, confirmed, [or] acquiesced" in Arar's removal to Syria and the mistreatment he suffered there, *id.* P71. We therefore conclude that, like the plaintiff in *Iqbal* Arar has alleged sufficient facts about the role that Ashcroft, Thompson, and Mueller played in violating his rights to make a *prima facie* showing that personal jurisdiction over those defendants exists under

New York's long-arm statute. Accordingly, we proceed to consider the arguments that defendants have raised in support of their motions to dismiss, for failure to state a claim upon which relief can be granted, Arar's various causes of action.

C. The Torture Victim Protection Act (Count One)

The TVPA, which is appended as a statutory note to the Alien Tort Claims Act, *28 U.S.C. § 1350*, creates a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture." *Id.* § 1350 note (2)(a)(1).[12] The District Court determined that the factual allegations set forth in Arar's complaint did not state a claim that defendants acted "under color of foreign law." United States Br. 54. We agree.

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[12] Several Courts of Appeals have held that neither the TVPA nor the Alien Tort Claims Act establishes the United States's consent to be sued under the cause of action created by the TVPA. *See28 U.S.C. § 1350*; *see also Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992)* ("[A]ny party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit"); *Koohi v. United States, 976 F.2d 1328, 1332 n.4 (9th Cir. 1992)* (noting that the Alien Tort Claims does not constitute a waiver of sovereign immunity); *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 207 (D.C. Cir. 1985)* (same). We agree with our sister circuits. Accordingly, we conclude that any cause of action Arar has under the TVPA exists against the defendants being sued in their individual capacities alone.

When seeking guidance on what it means to act under "color of foreign law" for the purposes of the TVPA, we generally look to "principles of agency law and to jurisprudence under *42 U.S.C. § 1983*." *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)*. As the Supreme Court has noted, "[t]he traditional definition of acting under color of state law requires that the defendant in a *§ 1983* action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (quoting *United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)*); *see also Hayut v. State Univ. of New York, 352 F.3d 733, 744 (2d Cir. 2003)*. Applied to the present context, this proposition suggests that a defendant alleged to have violated the TVPA acts under color of foreign law when he "exercise[s] power 'possessed by virtue of [foreign] law'" and commits wrongs "'made possible only because the wrongdoer is clothed with the authority of [foreign] law.'" *West, 487 U.S. at 49*.

Arar contends that our prior holdings contemplate a different standard of liability under *§ 1983* and, by extension, the TVPA. Specifically, he asserts that "*Kletschka [v. Driver, 411 F.2d 436 (2d Cir. 1969)* (Lumbard; C.J.)] holds that the *§ 1983* test is satisfied if the state or its officials played a significant role in the result," Plaintiff's Br. 25 (internal quotation marks omitted). We disagree. In *Kletschka,* we stated that, "[w]hen [a] violation [*176] is the

joint product of the exercise of a State power and of a non-State power[,] ... the test under the *Fourteenth Amendment* and *§ 1983* is whether the state or its officials played a 'significant' role in the result." *411 F.2d at 449*. We also noted, however, that, when the "non-State" actor is a federal official, we will not find that state law played a "significant role" unless the complained-of actions can be attributed to "the control or influence of the State defendants." *Id.* As we explained, this "control or influence" test reflects the "evident purpose of*§ 1983*[,] [which is] to provide a remedy when federal rights have been violated through the use or misuse of a power *derived from a State." Id. at 448-49* (emphasis added). Because federal officials cannot exercise power under foreign law without subjecting themselves to the control or influence of a foreign state, our comments in *Kletschka*are entirely consistent with the test for TVPA liability outlined above, which we hereby adopt in this opinion.

Arar alleges that defendants removed him to Syria with the knowledge or intention that Syrian authorities would interrogate him under torture. He also alleges that, while he was in Syria, defendants provided Syrian authorities with information about him, suggested subjects for Syrian authorities to interrogate him about, and received "all information coerced from [him] during [these] interrogations." Compl. P 56. Nowhere, however, does he contend that defendants possessed any power under Syrian law, that their allegedly culpable actions resulted

from the exercise of power under Syrian law, or that they would have been unable to undertake these culpable actions had they not possessed such power. Because prior precedents of the Supreme Court and our Court indicate that such allegations are necessary to state a claim under the TVPA, we affirm the District Court's dismissal of Count one of Arar's complaint.[13]

D. Money damages under the *Fifth Amendment* (Counts Two, Three, and Four)

Counts two and three of Arar's complaint allege that defendants violated Arar's rights under the substantive due process component of the *Fifth Amendment* by removing him to Syria with the knowledge or intention that he would be detained

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[13] The District Court also determined that Arar, "as a non-citizen[,] is unable to demonstrate that he has a viable cause of action," *414 F. Supp. 2d. at 287*, on the understanding that "only U.S. citizens ... are covered by the TVPA," *id. at 263.* Because we affirm on other grounds, we need not engage in extensive analysis of this issue. We do, however, observe that past holdings of our Court, as well as those of our sister courts of appeals, strongly suggest that TVPA actions may in fact be brought by non-U.S. citizens. *See, e.g., Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104-05 (2d Cir. 2000)* (expressing the view that the remedies provided by the TVPA "extend[] . . . to aliens"); *Kadic, 70 F.3d at 236* (reversing a district court judgment that dismissed, for failure to state a claim, a suit brought by "Croat and Muslim citizens of . . . Bosnia-Herzegovina" seeking relief under the TVPA); *see also Arce v. Garcia, 434 F.3d 1254, 1257-58 (11th Cir. 2006)* (allowing TVPA claim by citizens of El Salvador); *Hilao v. Estate of Marcos, 103 F.3d 767, 771 (9th Cir. 1996)* (allowing TVPA claim by citizens of the Philippines).

and tortured there. Count four of Arar's complaint alleges that defendants violated Arar's rights to substantive and procedural due process under the *Fifth Amendment* by mistreating him while he was detained in the United States. Arar contends that both of these alleged violations are actionable pursuant to *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).*

[*177] On the theory that, "in appropriate circumstances[,] a federal ... court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress,'" *Davis v. Passman, 442 U.S. 228, 245, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (quoting *Bivens, 403 U.S. at 396*), *Bivens* permitted plaintiffs to seek money damages for violations of the *Fourth Amendment*. Since then, however, the Supreme Court has created such remedies on only two other occasions: the first for employment discrimination in violation of the equal protection component of the *Fifth Amendment's Due Process Clause*, *Davis, 442 U.S. at 234*, and the second for violations of the *Eighth Amendment* by federal prison officials, *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)* ("In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of ac-

tion for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.").

Indeed, the Supreme Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky, 487 U.S. 412, 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*; *see also Wilkie v. Robbins, 127 S. Ct. 2588, 2597, 168 L. Ed. 2d 389 (2007)* (observing that, "in most instances," the Court "ha[s] found a *Bivens* remedy unjustified"); *Malesko, 534 U.S. at 70* (noting that, since *Carlson,* the Court has "consistently rejected invitations to extend *Bivens"* to new contexts); *FDIC v. Meyer, 510 U.S. 471, 484, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)* (discussing, with approval, the observations offered by the Court in *Schweiker).*

By asking us to devise a new *Bivens* damages action for alleged violations of the substantive due process component of the *Fifth Amendment*, Arar, effectively invites us to disregard the clear instructions of the Supreme Court by extending *Bivens* not only to a new context, but to a new context requiring the courts to intrude deeply into the national security policies and foreign relations of the United States.

(1)

In its most recent consideration of *Bivens,* the Supreme Court set out the following framework for analyzing *Bivens* claims:

> [O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. *[First],* there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the judicial Branch to refrain from providing a new and freestanding remedy in damages. *[Second,* there is the principle that] a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Robbins, 127 S. Ct. at 2598 (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983))* (internal citation omitted).

[*178] For guidance on what might constitute a "special factor," we turn to the Supreme Court's

past considerations of *Bivens*. The Court's prior precedents reveal a reluctance to create *Bivens* remedies where a coordinate branch of government is "in a far better position than a court," *Bush, 462 U.S. at 389*, to "decide whether ... a remedy should be provided," *id. at 380*; and, if a remedy is to be provided, to decide what form this remedy should take. For example, in *Bush v. Lucas,* the Court declined to create a damages remedy for alleged violations of a federal employee's *First Amendment* rights upon determining that Congress was in a better position "to evaluate the impact" of damages suits "on the efficiency of the civil service." *Id. at 389*. Similarly, in *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*, the Court declined to create a damages remedy for alleged violations of constitutional rights by military officers upon noting that the Constitution grants Congress "plenary control over ... regulations, procedures, and remedies related to military discipline," *id. at 301*; Congress, in exercising this authority, created a system of military justice that did not include a damages remedy for alleged violations of constitutional rights by military officers, *id. at 304*; and, therefore, creation of such a remedy by the federal courts "would be plainly inconsistent with Congress' authority in this field," *id.*

In *Schweiker v. Chilicky* the Court, relying on the reasoning set forth in *Bush* and *Chapell,* declined to create a non-statutory damages remedy against government officials alleged to have wrongfully terminated the plaintiffs' Social Security benefits. As

the Court explained, "making the inevitable compromises required in the design" of a welfare program is the responsibility of Congress rather than the courts, *487 U.S. at 429*; Congress had "discharged that responsibility," *id.,* by creating "elaborate administrative remedies," *id. at 424*, for dissatisfied Social Security claimants; in view of the fact that these remedies did not include a provision for recovery of money damages, the Court, in keeping with its prior precedents, would not create a *Bivens* remedy, *id. at 423* (noting that "[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 Court has] not created additional *Bivens* remedies"). *Schweiker,* therefore, establishes that "the concept of special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *487 U.S. at 423* (internal quotation marks omitted).

(2)

To the best of our understanding, Arar seeks a *Bivens* remedy for at least two analytically distinct categories of claims. The first set of claims, described in Counts two and three of Arar's complaint, arises from Arar's allegation that defendants removed him to Syria with the knowledge or intention that he

would be detained and tortured there. The second set of claims, described in Count four of the complaint, arises from Arar's allegations about the way in which defendants treated him while he was detained in the United States.[14] [*179] We consider each of these claims in turn.[15]

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[14] It is not clear whether Arar's complaint seeks to raise a third potential set of claims, arising from the general allegations that defendants provided Syrian authorities with information about him and suggested subjects for them to pursue in their interrogation of him. *See* Compl. PP 55-56. We need not explore this issue, however, as Arar has not raised such a claim in his written and oral presentations to this Court. *See, e.g.,* Pl.'s Br. 37 (describing the *Fifth Amendment* claims arising from Arar's removal to Syria as resting on the factual allegations that "defendants (i) acted against [Arar] while he was in Federal custody within the United States and; (ii) transported him abroad precisely to evade constitutional protections"); *see also id.* at 3 (describing the *Fifth Amendment* claims arising from Arar's removal to Syria as resting on the factual allegation that defendants "transport[ed] Arar to Syria" so that Syrian authorities could detain and coercively interrogate him).

[15] Rather than address these legal claims as pleaded by Arar, Judge Sack consolidates all of Arar's allegations into an omnibus generalized grievance, unmoored from any recognized legal claim. Judge Sack would take together events occurring within the United States *and those occurring overseas;* allegations of misconduct attributed to U.S. officials *and to foreign agents;* and violations that allegedly occurred during the period of time that Arar was held in U.S. custody as *well as the time Arar spent in foreign custody*. *See* Dissent **[27-28]** Judge Sack offers no authority to justify his remarkable treatment of Arar's complaint. It is clear, however, that his approach runs contrary to the Supreme Court's long-standing observations about the constitutional significance of geographic borders. *Cf. Zadvydas v. Davis, 533 U.S. 678, 690, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001)* ("It is well established that certain constitutional protections available to persons inside the United States are

(a)

Arar's removal-related claims arise from the alleged violation of his substantive due process interest in not being involuntarily removed to a country where he would be detained and subjected to torture. Step one of the *Bivens* inquiry reveals that Congress has created alternative processes for protecting this interest. The Foreign Affairs Reform and Restructuring Act of 1988, Pub L. 105-277, codified at *8 U.S.C. § 1231* note ("FARRA"), states that the United States "shall . . . not . . . 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," *id. § 1231* note (a); and provides for an alien to raise claims based on this section "as part of the review of a final order of removal pursuant to . . . the Immigration and Nationality Act," *id. § 1231* note (d). Thus, as a general matter, *Bivens* relief would not be available for removal-related claims such as the one that Arar raises here because the INA's "alternative, existing" mechanism of review would normally provide "a con-

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unavailable to aliens outside of our geographic borders."); *United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)* (noting that the Supreme Court's "rejection of extraterritorial application of the *Fifth Amendment* [has been] emphatic"); *Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S. Ct. 936, 94 L. Ed. 1255 (1950)* (noting that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act").

vincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," *Robbins, 127 S. Ct. at 2598*, under step one of our *Bivens* analysis.

Arar maintains, however, that because defendants intentionally prevented him from making use of the INA's judicial review provisions, the allegations of his complaint: compel a different conclusion. Assuming that Arar's allegations are true, it would be perverse to allow defendants to escape liability by pointing to the existence of the very procedures that they allegedly obstructed and asserting that Arar's sole [*180] remedy lay there. Accordingly, we could regard this as a situation where the presence of an alternative remedial scheme does not "amount to a convincing reason for the judicial Branch to refrain from providing a new and freestanding remedy in damages," *Robbins, 127 S. Ct. at 2598.*

Faced with similar allegations in *Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980)*, the Court of Appeals for the Eighth Circuit held that federal officials who interfered with a plaintiff's access to an exclusive administrative remedial scheme could, pursuant to *Bivens,* be held liable for that interference inasmuch as it violated due process, but could not be sued for the underlying injury that the remedial scheme was designed to redress. In *Bishop,* the plaintiff, a federal employee, alleged, *inter alia,* wrongful termination, *id. at 353*, and charged defendants with obstructing his access to the relevant ad-

ministrative remedies, *id. at 353 n.4*. The Eighth Circuit observed that Congress had enacted "civil service discharge appeal procedures" in order to permit "a wrongfully dismissed employee to [obtain] reinstatement and back pay." *Id. at 356*. The court noted, however, that "[t]he existence of civil service discharge appeal procedures is of little avail to [the plaintiff] ... if, as he has alleged, defendants blocked his resort to them." *Id. at 357*. On this basis, the court determined that if the plaintiff "can prove [that] defendants interfered with his right to procedural due process [by obstructing access to the appeal process], he is entitled to the damages that actually resulted" pursuant to *Bivens*.

The Eighth Circuit did not conclude, however, that the interference of federal officials permitted the plaintiff to avoid the procedures for appeal set forth by Congress by litigating his underlying claims--wrongful termination and defamation--through a *Bivens* action in federal district court. *Id.* The court explained:

> A *Bivens* style remedy for wrongfully dismissed federal employees not only is unnecessary but also would be at odds with the existing discharge appeal procedures to the extent that dismissed employees would be encouraged to bypass these procedures in order to seek direct judicial relief against either the government or individual government officers.

Id. Thus, the plaintiff in *Bishop*could maintain a *Bivens* cause of action against the officials for interfering with his due process rights (a claim equivalent to the claim brought by Arar in Count four of his complaint) but not for employment-related claims subject to the relevant procedures for appealing civil service discharges--in essence, claims of an analogous sort to the claims that Arar brings in Counts two and three of his complaint.

We find this reasoning compelling and, like the Eighth Circuit, are reluctant to permit litigants to avoid congressionally mandated remedial schemes on the basis of mere allegations of official interference. Accordingly, the review procedures set forth by the INA provide "a convincing reason," *Robbins, 127 S. Ct. at 2598*, for us to resist recognizing a *Bivens* cause of action for Arar's claims arising from his alleged detention and torture in Syria.[16] Even if they did not, however, our analysis of the significant "special factors," *id.,* implicated by these claims would lead us to [*181] the same result at step two of our *Bivens* analysis.

Step two of our *Bivens* analysis requires us to determine whether Arar's suit implicates what the

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[16] We agree with judge Sack that the alleged circumstances of Arar's removal may have made it difficult for Arar himself to seek relief through the procedures set forth in the INA. We note, however, that Arar did have an attorney working on his behalf; and that his attorney was in a position to inquire about both Arar's whereabouts and the status of the proceedings that the INS had initiated against him.

Supreme Court has described as "special factors" that would counsel against creation of a *Bivens* remedy. "The special factors counselling hesitation in the creation of a new remedy ... d[o] not concern the merits of the particular remedy that [i]s sought. Rather, they relate[] to the question of who should decide whether such a remedy should be provided ... [and] whether there are reasons for allowing Congress to prescribe the scope of relief that is made available." *Bush, 462 U.S. at 380*. Pursuant to the framework set forth by the Supreme Court, we are compelled to defer to the determination of Congress as to the availability of a damages remedy in circumstances where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers.

The Supreme Court has observed on numerous occasions that determinations relating to national security fall within "an area of executive action in which courts have long been hesitant to intrude." *Lincoln v. Vigil, 508 U.S. 182, 192, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)* (internal quotation marks omitted); *Department of Navy v. Egan, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988)* (noting 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" and citing illustrative cases). At its core, this suit arises from the Executive Branch's alleged determination that (a) Arar

was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests. There can be no doubt that for Arar's claims to proceed, he must probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States, in order to determine the basis for his alleged designation as an Al Qaeda affiliate and his removal to Syria via Jordan despite his request to be removed to Canada. Indeed, the Canadian government, which has provided Arar with compensation for its role in the events giving rise to this litigation, has asserted the need for Canada itself to maintain the confidentiality of material that goes to the heart of Arar's claims. *See* 1 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Factual Background 11-12 (2006) ("Canadian Commission, Factual Background") (noting that the Canadian government required the Commission to review "[a] good deal of evidence . . . *in camera"* out of a need to protect Canadian "national security and international relations interests"). For its part, the United States, as noted above, has invoked the state-secrets privilege in response to Arar's allegations.

Assuming that a sufficient record can even be developed in light of the confidential nature of the relevant evidence and the involvement of at least three foreign governments--Syria, Jordan, and Canada--in the salient events alleged in the complaint,

the District Court would then be called upon to rule on whether Arar's removal was proper in light of the record. In so doing, the effective functioning of U.S. foreign policy would be affected, if not undermined. For, to the extent that the fair and impartial adjudication of Arar's suit requires the federal courts to consider and evaluate the implementation of the foreign and national security policies of the United [*182] States and at least three foreign powers, the ability of the federal government to speak with one voice to its overseas counterparts is diminished, and the coherence and vitality of U.S. foreign policy is called into question.

On this point, the observations of the Court of Appeals for the District of Columbia Circuit are particularly relevant:

> [T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored--their ability to produce what the Supreme Court has called in another context "embarrassment of our government abroad" through "multifarious pronouncements by various departments on one question." Whether or not the present litigation is motivated by con-

> siderations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J) (quoting *Baker v. Carr, 369 U.S. 186, 226, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962))*. Similarly, we need not determine whether the motivation behind this lawsuit arises from geopolitical or personal considerations in order to recognize that litigation of this sort threatens to disrupt the implementation of our country's foreign and national security policies. The litigation of Arar's 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.[17] There can be no doubt that

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[17] That adjudication of Arar's claims would require inquiry into national-security intelligence and diplomatic communications cannot be doubted in light of federal regulations providing that, in determining whether removal to a particular country would be consistent with the obligations imposed by FARRA,

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.

In addition, the Supreme Court has observed that, when considering "the practical consequences of making [a] cause [of action] available to litigants in the federal courts," *Sosa v. Alvarez-Machain, 542 U.S. 692, 732-33, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy," *id. at 733 n.21*. Here, the United States has asserted the state-secrets privilege over information at the [*183] core of the claims being raised and, in support of that assertion of privilege, both the Acting Attorney General and Secretary of the Department of Homeland Security have submitted sworn state-

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> (1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.
>
> (2) If the Secretary of State forwards assurances described in paragraph (c)(l) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. . . .

8 C.F.R. § 208.18(c).

ments that Arar's removal-related claims cannot be adjudicated without harming the diplomatic and national security interests of the United States.

For the reasons stated above, we are not required, at this juncture in the proceedings, to consider the possible consequences of the assertion of the state-secrets privilege by the United States. The assertion of the state-secrets privilege is, however, a matter of record, and a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers. *Cf. ante* at **[34-35]** (noting the Canadian government's efforts to protect evidence relevant to Canadian "national security and international relations interests"); Canadian Commission, Analysis and Recommendations, *ante,* at 11 (stating that the governments of the United States, Jordan, and Syria all declined to "give evidence or otherwise participate" in the hearings held by the Commission). In that sense, the government's assertion of the state-secrets privilege in this litigation constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication employed by the federal courts.[18]

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[18] Our colleague, in his partial dissent, criticizes the majority for taking the state-secrets doctrine into account in the course of its *Bivens* analysis. *See* Dissent **[46]** He would rather this suit go forward on the understanding that "[a]ny legitimate interest that the United States has in shielding national secu-

That this action involves the intersection of removal decisions and national security also weighs against creation of a *Bivens* remedy. The Supreme Court has recently rioted that "[r]emoval decisions, including the selection of a removed alien's destination, may implicate our relations with foreign powers," *Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 348, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005)* (internal quotation marks omitted) (quoting *Mathews v. Diaz, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976))*; and it is well established that "[t]he conduct of the foreign relations of

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rity policy and foreign policy from intrusion by federal courts ... would be protected by the proper invocation of the state-secrets privilege." *Id.* Once put into effect, however, the state-secrets doctrine would have the undoubted effect of excluding information of central relevance to the claims brought in this complaint. *See ante* **[11-12]** (describing the information over which the United States has asserted the state-secrets privilege). The likely result would be foreclosure of our ability to resolve the important legal issues of first impression raised by this case. *See id.; see also El-Masri v. United States, 479 F.3d 296, 300, 313 (4th Cir. 2007)* (dismissing plaintiff's complaint on the basis of the invocation of the state-secrets doctrine by the United States without considering whether, as a matter of law, plaintiff could state a claim under *Bivens* or the Alien Tort Claims Act based on his allegations that he was detained and interrogated "pursuant to an unlawful policy and practice ... known as 'extraordinary rendition': the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws"). In light of the parties' requests for guidance on the important questions of first impression presented by this suit, *see ante* **[13]** we are reluctant to take the path our colleague suggests.

our Government is committed by the Constitution to the Executive and Legislative--the political--Departments of the Government," *First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972)* (quoting *Oetjen v. Central* [*184] *Leather Co., 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918)* (internal quotation marks omitted)).[19] In that sense, Arar's removal-related claims raise a difficulty similar to that posed by the plaintiffs in *Chappell* Here, as there, the claim under consideration raises questions entrusted principally to other branches of government; one of these other branches--namely, Congress--has exercised its authority to provide "what it considers adequate remedial mechanisms for constitutional violations," *Schweiker, 487 U.S. at 423*; and the remedial scheme in question--appellate review of removal decisions--does not provide for recovery of money damages. In light of these indications that absence of a Congressionally-mandated damages remedy "has not been inadvertent," *Schweiker, 487 U.S. at 423*, we understand the judicial creation of a damages remedy to be "plainly inconsistent," *Chappell, 462 U.S. at 304*, with Congress's exercise of authority over removal-related claims.

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[19] Judge Sack agrees that adjudication of Arar's claims requires us to intrude deeply into the national security policies and foreign relations of the United States, *see* Dissent **[46-48],** but, nevertheless, would hold that Arar's suit presents no "'special factors' counsel[ing] against the application of *Bivens," id.* at **[46].**

In sum, we hold that--barring further guidance from the Supreme Court--a *Bivens* remedy is unavailable for claims "arising from any action taken or proceeding brought to remove an alien from the United States under" the authority conferred upon the Attorney General and his delegates by the INA. *8 U.S.C. § 1252(b)(9).*

(b)

The vitality of Arar's request for *Bivens* relief for claims arising from Count four of his complaint ("domestic detention") turns, not on the existence of any "special factors," but on the more commonplace fact that Arar's factual allegations fail to state a claim under the *Due Process Clause of the Fifth Amendment*. Arar apparently seeks to bring two distinct types of claims based on events alleged to have occurred in the United States. The first is a "due process" claim based on defendants' alleged obstruction of Arar's access to counsel and to the courts.[20]

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[20] Although Arar describes his second claim as arising under the substantive due process component of the *Fifth Amendment*, *see, e.g.,* Compl. 23, Plaintiff's Reply Br. 21, the theory of liability he proffers is more suggestive of a procedural due process claim. *See, e.g.,* Plaintiff's Reply Br. 29 (asserting that "Arar had a right to the assistance of his attorney before being, deemed inadmissible, [and] before being removed to a country where he would be tortured"); *id.* at 34 (asserting that Arar had "a right to petition the [relevant court] to enjoin his removal to a country that would torture him"). We need not explore this issue, however, because, as set forth below, Arar has not established that defendants' conduct amounted to interference with a *constitutional* right; and violation of a "constitu-

The second is a substantive due process challenge to the conditions of Arar's U.S. detention. We consider each of these in turn.

(i)

The complaint alleges that, while Arar was incarcerated at the MDC, defendants ignored his initial requests to see a lawyer, misled him about the availability of his lawyer so that they could question him outside her presence, and misled his lawyer about his whereabouts so that they could prevent her from challenging his removal to Syria. Compl. PP 37, 44, 46. These allegations, if taken as true, may be [*185] sufficient to establish that one or more federal officials intentionally obstructed Arar's access to counsel and to the courts. They are not, however, sufficient to establish the appropriateness of *Bivens* relief. Rather, for a *Bivens* remedy to be available, Arar must establish that (1) an individual in his position possessed a constitutional right of access to counsel and the courts, and (2) that defendants' actions violated this constitutional right. *See, e.g., Robbins, 127 S. Ct. at 2598* (noting that violation of a "constitutionally recognized interest" is a necessary element of a *Bivens* claim).

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tionally recognized interest" is a necessary element of a *Bivens* claim, *see, e.g., Robbins, 127 S. Ct. at 2598.*

a. Right to Counsel

Arar contends that our prior precedents--specifically, *Montilla v. INS, 926 F.2d 162 (2d Cir. 1991)* and *Waldron v. INS, 17 F.3d 511 (2d Cir. 1993)*--establish that, although he was an unadmitted alien, he possessed a constitutional right to counsel under the *Due Process Clause of the Fifth Amendment*. He also contends that he possessed a due process right to counsel derived from the rights accorded to him under *8 C.F.R. § 235.8(a)*[21] and *8 U.S.C. §§ 1362*,[22] *1225(c)(3)*[23] and *1225(b)(1)(B)(iv)*.[24]

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[21] *8 C.F.R. § 235.8(a)* reads as follows:

> When an immigration officer or an immigration judge suspects that an arriving alien appears to be inadmissible [on security and related grounds], the immigration officer or immigration judge shall order the alien removed and report the action promptly to the district director who has administrative jurisdiction over the place where the alien has arrived or where the hearing is being held. The immigration officer shall, if possible, take a brief sworn question-and-answer statement from the alien, and the alien shall be notified by personal service of Form I-147, Notice of Temporary Inadmissibility, of the action taken and the right to submit a written statement and additional information for consideration by the Attorney General. The district director shall forward the report to the regional director for further action as provided in paragraph (b) of this section.

[22] *8 U.S.C. § 1362* states that:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the

We conclude that certain of the authorities upon which Arar relies--namely, *Montilla, Waldron* and *8 U.S.C. §§ 1362* and *1225(b)(1)(B)(iv)*--are simply inapplicable to an individual in Arar's position. We further conclude that, even if an unadmitted alien does enjoy a derivative due process right to the assistance of counsel under *8 U.S.C. § 1225(c)(3)* and *8 C.F.R. § 235.8(a)*, that right was neither triggered nor violated by the factual allegations stated in Arar's complaint.

Section 1362 applies only to "removal proceedings before an immigration judge and . . . appeal proceedings before the Attorney General." Similarly,

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> Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

[23] *8 U.S.C. § 1225(c)* sets out procedures for the removal of aliens who have been deemed inadmissible "on security and related grounds." *Subsection 1225(c)(3)* provides that, in the case of an alien who falls within the ambit of *section 1225(c)*, "[t]he alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General."

[24] *8 U.S.C. § 1225(b)(1)(B)* sets forth procedures relating to asylum interviews. *Subsection 1225(b)(1)(B)(iv)* provides that "[a]n alien who is eligible for [an asylum] interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process."

Montilla and *Waldron,* recognize the existence of a due process right to counsel in a subset of the [*186] circumstances to which *section 1362* applies--that is, removal of an alien through deportation. *See Waldron, 17 F.3d at 517*; *Montilla, 926 F.2d at 166.*

As an unadmitted alien, Arar as a matter of law lacked a physical presence in the United States.[25] *See Kaplan v. Tod, 267 U.S. 228, 230, 45 S.*

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[25] Judge Sack emphatically proclaims that this is not "an immigration case," *see* Dissent **[22],** and contends that the majority is incorrect to "treat[] Arar[] . . . as though he were an unadmitted alien," *id.* at **[31].** Specifically, Judge Sack takes the position that, in regarding Arar as an unadmitted alien, the majority incorrectly "treats Arar as though he was an immigrant seeking entry into the United States." *Id.* at **[32 n.21];** *see also id.* at 32 (taking the position that Arar cannot properly be treated "for immigration purposes, as though he had been held or turned back at the border" because Arar was not "seeking to immigrate to the United States") (emphasis omitted).

This represents a mischaracterization of the majority's approach, as well as the relevant law and regulations. Arar's intention, or lack thereof, to immigrate to the United States is irrelevant to the question of whether he was an admitted or unadmitted alien. The INA defines "[t]he terms 'admission' and 'admitted' [to] mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *8 U.S.C. § 1101(a)(13)(A)*; *see also id. § 1101(a)(4) ("The term application for admission' bas reference to the application for admission into the United States* and not to the application for the issuance of an immigrant or nonimmigrant visa.") (emphasis added). At the time that the events described in this complaint took place, individuals who, like Arar, were eligible to transfer flights through the United States without obtaining a visa first, *see8 C.F.R. § 1212.1(f)(1)* (describing the "transit without visa" program) were nevertheless subject to "the full border inspection process upon arrival in the U.S,," *see* Press Release, Department of Homeland Security,

Ct. 257, 69 L. Ed. 585 (1925) (noting that an alien "stopped at the boundary line" of the United States "had gained no foothold" in the country). His entitlement to a removal procedure of the sort that would trigger the provisions of *section 1362* was therefore limited to what Congress and the INS saw fit to provide.[26] [*187] *See, e.g., Zadvydas v. Davis,*

Homeland Security and Department of State Take Immediate Steps To Make Air Travel Even Safer (Aug. 2, 2003),available at http://www.dhs.gov/xnews/releases/press_release_ 0227.shtm (last visited June 11, 2008).

Accordingly, it is clear that (1) in subjecting himself to inspection upon arrival at JFK, Arar sought admission to the United States for purposes of the INA; and (2) because the immigration officer refused to authorize Arar's entry into the United States, Arar was not "admitted" for purposes of the INA. In sum, there is no basis--legal or factual--for the criticisms offered by our colleague in his partial dissent.

[26] Our colleague, in his partial dissent, also asserts that Arar's legal status as an unadmitted alien is irrelevant to any analysis of Arar's constitutional claims. This is plainly incorrect. The Supreme Court--both recently and in the past--has looked to the legal status of aliens under immigration law when considering petitions challenging the confinement of these aliens under the *Due Process Clause of the Fifth Amendment*. *See, e.g., Zadvydas, 533 U.S. at 690* (identifying the issue under consideration to be whether the "indefinite detention of an alien" violates "[t]he *Fifth Amendment's Due Process Clause*" and beginning the analysis of the claim brought by noting that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law"). In *Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953)*, for example, the Court considered the petition of an alien challenging the Attorney General's ability to detain him "without notice of any charge against him and without opportunity to be heard in opposition thereto." *Id. at 595*. The Court observed that, "[f]or

533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (observing that the full protections of the *Due Process Clause* apply only to "'persons' within the United States"); *Landon v. Plasencia, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982)* (noting that "an alien seeking initial admission to the United States ... has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S. Ct. 309, 94 L. Ed. 317 (1950)* (holding that "[w]hatever the procedure authorized

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purposes of [ascertaining] [the petitioner's] constitutional right to due process," it was required to take into account that the petitioner's legal status was that "of an alien continuously residing and physically present in the United States." *Id. at 596.* As the Court explained:

> The *Bill of Rights* is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the *Fifth Amendments* and by the *due process clause of the Fourteenth Amendment*."

Id. at 596 n.5. With respect to the relevance of an alien's legal status, Judge Sack distinguishes between claimed violations of "procedural" due process, where he concedes that status is relevant, and "substantive" due process, where he maintains that status is not. In view of the fact that Judge Sack does not offer any supporting authority from the Supreme Court or our Court--nor are we aware of any--we decline to disregard binding precedent that takes account of an alien's status when considering the scope of that alien's due process rights.

by Congress is, it is due process as far as an alien denied entry is concerned.").

In this case, the applicable statutory provisions specifically authorized the Attorney General to remove Arar "without further inquiry or hearing by an immigration judge" if the Attorney General, after reviewing the evidence establishing his inadmissibility, determined that a hearing "would be prejudicial to the public interest, safety, or security.[27] *See 8 U.S.C. § 1225(c)(2)(B)*. Arar does not claim that the Attorney General failed to properly review the evidence of his inadmissibility. Nor does he contend that the procedures set forth in *section 1225(c)* were constitutionally inadequate. *Cf. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953)* (holding that the due process rights of an unadmitted alien barred from entry one security grounds were not violated when he was excluded from the United States without a

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[27] Arar was removed pursuant to *8 U.S.C. § 1182(a)(3)* (removability on security and related grounds) under the procedures set forth in *8 U.S.C. § 1225(c)*; *subsection 1225(c)(2)(B)* provides that:

> If the Attorney General (i) is satisfied on the basis of confidential information that the alien is inadmissible . . . and (ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

hearing). Accordingly, Arar fails to establish that he possessed any entitlement to a pre-removal hearing. And because he possessed no entitlement to a hearing, he falls beyond the scope of *section 1362* and--by extension--our holdings in *Montilla*and *Waldron. Cf. Plasencia, 459 U.S. at 25* (noting that a "deportation hearing is the usual means of proceeding against an alien already physically in the United States, . . . [and] [an] exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission," and that "the alien who loses his right to reside in the United States in a deportation hearing has a number of substantive rights not available to the alien who is denied admission in an exclusion proceeding"). Arar also falls beyond the scope of the right to counsel set forth in *section 1225(b)(1)(B)(iv)*; this provision is limited to applicants for asylum and Arar neither made, nor makes, a claim to asylum in the United States.

[*188] *Section 1225(c)(3)* and *8 C.F.R. § 235.8(a)* both contemplate that an unadmitted alien being excluded on security grounds will have the opportunity to submit "a written statement and additional information for consideration by the Attorney General." Assuming for the sake of argument that an unadmitted alien who cannot provide a written statement without the assistance of counsel may enjoy a due process entitlement to counsel, we conclude that Arar has not alleged any facts that would trigger such a right. For example, Arar's complaint nowhere alleges that he wished to submit a written

statement but was prevented from doing so by the restrictions that defendants allegedly imposed on his access to counsel. Nor does it allege any background circumstances from which we may draw such an inference.[28]

In sum, Arar is unable to point to any legal authority suggesting that, as an unadmitted alien who was excluded pursuant to the procedures set forth in *8 U.S.C. § 1225(c)*, he possessed any form of entitlement to the assistance of counsel--let alone a constitutional entitlement, the violation of which could constitute a predicate for the *Bivens* relief he seeks. Accordingly, we conclude that Arar's allegations about the various ways in which defendants obstructed his access to counsel fail to state a claim under the *Due Process Clause of the Fifth Amendment*.

b. Right of Access to the Courts

As the Supreme Court has noted, the ultimate purpose of an access to the courts claim is to obtain "effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury, 536 U.S. 403, 414-15, 122 S. Ct.*

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[28] We note that Arar's allegation that he "was never given a meaningful opportunity to contest [the] finding" that he belonged to Al Qaeda, Compl. P38, constitutes a "legal conclusion[] couched as [a] factual allegation[]," *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007).*

2179, 153 L. Ed. 2d 413 (2002). For this reason, the complaint setting forth the claim in question must include an adequate description of a "'nonfrivolous,' 'arguable' underlying claim" that the plaintiff has lost as a result of the complained-of official actions. *Id. at 415*.

Arar's complaint fails this test insofar as his complaint fails to set forth adequately "the underlying cause of action," *id. at 418*, that defendants' conduct compromised. *Compare id. at 418* (finding excessively vague the plaintiff's claim that the defendants' "false and deceptive information and concealment foreclosed [the plaintiff] from effectively seeking adequate legal redress") *with* Compl. P 93 (alleging that, by subjecting Arar to "measures . . . that interfered with his access to lawyers and the courts, Defendants ... violated Plaintiff's right . . . to petition the courts for redress of his grievances"). Although Arar now claims that defendants compromised his right to seek a court order "enjoin[ing] his removal to a country that would torture him, as a violation of FARRA and [the Convention Against Torture ("CAT")]," Plaintiff's Reply Br. 34, his complaint makes no mention of FARRA, the CAT, or the possibility of injunctive relief. *Cf. Harbury, 536 U.S. at 416* ("Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant."). Indeed, Arar's complaint alleges that "[d]efendants ...violated [p]laintiff's right ... to petition the courts for redress

of his grievances" without any further elaboration [*189] whatsoever. Compl. P 93. This conclusory allegation falls far short of the pleading standard set forth in *Harbury*. *See Harbury, 536 U.S. at 418* ("[T]he complaint failed to identify the underlying cause of action that the alleged deception had compromised, going no further than the protean allegation that the State Department and NSC defendants' 'false and deceptive information and concealment foreclosed Plaintiff from effectively seeking adequate legal redress.'"). Accordingly, we conclude that Arar has, failed to state a due process claim based on defendants' alleged obstruction of his access to the courts.

(ii)

The framework for evaluating a conditions-of-confinement challenge brought by an unadmitted alien constitutes a question of first impression for our Court. *Cf. Lynch v. Cannatella, 810 F.2d 1363, 1373 (5th Cir. 1987)* (noting that "[t]he 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States . . . .does not limit the right of excludable aliens detained within United States territory to humane treatment"). Defendants urge us to adopt the position taken by the Fifth Circuit and Eleventh Circuit, both of which look to whether the challenged actions amounted to "gross physical abuse." *Lynch, 810 F.2d at 1374*; *see also Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990)* (noting, in pass-

ing, the holding of *Lynch); Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990)* (adopting and applying the approach set forth by the Fifth Circuit in *Lynch).* Arar, in turn, urges us to apply the approach that we have traditionally taken when evaluating substantive due process challenges to conditions of pre-trial confinement. This approach looks to whether the challenged conditions amount to "punishment that may not constitutionally be inflicted upon [pre-trial] detainees *qua* detainees." *Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*; *see also Block v. Rutherford, 468 U.S. 576, 584, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984)* (applying this approach); *Iqbal, 490 F.3d at 168-69* (same).

Arar alleges that, while in the United States, he was subjected to "coercive and involuntary custodial interrogations . . . . conducted for excessively long periods of time and at odd hours of the day and night" on three occasions over twelve days; deprived of sleep and food on his first day of detention; and, thereafter, was "held in solitary confinement, chained and shackled, [and] subjected to [an] invasive strip-search[]." Compl. P 4. These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse. *Cf. Adras, 917 F.2d at 1559* (finding that detainees had not sufficiently alleged "gross physical abuse" where their complaint claimed, *inter alia,* "insufficient nourishment," "prolonged incarceration under harsh conditions," "deprivation of liberty, embarrassment, hu-

miliation, disgrace and injury to feelings, physical and mental pain and suffering"). For this reason, we conclude that Arar has not adequately alleged that the conditions of his confinement violated his *Fifth Amendment* substantive due process rights under the "gross physical abuse" approach of the Fifth Circuit and Eleventh Circuit.

Arar fares no better under the alternative standard he proposes.[29] As the [*190] Supreme Court noted in *Wolfish,* "the fact that [lawful] detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *441 U.S. at 537.* Only if a detention facility official has "expressed intent to punish," *id. at 538* or "a restriction or condition is not reasonably related to a legitimate goal" may a court "infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees," *id. at 539.*

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[29] Judge Sack disagrees with our decision to evaluate Arar's substantive due process claims under the standard that Arar himself proposes, characterizing the Supreme Court's analysis in *Wolfish* as "unhelpful" because Arar "was not a pretrial detainee." Dissent **[35 n.24]** Accordingly, we are puzzled to note that Judge Sack elects to base his conclusion that a *Bivens* action should be available to Arar on two *courts of appeals* decisions relating to the rights of pretrial detainees: *Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007)*, *cert. granted sub nom. Ashcroft v. Iqbal*, 76 U.S.L.W. 3417 (U.S. June 16, 2008) (No. 07-1015) and *Magluta v. Samples, 375 F.3d 1269 (11th Cir. 2004). See* Dissent **[40, 42].**

Arar nowhere alleges that the conditions of his confinement were inflicted with punitive intent or were otherwise unrelated to a legitimate government purpose. Rather, his complaint repeatedly emphasizes that defendants kept him in custody in order to interrogate him, and sought to interrogate him in an effort to obtain information "about his membership in or affiliation with various terrorist groups." Compl. P 31. Nor do the other incidental conditions of his detention--specifically, the shackling, strip search, and delay in providing him with adequate food and sleeping facilities--rise to the level of a constitutional violation. *Cf. Wolfish, 441 U.S. at 530, 543, 558* (rejecting the claim that, in subjecting pretrial detainees to visual body cavity searches and using common rooms to provide temporary sleeping accommodations, the officials running a federal detention facility had violated the detainees' rights of substantive due process). For this reason, we conclude that Arar's allegations also fail to state a claim under the punishment-focused approach we have traditionally applied when analyzing substantive due process challenges to conditions of pre-trial confinement.

Because it is not implicated by, the facts of this case, we leave for another day the question of whether an unadmitted alien challenging his conditions of confinement has rights beyond the right to be free of "gross physical abuse at the hands of state [and] federal officials," *Lynch, 810 F.2d at 1374.*

(iii)

Having determined that the allegations set forth in Count four of Arar's complaint do not state a claim under the *Due Process Clause of the Fifth Amendment*, we affirm the order dismissing Count four of Arar's complaint. Contrary to judge Sack's suggestion, we do not hold that a *Bivens* action is unavailable for the claims raised in Count four of Arar's complaint. *See* Dissent 201-02. Rather, we decline to reach this question in light of Arar's failure to allege facts that, if taken as true, establish the violation of any "constitutionally protected interest." *Robbins, 127 S. Ct. at 2598.*

E. Declaratory relief (General Prayer for Relief)

Arar's prayer for relief includes a request that this Court enter a judgment declaring that the actions defendants took with respect to him "are illegal and violate [his] constitutional, civil, and international [*191] human rights." Compl. 24. Following the Supreme Court's instructions, we begin our analysis by considering "whether this action for a declaratory judgment is the sort of Article III case or controversy to which federal courts are limited." *Calderon v. Ashmus, 523 U.S. 740, 745, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998)* (internal quotation marks omitted).

As the Supreme Court has frequently noted, "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*; and "the irreducible constitutional minimum of standing contains three elements," *id.:*

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, [affecting the plaintiff in a personal and individual way] and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . trace[able] to, the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations and internal quotation marks omitted, first alteration supplied); *see also Baur v. Veneman, 352 F.3d 625, 631-32 (2d Cir. 2003).* "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan, 504 U.S. at 561.*

The conduct of which Arar complains is his alleged detention, by defendants, "for the purpose of removing him to Syria for arbitrary detention and interrogation under torture." Pl.'s Br. 55. The personal injury he alleges is a "bar to reentering the United States," which harms him "because he has worked for sustained periods for U.S. companies in the past, and ... would like to return to the U.S. for that purpose, as well as to visit relatives and friends." Pl.'s Br. 54.

In examining Arar's claim, we conclude that he fails to meet both the "traceability" and "redressability" prongs of the test for constitutional standing set forth by the Supreme Court. The reentry bar from which Arar seeks relief arises as an automatic incident of (1) the finding that Arar was inadmissible to the United States for reasons of national security, *see 8 U.S.C. § 1182(a)(3)(B)*; and (2) the entry of an order of removal pursuant to that finding, *see 8 U.S.C. § 1225(c)*. It bears no relationship with the country of removal that defendants selected for Arar. Any injury associated with the reentry bar is, therefore, not "fairly traceable" to the conduct of which Arar complains--namely, defendants' removal of Arar *"to Syria* for arbitrary detention and interrogation under torture." Pl.'s Br. 55 (emphasis added).

The problem with redressability arises because, as Arar's submissions to both this Court and the District Court unequivocally establish, Arar does

not directly challenge his removal order or defendants' underlying decision to classify him as inadmissible to the United States. *See 414 F. Supp. 2d at 259* (discussing Arar's brief in opposition to defendants' motion to dismiss). Arar contends that "if [he] prevails on his constitutional claims, the removal order will be expunged as null and void, thereby lifting the current barrier to [his] re-entry into the U.S." Pl.'s Br. 53. He does not, however, articulate the theory on which he bases this argument or, for that matter, [*192] set forth any authority in support of his position. We conclude that Arar's claimed injury--namely, the bar to his re-entry to the United States pursuant to a removal order, the lawfulness of which he does not challenge--is not likely to be redressed (indeed, cannot be redressed) by the declaratory judgment he seeks. That is so because a declaration that defendants acted illegally by removing Arar to a particular country for a particular purpose would not change the underlying, uncontested fact that Arar cannot be admitted to the United States: Even if Arar had been removed to Canada rather than Syria, he would still be inadmissible to the United States by virtue of the order of removal entered against him.

Because Arar cannot meet the test for constitutional standing set forth by the Supreme Court, we lack subject matter jurisdiction over his request for a judgment declaring that defendants violated his rights by removing him to Syria for the purpose of arbitrary detention and interrogation under torture.

CONCLUSION

To summarize:

(1) Because we conclude that reasons independent of the state-secrets privilege require dismissal of Arar's complaint, we do not consider whether, if Arar were able to state a claim for relief under notice pleading rules, the assertion of the state-secrets privilege by the United States would require dismissal of Counts one through three of his complaint.

(2) Because we conclude that Arar's complaint has not stated a claim upon which relief can be granted, we need not consider defendants' argument that if any of Arar's claims were cognizable defendants would be entitled to qualified immunity with respect to those claims.

(3) Arar has satisfied Article III requirements as to the claims raised in Counts two and three of his complaint. However, the adjudication of whether, under the facts of this case, the INA stripped the District Court of subject matter jurisdiction to hear Arar's removal-related constitutional claims would be particularly difficult in light of the record before us. Accordingly, we exercise our discretion to dismiss Counts two and three on other threshold--that is, non-merits--grounds, as set forth below.

(4) For the reasons stated above, we conclude that Arar has made a *prima facie* showing sufficient to establish personal jurisdiction over Thompson, Ashcroft, and Mueller at this early stage of the litigation.

As to the causes of action set forth in Arar's complaint, we conclude that:

(5) Count one of Arar's complaint must be dismissed because Arar's allegations about the events surrounding his removal to Syria do not state a claim against defendants under the Torture Victim Protection Act;

(6) Counts two and three of Arar's complaint, which envisage the judicial creation of a cause of action pursuant to the doctrine of *Bivens,* must also be dismissed because (a) the remedial scheme established by Congress is sufficient to convince us at step one of our *Bivens* analysis to refrain from creating a free standing damages remedy for Arar's removal-related claims. Even giving Arar the benefit of the doubt and assuming that this remedial scheme were insufficient to convince us, (b) "special factors" of the kind identified by the Supreme Court in its *Bivens* jurisprudence counsel against the judicial creation of a damages remedy for claims arising from Arar's removal to Syria;

(7) Count four of Arar's complaint must be dismissed because Arar's allegations [*193] about

the mistreatment he suffered while in the United States do not state a claim against defendants under the *Due Process Clause of the Fifth Amendment*; and

(8) With respect to Arar's petition for a declaratory judgment, Arar has not adequately established federal subject matter jurisdiction over his request for a judgment declaring that defendants acted illegally by removing him to Syria so that Syrian authorities could interrogate him under torture.

The judgment of the District Court is **AFFIRMED.**

Arar v. Ashcroft, No. 06-4216

Sack, Circuit Judge, concurring in part and dissenting in part

I. OVERVIEW

Last year, in *Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007)* (Newman, J.), cert. granted sub nom. Ashcroft v. Iqbal, 76 U.S.L.W. 3417 (U.S. June 16, 2008) (No. 07-1015), "[w]e . . . recognize[d] the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attacks. We also recognize[d] that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Id. at 159* (citation omitted). But, we pointed out,

> most . . . rights . . . do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

Id.[1]

The majority fails, in my view, fully to adhere to these principles. It avoids them by mischaracterizing this as an immigration case, when it is in fact about forbidden tactics allegedly employed by United States law enforcement officers in a terrorism inquiry. Although I concur in some parts of the judgment, I respectfully dissent from its ultimate conclusion. I would vacate the judgment of the district court granting the defendants' motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* and remand for further proceedings

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The plaintiff-appellant, Maher Arar, a resident of Ottawa, Canada, and a dual citizen of Canada and Syria,[2] alleges[3] that [*194] on September

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[1] The Supreme Court granted certiorari in Iqbal to address (1) the requirements under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, for stating an "individual-capacity claim[]" against a "cabinet-level officer or other high-ranking official," and (2) the extent to which a "cabinet-level officer or other high-ranking official" can be held "personally liable for the allegedly unconstitutional acts of subordinate officials." Ashcroft v. Iqbal, 76 U.S.L.W. 3417 (U.S. June 16, 2008) (No. 07-1015); see also Petition for a Writ of Certiorari, Ashcroft v. Iqbal, No. 07-1015 (U.S. cert. granted sub nom. June 16, 2008). These questions have no bearing on the propositions for which this dissent cites Iqbal.

[2] As a teenager, Arar had emigrated from Syria to Canada where he lived with his parents, and then his wife and

26, 2002, he was, by travel happenstance, a transit passenger at New York's John F. Kennedy International Airport ("JFK Airport") in Queens, New York. He had cut short a family vacation in Tunisia and was bound, he thought, for a business meeting in Montreal. What happened to him next would beggar the imagination of Franz Kafka.

When Arar sought to pass through the immigration check-point at JFK Airport in order to catch his connecting flight to Montreal, he was detained by U.S. agents who had been led to believe, on the basis of information provided by Canadian government officials, that Arar had connections with al Qaeda. FBI agents first, and then Immigration and Naturalization Service ("INS")[4] officers, held Arar largely

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children.

[3] For present purposes, on this appeal from a dismissal of the complaint under *Fed. R. Civ. P. 12(b)(6)*, the facts are the factual allegations as pleaded in the complaint. See, e.g., *Iqbal, 490 F.3d at 147*. The fact that Arar did not choose to verify his complaint, see ante at **[10, 19],** is irrelevant. 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1339 (3d ed. 2004) ("Under *Federal Rule 11*, pleadings, motions, and other papers need not be verified or accompanied by an affidavit except when 'specifically provided by rule or statute' . . . [and] [a] party's verification of a pleading that need not have been verified does not give the pleading any added weight or importance in the eyes of the district court.").

[4] On March 1, 2003, the INS was reconstituted as the Bureau of Immigration and Customs Enforcement and the Bureau of United States Citizenship and Immigration Services, both within the Department of Homeland Security. The actions

incommunicado at several locations in New York City for thirteen days, subjecting him to harsh interrogation under abusive conditions of detention.

Unable to acquire from him the information they sought, the agents attempted to obtain Arar's consent to be removed to Syria. They expected Syrian officials to continue questioning him, but under conditions of torture and abuse that they, the U.S. government agents, would not themselves employ. When Arar declined to consent, the agents sent him to Syria against his will for the purpose, ultimately fulfilled, of having him held captive and further questioned under torture there.

Arar brought suit in the United States District Court for the Eastern District of New York on both statutory and constitutional grounds. He seeks damages from the federal officials he thinks responsible for his abuse. The district court dismissed the action for failure to state a claim upon which relief can be granted. This Court now affirms. I disagree in significant part, and therefore respectfully dissent in significant part.

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at issue in this appeal were taken when the agency was still known as the INS.

II. THE FACTS AS ALLEGED IN ARAR'S COMPLAINT

The majority provides a strikingly spare description of the allegations of fact on the basis of which Arar mounts this appeal. The district court's opinion, see *Arar v. Ashcroft, 414 F. Supp. 2d 250, 252-57 (E.D.N.Y. 2006)*, by contrast, rehearses the facts in considerable detail. According to the district court, the complaint alleges the following facts, repeated here nearly verbatim.[5] They "are assumed to be true for purposes of the pending appeal[], as . . . [is] required [when] . . . reviewing a ruling on a motion to dismiss." *Iqbal, 490 F.3d at 147.*

A. Arar's Apprehension, Detention, and Forcible Transportation to Syria

Arar, in his thirties, is a native of Syria. He immigrated to Canada with his family when he was a teenager. He is a dual citizen of Syria and Canada. He resides in Ottawa.

[*195] In September 2002, while vacationing with his family in Tunisia, he was called back to work by his employer[6] to consult with a prospective

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[5] Citations to the district court opinion are in parentheses. The footnotes and subheadings are mine.

[6] Arar was employed by The MathWorks, Inc., a privately held, Massachusetts-based developer and supplier of software for technical computing. See Complaint, P 12; About The MathWorks, http://www.mathworks.com/company/aboutus/ (last visited May 31, 2008).

client. He purchased a return ticket to Montreal with stops[7] in Zurich and New York. He left Tunisia on September 25, 2002. (*Arar, 414 F. Supp. 2d at 252.*)

On September 26, 2002, Arar arrived from Switzerland at JFK Airport in New York to catch a connecting flight to Montreal. Upon presenting his passport to an immigration inspector, he was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." Complaint ("Cplt.") Ex. D (Decision of J. Scott Blackman, Regional Director) at 2. He was interrogated by various officials for approximately eight hours.[8] The officials asked Arar if he had contacts with terrorist groups, which he categorically denied. Arar was then transported to another site at JFK Airport, where he was placed in solitary confinement. He alleges that he was transported in chains and shackles and was left in a room with no bed and with lights on throughout the night. (*Arar, 414 F. Supp. 2d at 253.*)

The following morning, September 27, 2002, starting at approximately 9:00 a.m., two FBI agents interrogated Arar for about five hours, asking him questions about Osama bin Laden, Iraq, and Palestine. Arar alleges that the agents yelled and swore at him throughout the interrogation. They ignored his

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[7] That is, changes of plane.

[8] According to the complaint, on that day, Arar was questioned first by an FBI agent for five hours, Cplt. P 29, then by an immigration officer for three hours, Cplt. P 31.

repeated requests to make a telephone call and see a lawyer. At 2:00 p.m. that day, Arar was taken back to his cell, chained and shackled, and provided a cold McDonald's meal -- his first food in nearly two days. (Id.)

That evening, Arar was given an opportunity to voluntarily return to Syria, but refused, citing a fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a "special interest" in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center ("MDC") in Brooklyn, New York,[9] where he was strip-searched and placed in solitary confinement. During his initial three days at MDC, Arar's continued requests to meet with a lawyer and make telephone calls were refused. (Id.)

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[9] This is the same federal jail in which, less than a year earlier, Javaid Iqbal was allegedly mistreated. Iqbal, a Muslim inmate accused of violations of *18 U.S.C. §§ 371* and *1028* (conspiracy to defraud the United States and fraud with identification) and held post-9/11 in the MDC, allegedly suffered "unconstitutional actions against him in connection with his confinement under harsh conditions ... after separation from the general prison population." *Iqbal, 490 F.3d at 147, 148 n.1.* We held, with respect to Iqbal's subsequent Bivens actions, that such treatment was not protected, as a matter of law, under the doctrine of qualified immunity. *Id. at 177-78.*

On October 1, 2002,[10] the INS initiated removal proceedings against Arar, who was charged with being temporarily inadmissible because of his membership in al [*196] Qaeda, a group designated by the Secretary of State as a foreign terrorist organization. Upon being given permission to make one telephone call, Arar called his mother-in-law in Ottawa, Canada. (Id.)

Upon learning of Arar's whereabouts, his family contacted the Office for Consular Affairs ("Canadian Consulate")[11] and retained an attorney, Amal Oummih, to represent him. The Canadian Consulate had not been notified of Arar's detention. On October 3, 2002, Arar received a visit from Maureen Girvan from the Canadian Consulate, who, when presented with the document noting Arar's inadmissibility to the United States, assured Arar that removal to Syria was not an option. On October 4, 2002, Arar designated Canada as the country to which he wished to be removed. (Id.)

On October 5, 2002, Arar had his only meeting with counsel. The following day, he was taken in chains and shackles to a room where approximately seven INS officials questioned him about his reasons for opposing removal to Syria. His attorney was not provided advance notice of the interrogation, and Arar further alleges that U.S. officials misled him

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[10] Five days after Arar's arrival in the United States.

[11] In New York City.

into thinking his attorney had chosen not to attend. During the interrogation, Arar continued to express his fear of being tortured if returned to Syria. At the conclusion of the six-hour interrogation, Arar was informed that the officials were discussing his case with "Washington, D.C." Arar was asked to sign a document that appeared to be a transcript. He refused to sign the form. (*Id. at 253-54.*)

The following day (October 7, 2002), attorney Oummih received two telephone calls informing her that Arar had been taken for processing to an INS office at Varick Street in Manhattan, that he would eventually be placed in a detention facility in New Jersey, and that she should call back the following morning for Arar's exact whereabouts. However, Arar alleges that he never left the MDC and that the contents of both of these phone calls to his counsel were false and misleading. (*Id. at 254.*)

That same day, October 7, 2002, the INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is "clearly and unequivocally" a member of al Qaeda and, therefore, "clearly and unequivocally inadmissible to the United States" under *8 U.S.C. § 1182(a)(3)(B)(i)(V).* See Cplt. Ex. D. at 1, 3, 5. Based on that finding, Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." Id. at 6 (brackets in original). (*Arar, 414 F. Supp. 2d at 254.*)

At approximately 4:00 a.m. on October 8, 2002, Arar learned that, based on classified information, INS regional director Blackman had ordered that Arar be sent to Syria and that his removal there was consistent with Article Three of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). Arar pleaded for reconsideration but was told by INS officials that the agency was not governed by the "Geneva Conventions" and that Arar was barred from reentering the country for a period of five years and would be admissible only with the permission of the Attorney General. (Id.)

Later that day, Arar was taken in chains and shackles to a New Jersey airfield, where he boarded a small jet plane bound for Washington, D.C. From there, he was flown to Amman, Jordan, arriving there on October 9, 2002. He was then handed [*197] over to Jordanian authorities, who delivered him to the Syrians later that day. At this time, U.S. officials had not informed either Canadian Consulate official Girvan or attorney Oummih that Arar had been removed to Syria. Arar alleges that Syrian officials refused to accept Arar directly from the United States. (Id.)

Arar's Final Notice of Inadmissability ("Final Notice") ordered him removed without further inquiry before an immigration judge. See Cplt. Ex. D. According to the Final Notice: "The Commissioner of the Immigration and Naturalization Service has de-

termined that your removal to Syria would be consistent with [CAT]." Id. It was dated October 8, 2002, and signed by Deputy Attorney General Larry Thompson. After oral argument in the district court on the defendants' motions to dismiss, in a letter dated August 18, 2005, counsel for Arar clarified that Arar received the Final Notice within hours of boarding the aircraft taking him to Jordan. See Dkt. No. 93. (*Arar, 414 F. Supp. 2d at 254.*)

B. Arar's Detention in Syria

During his ten-month period of detention in Syria, Arar alleges, he was placed in a "grave" cell measuring six feet long, seven feet high, and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch"). The cell was damp and cold, contained very little light, and was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria. (Id.)

During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips, and lower back

with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, his face, and the back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings, and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity. (*Id. at 255.*)

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As evidence of this, Arar notes that the interrogations in the United States and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, the Syrian officials supplied U.S. officials with all information extracted from Arar; plaintiff cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the United States that it extracted from Arar. See Cplt. Ex. E (January 21, 2004 transcript of CBS's Sixty Minutes II: "His Year In Hell"). (*Arar, 414 F. Supp. 2d at 255.*)

C. Arar's Contact with the Canadian Government While Detained in Syria

The Canadian Embassy contacted the Syrian government about Arar on October [*198] 20, 2002, and the following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar. (Id.)

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave. (Id.)

Five days later, Arar was brought to a Syrian investigation branch, where he was forced to sign a confession stating that he had participated in terrorist training in Afghanistan even though, Arar states, he has never been to Afghanistan or participated in any terrorist activity. Arar was then taken to an overcrowded Syrian prison, where he remained for six weeks. (Id.)

On September 28, 2003, Arar was transferred back to the Palestine Branch, where he was held for one week. During this week, he heard other detainees screaming in pain and begging for their torture to end. (Id.)

On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus. He was flown to Ottawa the following day and reunited with his family. (Id.)

Arar contends that he is not a member of any terrorists organization, including al Qaeda, and has never knowingly associated himself with terrorists, terrorist organizations or terrorist activity. Arar claims that the individual about whom he was questioned was a casual acquaintance whom Arar had last seen in October 2001. He believes that he was removed to Syria for interrogation under torture because of his casual acquaintances with this individual and others believed to be involved in terrorist activity. But Arar contends "on information and belief" that there has never been, nor is there now, any reasonable suspicion that he was involved in such activity.[12] Cplt. P 2. (*Arar, 414 F. Supp. 2d at 255-56.*)

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist, and is having trouble finding employment due to

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[12] Footnote in district court opinion, relating to the so-called "LaHood Letter" about a subsequent Canadian inquiry, omitted. See *Arar, 414 F. Supp. 2d at 256 n.1.*

his reputation and inability to travel in the United States. (*Id. at 256.*)

D. U.S. Policy Related to Interrogation of Detainees by Foreign Governments

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of "extraordinary rendition," according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The "extraordinary rendition" policy involves the removal of "non-U.S. citizens detained in this country and elsewhere and suspected -- reasonably or unreasonably -- of terrorist activity to countries, including Syria, where interrogations under torture are routine." Cplt. P 24. Arar alleges on information and belief that the United States sends individuals "to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United [*199] States and other democracies." Id. The complaint further alleges that the defendants "have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed." Id. The complaint also alleges that the United States involves Syria in its "extraordinary rendition" program to extract counter-terrorism information. (*Arar, 414 F. Supp. 2d at 256.*)

This "extraordinary rendition" program is not part of any official or declared U.S. public policy; nevertheless, it has received extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Arar details a number of articles in the mainstream press recounting both the incidents of this particular case and the "extraordinary rendition" program more broadly. These articles are attached as Exhibit C of his complaint. (*Id. at 256-57.*)

Arar alleges that the defendants directed the interrogations by providing information about Arar to Syrian officials and receiving reports on Arar's responses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating, and torturing Arar. Arar argues in the alternative that, at a minimum, the defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria. (*Id. at 257.*)

E. Syria's Human Rights Record

Arar's claim that he faced a likelihood of torture in Syria is supported by U.S. State Department reports on Syria's human rights practices. See, e.g., Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2004 Country Reports on Human Rights Practices (Released February 28, 2005) ("2004 Report"). According to the

State Department, Syria's "human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . includ[ing] the use of torture in detention, which at times resulted in death." Id. at 1. Although the Syrian constitution officially prohibits such practices, "there was credible evidence that security forces continued to use torture frequently." Id. at 2. The 2004 Report cites "numerous cases of security forces using torture on prisoners in custody." Id. Similar references throughout the 2004 Report, as well as State Department reports from prior years; are legion. See, e.g., Cplt. Ex. A (2002 State Department Human Rights Report on Syria). (*Arar, 414 F. Supp. 2d at 257.*)[13]

F. The Canadian Government Inquiry

On September 18, 2006, a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Commission"), established by the government of Canada to investigate the Arar affair, issued a three-volume report. See Arar Comm'n, Report of the Events Relating to Maher Arar (2006).[14] A press release issued by the Commission

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[13] The district court's description of the facts as alleged in the complaint ends here.

[14] On October 23, 2007, this Court granted Arar's motion to take judicial notice of the Report insofar as its existence and the scope of its contents were concerned, but denied the motion insofar as it may have sought judicial notice of the facts asserted in the report. But cf. ante at **[4-5]** (employing the report as the source for facts relating to Canadian involvement in

summarized: "On Maher Arar the Commissioner [Dennis O'Connor] comes to one important [*200] conclusion: 'I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.'" Press Release, Arar Comm'n, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case 1 (Sept. 18, 2006) (boldface in original), available at http://www.ararcommission.ca/eng/ReleaseFinal-Sept18.pdf (last visited May 31, 2008). On January 26, 2007, the Office of the Prime Minister of Canada issued the following announcement:

> Prime Minister Stephen Harper today released the letter of apology he has sent to Maher Arar and his family for any role Canadian officials may have played in what happened to Mr. Arar, Monia Mazigh and their family in 2002 and 2003.
>
> "Although the events leading up to this terrible ordeal happened under the previous government, our Government will do everything in its power to ensure that the issues raised by Commissioner O'Connor are addressed," said the Prime Minister. "I sincerely hope that these actions will

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the Arar incident).

> help Mr. Arar and his familybegin a new and hopeful chapter in their lives."
>
> Canada's New Government has accepted all 23 recommendations made in Commissioner O'Connor's first report, and has already begun acting upon them. The Government has sent letters to both the Syrian and the U.S. governments formally objecting to the treatment of Mr. Arar. Ministers Day and MacKay have also expressed Canada's concerns on this important issue to their American counterparts. Finally, Canada has removed Mr. Arar from Canadian lookout lists, and requested that the United States amend its own records accordingly.
>
> The Prime Minister also announced that Canada's New Government has successfully completed the mediation process with Mr. Arar, fulfilling another one of Commissioner O'Connor's recommendations. This settlement, mutually agreed upon by all parties, ensures that Mr. Arar and his family will obtain fair compensation, in the amount of $10.5 million, plus legal costs, for the ordeal they have suffered.

Press Release, Prime Minister Releases Letter of Apology to Maher Arar and His Family and An-

nounces Completion of Mediation Process (Jan. 26, 2007), available at http://pm.gc.ca/eng/media.asp?id =1509 (last visited May 31, 2008); see also Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, *75 Geo. Wash. L. Rev. 1333, 1339-40 (2007).*

III. PROCEDURAL HISTORY

A. The Complaint and the District Court's Opinion

On January 22, 2004, Arar filed a complaint in the United States District Court for the Eastern District of New York. In addition to its factual allegations, his complaint asserts as "Claims for Relief":

> 1. That defendants, in contravention of the Torture Victim Prevention Act of 1991 ("TVPA"), *28 U.S.C. § 1350* (note), acted in concert with Jordanian and Syrian officials, and under color of Syrian law, to conspire and/or aid and abet in violating his right to be free from torture (Count 1).
>
> 2. That defendants knowingly or recklessly subjected him to torture and coercive interrogation in Syria in violation of his *Fifth Amendment* right to substantive due process (Count 2).

> 3. That defendants knowingly or recklessly subjected him to arbitrary detention [*201] without trial in Syria in violation of his *Fifth Amendment* right to substantive due process (Count 3).
>
> 4. That defendants intentionally or recklessly subjected him to arbitrary detention and coercive and involuntary custodial interrogation in the United States, and interfered with his ability to obtain counsel or petition the courts for redress, in violation of his *Fifth Amendment* right to substantive due process (Count 4).

See *Arar, 414 F. Supp. 2d at 257-58*.

The district court denied Arar's claim for declaratory relief, dismissed Counts 1, 2, and 3 with prejudice, and dismissed Count 4 without prejudice and with leave to replead. *Id. at 287-88*. The district court decided that: 1) Arar lacks standing to bring a claim for declaratory relief; 2) Arar has no TVPA action since (a) in the court's view, Congress provided no private right of action under the TVPA for non-citizens such as Arar, and (b) he cannot show that defendants were acting under "color of law, of any foreign nation," *id. at 287*; 3) even though the Immigration and Nationality Act ("INA") does not foreclose jurisdiction over Arar's substantive due process claims, no cause of action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,*

403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), can be extended in light of "special factors counselling hesitation in the absence of affirmative action by Congress," *id. at 396*, namely the national security and foreign policy considerations at stake; and 4) prior cases holding that inadmissible aliens deserve little due process protection are inapplicable to Arar's claim that he was deprived of due process during his period of domestic detention because Arar was not attempting to effect an entry into the United States, and therefore the circumstances and conditions of confinement to which Arar was subjected while in U.S. custody may potentially raise Bivens claims, but Arar was required to replead them without regard to any rendition claim and name those defendants that were personally involved in the alleged unconstitutional treatment. *Arar, 414 F. Supp. 2d at 287-88*.

Arar declined the district court's invitation to replead. Instead, he appeals from the judgment of the district court.

B. The Panel's Majority Opinion

The panel affirms the judgment of the district court as explained by the majority opinion. The majority concludes that (1) the allegations set forth in Arar's complaint are sufficient, at this early stage of the litigation, to establish personal jurisdiction over defendants not resident in New York, but (2) Arar has not established federal subject-matter jurisdic-

tion over his claim for declaratory relief. Ante at **[7-8, 49-51].** It concludes further that (3) Arar's allegations do not state a claim against the defendants for damages under the TVPA, and (4) we cannot provide Arar with a judicially created cause of action for damages under the *Fifth Amendment*, pursuant to the Bivens doctrine. Id. at **[7-8, 49-51].** Finally, having decided to dismiss the complaint on these grounds, the majority does not reach the question of whether the INA or the state-secrets privilege foreclose Arar's pursuit of this litigation. Id. at **[49-50].**

I agree with the majority's conclusions as to personal jurisdiction, Arar's request for a declaratory judgment, and his claim under the TVPA. Unlike the majority, however, I conclude that Arar adequately pleads violations of his constitutional rights and is entitled to proceed with his claims for monetary damages under Bivens. Finally, as Arar and the defendants agree, [*202] were the complaint reinstated and this matter remanded, as I think it should be, the district court could then consider the defendants' assertion of the "state-secrets privilege"[15] in the first instance, and limit discovery as is necessary to meet legitimate national security and related concerns.

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[15] See *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)*; *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991).*

IV. ANALYSIS

This is not an immigration case. Contrary to the majority's analysis, Arar's allegations do not describe an action arising under or to be decided according to the immigration laws of the United States. Arar did not attempt to enter the United States in any but the most trivial sense; he sought only to transit through JFK Airport in order to travel from one foreign country to another. He was initially interrogated by FBI agents, not INS officials; they sought to learn not about the bona fides of his attempt to "enter" the United States, but about his alleged links to al Qaeda. The INS was not engaged in order to make a determination as to Arar's immigration status. The agency's principal involvement came after the FBI failed to obtain desired information from him, in order to facilitate his transfer to Syria so that he might be further held and questioned under torture.

This lawsuit is thus about the propriety and constitutionality of the manner in which United, States law enforcement agents sought to obtain from Arar information about terrorism or terrorists which they thought -- wrongly as it turned out -- that he possessed. The majority goes astray when it accepts the defendants' attempt to cast it as an immigration matter.[16]

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[16] The district court, by contrast, did not treat this as an immigration case. See *Arar, 414 F. Supp. 2d at 285, 287.*

In my view, the issues raised on this appeal, approached in light of the case Arar actually seeks to assert, are relatively straightforward:

> 1. What is the gravamen of Arar's complaint?
>
> 2. Does it allege a deprivation of his right to substantive due process under the *Fifth Amendment to the United States Constitution*?
>
> 3. If so, is a Bivens action available as a vehicle by which he may seek redress for the violation?
>
> 4. And, if so, are the defendants entitled to qualified immunity?

A. The Gravamen of the Complaint

It is well-settled in this Circuit that "we may not affirm the dismissal of [a plaintiff's] complaint because [he has] proceeded under the wrong theory 'so long as [he has] alleged facts sufficient to support a meritorious legal claim.'" *Hack v. President & Fellows of Yale College, 237 F.3d 81, 89 (2d Cir. 2000)* (quoting *Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41, 46 (2d Cir. 1997))*, cert. denied, *534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001)*. In considering an appeal such as this one from a district court's grant of the defendants' *Rule 12(b)(6)* motion

to dismiss, "'[f]actual allegations alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert v. Carovano, 851 F.2d 561, 571 n.3 (2d Cir. 1988)* (en banc) (citing *Newman v. Silver, 713 F.2d 14, 15 n.1 (2d Cir. 1983))).*[17] We are, moreover, required to [*203] read the factual allegations in a complaint "as a whole." See *Shapiro v. Cantor, 123 F.3d 717, 719 (2d Cir. 1997)*; see also *Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1252 n.11 (11th Cir. 2005)* (per curiam), cert. denied, *549 U.S. 1032, 127 S. Ct. 596, 166 L. Ed. 2d 431 (2006)*; *Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000).*

The allegations contained in Arar's complaint include assertions, which must be treated as established facts for present purposes, that: 1) Arar was apprehended by government agents as he sought to change planes at JFK Airport; he was not seeking to enter the United States; 2) his detention, based on false information given by the government of Canada, was for the purpose of obtaining information from him about terrorism and his alleged links with

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[17] The Federal Rules of Civil Procedure tell us that "[p]leadings must be construed so as to do justice." *Fed. R. Civ. P. 8(e).* Wright and Miller's treatise counsels that "[t]his provision is not simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004). "One of the most important objectives of the federal rules is that lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn." Id.

terrorists and terrorist organizations; 3) he was interrogated harshly on that topic -- mostly by FBI agents -- for many hours over a period of two days; 4) during that period, he was held incommunicado and was mistreated by, among other things, being deprived of food and water for a substantial portion of his time in custody; 5) he was then taken from JFK Airport to the MDC in Brooklyn, where he continued to be held incommunicado and in solitary confinement for another three days; 6) while at the MDC, INS agents sought unsuccessfully to have him agree to be removed to Syria because they and other U.S. government agents intended that he would be questioned there along similar lines, but under torture; 7) thirteen days after Arar had been intercepted and incarcerated at the airport, defendants sent him against his will to Syria. The defendants intended that he be questioned in Syria under torture and while enduring brutal and inhumane conditions of captivity. This was, as alleged, all part of a single course of action, conceived of and executed by the defendants in the United States. Its purpose: to make Arar "talk."

Not until deep in its opinion, though, does the majority come to address the heart of the matter: Arar's treatment by defendants while he was present in the United States. When it finally does, the opinion disposes of the issue by describing only some of the pleaded facts: "[W]hile in the United States," it says, Arar "was subjected to 'coercive and involuntary custodial interrogations . . . conducted for exces-

sively long periods of time and at odd hours of the day and night' on three occasions over thirteen days; 'deprived of sleep and food for extended periods of time'; and, thereafter, was 'held in solitary confinement, chained and shackled, [and] subjected to [an] invasive strip-search[].'" Ante at **[45].** Having thus limited its consideration to only a portion of the acts Arar complains of, the majority blandly concludes: "These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse" necessary to support a conclusion that his due process rights had been infringed. Id. at **[45].**

But the majority reaches its conclusion by eliding, among other things, the manner in which Arar was taken into custody and the manner in which defendants disposed [*204] of him when their efforts to obtain information from him here proved fruitless. Arar was, in effect, abducted while attempting to transit at JFK Airport. And when he failed to give defendants the information they were looking for, and he refused to be sent "voluntarily" to Syria, they forcibly sent him there to be detained and questioned under torture.

It is true that after setting forth his allegations of fact in detail in his complaint, Arar structures his "claims for relief" to charge knowing or reckless subjection to torture, coercive interrogation, and arbitrary detention in Syria (counts two and three) separately from, among other things, arbitrary

detention and coercive and involuntary custodial interrogation in the United States (count four). See *Arar, 414 F. Supp. 2d at 257-58*. The pleading's form may have contributed to the majority's erroneous separation of the decision to send Arar to Syria to be interrogated under torture from his "domestic" physical mistreatment. But, as noted, "'[f]actual allegations alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert, 851 F.2d at 571 n.3*). The assessment of Arar's alleged complaint must take into account the entire arc of factual allegations that Arar makes -- his interception and arrest; his questioning, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK Airport in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C., and forced transfer to Syrian authorities for further detention and questioning under torture.

B. Arar's Pleading of a Substantive Due Process Violation

Principles of substantive due process apply only to a narrow band of extreme misbehavior by government agents acting under color of law: mistreatment of a person that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi v. Whitman, 485 F.3d 73, 79 (2d Cir. 2007)* (citations and internal quotation marks omitted). When Arar's complaint is read to include all of the actions allegedly taken by the

defendants against him within this country, including the actions taken to send him to Syria with the intent that he be tortured there, it alleges conduct that easily exceeds the level of outrageousness needed to make out a due process claim. Indeed, although the "shocks the conscience" test is undeniably vague, see *Estate of Smith v. Marasco, 430 F.3d 140, 156 (3d Cir. 2005)*; *Schaefer v. Goch, 153 F.3d 793, 798 (7th Cir. 1998)*, "[n]o one doubts that under Supreme Court precedent, interrogation by torture" meets that test, *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 602 (D.C. Cir. 2000)*, rev'd on other grounds, *536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*;[18] see also *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)* (interrogation methods were "too close to the rack and the screw to permit of constitutional differentiation"); *Palko v. Connecticut, 302 U.S. 319, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937)* (noting that the *Due Process Clause* must at least "give protection against torture, physical or mental"), overruled on other grounds by *Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*. The defendants did not themselves torture [*205] Arar; they "outsourced" it.[19] But I do not think that whether the

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[18] The Harbury court concluded, nonetheless, that because the murdered alien's mistreatment occurred entirely abroad, he had not suffered a violation of his *Fifth Amendment* rights. See *Harbury, 233 F.3d at 603-04* (relying on *United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)).*

[19] "[R]endition -- the market approach -- outsources our

defendants violated Arar's *Fifth Amendment* rights turns on whom they selected to do the torturing: themselves, a Syrian Intelligence officer, a warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles.

We have held that under the state-created danger doctrine, "[w]here a government official takes an affirmative act that creates an opportunity for a third party to harm a victim (or increases the risk of such harm), the government official can potentially be liable for damages." *Lombardi, 485 F.3d at 80*; see also, e.g., *Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993)* (finding liability where the police allegedly gave the green light for skinheads to assault a group of flag-burners), overruled on other grounds by *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*; see also *Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 79 (1st Cir. 2005)* ("[I]n scenarios in which government officials actively direct or assist private actors in causing harm to an individual . . . the government officials and the private actor are essentially joint tortfeasors,

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crimes, which puts us at the mercy of anyone who can expose us, makes us dependent on some of the world's most unsavory actors, and abandons accountability. It is an approach we associate with crime families, not with great nations." Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 388 (2008). "[O]ne could get the worst of both worlds: national responsibility for acts as to which the agents we have empowered are unaccountable." Id. at 387.

and therefore, may incur shared constitutional responsibility." (citations and internal quotation marks omitted)). We have also held that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. Under these limited circumstances, the state may owe the incarcerated person an affirmative duty to protect against harms to his liberties inflicted by third parties." *Matican v. City of New York, 524 F.3d 151, 155-56 (2d Cir. 2008)* (citations, internal quotation, marks, and footnotes omitted). This "duty arises solely from the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint of personal liberty." Id.[20]

The majority reaches the wrong conclusion in large measure, I think, by treating Arar's claims as though he were an unadmitted alien seeking entry into the United States. The majority asserts that "[a]s an unadmitted alien, Arar as a matter of law lacked a physical presence in the United States." Ante at **[39].** And it concludes from this that "the full protections of the *due process clause*" do not apply to Arar because they "apply only to 'persons within the United States.'" Id. (quoting *Zadvydas v. Davis, 533*

[20] Accordingly, Arar's claim can be analyzed under either of the "two 'separate and distinct theories of liability' under the substantive component of the *Due Process Clause*: 'special relationship' liability or 'state-created-danger' liability." *Benzman v. Whitman, 523 F.3d 119, 127 (2d Cir. 2008).*

U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (internal quotation marks omitted)).

But the notion that, while in New York City, Arar was not "physically present" in the United States, is a legal fiction peculiar to immigration law. It is relevant only to the determination of an alien's immigration [*206] status and related matters. It is indeed a fiction that works largely to the benefit of aliens, permitting them to remain here while immigration officials determine whether they are legally admissible.

If Arar had been seeking to immigrate to the United States,[21] had he been detained at, the immi-

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[21] While the majority opinion from time to time treats Arar as though he was an immigrant seeking entry into the United States, the INA makes a clear distinction between an immigrant seeking entry and an alien seeking only transit through the United States. The INA excludes from the definition of "immigrant" an alien "in immediate and continuous transit through the United States." *8 U.S.C. § 1101(a)(15)(C)*. Moreover, at the time Arar flew to JFK Airport, the United States had in place a Transit Without Visa program that allowed an alien who would be required to obtain a visa to enter the United States to transit through a U.S. airport without obtaining a visa. As a citizen of Canada, a visa waiver country, Arar had no need to avail himself of this program. But its existence demonstrates the distinction, recognized by the government, between transit passengers, like Arar, and immigrants seeking entry into the United States. The program was suspended for security reasons on August 2, 2003, long after Arar's attempt to transit through JFK Airport. See Press Release, Department of Homeland Security, Homeland Security and Department of State Take Immediate Steps To Make Air Travel Even Safer (Aug. 2, 2003), available at

gration entry point at JFK Airport; had he thereafter been held at the MDC in Brooklyn pending deportation to his home in Canada, he presumably would have properly been treated, for immigration purposes, as though he had been held or turned back at the border. See *Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215, 73 S. Ct. 625, 97 L. Ed. 956 (1953)* ("Aliens seeking entry obviously can be turned back at the border without more. . . . [T]emporary harborage, an act of legislative grace, bestows no additional rights."); *Kaplan v. Tod, 267 U.S. 228, 230, 45 S. Ct. 257, 69 L. Ed. 585 (1925)* (concluding that an unadmitted alien held on Ellis Island, and later elsewhere within the United States, was "to be regarded as stopped at the boundary line" for naturalization purposes). But for purposes of assessing his treatment by law enforcement agents during his detention and interrogation in several places in the City of New York, it cannot follow from a legal fiction applicable to immigration status that Arar, rather like the fictional "little man who wasn't there,"[22] was never in this country.[23] Arar sought not

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http://www.dhs.gov/xnews/releases/pressreleases0227.shtm (last visited May 30, 2008).

[22] Hughes Mearns, Antigonish (1899).

[23] The Supreme Court's decisions and our own invoke the entry fiction in cases related to the determination of an alien's immigration status, and the procedural due process to which an alien is entitled by virtue of that status, not cases adjudicating alleged violations of an alien's substantive due process rights during detention. See, e.g., *Leng May Ma v. Barber, 357 U.S. 185, 78 S. Ct. 1072, 2 L. Ed. 2d 1246 (1958)* (con-

to enter this [*207] country, but to leave it, after transiting briefly through one of its airports. For purposes of identifying the most rudimentary of his rights under the Constitution, the fiction that Arar was not here is senseless. He was here, as a matter of both fact and law, and was therefore entitled to protection against mistreatment under the *Due Process Clause*.

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cluding that temporary parole in United States while alien's admissibility was being determined did not entitle alien to benefit of statute giving Attorney General authority to withhold deportation of any alien "within the United States" if alien would thereby be subjected to physical persecution); *Menon v. Esperdy, 413 F.2d 644, 647 (2d Cir. 1969)* (noting that "since a parole does not constitute an admission into the United States ... th[e] appeal involve[d] an exclusion ... rather than an expulsion"); *Dong Wing Ott v. Shaughnessy, 247 F.2d 769, 770 (2d Cir. 1957)* (per curiam) (holding that the Attorney General's "discretionary power to suspend deportation" did not apply to aliens "within the country on parole," because parole, "by statute[, was] not [to] be regarded as an admission of the alien" (citation and internal quotation marks omitted)), cert. denied, *357 U.S. 925, 78 S. Ct. 1368, 2 L. Ed. 2d 1370 (1958)*; *Knauff v. Shaughnessy, 179 F.2d 628, 630 (2d Cir. 1950)* (per curiam) (alien stopped at the border and detained on Ellis Island "is not 'in the United States' . . . [and therefore] is not entitled to naturalization"); see also *Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir.)* (rejecting application of the entry fiction to Bivens claims involving the use of excessive force), cert. denied, *549 U.S. 1096, 127 S. Ct. 837, 166 L. Ed. 2d 667 (2006)*; *Kwai Fun Wong v. United States, 373 F.3d 952, 973 (9th Cir. 2004)* ("The entry fiction is best seen ... as a fairly narrow doctrine that primarily determines the procedures that the executive branch must follow before turning an immigrant away." (emphasis in original)).

The majority acknowledges that even an unadmitted alien, treated under the immigration laws as though he was not physically present within the United States, has constitutional rights. The majority sees the scope of those rights as not extending "beyond" freedom from "gross physical abuse." See ante at **[47].** I think that unduly narrow. It seems to me that Arar was entitled to the bare-minimum protection that substantive due process affords.

In support of applying a "gross physical abuse" standard, the majority cites *Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987)*, *Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990)*, and *Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990)*. These cases are highly doubtful authority for present purposes. Again, they are immigration cases. They deal with the treatment of aliens who, having sought admission to the United States, were awaiting removal or a determination of their status under the immigration laws. It is difficult to understand the relevance of those decisions to the rights of an alien who wished to transit through an American airport but was taken into custody for interrogation as to non-immigration matters instead.

Even accepting these cases as setting forth the applicable standard, however, I think Arar adequately alleges a violation of his substantive due process rights. His allegations, properly construed, describe decisions made and actions taken by defendants within the United States, while Arar was in

the United States, designed to obtain information from him, even if doing so ultimately required his detention and torture abroad. Once the defendants, having despaired of acquiring the information from Arar here, physically caused him to be placed in the hands of someone, somewhere -- anyone, anywhere -- for the purpose of having him tortured, it seems to me that they were subjecting him to the most appalling kind of "gross physical abuse."[24] They thereby violated his right to due process even as the majority artificially limits that right.

It may be worth noting, finally, that in order for one or more of the defendants to be liable for the infringement of Arar's [*208] substantive due process rights, that defendant or those defendants would presumably have to be found by the trier of fact to have participated in a broad enough swath of Arar's mistreatment to be held responsible for the violation. A lone INS agent who asked Arar questions at JFK

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[24] As the majority notes, Arar asserts that his substantive due process rights should be assessed under standards established for pre-trial detainees in *Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)* (deciding whether the challenged conditions amount to "punishment that may not constitutionally be inflicted upon [pre-trial] detainees qua detainees"), *Block v. Rutherford, 468 U.S. 576, 584, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984)*, and *Iqbal, 490 F.3d at 168-69*. See ante at **[45-46].** I find such an analysis under these cases to be unhelpful. The issue here is not whether Arar was "punished" as a pre-trial detainee without first being tried and convicted. He was not a pre-trial detainee. The question is whether, as a person detained in the United States for interrogation, he may be mistreated and sent to be tortured in the way that he was.

Airport on September 26, or the pilot of the airplane in which Arar was sent to Washington, D.C., en route to Jordan and Syria on October 8, would be unlikely to be liable to Arar for damages for their limited roles in the events. Who, if anyone, fits that description, however, seems to me a question that cannot be addressed at this time, without the fruits of pre-trial discovery.

C. Availability of a Bivens Action

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the Supreme Court "recognized for the first time an implied private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).*[25] The

[25] Bivens thus gave persons whose constitutional rights were violated by federal officers a remedy roughly akin to that available under *42 U.S.C. § 1983* to persons aggrieved by the acts, of state officers. Unlike a Bivens action, the remedy provided by *section 1983* is statutory in nature. But that statute was virtually a dead letter until it was given life by an interpretation of the Supreme Court some ninety years after it was enacted. See *Monroe v. Pape, 365 U.S. 167, 171-72, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)* (concluding that what is now *section 1983*, derived from section 1of the "Ku Klux Act" of 1871 , provides for a cause of action against a state official acting under color of state law even if there is no authority under state law, custom, or usage for the state official to do what he or she did), overruled on other grounds by *Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).*

Bivens Court permitted "a victim of a *Fourth Amendment* violation by federal officers [to] bring suit for money damages against the officers in federal court." Id.

I have no quarrel with much of what I take to be the majority's view of Bivens jurisprudence. The Supreme Court has indeed been most reluctant to "extend" use of the "Bivens model." *Wilkie v. Robbins, 127 S. Ct. 2588, 2597, 168 L. Ed. 2d 389 (2007).* Since Bivens, the Court has "extended" its reach only twice -- to "recognize[] an implied damages remedy under the *Due Process Clause of the Fifth Amendment*, *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, and the *Cruel and Unusual Punishments Clause of the Eighth Amendment*, *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).*" *Malesko, 534 U.S. at 67*; see also*Wilkie, 127 S. Ct. at 2597-98.*

The majority is also correct in observing that when determining whether to extend Bivens, i.e., whether "to devise a new Bivens damages action," *Wilkie, 127 S. Ct. at 2597*, a court must first determine whether Congress has provided "any alternative, existing process for protecting the interest" in question, *id. at 2598.* If no alternative remedial scheme exists, whether to provide "a Bivens remedy is a matter of judicial judgment." Id. "'[T]he federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special fac-

tors counselling hesitation before authorizing a new kind of federal litigation.'" Id. (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)).*

But not every attempt to employ Bivens to redress asserted constitutional violations requires a separate and independent [*209] judicial inquiry as to whether the remedy is appropriate in that particular case. Only when the court is being asked "to devise a new Bivens damages action," *id. at 2597* (emphasis added), do we make such an assessment. And a "new Bivens damages action" is not being sought unless the plaintiff is asking the court to "extend Bivens liability to a[] new context or new category of defendants." *Malesko, 534 U.S. at 68.*

In the case before us, Arar seeks to add no new category of defendants. Cf. *Malesko, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456* (refusing to extend Bivens to claims against private prisons); *FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)* (refusing to extend Bivens to claims against federal agencies). Indeed, it was recovery of damages incurred as a result of the violation of constitutional rights by federal agents and officials, such as the defendants here, for which the Bivens remedy was devised. See *Malesko, 534 U.S. at 70* ("The purpose of Bivens is to deter individual federal officers from committing constitutional violations.").

We must ask, then, whether Arar seeks to extend Bivens liability into a new context and, if so, what that new context is. The task is complicated by the fact that the meaning that the Supreme Court ascribes to the term "new context" is not entirely clear. Compare *Malesko, 534 U.S. at 67* (noting that Bivens was extended to a new context in *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, when the Court "recognized an implied damages remedy under the *Due Process Clause of the Fifth Amendment* (emphasis added)), with *id. at 68* (describing *Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*, in which the plaintiffs sought damages under the *Due Process Clause of the Fifth Amendment* for errors made by federal officials in "in the[] handling [their] of Social Security applications," as describing a new context to which the Court declined to extend Bivens (emphasis added)). The majority seems to be of the view that "new context" means a new set of facts, rather than a new legal context. But every case we hear presents a new set of facts to which we are expected to apply established law. Yet, each panel of this Court does not decide for itself, on an ad hoc basis, whether or not it is a good idea to allow a plaintiff, on the particular factual circumstances presented, to avail him or herself of a well-established remedy such as that afforded by Bivens.[26] I therefore think that the word

[26] Indeed, in those legal contexts where Bivens is well-established, courts do not conduct a fresh assessment as to whether a Bivens action is available based on the facts of each case. See, e.g., *Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284,*

"context," as employed for purposes of deciding whether we are "devis[ing] a new Bivens damages action," *Wilkie, 127 S. Ct. at 2597*, is best understood to mean legal context -- in this case a substantive due process claim by a federal detainee -- and not, as the majority would have it, the fact-specific "context" of Arar's treatment, from his being taken into custody as a suspected member of al Qaeda to [*210] his being sent to Syria to be questioned under torture.

As far as I can determine, this Circuit has never explicitly decided whether a Bivens action can lie for alleged violations of substantive due process under the *Fifth Amendment*. But our cases imply that such a remedy is appropriate.

In Iqbal, for example, we considered a Bivens action brought on, inter alia, a *Fifth Amendment* substantive due process theory. The plaintiff alleged his physical mistreatment and humiliation, as a Muslim prisoner, by federal prison officials, while he was detained at the MDC. After concluding, on

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157 L. Ed. 2d 1068 (2004) (Bivens action for *Fourth Amendment* violation); *McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)* (Bivens action for *Eighth Amendment* violation), superseded by statute on other grounds as stated in *Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)*; *Castro v. United States, 34 F.3d 106 (2d Cir. 1994)* (*Fourth Amendment*); *Armstrong v. Sears, 33 F.3d 182 (2d Cir. 1994)* (same); *Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994)* (same); *Hallock v. Bonner, 387 F.3d 147 (2d Cir. 2004)* (same), rev'd on other grounds, *546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*.

interlocutory appeal, that the defendants were not entitled to qualified immunity, we returned the matter to the district court for further proceedings. We did not somuch as hint either that a Bivens remedy was unavailable or that its availability would constitute an unwarranted extension of the Bivens doctrine.[27] *Iqbal, 490 F.3d at 177-78.*

In any event, I see no reason why Bivens should not be available to vindicate *Fifth Amendment* substantive due process rights. As Judge Posner wrote for the Seventh Circuit with respect to a Bivens action:

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[27] Shortly after we decided Iqbal, the Supreme Court made clear that by appealing from the district court's denial of qualified immunity, the defendants placed within our jurisdiction "the recognition of the entire cause of action." *Wilkie, 127 S. Ct. at 2597 n.4.* The district court in Iqbal had specifically rejected the defendants' argument that a Bivens action was unavailable. *Elmaghraby v. Ashcroft, No. 04 CV 01809, 2005 WL 2375202, at *14, 2005 U.S. Dist. LEXIS 21434, *44-*45 (E.D.N.Y. Sept. 27, 2005).* Thus, had we thought that no Bivens action was available, we had the power to resolve Iqbal's claims on that basis then. *Wilkie, 127 S. Ct. at 2597 n.4.*

See also *Thomas v. Ashcroft, 470 F.3d 491 (2d Cir. 2006)* (reversing district court's dismissal of Bivens action for violation of plaintiffs *Fifth Amendment* substantive due process rights while detained at the MDC); *Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000)* (dismissing, on qualified immunity grounds, plaintiffs substantive due process Bivens claim against federal prison officials, without questioning whether a cause of action was available); *Li v. Canarozzi, 142 F.3d 83 (2d Cir. 1998)* (affirming judgment following jury verdict for the defendants in substantive due process Bivens action based on allegations of abuse by a prison guard at the federal Metropolitan Correctional Center in New York City).

> [I]f ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the *Fourth Amendment* -- as no one doubts -- and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the *Eighth Amendment* -- as no one doubts -- it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process.

Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989), cert. denied, *493 U.S. 1026, 110 S. Ct. 733, 107 L. Ed. 2d 752 (1990)*;[28] accord *Magluta v. Samples, 375 F.3d 1269 (11th Cir. 2004)* (reversing district court's dismissal of pretrial detainee's Bivens action alleging unconstitutional conditions of confinement at federal penitentiary in violation of the *Due Process Clause of the Fifth Amendment*); *Cale v. Johnson, 861 F.2d 943, 946-47 (6th Cir. 1988)* (con-

[28] Although there is some disagreement in the Circuits regarding precisely when, following arrest, abuse of detained persons is to be analyzed under principles of substantive due process, we think Wilkins' comment as to why those principles must apply at some point is insightful and remains valid.

cluding [*211] that "federal courts have the jurisdictional authority to entertain a Bivens action brought by a federal prisoner, alleging violations of his right to substantive due process"), abrogated on other grounds by *Thaddeus-X v. Blatter, 175 F.3d 378, 387-88 (6th Cir. 1999)*; see also *Sell v. United States, 539 U.S. 166, 193, 123 S. Ct. 2174, 156 L. Ed. 2d 197* (Scalia, J., dissenting) (observing, in dissent, that "a [Bivens] action . . . is available to federal pretrial detainees challenging the conditions of their confinement" (citing *Lyons v. U.S. Marshals, 840 F.2d 202 (3d Cir. 1988))*. [29]

A federal inmate serving a prison sentence can employ Bivens to seek damages resulting from mistreatment by prison officials. *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*. It would be odd if a federal detainee not charged with or convicted of any offense could not bring an analogous claim.[30]

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[29] While cases permitting pre-trial detainees to bring Bivens actions for violations of their substantive due process rights support the availability of a Bivens action here, Arar's substantive due process claim should not be evaluated under the standard for assessing the claims of persons who, unlike Arar, were detained pre-trial rather than for the purpose of interrogation. See supra **[note 24].** Cf. ante at **[46 n.29].**

[30] We have not been asked by the parties to examine the possibility that Arar has pleaded facts sufficient to raise a claim under theories other than substantive due process -- such as under the *Fourth Amendment*, the *self-incrimination clause of the Fifth Amendment*, or even the *Eighth Amendment*. Because this is an appeal from a dismissal on the facts pleaded in the complaint under *Rule 12(b)(6)*, I think that even if this

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Even if "new context" for Bivens purposes does mean a new set of facts, however, and even if Iqbal, despite its factual and legal similarities, does not foreclose the notion that the facts of this case are sufficiently new to present a "new context," I think the majority's conclusion is in error.

The majority, applying the first step of the Bivens inquiry, argues that the INA provided an alternative remedial scheme for Arar. Ante at **[31-33].** The district court correctly noted to the contrary that "Arar alleges that his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay, preserving Arar's procedural rights under the INA." *Arar, 414 F. Supp. 2d at 280.* Nonetheless, the majority ultimately finds that this claim of official interference does not exclude the INA as providing an alternative remedial scheme. It relies on *Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980)*, which, it says, stands for the proposition that "federal officials who interfere [] with a plaintiff's access to an exclusive remedial scheme c[an], pursuant to Bivens, be held liable for that interference inasmuch as it violated due process, but c[an]

Court were to consider such an alternate theory and conclude that it was valid, the case would be subject to remand to the district court for further proceedings on that theory. See section IV.A, *supra.*

not be sued for the underlying injury that the remedial scheme was designed to redress." Ante at **[31-32].**

Arar is not, however, seeking relief for the underlying injury that the INA was designed to redress. As the majority recognizes, ante at **[49],** he is not challenging his removal order. Nor is he questioning this country's ability, however it might limit itself under its immigration laws, to remove an alien under those laws to a country of its choosing. He is challenging the constitutionality of his treatment by defendant law-enforcement officers while he was [*212] in detention in the United States.[31] For allegations of this sort, the INA offers no mechanism for redress. As the district court noted correctly:

> [T]he INA deals overwhelmingly with the admission, exclusion and removal of

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[31] Arar raises an actionable claim under Bivens for constitutional violations incurred at the hands of federal officials during his detention in the United States. The district court had jurisdiction over Arar's claims pursuant to *28 U.S.C. § 1331*, and we have appellate jurisdiction under *28 U.S.C. § 1291*. See *Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*; *Macias v. Zenk, 495 F.3d 37, 40 (2d Cir. 2007)*. Because Arar is not challenging his removal order, see ante at **[49],** the jurisdiction-stripping provision of the INA, *8 U.S.C. § 1252(a)(2)(B)(ii)* (providing that "no court shall have jurisdiction to review ... any ... decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified ... to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum]") does not apply.

> aliens -- almost all of whom seek to remain within this country until their claims are fairly resolved. That framework does not automatically lead to an adequate and meaningful remedy for the conduct alleged here.
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> *Arar, 414 F. Supp. 2d at 280.*[32]

The majority also errs, I think, in concluding that "special factors" counsel against the application of Bivens here. Ante at **[33-38].** The majority dwells at length on the implications of Arar's Bivens claim for diplomatic relations and foreign policy. See ante at **[33-38].**

Any legitimate interest that the United States has in shielding national security policy and foreign

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[32] The majority says that its holding is limited to the conclusion that, "barring further guidance from the Supreme Court . . . a Bivens remedy is unavailable for claims 'arising from any action taken or proceeding brought to remove an alien from the United States under' the authority conferred upon the Attorney General and his delegates by the INA." Ante at **[38]** (quoting *8 U.S.C. § 1252(b)(9).* But this is not an immigration case and it seems to me that "the authority conferred upon the Attorney General and his delegates by the INA" is therefore not relevant to the Bivens question presented. The majority offers no view as to whether a substantive due process Bivens action is available to detained persons generally. I cannot ultimately tell, then, what the majority's view would be as to Arar's ability to avail himself of Bivens if we were to treat this case, as I think we must, as a claim that law enforcement officials abused their authority under color of federal law rather than a case arising under and governed by immigration law.

policy from intrusion by federal courts, however, would be protected by the proper invocation of the state-secrets privilege. The majority says that the "government's assertion of the state-secrets privilege . . . constitutes a . . . special factor counseling this Court to hesitate before creating a new [Bivens action]." Ante at **[36-37].** But as the majority earlier acknowledges, "[o]nce properly invoked, the effect of the [state-secrets] privilege is to exclude [privileged] evidence from the case." Ante at **[12 n.4]** (citing *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991)).*

Moreover, the state-secrets privilege is a. narrow device that must be specifically invoked by the United States and established by it on a case-by-case basis. See *Zuckerbraun, 935 F.2d at 546* ("The privilege may be invoked only by the government and may be asserted even when the government is not a party to the case."). That seems far preferable to the majority's blunderbuss solution -- to withhold categorically the availability of a Bivens cause of [*213] action in all such cases -- and the concomitant additional license it gives federal officials to violate constitutional rights with virtual impunity. Rather than counseling against applying Bivens, the availability to the defendants of the state-secrets privilege counsels permitting a Bivens action to go forward by ensuring that such proceedings will not endanger the kinds of interests that properly concern the majority.

The majority reaches its conclusion, moreover, on the basis of the proposition that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments of the Government," ante at **[37]** (citing *First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972)* (plurality opinion)). But there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security. See, e.g., *Hamdi v. Rumsfeld, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *Mitchell v. Forsyth, 472 U.S. 511, 523, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* ("[D]espite our recognition of the importance of [the Attorney General's activities in the name of national security] to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary."); *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934)* ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."). As the Supreme Court observed in *Baker v. Carr, 369 U.S 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*, "it is error to suppose that every case or controversy' which touches foreign relations lies beyond judicial cognizance." *Id. at 211*; see

also Brief of Retired Federal Judges as Amici Curiae at 11 ("The Supreme Court has made clear that the Executive's power to protect national security or conduct foreign affairs does not deprive the judiciary of its authority to act as a check against abuses of those powers that violate individual rights.").

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The alleged intentional acts which resulted in Arar's eventual torture and inhumane captivity were taken by federal officials while the officials and Arar were within United States borders, and while Arar was in the custody of those federal officials.[33] He

[33] Irrespective of what ultimately happened to Arar abroad, the actions that he challenges were perpetrated by U.S. agents entirely within the United States. This case is thus decisively different from *United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*, where the allegedly unconstitutional conduct, an illegal search and seizure, took place in Mexico. It is similarly different from *Johnson v. Eisentrager, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950)*, which held that "(a) ... an enemy alien; (b) [who] has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [wa]s at all times imprisoned outside the United States" did not have a right to seek a writ of habeas corpus from the courts of the United States on the grounds that, inter alia, his *Fifth Amendment* rights had been violated. *Id. at 777.* Eisentrager remains good law for the proposition that there is "no authority ... for holding that the *Fifth Amendment* confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," *id. at 783.* But that proposition is not inconsistent with any principle that Arar

therefore presents this [*214] Court with a classic, or at the very least viable, Bivens claim -- a request for damages incurred as a result of violations of his *Fifth Amendment* substantive due process rights by federal officials while they detained him.

D. Qualified Immunity

Having thus found that Arar makes out an actionable claim under Bivens, we must analyze whether the defendants are entitled to qualified immunity. In Iqbal, we set forth the elements of qualified immunity review:

> The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action -- that is, whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for

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asserts or that this dissent embraces or applies.

> him to believe that his actions did not violate clearly established law.

Iqbal, 490 F.3d at 152 (citations and internal quotation marks omitted). For the reasons set forth above, I have little doubt as to step one: The facts as alleged constitute a violation of Arar's constitutional rights.

We must therefore ask whether these rights were clearly established at the time of their violation. In Iqbal, as already noted above, "[w]e . . . recognize[d] the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attacks. We also recognize[d] that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Iqbal, 490 F.3d at 159*. But we said that the right to substantive due process -- including "the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination" -- "do[es] not vary with surrounding circumstances." Id."The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." Id. We said nothing to indicate that this notion was novel at the time of Iqbal's alleged mistreatment; neither was it at the time of Arar's some months later.

The question here is whether the treatment that Arar received at the hands of the defendants in order to coerce him to "talk" would be understood by a reasonable officer to be beyond the constitutional pale. We need not recite the facts as alleged yet again in order to conclude that they would have been. "No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [the plaintiff] shocks the conscience," *Harbury, 233 F.3d at 602*, and would therefore constitute a violation of the plaintiff's *Fifth Amendment* right to substantive due process if perpetrated directly by the defendants, cf. *Chavez v. Martinez, 538 U.S. 760, 773, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003)* (plurality opinion) (stating that the *Due Process Clause* would "provide relief [*215] in appropriate circumstances" for "police torture or other abuse").

I think it would be no less "clear to a reasonable officer" that attempting, however unsuccessfully, to obtain information from Arar under abusive conditions of confinement and interrogation, and then outsourcing his further questioning under torture to the same end, is "unlawful." The defendants here had "fair warning that their alleged treatment of [Arar] was unconstitutional." *Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)*. I would therefore conclude that they are not entitled to qualified immunity at this stage of the proceedings.

It may seem odd that after all the deliberation that has been expended in deciding this case at the trial and appellate levels, I can conclude that the constitutional violation is clear. But it is the availability of a Bivens action that has been the focus of controversy. Perhaps no federal agent could foretell that he or she would be subject to one. That, though, is not the question. The question is whether the unconstitutional nature of the conduct was clear. I think that it was.

E. Summary

In my view, then:

First, Arar's factual allegations -- beginning with his interception, detention, and FBI interrogation at JFK Airport, and continuing through his forced transportation to Syria in order that he be questioned under torture -- must be considered in their entirety and as a whole.

Second, that conduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi, 485 F.3d at 79* (citations and internal quotation marks omitted). Arar therefore alleges a violation of his right to substantive due process.

Third, he may seek to recover the damages allegedly thus incurred in a Bivens action.

Finally, although a reasonable government official may have wondered whether a Bivens action was available as a means for Arar to redress his rights allegedly infringed, insofar as any one of them was responsible for his treatment as a whole, he or she could not have reasonably thought that his or her behavior was constitutionally permissible and is therefore not entitled to qualified immunity, at least at this stage of the proceedings.

The defendants' actions as alleged in the complaint, considered together, constitute a violation of Arar's *Fifth Amendment* right to substantive due process committed by government agents acting in the United States under color of federal authority. Whether Arar can establish, even in the teeth of the state-secrets doctrine, properly applied, the truth of the allegations of his mistreatment (including causation and damages), should be tested in discovery proceedings, at the summary-judgment phase, and perhaps at trial.

V. CONCLUDING OBSERVATION

I have no reason whatever to doubt the seriousness of the challenge that terrorism poses to our safety and well-being. See generally, e.g., Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century (2008). During another time of national challenge, however, Justice Jackson, joined by Justice Frankfurter, dissented from the Supreme Court's decision that the due process rights of an un-

admitted alien were not violated when he was kept indefinitely on Ellis Island without a hearing. See *Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953).* The alien's entry had been determined by the Attorney General to "be prejudicial to the public [*216] interest for security reasons," *id. at 208*, and he had therefore been excluded from the United States. Although Mezei was an immigration case with little bearing on the matter before us today, Justice Jackson's observations then, at a time when we thought ourselves in imminent and mortal danger from international Communism, see, e.g., *United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950)* (L. Hand,.J.), aff'd, *341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951)*, are worth repeating now:

> The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.

Shaughnessy, 345 U.S. at 227 (Jackson, J., dissenting).[34]

When it came to protection of the United States from then-perceived threats from abroad, Jackson was no absolutist. See *American Communications Ass'n v. Douds, 339 U.S. 382, 422-52, 70 S. Ct. 674, 94 L. Ed. 925 (1950)* (Jackson, J., concurring in part and dissenting in part) (addressing the threat of international Communism); *Terminiello v. City of Chicago, 337 U.S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)* (Jackson, J., dissenting) (warning that if "if the Court does not temper its doctrinaire logic [as to freedom of speech] with a little practical wisdom," there is a danger that "it will convert the constitutional *Bill of Rights* into a suicide pact"). But with respect to the government's treatment of Mr. Mezei, he concluded: "It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone." *Shaughnessy,*

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[34] The Supreme Court very recently observed:

> Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint....

Boumediene v. Bush, No. 06-1195, slip op. at 68-69, 128 S. Ct. 2229, 171 L. Ed. 2d 41, 2008 U.S. LEXIS 4887, at *127, 2008 WL 2369628, at *46 (U.S. June 12, 2008).

345 U.S. at 227 (Jackson, J., dissenting). I think Justice Jackson's observations warrant careful consideration at the present time and under present circumstances.

APPENDIX C – ENTERED February 16, 2006

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-04-0249 (DGT) (VVP)

414 F. Supp. 2d 250

February 16, 2006, Decided

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, formerly Attorney General of the United States; LARRY D. THOMPSON, formerly Acting Deputy Attorney General; TOM RIDGE, formerly Secretary for Homeland Security; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the Immigration and Naturalization Service; 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 District Director of Immigration and Customs En-

forcement; ROBERT MUELLER, Director of the Federal Bureau of Investigation; and JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, Defendants.

Defendants

MEMORANDUM AND ORDER

TRAGER, J.

Plaintiff Maher Arar brings this action against defendants, U.S. officials, who allegedly held him virtually incommunicado for thirteen days at the U.S. border and then ordered his removal to Syria for the express purpose of detention and interrogation under torture by Syrian officials. He brings claims under the Torture Victim Prevention Act and the *Fifth Amendment to the U.S. Constitution*.

Defendants have filed motions to dismiss the complaint pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. The questions presented by these motions are whether the facts alleged can give rise to any theory of liability under those provisions of law and, if so, whether those claims can survive on prudential grounds in light of the national-security and foreign policy issues involved.

Background

All statements contained in parts (1) through (4) in this background section of the opinion are 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. The alleged facts will be presented as they have been pled and will be borrowed liberally from the complaint.

(1)

Plaintiff Maher Arar ("Arar" or "plaintiff") is a 33-year-old native of Syria who immigrated to Canada with his family when he was a teenager. He is a dual citizen of Syria and Canada and presently resides in Ottawa. In September 2002, while vacationing with family in Tunisia, he was called back to work by his employer to consult with a prospective client. He purchased a return ticket to Montreal with stops in Zurich and New York and left Tunisia on September 25, 2002.

[*253] On September 26, 2002, Arar arrived from Switzerland at John F. Kennedy Airport ("JFK Airport") in New York to catch a connecting flight to Montreal. Upon presenting his passport to an immigration inspector, he was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." Complaint ("Cplt.") Ex. D (Decision of J. Scott Blackman, Regional Director) at 2. He was

interrogated by various officials for approximately eight hours. The officials asked Arar if he had contacts with terrorist groups, which he categorically denied. Arar was then transported to another site at JFK Airport, where he was placed in solitary confinement. He alleges that he was transported in chains and shackles and was left in a room with no bed and with lights on throughout the night.

The following morning, September 27, 2002, starting at approximately 9:00 a.m., two FBI agents interrogated Arar for about five hours, asking him questions about Osama bin Laden, Iraq and Palestine. Arar alleges that the agents yelled and swore at him throughout the interrogation. They ignored his repeated requests to make a telephone call and see a lawyer. At 2:00 p.m. that day, Arar was taken back to his cell, chained and shackled and provided a cold McDonald's meal - his first food in nearly two days.

That evening, Arar was given an opportunity to voluntarily return to Syria, but refused, citing a fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a "special interest" in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center ("MDC") in Brooklyn, New York, where he was strip-searched and placed in solitary confinement. During his initial three days at

MDC, Arar's continued requests to meet with a lawyer and make telephone calls were refused.

On October 1, 2002, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Arar, who was charged with being temporarily inadmissible because of his membership in al Qaeda, a group designated by the Secretary of State as a foreign terrorist organization. Upon being given permission to make one telephone call, Arar called his mother-in-law in Ottawa, Canada.

Upon learning Arar's whereabouts, his family contacted the Office for Consular Affairs ("Canadian Consulate") and retained an attorney, Amal Oummih, to represent him. The Canadian Consulate had not been notified of Arar's detention. On October 3, 2002, Arar received a visit from Maureen Girvan from the Canadian Consulate, who, when presented with the document noting Arar's inadmissibility within the U.S., assured Arar that removal to Syria was not an option. On October 4, 2002, Arar designated Canada as the country to which he wished to be removed.

On October 5, 2002, Arar had his only meeting with counsel. The following day, he was taken in chains and shackles to a room where approximately seven INS officials questioned him about his reasons for opposing removal to Syria. His attorney was not provided advance notice of the interrogation, and Arar further alleges that U.S. officials misled him

into thinking his attorney had chosen not to attend. During the interrogation, Arar continued to express his fear of being tortured if returned to Syria. At the conclusion of the six-hour interrogation, Arar was informed that the officials were discussing his case with "Washington, D.C." Arar was asked to sign a document that appeared to [*254] be a transcript. He refused to sign the form.

The following day (October 7, 2002), attorney Oummih received two telephone calls informing her that Arar had been taken for processing to an INS office at Varick Street in Manhattan, that he would eventually be placed in a detention facility in New Jersey and that she should call back the following morning for Arar's exact whereabouts. However, Arar alleges that he never left MDC and that the contents of both of these phone calls to his counsel were false and misleading.

That same day, October 7, 2002, the INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is "clearly and unequivocally" a member of al Qaeda and, therefore, "clearly and unequivocally inadmissible to the United States" under *8 U.S.C. § 1182(a)(3)(B)(i)(V)*. *See* Cplt. Ex. D. at 1, 3, 5. Based on that finding, Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." *Id.* at 6.

At approximately 4:00 a.m. on October 8, 2002, Arar learned that, based on classified information, INS regional director Blackman had ordered that Arar be sent to Syria and that his removal there was consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). Arar pleaded for reconsideration but was told by INS officials that the agency was not governed by the "Geneva Conventions" and that Arar was barred from reentering the country for a period of five years and would be admissible only with the permission of the Attorney General.

Later that day, Arar was taken in chains and shackles to a New Jersey airfield, where he boarded a small jet bound for Washington, D.C. From there, he was flown to Amman, Jordan, arriving there on October 9, 2002. He was then handed over to Jordanian authorities, who delivered him to the Syrians later that day. At this time, U.S. officials had not informed either Canadian Consulate official Girvan or attorney Oummih that Arar had been removed to Syria. Arar alleges that Syrian officials refused to accept Arar directly from the United States.

Arar's Final Notice of Inadmissibility ("Final Notice") ordered him removed without further inquiry before an immigration judge. *See* Cplt. Ex. D. According to the Final Notice: "The Commissioner of the Immigration and Naturalization Service has determined that your removal to Syria would be consis-

tent with [CAT]." *Id.* It was dated October 8, 2002, and signed by Deputy Attorney General Larry Thompson. After oral argument on these motions to dismiss, in a letter dated August 18, 2005, counsel for Arar clarified that he received the Final Notice within hours of boarding the aircraft taking him to Jordan. *See* Dkt. No. 93.

(2)

During his ten-month period of detention in Syria, Arar alleges that he was placed in a "grave" cell measuring six-feet long, seven feet high and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch"). The cell was damp and cold, contained very little light and was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria.

[*255] During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips and lower back with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, face

and back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity.

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As evidence of this, Arar notes that the interrogations in the U.S. and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, the Syrian officials supplied U.S. officials with all information extracted from Arar; plaintiff cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the U.S. that it extracted from Arar. *See* Cplt. Ex. E (January 21, 2004 transcript of CBS's *Sixty Minutes II:* "His Year In Hell").

(3)

The Canadian Embassy contacted the Syrian government about Arar on October 20, 2002, and, the

following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar.

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave.

Five days later, Arar was brought to a Syrian investigation branch, where he was forced to sign a confession stating that he had participated in terrorist training in Afghanistan even though, Arar states, he has never been to Afghanistan or participated in any terrorist activity. Arar was then taken to an overcrowded Syrian prison, where he remained for six weeks.

On September 28, 2003, Arar was transferred back to the Palestine Branch, where he was held for one week. During this week, he heard other detainees screaming in pain and begging for their torture to end.

On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus. He was flown to Ottawa the following day and reunited with his family.

Arar contends that he is not a member of any terrorist organization, including al Qaeda, and has never knowingly associated himself with terrorists, terrorist organizations or terrorist activity. He claims that the individual about whom he was questioned was a casual acquaintance whom Arar had last seen in October 2001. He believes that he was removed to Syria for interrogation under torture because of his casual acquaintances with this individual and others believed to be involved in terrorist activity. But Arar contends "on information and belief" that there has never been, nor is there now, any reasonable [*256] suspicion that he was involved in such activity.[68] Cplt. P2.

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[68] Prior to oral argument, counsel for Arar submitted a letter providing supplemental information in support of plaintiff's opposition to the U.S. Government's assertion of state-secrets privilege. *See* Dkt. No. 85 (Letter dated July 27, 2005 from Maria LaHood ("LaHood Letter")). The LaHood Letter contains certain publicly available information arising out of the Canadian Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar.

In that letter, plaintiff's counsel explains that Arar was a potential witness, but not a suspect or target, in an investigation by "Project A-O Canada," a Canadian team investigating terrorist suspects in Ottawa. According to the letter, Arar was contacted by an investigator with Project A-O Canada on January 22, 2002, during which time he was in Tunisia. On January 25, Arar told the investigator "he could perhaps be available" on Monday, July 28 for an interview. *See* LaHood Letter at 2. Later that day, however, Arar's attorney "contacted the investigator to advise him that there would need to be parameters for the interview." *Id.* at 2-3. The attorney "requested that the interview take place in his office and that Mr. Arar's statement not be used in proceedings as a substitution for his actual testimony; clearly the information gathered could be used for the

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist and is having trouble finding employment due to his reputation and inability to travel in the United States.

(4)

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of "extraordinary rendition," according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The extraordinary rendition policy involves the removal of "non-U.S. citizens detained in

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investigation, and nothing would preclude calling Mr. Arar to testify." *Id.* at 3. As a result of these conditions - which were shared with U.S. officials - and because the investigation wound up focusing on other areas, Arar was never contacted again for an interview. *See id.* The LaHood letter claims that, in light of plaintiff's decision to exercise his constitutional right to remain silent, which was known to U.S. officials, Arar's interrogation within the United States took place in disregard of Arar and his attorney's request.

To some extent, the contents of the LaHood letter undermine plaintiff's claim, "on information and belief," that there has never been, nor is there now, any reasonable suspicion that he was involved in such activity. Although the account of what occurred in the Canadian investigation could not give rise to an adverse inference in a criminal prosecution, the change in Arar's posture would certainly justify at least some suspicion (and perhaps reasonable suspicion) on the part of U.S. officials during their investigation about Arar's activities.

this country and elsewhere and suspected - reasonably or unreasonably - of terrorist activity to countries, including Syria, where interrogations under torture are routine." Cplt. P24. Arar alleges on information and belief that the United States sends individuals "to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies." *Id.* The complaint further alleges that "these officials have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed." *Id.* The complaint also alleges that the U.S. involves Syria in its extraordinary rendition program to extract counter-terrorism information.

This extraordinary rendition program is not part of any official or declared U.S. public policy; nevertheless, it has received [*257] extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Plaintiff details a number of articles in the mainstream press recounting both the incidents of this particular case and the extraordinary rendition program more broadly. These articles are attached as Exhibit C of his complaint.

Arar alleges that defendants directed the interrogations by providing information about Arar to Syrian officials and receiving reports on Arar's re-

sponses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating and torturing Arar. Plaintiff argues in the alternative that, at a minimum, defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria.

(5)

Arar's claim that he faced a likelihood of torture in Syria is supported by U.S. State Department reports on Syria's human rights practices. *See, e.g.,* Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2004 Country Reports on Human Rights Practices (Released February 28, 2005) ("2004 Report"). According to the State Department, Syria's "human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . including the use of torture in detention, which at times resulted in death." 2004 Report at 1. Although the Syrian constitution officially prohibits such practices, "there was credible evidence that security forces continued to use torture frequently." *Id.* at 2. The 2004 report cites "numerous cases of security forces using torture on prisoners in custody." *Id.* Similar references throughout the 2004 Report, as well as State Department reports from prior years, are legion. *See, e.g.,* Cplt. Ex. A (2002 State Department Human Rights Report on Syria).

(6)

Arar seeks both declaratory and monetary relief. With respect to declaratory relief, he has sued John Ashcroft, Robert Mueller, Tom Ridge and Paula Corrigan in their official capacities. The United States has moved to dismiss these claims under *Rule 12(b)(1)* for lack of subject-matter jurisdiction and under *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted.

With respect to monetary relief, Arar has sued John Ashcroft, Robert Mueller, J. Scott Blackman, James W. Ziglar, Edward J. McElroy and Larry D. Thompson in their personal capacities. Each of these defendants has filed a separate motion to dismiss these claims under *Rules 12(b)(1)* and *12(b)(6)*.

The complaint also names ten John Doe law enforcement agents employed by the FBI or INS who, singly or collectively, subjected Arar to coercive and involuntary custodial interrogation and unreasonably harsh and punitive conditions of detention.

Discussion

Arar raises four claims for relief.

First, he alleges that defendants violated the Torture Victim Prevention Act by conspiring with and/or aiding and abetting Jordanian and Syrian officials to bring about his torture (Count 1).

Second, Arar alleges that defendants violated his rights under the *Fifth Amendment to the U.S. Constitution* ("*Fifth Amendment*") by knowingly and intentionally subjecting him to torture and coercive interrogation in Syria (Count 2).

Third, Arar alleges that as a result of the actions of the defendants, he was subjected to arbitrary and indefinite detention in Syria, including the denial of access to [*258] counsel, the courts and his consulate, all of which also violated the *Fifth Amendment* (Count 3).

Fourth, Arar alleges that he suffered outrageous, excessive, cruel, inhumane and degrading conditions of confinement in the United States, was subjected to coercive and involuntary custodial interrogation and deprived of access to lawyers and courts, in violation of the *Fifth Amendment* (Count 4). Although Arar's complaint also alleges that defendants violated "treaty law," he appears to have abandoned any such claims in the subsequent briefing.

As clarified at oral argument, Arar seeks a declaratory judgment with respect to Counts 2, 3 and 4 and compensatory and punitive damages with respect to all four counts.

(1)

Standards

a. 12(b)(1)

A motion to dismiss under *Rule 12(b)(1)* tests the jurisdictional basis for the underlying complaint. Under *Rule 12(b)(1)*, a "plaintiff has the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists." *Lunney v. U.S., 319 F.3d 550, 554 (2d Cir. 2003)*. When defendants move to dismiss under *Rule 12(b)(1)*, "a court accepts as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." *Id.*

b. 12(b)(6)

A motion to dismiss for failure to state a claim under *Rule 12(b)(6)* tests the legal sufficiency of a complaint. Under *Rule 12(b)(6)*, a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)* ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

(2)

Declaratory Relief

Arar seeks a declaration that his detention in the United States and his detention and torture in Syria violated his rights under the *Due Process Clause of the U.S. Constitution*. The United States (or the "government"), on behalf of the defendants sued in their official capacities,[69] argues that Arar lacks standing to bring a claim for declaratory relief because the challenged activity is neither ongoing nor likely to impact him in the future. The government further argues that the injuries for which Arar seeks declaratory relief are not redressable or fairly traceable to the underlying actions Arar challenges in this lawsuit.

In *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)*, the Supreme Court articulated three elements necessary to establish Article III standing:

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[69] Claims against official-capacity defendants "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985)* (citing *Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978))*. "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id. at 166, 105 S.Ct. at 3105.*

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete [*259] and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'". . . Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace [able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . .

Id. at 560-61, 112 S.Ct. at 2136 (citations and footnote omitted).

In his opposition brief, and as clarified at oral argument, Arar states that he seeks a declaratory judgment invalidating his domestic detention as well as his removal to, and torture in, Syria. At the same time, however, Arar contends that his only continuing injury is a five-year bar to reentry. Defendants argue that this injury is untethered to the detention, torture and unlawful conditions of confinement at the heart of this suit and that, therefore, Arar's claim for declaratory relief fails to satisfy the requisite constitutional minima needed for Article III standing.

Plaintiff argues that *Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004)*, establishes his standing to sue. In *Swaby,* a deported alien brought a habeas petition challenging the determination that he was ineligible for a waiver of deportation. The government argued that Swaby's deportation, which occurred before he filed suit, rendered it moot, but the Second Circuit held that the deportation would not moot any "immigration appeal or a collateral attack on an order of removal." *Id. at 160, n.8.* The Second Circuit reasoned that a favorable ruling on the merits would vacate the order of removal, rendering the petitioner eligible to return to the United States. In that regard, his lifetime bar from reentering the United States constituted an "actual injury" with "a sufficient likelihood of being redressed by the relief petitioner seeks from this Court." *Id. at 160.*

The circumstances of *Swaby* are not present here. At the outset, Arar avers in his opposition brief that he "does not challenge his removal order." Pl. Mem. at 15. Moreover, he "does not complain about the decision to classify him as inadmissible into the United States." *Id.* at 13. Thus, any judgment declaring unlawful the conditions of his detention or his removal to Syria would not alter in any way his ineligibility to reenter this country. Consequently, Arar's claim for declaratory relief fails to meet the requirement in *Lujan* that it be "'likely,' as opposed to merely 'speculative,' that the injury" - for these purposes, the bar to reentry - would "be 'redressed by a favorable decision.'" *Id. at 561, 112 S.Ct. at 2136*

(citations and footnote omitted).[70] Arar's request for declaratory relief is therefore denied with respect to all counts, and all claims against defendants sued in their official capacities are dismissed.[71]

(3)

Torture Victim Protection Act

Count 1 of plaintiff's complaint alleges that the individually named defendants [*260] violated the Torture Victim Protection Act (or "TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to *28 U.S.C. § 1350*), by conspiring with and/or aiding and abetting unnamed Jordanian and Syrian officials in bringing about Arar's torture in Syria.[72]

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[70] There is also a serious question whether Arar satisfies the traceability requirement, given that the five-year bar to reentry did not result from Arar's detention or the alleged mistreatment he suffered abroad. Thus, it would appear that his claim for declaratory relief would fail to demonstrate "a causal connection between the injury and the conduct complained of." *Lujan, 504 U.S. at 560, 112 S.Ct. at 2136* (citation omitted).

[71] For the remainder of this opinion, the remaining defendants, all of whom are sued in their individual capacities, will be referred to collectively as "defendants."

[72] With respect to the Torture Victim Protection Act, the United States would appear to be protected by sovereign immunity, given that it has not consented to be sued in this matter. *United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 769, 85 L. Ed. 1058 (1941)* ("The United States, as sovereign, is immune from suit save as it consents to be sued"). In any event, it appears that plaintiff's Torture Victim Protection Act claims

The Torture Victim Protection Act was enacted in 1992 to provide a cause of action in cases of officially sanctioned torture and extrajudicial killing. It states:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA § 2(a). Torture is defined under the TVPA as

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual

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are brought exclusively against defendants in their individual capacities. *See* Pl. Mem. 39-54.

> for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

TVPA § 3(b)(1). The statute requires that all adequate and available local remedies be exhausted, *see id.* § 2(b). There does not seem to be any dispute that Arar is without any adequate, alternative remedy in Syria. Finally, it imposes a ten-year statute of limitations, *see id.* § 2(c)).

a. Subject Matter Jurisdiction

The Torture Victim Protection Act is appended as a statutory note to the Alien Tort Claims Act ("ATCA"), codified at *28 U.S.C. § 1350*. However, unlike the ATCA, the TVPA does not in itself supply a jurisdictional basis for Arar's claim. As the Second Circuit noted in *Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995)*, the Torture Victim Protection Act, "unlike the Alien Tort [Claims] Act, is not itself a jurisdictional statute." *See Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *3 (S.D.N.Y. Feb. 28, 2002)* ("The TVPA works in conjunction with the ATCA, expanding the ATCA's reach to torts committed against United States citizens (not just 'aliens') who, while in a foreign country, are victims of torture or 'extrajudicial killing.'").

In *Kadic,* the Second Circuit held that "the Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort [Claims] Act and also under the general federal question jurisdiction of *section 1331*." *70 F.3d 232, 246 (2d Cir. 1995).* Although this statement appears to allow Torture Victim Protection Act plaintiffs to ground their cause of action either under the jurisdiction provided under the ATCA or under *§ 1331*, subsequent case [*261] law creates a more ambiguous picture. After *Kadic,* the Second Circuit notes, without resolving, a split of authority on the issue whether a claim under the Torture Victim Protection Act could be based solely under *§ 1331. See Flores v. Southern Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003).* Moreover, after *Flores,* at least one court within this district has noted that "whether subject matter jurisdiction for a claim asserted under the TVPA must be conferred on this Court through the ATCA or can be based solely on *28 U.S.C. § 1331* is a thorny issue." *Arndt v. UBS AG, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).*

This ambiguity notwithstanding, there is no proscription against basing Torture Victim Protection Act claims exclusively under *§ 1331.* The language of *Kadic* certainly appears to be consistent with such a notion. In any event, it is only logical that *§ 1331* apply to any action "arising under" federal law. *See Al-Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 1146 (D.C. Cir. 2003)*

(Randolph, J., concurring) ("The Torture Victim Act does not contain its own jurisdictional provision. But it is clear that any case brought pursuant to that statute would arise under federal law and thus come within *28 U.S.C. § 1331*, the grant of general federal question jurisdiction."), *rev'd on other grounds, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004)*; *Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995)* (permitting plaintiff to pursue Torture Victim Protection Act claims directly under *§ 1331*).[73]

b. Secondary Liability

The *Torture Victim Protection Act* does not specifically grant a right of action against those who aid or abet, or conspire with, primary violators. Noting this, defendants argue that only primary, not secondary, violators are liable. But every court construing this question has reached the contrary outcome, holding that the TVPA can be interpreted to allow claims for secondary liability. *E.g., Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996)*; *Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *16*; *see also Cabello v. Fernandez Larios, 402 F.3d 1148, 1158 (11th Cir. 2005)*. Those courts have reached that conclusion by interpreting the legislative history of the Torture Victim Protection Act.

[73] It could be that diversity jurisdiction is also present, but plaintiff has chosen not to rely upon it.

Although the plain language of the statute does not expressly call for secondary liability, its legislative history offers proof of an intention to impose it. As noted in the Senate Report, "a higher official need not have personally performed or ordered the abuses in order to be held liable . . . anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." S.Rep. No. 249 ("TVPA Senate Report"), 102d Cong., 1st Sess. at 9 (1991) (footnote omitted).

Defendants rely on *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173, 114 S.Ct. 1439, 1446, 128 L.Ed.2d 119 (1994)*, to support a narrower reading of the Torture Victim Protection Act. In *Central Bank,* the Supreme Court held that *§ 10(b)* of the Securities Exchange Act of 1934, prohibiting manipulative or deceptive practices in connection with securities transactions, does not allow for private suits alleging aiding and abetting liability. *See also Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837 (2d Cir. 1998)* (applying the reasoning of *Central Bank* to preclude conspiracy liability under federal securities law). But the principle enunciated in *Central Bank* [*262] does not, as defendants contend, require an unequivocal congressional mandate before allowing a claim for secondary liability. Rather, the case holds that the scope of liability must be based on a fair reading of statutory text. *Central Bank, 511 U.S. at 175, 114 S.Ct. at 1447* ("Our consideration of statutory duties, especially in cases interpreting *§*

10(b), establishes that the statutory text controls the definition of conduct covered by *§ 10(b).*"); *Dinsmore, 135 F.3d at 844* ("The statutory text . . . was the determinative issue in *Central Bank,* and it controls here as well."). *Accord Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *16* ("Neither *Central Bank* nor *Dinsmore* holds that a statute must explicitly allow for secondary liability in order for a court to hold aiders and abetters or co-conspirators liable. Rather, *Central Bank* and *Dinsmore* support the proposition that the scope of liability under a statute should be determined based on a reading of the text of the specific statute.").

Defendants also fail to note that *Central Bank* involved an aiding and abetting claim in the context of an *implied,* not express, right of action. *See Central Bank, 511 U.S. at 173, 114 S.Ct. at 1446*. The TVPA, by contrast, provides an express cause of action, and thus the link to secondary liability under the Act is less attenuated than would have been the case in *Central Bank.*

Defendants further argue that Arar does not adequately plead the existence of a conspiracy to commit torture or that defendants aided and abetted torture. But Arar's allegations clearly meet the notice-pleading requirements of *Fed. R. Civ. P. 8(a)*, and the allegations of a conspiracy, as well as aiding and abetting liability, are adequately pled. Indeed, a plaintiff need not "yet know the details of the alleged conspiracy" to successfully plead one under liberal

pleading rules. *Brown v. Western Conn. State Univ., 204 F. Supp. 2d 355, 364 (D. Conn. 2002)*. At present, the allegations of conspiracy or aiding and abetting liability are sufficient.

b. Custody or Control

Section 3(b)(1) of the Torture Victim Protection Act further requires that a plaintiff be in the offender's "custody or physical control." Defendants argue that this element is lacking because the alleged torture occurred while Arar was in Syrian custody. However, according to the complaint, defendants orchestrated Arar's ordeal by sending him to Syria for the express purpose of being confined and questioned there under torture. Arar alleges that defendants provided the Syrians a dossier on him to be used during interrogations conducted under conditions of torture and that U.S. officials were supplied with information gained from those investigations. *See* Cplt. PP55-56. Such allegations, he argues, sufficiently demonstrate that these actions occurred while he was in defendants' "custody or control."

Plaintiff also cites at least one decision applying a broad interpretation of the "custody or control requirement," *see Xuncax, 886 F. Supp. at 178 n. 15*, and relies on language in the legislative history that "a higher official need not have personally performed or ordered the abuses in order to be held liable. . . ." Pl. Mem. at 61 (citing TVPA Senate Report).

The *Xuncax* court allowed a U.S. citizen to bring a Torture Victim Protection Act claim against a Guatemalan Defense Minister for abuses suffered at the hands of the Guatemalan military forces. However, there is an obvious difference between the vertical control exercised by a higher official over his subordinates, as was the case there, and the degree of custody or control exercised by U.S. officials over Syrian officials, even if, as plaintiff alleges, the Syrians acted at the behest of U.S. officials. [*263] Regardless, the issue of custody or physical control need not be resolved. Assuming, *arguendo,* that defendants can be deemed to have had custody or control of Arar while he was detained and tortured in Syria, his Torture Victim Protection Act claim must still overcome concerns raised by the Torture Victim Protection Act's statutory requirement that the tort be committed under "color of law, of any foreign nation," TVPA § 2(a), as well as implicit limitations on the reach of the TVPA based on other relevant statutory provisions and materials.

c. The Torture Victim Protection Act's Statutory Context

(i) Alien Tort Claims Act

The legislative history to the Torture Victim Protection Act explains that the statute, a statutory note to the ATCA, was intended to provide an explicit grant of a cause of action to victims of torture committed in foreign nations and to extend the rem-

edy under the ATCA to U.S. citizens tortured abroad. "While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." H.R. Rep. No. 102-367, 102d Cong., 2d Sess. ("TVPA House Report"), at *4 (1991). Numerous cases interpreting the Torture Victim Protection Act have noted this purpose as well. *Enahoro v. Abubakar, 408 F.3d 877, 888 (7th Cir. 2005)* ("While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."); *Cabello v. Fernandez-Larios, 402 F.3d 1148, 1154 (11th Cir. 2005)* ("The TVPA extended the ATCA, which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killings in United States courts."); *Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003)* ("the TVPA . . . extend[s] a civil remedy also to U.S. citizens who may have been tortured abroad.") (citation omitted); *Kadic, 70 F.3d at 241* ("Congress enacted the Torture Victim Act to . . . further extend that cause of action to plaintiffs who are U.S. citizens."). The legislative history and these case citations strongly suggest that U.S. citizens, and only U.S. citizens, are covered by the TVPA.

(ii) Foreign Affairs Reform and Restructuring Act (FARRA)

The Torture Victim Protection Act "executes" in part the Convention Against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39 (1984), 23 I.L.M. 1027, to which the Senate gave its consent on October 27, 1990. S. Treaty Doc. No. 100-20, 136 Cong. Rec. D 1442 (1990). In addition to enacting the Torture Victim Protection Act and creating a private cause of action for officially sanctioned torture, Congress implemented Article 3 of the CAT by enacting the Foreign Affairs Reform and Restructuring Act of 1988 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to *8 U.S.C. § 1231*).

Under FARRA, "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture. . . ." FARRA § 2242(a). Regulations promulgated under FARRA, *see 8 C.F.R. §§ 208.16-18*, provide that the United States will not send individuals to countries where they are "more likely than not to be tortured. . . ." *8 C.F.R. § 208.16(c)(4)* .

Although FARRA and its regulations are highly relevant to the facts of this case, [*264] plaintiff does not advance any claim under that statute, a decision based no doubt upon the absence of a private cause of action in that statute. To be sure, the absence of a right of action under FARRA sheds light on the Torture Victim Protection Act, specifically with regard to "whether Congress intended to

create a remedy" under the TVPA in situations like *Arar's. California v. Sierra Club, 451 U.S. 287, 297, 101 S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981)* ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.").

In addition to the absence of any express right of action for damages under FARRA, Congress appears to have foreclosed the possibility of a court implying a cause of action under the statute as well. Evidence for this foreclosure can be found in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). That statute, which *amends 8* U.S.C. *§ 1231*, states that nothing within that section, which includes FARRA (a statutory note to *§ 1231*), "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." *8 U.S.C. § 1231(h).*

The absence of any private right of action under FARRA, combined with the provision of the Immigration and Nationality Act ("INA") barring any substantive right enforceable against the United States or its officials, forecloses any substantive right under FARRA.[74] That conclusion, moreover, casts

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[74] There is no need to analyze two additional arguments raised by defendants - first, that a cause of action under FARRA (possibly via regulations promulgated under FARRA) is foreclosed because, outside the process of challenging a final

important light on the reach of the Torture Victim Protection Act in this case.[75]

e. Color of Foreign Law

The Torture Victim Protection Act makes clear that individuals are liable only if they have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a). The Second Circuit has held that the "color of law" requirement of the TVPA is "intended to 'make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)* (citing TVPA House Report, at *5). Plaintiff argues that defendants operated under color of law of a foreign nation by conspiring with, or aiding and abetting, Syrian officials in their unlawful detention and torture of Arar.

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order of removal in the relevant court of appeals, FARRA § (d) presumptively bars federal jurisdiction over other types of claims brought under FARRA like the kind raised here; and second, that FARRA § (c) is not applicable to any alien considered a potential danger to the security of the United States as described in *8 U.S.C. § 1231(b)(3)(B)*.

[75] It is also noteworthy, in this regard, that Congress has specifically chosen to criminalize conspiracy to commit torture. *See 18 U.S.C. § 2340A*. Although this statute applies with full force against U.S. officials, it creates no civil liability.

Defendants argue that they cannot be held liable under the Torture Victim Protection Act because any "law" under which they were acting in this case would be domestic - not foreign - and, therefore, the language in the Torture Victim Protection Act regarding "color of law[] of any foreign nation" does not apply to them.

[*265] Only one court has considered this question to date. That case, *Schneider v. Kissinger, 310 F. Supp. 2d. 251 (D.D.C. 2004)*, *aff'd 366 U.S. App. D.C. 408, 412 F.3d 190 (D.C. Cir. 2005)*, held that a U.S. official acting under the directive of the President of the United States would *ipso facto* act only under auspices of U.S., not foreign, law. *Schneider* involved claims arising out of the CIA's alleged involvement in the anti-Allende coup in Chile. The survivors and personal representative of General Rene Schneider, who was killed during a botched kidnaping by plotters of the 1970 Chilean government coup, sued the United States and former national security advisor Henry A. Kissinger, alleging that President Nixon had ordered Kissinger, the CIA and others to do whatever would be necessary to prevent the election of Dr. Salvadore Allende as Chile's first Socialist President and that Kissinger, apparently unconcerned with the risks involved, allocated $ 10 million to effect a military coup, leading to Schneider's death. *Id. at 255.*

After concluding that the plaintiffs' claims presented non-justiciable political questions, the dis-

trict court went on to briefly consider alternative bases for dismissal, including under the Torture Victim Protection Act. *See id. at 264, n. 13.* In a terse discussion, the district court reasoned that Kissinger could not be held to have acted color of law of a foreign nation. "In carrying out the direct orders of the President of the United States . . . Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law." *Id. at 267.*

Plaintiff argues that *Schneider* is inapposite because, in that case, Kissinger was acting at the direction of the President, whereas, here, the defendants are not alleged to have acted at the behest of President Bush. However, Arar's complaint alleges unconstitutional conduct by some of the highest policy-making officials of this country, not low-level officers acting on their own. Thus, in this case, as in *Schneider,* the defendants' alleged conduct would have been taken pursuant to U.S., not Syrian, law. Although *Schneider* does not provide extensive analysis of the issue, its analysis would seem applicable here.

Plaintiff contends, nevertheless, that defendants, by acting in conspiracy with foreign officials, can be deemed to have acted under color of foreign law. To support this argument, plaintiff draws upon, by way of analogy, the jurisprudence developed under *42 U.S.C. § 1983.* Plaintiff notes Second Circuit

case law directing courts construing Torture Victim Protection Act claims to interpret the "color of law" requirement in light of *§ 1983. Kadic, 70 F.3d at 245*; TVPA House Report, at *5 ("Courts should look to *42 U.S.C. § 1983* in construing 'color of law' and agency law in construing 'actual or apparent authority.'"). Noting this, plaintiff argues that U.S. officials can be deemed to have acted under color of Syrian law in the same way courts have found federal officials to have acted under color of state law under *§ 1983*.

Indeed, courts have held that, under certain circumstances, joint action between federal and state officials can amount to conduct under color of state law for purposes of *§ 1983*. "When the violation is the joint product of the exercise of a State power and of a non-State power then the test . . . is whether the state or its officials played a 'significant' role in the result." *Kletschka v. Driver, 411 F.2d 436, 449 (2d Cir. 1969). See Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 111 n. 17 (3d Cir. 1986)*; *Knights of the KKK v. East Baton Rouge Parish School Board, 735 F.2d 895, 900 (5th Cir. 1984)*; *Reuber v. U.S., 242 U.S. App. D.C. 370, 750 F.2d 1039, 1061 (D.C. Cir. 1984)*.

[*266] *Kletschka* extended to federal officials the reach of prior holdings establishing that private individuals acting jointly with state officers could be held to violate *§ 1983. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)*; *Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963)*. The Second Cir-

cuit saw "no reason why a joint conspiracy between federal and state officials should not carry the same consequences under *§ 1983* as does joint action by state officials and private persons." *Kletschka, 411 F.2d at 448.*

However, plaintiff's analogy to *§ 1983* ultimately fails. Preliminarily, it is perfectly reasonable to hold federal officials liable for constitutional wrongs committed under color of state law because federal officials, when acting under color of state law, are still acting under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena. However, this equation of the duties and obligations of federal officials under state and federal law is ill-suited to the foreign arena. The issues federal officials confront when acting in the realm of foreign affairs may involve conduct and relationships 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. Thus, it is by no means a simple matter to equate actions taken under the color of state law in the domestic front to conduct undertaken under color of foreign law. That arena is animated by different interests and issues.

Applying the logic of *Kletschka* to the Torture Victim Protection Act breaks down for another reason. Federal officials, in order to be held liable under *§ 1983* for joint action with state officials, must act "under the control or influence of the State defendants"; otherwise, *§ 1983* liability is lacking. *Id. at 449*. Indeed, where federal officials direct state officers to violate federal law, *§ 1983* liability will not be found. *See Billings v. United States, 57 F.3d 797, 801 (9th Cir. 1995)* (affirming dismissal of *§ 1983* claims against county officials who "were clearly acting at the behest and under the direction of the federal agents" and noting that any joint action between the two would have arisen under color of federal, not state, law). Thus, plaintiff's analogy works only if Syrian officials ordered U.S. officials to torture Arar, not vice versa - as alleged.

f. Conclusion

The decision by Congress not to provide a private cause of action under FARRA for individuals improperly removed to countries practicing torture militates against creating one in this case under the Torture Victim Protection Act. Moreover, the color of "foreign law" requirement, combined with the intent by Congress to use the Torture Victim Protection Act as a remedy for U.S. citizens subjected to torts committed overseas, strongly supports defendants' claim that the Torture Victim Protection Act does not apply here. In conclusion, plaintiff does not meet the statutory requirements of the Torture Victim Protection

Act, and, accordingly, Count 1 of the complaint is dismissed.

(4)

Due Process Claims for Detention and Torture in Syria

Counts 2 and 3 of plaintiff's complaint allege that defendants violated Arar's [*267] rights to substantive due process by removing him to Syria and subjecting him to both torture and coercive interrogation (Count 2) and arbitrary and indefinite detention (Count 3). He seeks damages under *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971),* claiming deprivation of *Fifth Amendment* due process rights.

Bivens establishes "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green, 446 U.S. 14, 18, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980).* The threshold inquiry is whether Arar alleges a violation of federal law that can be vindicated in his *Bivens* claim. Preliminarily, however, defendants argue that there is no subject-matter jurisdiction to even consider the substance of Arar's complaint. That jurisdictional argument will be taken up first.

a. Jurisdiction

Defendants argue that, under the INA, this court is without jurisdiction to consider any claims arising out of Counts 2 and 3 of the complaint and that any and all questions involving Arar's transfer, detention and torture in Syria - including constitutional claims - must be dismissed. Defendants rely on three provisions of the INA, as amended by IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), all of which purportedly preclude subject-matter jurisdiction. They also point to one provision of FARRA that would divest this court of jurisdiction as well.

The three separate provisions upon which defendants rely are: (1) *8 U.S.C. § 1252(b)(9)*, the "zipper clause," which channels all questions of law and fact arising from removal proceedings to the federal courts of appeals; (2) *8 U.S.C. § 1252(g)*, which prevents district courts from exercising subject-matter jurisdiction over the Attorney General's decision to execute removal orders; and (3) *8 U.S.C. § 1252(a)(2)(B)(ii)*, which bars judicial review of "any" discretionary decision of the Attorney General covered by applicable provisions of Title 8 of the U.S. Code. According to defendants, IIRIRA expands the withdrawal of federal question jurisdiction by channeling judicial review of the execution of removal orders to the circuit courts of appeals (*8 U.S.C. § 1252(g)*), consolidates in the courts of appeals all legal and factual questions arising from said removal proceedings (*8 U.S.C. § 1252(b)(9)*), and bars federal

jurisdiction altogether for discretionary decisions of any kind (*8 U.S.C. § 1252 (a)(2)(B)(ii)*). Finally, defendants point to FARRA, § 2242(d), which strips all federal court jurisdiction over claims brought under the CAT except as part of a final order of removal in a court of appeals.

Any analysis of these provisions must start with the proposition that they be interpreted in light of "the strong presumption in favor of judicial review of administrative action," *INS v. St. Cyr, 533 U.S. 289, 298, 121 S.Ct. 2271, 2278, 150 L.Ed.2d 347 (2001)*, as well as the "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id. at 320, 121 S.Ct. at 2290* (quoting *INS v. Cardoza-Fonseca, 480 U.S. 421, 449, 107 S.Ct. 1207, 1222, 94 L.Ed.2d 434 (1987)).* Finally, "where Congress intends to preclude judicial review of constitutional claims [of aliens] its intent to do so must be clear." *Demore v. Kim, 538 U.S. 510, 517, 123 S.Ct. 1708, 1714, 155 L.Ed.2d 724 (2003)* (citing *Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988)).*

[*268] The INA provisions cited by defendants are designed to create a streamlined procedure allowing for the effective administration of the immigration laws so that the removal of illegal aliens can proceed with as much alacrity as possible while maintaining a minimum of procedural due process. According to defendants, these provisions apply because Counts 2 and 3 of the complaint, "at their

core," challenge Arar's removal order. *See, e.g.,* Ashcroft Mem. at 19. Arar, by contrast, insists that Counts 2 and 3 raise issues collateral to the removal order, directly challenging his detention, transfer and torture in Syria. Thus, the applicability of the three provisions turns on this deep disagreement about the precise nature of Counts 2 and 3.

Defendants' attempt to redefine this action as a simple challenge to circumstances "arising out of" Arar's removal is not persuasive. That Arar's complaint goes beyond his removal is evidenced not least by the fact that he *requested* removal - to Canada. Thus, this case does not concern *why* defendants might have chosen to send Arar to Syria; neither does Arar appear to attack the bases for sending him there. Rather, this case concerns whether defendants could legally send Arar to a country where they knew he would be tortured and arbitrarily detained or where they knew there was a strong possibility of such a fate. As Arar argues, this case attacks a *policy* under which he was sent to a country, either in spite of, or perhaps because of, the likelihood that he would be tortured upon arrival.

But even on defendants' account of the nature of this suit, it remains the case that Arar's only available remedy under the INA would have been an order seeking his return. That remedy would have had no bearing on his detention and coercive interrogation, which would cease only if, and when, immigration authorities were capable of effecting his re-

lease. This case thus raises a serious question whether the procedural system administrating the admission and exclusion of aliens is truly capable of remedying the alleged torture and detention.

Nevertheless, defendants insist that the above-cited provisions of the INA bar Counts 2 and 3. Assuming the applicability of those provisions, they still do not preclude subject-matter jurisdiction for the reasons explained below.

(i) ***8 U.S.C. § 1252(b)(9)***

Section 1252(b)(9) provides:

> Judicial 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 under this chapter shall be available only in judicial review of a final order under this section.

According to defendants, *§ 1252(b)(9)* deprives this court of jurisdiction to consider Counts 2 and 3 because those claims involve actions "arising from" removal proceedings and can therefore only be heard by a court of appeals upon a petition for review of a final order of removal. *See, e.g.,* Ashcroft Mem. at 22 ("the heart of Arar's complaint involves his removal to Syria rather than a country where he alleges he would have been treated more humanely").

Arar claims that *§ 1252(b)(9)* has no application because, in fact, he does not contest the underlying removal order as such. Rather, he alleges a conspiracy by defendants to detain him without formal charges and to render him to Syria for interrogation under torture. As I have already indicated, these allegations are separate from, and collateral to, the underlying removal order under which he was deported.

[*269] Moreover, the very citation of this "zipper clause" assumes the availability of certain kinds of relief that were not present here. Most immigration petitioners have the opportunity to challenge their removal at a hearing, with the ability to be represented by counsel, where they can raise legal claims, including those with respect to CAT. These proceedings include, at a minimum, a hearing before an immigration judge, an appeal before the Board of Immigration Appeals and, finally, review in the relevant U.S. court of appeals. In this case, Arar alleges that he was intentionally deprived of the opportunity to obtain adequate review over his CAT claim. Moreover, he alleges he was denied access to counsel while held in the United States and then transported to Syria, against his will, where he was held incommunicado and tortured for ten months. If, as Arar alleges, federal officials actually obstructed him from filing a grievance, there is no basis for defendants' claim that *§ 1252(b) (9)* can be interpreted to effectively bar him from any forum to litigate his claim. Certainly, Arar was not in a position similar to ordi-

nary deportees who can "wait until their administrative proceedings come to a close and then seek review in a court of appeals." *Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 479, 119 S.Ct. 936, 941, 142 L.Ed.2d 940 (1999)*. Thus, the "zipper clause" defendants invoke to bar this litigation rings hollow.

Defendants cite *Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000)*, in which the Second Circuit noted that because *§ 1252(b)(9)* establishes "'exclusive appellate court' jurisdiction over claims 'arising from any action taken or proceeding brought to remove an alien,' all challenges are channeled into one petition." *Id. at 340* (citing *8 U.S.C. § 1252 (b) (9)*; *see also Flores-Miramontes v. INS, 212 F.3d 1133, 1140-41 (9th Cir. 2000))*. Noting that "all challenges" must now be brought under one petition for review, defendants assert that the current action is foreclosed in this court. But this analysis misreads the holding of *Calcano-Martinez* and mischaracterizes the purpose behind *§ 1252(b)(9)*.

Calcano-Martinez held that the jurisdiction-limiting provisions of IIRIRA, including *§ 1252(b)(9)*, did not divest district courts of jurisdiction to hear habeas appeals raising legal challenges to removal orders. *232 F.3d at 337*, *aff'd 533 U.S. 348, 121 S.Ct. 2268, 150 L.Ed.2d 392 (2001)*. The petitioners, who enjoyed a full administrative process before the agency, were not precluded from raising legal challenges under habeas. As the Second Circuit ex-

plained in *Calcano-Martinez, § 1252(b)(9)* was intended to resolve certain procedural and administrative problems presented in immigration proceedings. "Before *[§ 1252(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*." *Id. at 340*. For instance, in *Cheng Fan Kwok v. INS, 392 U.S. 206, 212, 88 S.Ct. 1970, 1974, 20 L.Ed.2d 1037 (1968)*, the Supreme Court held that the statutory precursor to *§ 1252(b)(9)* allowed an alien to institute separate proceedings for a challenge to the denial of a stay of deportation and a challenge to the underlying deportation order itself. After *Cheng Fan Kwok,* parties could initiate separate court proceedings, at times in separate courts, for successive filings in matters ultimately originating out of the same set of circumstances. *See also Flores-Miramontes, 212 F.3d at 1140-41* (noting that, prior to *§ 1252 (b) (9)*, "while motions to reopen were to be brought in the courts of appeal . . . challenges to denials of stays of deportation fell within the jurisdiction of the district courts, under the general federal question statute"). By consolidating [*270] review of all appeals of the removal order itself in one forum, Congress solved the problem of successive filings and additional back-door challenges to removal orders. *Calcano-Martinez, 232 F.3d at 340*. But this action is neither a direct nor back-door challenge to a removal proceeding.

The inapplicability of *§ 1252(b)(9)* to the facts of this case is further highlighted by recent Supreme Court directives regarding the "zipper clause." As the Supreme Court explained in *St. Cyr,* the provision is intended "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals," not to eliminate judicial review altogether. *533 U.S. at 313, 121 S.Ct. at 2286*; *see Calcano-Martinez, 232 F.3d at 340*. Recent cases interpreting analogous provisions of IIRIRA comport with this understanding. *See American-Arab Anti-Discrimination Committee, 525 U.S. at 485, 119 S.Ct. at 944* (noting, with respect to *§ 1252(g)*, Congress's interest in making sure that "certain immigration decisions, "if . . . reviewable at all . . . at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed.").

In light of the purpose behind its enactment as well as the facts attending Arar's removal, *§ 1252(b)(9)* does not bar Arar's suit.

(ii) *8 U.S.C. § 1252(g)*

Section 1252(g) reads as follows:

> Except as provided in this section and notwithstanding any other provision of law . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

> execute removal orders against any alien under this chapter.

Defendants argue, again, that Counts 2 and 3 are barred because all events "arise from" the execution of Arar's removal order. *See, e.g.,* Ashcroft Mem. at 24 ("Accepting Arar's allegations, the decision which is the subject of Arar's Second and Third *Bivens* claims was 'removing Mr. Arar to Syria' ostensibly for the purpose of his detention and torture by Syrian officials.") (citing Cplt. P48). For the reasons expressed *supra,* that description of the complaint is neither correct nor fair. In any event, the broad reading defendants insert into *§ 1252(g)* is not borne out by the case law. The *American-Arab Anti-Discrimination Committee* court specifically rejected the

> unexamined assumption that *§ 1252(g)* covers the universe of deportation claims -- that it is a sort of "zipper" clause that says "no judicial review in deportation cases unless this section provides judicial review." In fact, what *§ 1252(g)* says is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders."

525 U.S. at 482, 119 S.Ct. at 943 (emphasis in original). *See Calcano-Martinez, 232 F.3d at 339, n.5* (noting that, in *American-Arab Anti-Discrimination Committee,* "the Supreme Court thus held that *[§ 1252(g)*] applies in a very narrow class of cases"). As the Fourth Circuit has explained, the Supreme Court "reasoned that these three actions are stages of the deportation process at which the Executive has discretion to go forward or to abandon the endeavor and that *§ 1252(g)* was designed to prevent judicial intervention into these actions outside the streamlined process Congress had designed." *Mapoy v. Carroll, 185 F.3d 224, 228 (4th Cir. 1999).* In other words, *§ 1252(g)*, like *§ 1252(b)(9)*, was intended to help restore [*271] order to the administrative process by preventing multiple lawsuits over claims arising from action involving the removal of an alien -- not to foreclose *bona fide* legal and constitutional questions unrelated to the removal order by barring all federal court review.

Even if Arar were challenging the underlying removal order according to which he was transferred to Syria -- as defendants claim -- *§ 1252(g)* would still not apply. Arar challenges, on constitutional grounds, the decision to send him abroad for torture, pursuant to a purported policy of extraordinary rendition for individuals suspected of terrorist involvement. That goes far beyond a mere challenge to the "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders." As noted in *American-Arab Anti-Discrimination Com-*

mittee, it would be "implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *525 U.S. at 482, 119 S.Ct. at 943. See Wong v. INS, 373 F.3d 952, 964 (9th Cir. 2004)* (rejecting government's position with respect to *§ 1252(g)* by finding that the provision does not bar "all claims relating in any way to deportation proceedings") (citing *Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139, 1150 (9th Cir. 2000)* (en banc)). Consequently, even accepting defendants' characterization of the nature of this suit, *§ 1252(g)* would not bar Counts 2 and 3.

(iii) ***8 U.S.C. § 1252(a)(2)(B)(ii)***

Section 1252(a)(2)(B)(ii), provides in relevant part,

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review--
>
> (i) any judgment regarding the granting of relief under *section 1182(h)*, *1182(i)*, *1229b*, *1229c*, or *1255* of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the

> Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

"The starting point of the analysis," defendants argue, "is Arar's status as an arriving alien seeking admission." Ashcroft Mem. at 25. Thus, defendants point out, the Attorney General has discretion in deciding what to do with aliens suspected of being involved in terrorism and where to send them -- including the ability to disregard their preferred country of removal. *See* Ashcroft Mem. at 25-27. Under *8 U.S.C. § 1231(b)(2)(C)(IV)*, they point out, the Attorney General "may disregard" an alien's designation of a country of removal if granting the request would be prejudicial to the interests of the United States.

However, Arar was *not* seeking admission to the United States, and, thus, defendants' argument begins from an incorrect "starting point." In any event, *§ 1252(a)(2)(B)(ii)*, which essentially bars judicial review of purely discretionary determinations, is not dispositive.

The Ninth Circuit is the only court of appeals to have thus far analyzed *8 U.S.C. § 1252(a)(2)(B)(ii)* in remotely similar circumstances. In *Wong* the Ninth Circuit rejected the government's position by ruling that "claims of constitutional violations are not barred by *§ 1252(a)(2)(B)*." *373 F.3d at 963*.

Although this circuit has not directly interpreted that provision, a recent case, *Sepulveda v. Gonzales, 407 F.3d 59 (2d Cir. 2005)*, is instructive. In *Sepulveda,* the Second Circuit interpreted *8 U.S.C. § 1252(a)(2)(B)(i)*, which bars federal review of judgments regarding the granting of relief of, *inter alia,* cancellation of removal under *8 U.S.C. § 1229b* and adjustment [*272] of status under *8 U.S.C. § 1255(i)*. The Second Circuit held that the jurisdiction-stripping provision would not bar federal review of nondiscretionary or purely legal questions regarding an alien's eligibility for such relief. Rather, *8 U.S.C. § 1252(a)(2)(B)(i)* only precludes review of *discretionary* determinations to grant or deny relief. *Id. at 62-64*. Because both (i) and (ii) concern varieties of judgments that are otherwise non-justiciable in federal courts, the analysis in *Sepulveda* would apply to subsection (ii) as well. *Santos-Salazar v. United States DOJ, 400 F.3d 99, 104 (2d Cir. 2005)*, interpreting a separate jurisdiction-stripping element of the INA, is equally on point. The Second Circuit noted that, although *8 U.S.C. § 1255(a)(2)(C)* bars federal-court review of final orders of removal based on certain criminal conduct, "there are, however, aspects of *§ 1252(a)(2)(C)* as to which judicial review has not been eliminated." *Id. at 104. Section 1252(a)(2)(C)* "does not deprive the courts of jurisdiction to determine whether the section is applicable, *e.g.,* whether the petitioner is in fact an alien, whether he has in fact been convicted, and whether his offense is one that is within the scope of *8 U.S.C. § 1182(a)(2)*." *Id.* (citations omitted). The *Santos-*

Salazar court ultimately dismissed the action for lack of a substantial constitutional question. Had it found such a question apparent, its discussion indicates that it would have ruled differently.

The maxim that courts retain jurisdiction to consider purely legal questions holds true in other administrative contexts as well. *See Johnson v. Robison, 415 U.S. 361, 367, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974)* (provision barring review of "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans" did not bar constitutional challenge) (internal quotation marks omitted). *Wong* and *Sepulveda* as well as the Supreme Court cases cited strongly favor jurisdiction over Arar's claims because he does not challenge discretionary decision-making by the Attorney General, but rather constitutional violations incident to his removal to Syria to face torture.

Defendants cite *Doherty v. Meese, 808 F.2d 938, 941 (2d Cir. 1986)*, for the proposition that such determinations are "essentially unreviewable." *Id. at 944*; *see* Ashcroft Mem. at 26. In *Doherty,* an immigration petitioner attempted to short-circuit the government's appeal of the immigration judge's decision granting the petitioner's request to be deported to the country of his choice. The petitioner attempted to block the appeal in the agency by seeking federal court review in the midst of the administrative process. The actual holding of *Doherty* is that, absent ex-

traordinary circumstances, the court of appeals cannot "intervene in the administrative process *prior* to a final order of deportation." *808 F.2d at 942* (emphasis added). Although it is not crystal clear whether the *Doherty* court would have reached the same conclusion regarding its power to review the Attorney General's determination at the *conclusion* of the administrative hearings, *§ 1252(a)(2)(B)(ii)* appears to bar jurisdiction in ordinary circumstances where the only aspect of an appeal is the Attorney General's discretion itself. Nevertheless, *Doherty* is not squarely applicable to the case at bar because Arar does not simply challenge the discretionary determinations of the Attorney General, but rather the legal authority of the Attorney General to send him to a country in violation of CAT.

Defendants further note that the Attorney General's discretion is even more expansive in cases involving the removal of aliens who pose dangers to national security. First, Congress established, through [*273] FARRA, that regulations implementing the United States' obligations under the CAT, *see* Pub. L. No. 105-277, § 2242(c), do not apply to aliens who may pose a danger to the security of the United States. *See 8 U.S.C. § 1231(b)(3)(B)*. Second, alien terrorists seeking protection under Article 3 of CAT are not entitled to standard administrative proceedings governing their requests for withholding of removal under the CAT. *See 8 C.F.R. § 208.18(d)*.

To the extent that Arar challenges the Attorney General's discretion in these areas, his claims would be foreclosed. *See Doherty, 808 F.2d at 942*. But, outside a challenge to the *merits* of the Attorney General's findings, the question is whether, in spite of CAT, the Attorney General had the authority to remove Arar, even if he were a member of al Queda, to a country where he was likely to face torture. *Section 1252(a)(2)(B)(ii)*, as interpreted under case law, will not erect a bar to that constitutional question, regardless of whether Arar can prevail on the merits of the issue.

"If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept" defendants' jurisdictional argument. *St. Cyr, 533 U.S. at 314, 121 S.Ct. at 2287*. "But the absence of such a forum," *id.,* coupled with the serious constitutional questions raised in this case, cautions against foreclosing what is apparently Arar's sole remaining avenue for legal challenge.

(iv) FARRA

Finally, defendants argue that any claim involving a violation of the CAT would be foreclosed due to plaintiff's failure to institute a review of a final order of removal under FARRA. Under FARRA, § 2242(d),

> Notwithstanding any other provision of law, and except as provided in the regula-

> tions described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section [this note] shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section [this note], 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*).

Claiming that Counts 2 and 3, "at their core," assert violations of FARRA, defendants contend that the jurisdiction-limiting principles of FARRA bar federal question jurisdiction "to 'consider' that determination, whether in the guise of a *Bivens* action or otherwise." Ashcroft Mem. at 30.

As discussed *supra* at part (4) of this discussion section of the opinion, the policies enunciated under FARRA do not permit a private cause of action for damages for a violation of that provision. Nevertheless, the jurisdiction-limiting provision of FARRA, which channels review into one consolidated proceeding in the court of appeals, is of questionable relevance to claims (whatever their merit) raised under other statutes and the constitution in a case in which defendants by their actions essentially rendered

meaningful review an impossibility. This is the case even if, as defendants argue, Arar's complaint is nothing more than a second chance at challenging "the determination that his removal to Syria complied with the policy [in FARRA]." Ashcroft Mem. at 30.

To summarize the jurisdictional argument, IIRIRA was intended to create a "streamlined process," in which issues of law and fact in matters concerning the admission and exclusion of aliens "are not [*274] subject to separate rounds of litigation," *Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999)* - not to eliminate judicial review altogether. The jurisdiction-limiting and jurisdiction-stripping provisions of IIRIRA do not preclude a consideration of the merits of Arar's alleged due process violations.

b. **Substantive Due Process**[76]

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[76] Defendants also raise qualified immunity arguments with respect to Counts 2 and 3 as well as 4, and those arguments will be considered, as necessary, only after the underlying constitutional questions have been addressed. Although "many courts faced with claims resting on constitutional rights of uncertain scope have dismissed cases based on qualified immunity alone," *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 601 (D.C. Cir. 2000)*, *rev'd on other grounds sub nom., Christopher v. Harbury, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002)* (citing *Childress v. Small Bus. Admin., 825 F.2d 1550, 1552 (11th Cir. 1987))*, the Supreme Court has cast doubt on this approach. *See Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999).* Accordingly, the merits of the constitutional argument will be considered before adjudication of the qualified-immunity issue.

Arar argues that the treatment he allegedly suffered unquestionably constitutes a violation of substantive due process. *See* Pl. Opp. Mem.at 27. However, defendants question whether robust *Fifth Amendment* protections can extend to someone like Arar, who, for juridical purposes, never actually entered the United States. Moreover, they cite precedent rejecting extraterritorial *Fifth Amendment* protections to non-U.S. citizens.

While one cannot ignore the "shocks the conscience" test established in *Rochin v. California, 342 U.S. 165, 172-73, 72 S.Ct. 205, 209-10, 96 L.Ed. 183 (1952)*, that case involved the question whether torture could be used to extract evidence for the purpose of prosecuting criminal conduct, a very different question from the one ultimately presented here, to wit, whether substantive due process would erect a *per se* bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack. Whether the circumstances here ultimately cry out for immediate application of the Due Process clause, or, put differently, whether torture always violates the *Fifth Amendment* under established Supreme Court case law prohibiting government action that "shocks the conscience" - a question analytically prior to those taken up in the parties' briefing - remains unresolved from a doctrinal standpoint.[77] Neverthe-

[77] In *Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)*, this circuit noted the "universal condemnation of torture in numerous international agreements[] and the renunciation of torture as an instrument of official policy by virtually all of the

less, because [*275] both parties seem (at least implicitly) to have answered this question in the affirmative, it will be presumed for present purposes

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nations of the world (in principle if not in practice)" and found that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." *Id. at 880*. *Filartiga* cited, in a footnote, survey data (which the circuit court did not clearly endorse) indicating that torture might be prohibited under the *Eighth Amendment to the U.S. Constitution*, which bars "cruel and unusual punishments." *See id. at 884, n. 13*. But, this dictum does not address the constitutionality of torture to prevent a terrorist attack.

Although the United States has, in the context of various international undertakings, made certain treaty commitments against torture, these obligations, unlike the Due Process clause, can be repudiated. Notwithstanding the well established cannon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. The Schooner Charming Betsy, 2 Cranch 64, 6 U.S. 64, 118, 2 L. Ed. 208 (1804)*, as well as the argument, pressed by some, that customary international law is always binding on all states, it is dubious whether that proposition would hold true in the face of congressional legislation to the contrary. As the Ninth Circuit has explained, "we are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law." *Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991). See United States v. Aguilar, 883 F.2d 662, 679 (9th Cir. 1989)* ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law."), *cert. denied, 498 U.S. 1046, 111 S. Ct. 751, 112 L. Ed. 2d 771 (1991). See also* Restatement (Third) of International Law § 115(1) (a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled.").

that the Due Process clause would apply to the facts alleged.

Defendants argue that Arar's claims alleging torture and unlawful detention in Syria are *per se* foreclosed under *Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950)*, and its progeny. These cases, they claim, unequivocally establish that non-resident aliens subjected to constitutional violations on non-U.S. soil are prohibited from bringing claims under the Due Process clause. *See, e.g.,* U.S. Mem. at 25; Thompson Mem. at 29, 31.

In *Eisentrager,* the Supreme Court held that a federal district court lacked jurisdiction to issue a writ of habeas corpus to twenty-one German nationals who had been captured in China by U.S. forces, brought to trial and convicted before an American military commission in Nanking and placed in incarceration in occupied Germany. The Supreme Court ruled that non-U.S. citizens with absolutely no relationship to the United States, captured outside U.S. territory and tried before a military tribunal, could not avail themselves of the right of habeas corpus to prove their innocence before a U.S. court. The Court held that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id. at 771, 70 S.Ct. at 940.* Bereft of any established contacts with the United States, the *Eisen-*

trager petitioners could not avail themselves of U.S. courts.

Under *Eisentrager,* given that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection," *id. at 777-78, 70 S.Ct. at 943*, aliens outside the United States could not invoke the Constitution on their behalf. Consequently, the "nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." *Id. at 776, 70 S.Ct. at 943.*

However, there are obvious distinctions between *Eisentrager* and the case at bar. The *Eisentrager* petitioners had a trial pursuant to the laws of war. Although that trial might not have afforded them the panoply of rights provided in the civilian context, one cannot say that the petitioners had no fair process. Moreover, the *Eisentrager* detainees had "never been or resided in the United States," were "captured outside of our territory and there held in military custody as [ ] prisoner[s] of war," were "tried by a Military Commission sitting outside the United States" and were "at all times imprisoned outside the United States." *Eisentrager, 339 U.S. at 777, 70 S.Ct. at 943.* Arar, by contrast, was held virtually incommunicado - moreover, on U.S. soil - and denied access to counsel and process of any kind. Owing to these

factual distinctions, *Eisentrager* is not squarely applicable to the case at bar.

Defendants also cite [*276] *United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990)*, in which the Supreme Court revisited the question of the extraterritoriality of the U.S. Constitution to non-U.S. citizens. *Verdugo-Urquidez* involved a question regarding the extraterritoriality of the *Fourth Amendment's* protection against unreasonable searches and seizures. The Court held that a warrantless search and seizure of an alien's property in Mexico, even though orchestrated within the United States, did not constitute a *Fourth Amendment* violation. Although the illegal search was ordered by U.S. officials, it took place "solely in Mexico," *Verdugo-Urquidez, 494 U.S. at 264, 110 S.Ct. at 1060*, which, the Court held, amounted to no *Fourth Amendment* violation.

After foreclosing the possibility of any extraterritorial application of the *Fourth Amendment*, the *Verdugo-Urquidez* court explored in dicta the same question with regard to the *Fifth Amendment*. Relying on dicta in *Eisentrager,* the Supreme Court held that prior case law foreclosed such possibility:

> Indeed, we have rejected the claim that aliens are entitled to *Fifth Amendment* rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager* . . . the Court held that enemy

> aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the *Fifth Amendment* . . . . The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society." But our rejection of the extraterritorial application of the *Fifth Amendment* was emphatic: "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it."

494 U.S. at 269, 110 S.Ct. at 1063 (quoting *Eisentrager, 339 U.S. at 770, 784-85, 70 S.Ct. at 940, 947).*

However, *Verdugo-Urquidez,* which involved a search and seizure of a home in Mexico, can be distinguished from the case at bar. As Justice Kennedy

observed in his concurring opinion, Mexico's different legal regime compounded (and perhaps created) the *Fourth Amendment* violations. "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the *Fourth Amendment's* warrant requirement should not apply in Mexico as it does in this country." *Verdugo-Urquidez, 494 U.S. at 278, 110 S.Ct. at 1068* (Kennedy, J., concurring).

Verdugo-Urquidez is further distinguishable from the instant case by the fact that the defendant in that case was prosecuted in an Article III court, where "all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the *Due Process Clause of the Fifth Amendment* protect the defendant." *Id.* Thus, any anxiety over the lack of *Fourth Amendment* protection were minimized by the fact that the trial would ultimately proceed in accordance with *Fifth Amendment* guarantees.

[*277] After *Verdugo-Urquidez,* the Court of Appeals for the District of Columbia Circuit considered a case, more directly applicable to the facts at issue here, involving a Guatemalan citizen and high-ranking member of a Guatemalan rebel organization who was allegedly tortured in Guatemala at the behest of CIA officials, who had ordered and directed the torture and then engaged in an eighteen-month

cover-up. *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596 (D.C. Cir. 2000)*, *rev'd on other grounds sub nom., Christopher v. Harbury, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002)*. The constitutional violations at issue in *Harbury* included torture. Moreover, the torture was allegedly planned and orchestrated by U.S. officials acting within the United States. Thus, unlike *Eisentrager* and *Verdugo-Urquidez,* the factual background of *Harbury* is closely related to the case at bar.

The D.C. Circuit relied heavily on dicta in *Verdugo-Urquidez,* particularly its reading of *Eisentrager,* to ultimately hold that the decedent's wife (a U.S. citizen) could not bring a *Fifth Amendment* claim on his behalf for the torture he suffered in Guatemala. The D.C. Circuit noted, first, that *Verdugo-Urquidez* did not attach constitutional significance to the fact "that the search was both planned and ordered from within the United States. Instead, it focused on the location of the primary constitutionally significant conduct at issue: the search and seizure itself." *Harbury, 233 F.3d at 603*. *See id.* ("The search was conceived, planned, and ordered in the United States, carried out in part by agents of the United States Drug Enforcement Agency, and conducted for the express purpose of obtaining evidence for use in a United States trial. . . . Still, the Court treated the alleged violation as having 'occurred solely in Mexico.'") (citing *Verdugo-Urquidez, 494 U.S. at 264, 110 S.Ct. at 1060*). Because of this, the D.C. Circuit found that "the primary constitu-

tionally relevant conduct at issue here - [the deceased's] torture - occurred outside the United States." *Id. at 603.*

The D.C. circuit further noted that *Verdugo-Urquidez* read *Eisentrager* to "emphatically" reject the notion of any extraterritorial application of the *Fifth Amendment*. That language, although "dicta . . . is firm and considered dicta that binds this court." *Harbury, 233 F.3d at 604* (citing *United States v. Oakar, 324 U.S. App. D.C. 104, 111 F.3d 146, 153 (D.C. Cir. 1997)).*[78]

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[78] The standard in the Second Circuit regarding the effect of dictum is slightly different. The Second Circuit held in *United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975)* that "a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' . . . to guide the future conduct of inferior courts." Under this ruling, Supreme Court dictum is not binding on lower courts within this judicial circuit, but "must be given considerable weight and cannot be ignored in the resolution of the close question." *Id. at 206.* Such dictum, "while of great significance and entitled to this Court's respect does not preclude . . . this Court from reaching its own decision after independent consideration and study of the question." *Id. at 206, n. 4* (citation omitted).

Under the Second Circuit's approach, the Supreme Court's discussion of the extraterritoriality of the *Fifth Amendment*, for these purposes, appears to be "of the 'obiter dictum' variety. Even if it were 'judicial dictum,' it would still 'not be binding,' although 'it must be given considerable weight and can not be ignored in the resolution of [a] close question.'" *Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566, 582 (E.D.N.Y. 2004)* (citing *Bell, 542 F.2d at 206*).

Still, the case at bar, unlike *Harbury,* presents a claim of torture by an alien apprehended at the U.S. border and held here pending removal; furthermore, the fact that Arar's alleged torture began with his removal from the territory of the United [*278] States makes this case factually different from *Harbury*. Nevertheless, by answering the question "whether the *Fifth Amendment* prohibits torture of non-resident foreign nationals living abroad" in the negative, *id. at 602*, *Harbury* appears to have important implications for the case at bar.

However, in *Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004)*, the Supreme Court issued a ruling potentially favorable to Arar. *Rasul* considered the statutory habeas claims of two Australian and twelve Kuwaiti citizens captured abroad, who challenged the legality of their detention at the Guantanamo Bay Naval Base. The Supreme Court extended statutory habeas jurisdiction to the detainees, finding that they could challenge their detention in Guantanamo Bay, a territory over which "the United States . . . exercise[s] complete jurisdiction and control." *Id. at 471, 124 S.Ct. at 2691* (internal quotation marks omitted).

Rasul only considered the question "whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id. at 485, 124 S.Ct. at 2699.* Moreover, the Supreme Court reached its decision by

noting that "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." *Id. at 480, 124 S.Ct. at 2696.*

To be sure, there is no argument that the United States exercises the same control over the Syrian officials alleged to have detained and tortured Arar as it does in the case of Guantanamo Bay. Nevertheless, one might read *Rasul* as extending habeas jurisdiction to a group of aliens with even less of a connection to the United States than Arar.

Defendants reject that contention, arguing that, in light of the above-cited cases, the substantive due process violations asserted in Arar's complaint "are predicated upon a constitutional protection that has never been extended to arriving aliens, much less aliens whom the executive has determined pursuant to legislative authorization have terrorist connections." Ashcroft Mem. at 7. But Arar - who received none of the procedural and substantive protections afforded the petitioners in *Eisentrager* - *has* a connection to the United States lacking in *Eisentrager, Verdugo-Urquidez, Harbury* and *Rasul.* All of Arar's claims against U.S. officials allegedly arise out of actions taken or initiated by them while Arar was on U.S. soil. Moreover, the factual scenario presented in this case makes it more difficult to simply apply the precedents established in the *Eisentrager* line of cases.

As already noted, the *Eisentrager* detainees had "never been or resided in the United States," were "captured outside of our territory and there held in military custody as [] prisoner[s] of war, were 'tried by a Military Commission sitting outside the United States' and were "at all times imprisoned outside the United States." *Eisentrager, 70 S.Ct. at 934*. Arar, by contrast, was held virtually incommunicado in *this* country and denied access to counsel and a meaningful process of any kind. Moreover, as the *Rasul* court noted, the Guantanamo detainees "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing. . . ." *Id. at 476, 124 S.Ct. at 2693. See also id. at 488, 124 S.Ct. at 2700* (Kennedy, J., concurring in judgment) ("having already been subject to procedures establishing their status, [*279] [the *Eisentrager* plaintiffs] could not justify 'a limited opening of our courts' to show that they were 'of friendly personal disposition' and not enemy aliens.") (citing *Eisentrager, 339 U.S. at 778*).

Another difference between *Rasul* and the case at bar is that *Rasul* based its jurisdiction on the statutory habeas provision (*28 U.S.C. § 2241*), not the U.S. Constitution.[79] Arar, by contrast, alleges

[79] It should be noted that Arar's counsel (both present and former) never brought a petition for habeas corpus during his detention in the United States or while in Syria. Precisely what, if

substantive constitutional claims not addressed in *Rasul*. *See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 463 (D.D.C. 2005)* (citing language in *Rasul* as "standing in sharp contrast to the declaration in *Verdugo-Urquidez* . . . that the Supreme Court's 'rejection of extraterritorial application of the *Fifth Amendment* [has been] emphatic'") (citing *Verdugo-Urquidez, 494 U.S. at 269, 110 S.Ct. at 1063*), *appeal docketed,* No. 05-8003 (D.C. Cir. March 10, 2005); *Khalid v. Bush, 355 F. Supp. 2d 311, 321 (D.D.C. 2005)* ("In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains 'the alien's presence within its territorial jurisdiction.'") (citing *Eisentrager, 339 U.S. at 771, 70 S.Ct. at 940*), *appeal docketed sub nom. Boumediene v. Bush et al.,* No. 05-5062 (D.C. Cir. March 10, 2005).

At this juncture, the question whether the *Due Process Clause* vests Arar with substantive rights is unresolved. Assuming, without resolving, the existence of some substantive protection, Arar's

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any, remedy might have been available to Arar via habeas is uncertain. Moreover, without the benefit of hindsight, Arar's former counsel may not have known to bring an emergency petition for stay of removal during Arar's 13-day U.S. detention, especially if counsel was not informed of any final order of removal. And once Arar had been removed from the United States, it is uncertain how a habeas petition would have fared. Because no habeas petition was ever sought, the question whether statutory habeas protection might have been available during the pendency of Arar's detention is, at this point, an academic question.

claims are foreclosed under an exception to the *Bivens* doctrine.

c. Special Factors Counseling Hesitation

The substantive due process analysis notwithstanding, the Supreme Court's creation of a *Bivens* remedy for alleged constitutional violations by federal officials is subject to certain prudential limitations and exceptions. The Supreme Court has "expressly cautioned . . . that such a remedy will not be available when 'special factors counseling hesitation' are present." *Chappell v. Wallace, 462 U.S. 296, 298, 103 S.Ct. 2362, 2365, 76 L.Ed.2d 586 (1983)* (quoting *Bivens, 403 U.S. at 396, 91 S.Ct. at 2005*). Those factors do not concern "the merits of the particular remedy [being] sought." *Bush v. Lucas, 462 U.S. 367, 380, 103 S.Ct. 2404, 2413, 76 L.Ed.2d 648 (1983).* Rather, they involve "the question of who should decide whether such a remedy should be provided." *Id.* For example, a *Bivens* remedy will not be extended to a plaintiff if "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980).* Moreover, courts will refrain from extending a *Bivens* claim if doing so trammels upon matters best decided by coordinate branches of government. *See Lucas, 462 U.S. at 378-80, 103 S.Ct. at 2411-13* (discussing [*280] case law

according to which courts have deferred to coordinate branches).

Defendants argue that both of these exceptions apply to Counts 2 and 3 because, first, the INA provides Arar with an adequate, comprehensive remedy and, second, because the foreign policy and national-security concerns raised here are properly left to the political branches of government. The first argument is unpersuasive; the second is compelling.

(i) The Immigration and Nationality Act

First, defendants argue that the remedial scheme set forth in the INA obviates any need for a *Bivens* remedy. Having already pursued the argument that the INA bars federal jurisdiction over Arar's claims, they press this contradictory argument. Here, they claim that the INA provides Arar with a "comprehensive statutory scheme" to bring claims incident to his removal order, particularly via statutory provisions channeling review of the immigration-related issues to the federal courts of appeal. *See, e.g.,* Thompson Mem. at 26.

Defendants' invocation of the INA is no more persuasive in the *Bivens* context than it was in the jurisdictional context. In fact, to argue that the INA precludes federal jurisdiction and, at the same time, affords Arar a "comprehensive scheme" for review has a certain dissonance, even under the most liberal construction of alternative pleading. Arar alleges

that his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay, preserving Arar's procedural rights under the INA. *See supra* at footnote 12 of this opinion. In any event, the INA would not provide any kind of "comprehensive scheme" with respect to his alleged torture by Syrian officials.

Defendants cite *Sugrue v. Derwinski, 26 F.3d 8 (2d Cir. 1994)*, and Van *Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999)*, in support of their contention that the INA is an adequate alternative to *Bivens*. Neither case supports their position. *Surgue* involved, *inter alia,* a claim against employees of the Veterans Administration based on a disputed disability rating and lost benefits. The court declined to infer a cause of action against the employees in their individual capacities, in light of the "multitiered and carefully crafted administrative process" for addressing disputed benefit ratings. *26 F.3d at 12*.

Van Dinh is equally inapposite. That case sought class-wide injunctive relief against the Attorney General's *discretionary* decision to detain aliens pending their removal. Unlike the case at bar, the jurisdiction-stripping provisions of the INA raised by defendants *did* apply. *See 197 F.3d at 432* (citing *8 U.S.C. § 1252(a)(2)(B)(ii)*). Moreover, the alien had a meaningful alternative remedy as he was entitled to individual relief by appealing his order of deportation to the Board of Immigration Appeals, which he

bypassed by filing a habeas corpus action in federal district court instead. *Id. at 429*.

Defendants note, however, that Congress has deliberately refused to provide a private cause of action for monetary damages within any provision of the INA. This is perhaps their strongest argument that Congress did not intend to allow a private party to pursue a judicial solution to an administrative problem. Nevertheless, the INA deals overwhelmingly with the admission, exclusion and removal of aliens - almost all of whom seek to remain within this country until their claims are fairly resolved. That framework does not automatically lead to an adequate and meaningful remedy for the conduct alleged here.

[*281] In short, defendants have failed to demonstrate that "Congress has provided an alternative remedy [in the form of the INA]," *Carlson, 446 U.S. at 18-19*, or to identify an alternative venue through which Arar could have satisfactorily preserved "some avenue for judicial relief." *Calcano-Martinez v. INS, 232 F.3d 328, 333 (2d Cir. 2000)*.

(ii) National-Security and Foreign Policy Considerations

Defendants next argue that this court should decline to extend a *Bivens* remedy in light of the national-security concerns and foreign policy decisions at the heart of this case. Such determinations,

they claim, are uniquely reserved to the political branches of government and counsel against the extension of a damages remedy here. *See, e.g.,* Ashcroft Mem. at 33, n.32.

This case undoubtedly presents broad questions touching on the role of the Executive branch in combating terrorist forces - namely the prevention of future terrorist attacks within U.S. borders by capturing or containing members of those groups who seek to inflict damage on this country and its people. Success in these efforts requires coordination between law-enforcement and foreign-policy officials; complex relationships with foreign governments are also involved. In light of these factors, courts must proceed cautiously in reviewing constitutional and statutory claims in that arena, especially where they raise policy-making issues that are the prerogative of coordinate branches of government.

A number of considerations must be noted here. First, Article I, Section 8 of the U.S. Constitution places the regulation of aliens squarely within the authority of the Legislative branch. Congress has yet to take any affirmative position on federal-court review of renditions; indeed, by withholding any explicit grant of a private cause of action under the Torture Victim Protection Act to plaintiffs like Arar, or to any plaintiff under FARRA, the opposite is the more reasonable inference.

Second, this case raises crucial national-security and foreign policy considerations, implicating "the complicated multilateral negotiations concerning efforts to halt international terrorism." *Doherty v. Meese, 808 F.2d 938, 943 (2d Cir. 1986).* The propriety of these considerations, including supposed agreements between the United States and foreign governments regarding intelligence-gathering in the context of the efforts to combat terrorism, are most appropriately reserved to the Executive and Legislative branches of government. Moreover, the need for much secrecy can hardly be doubted. One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria. More generally, governments 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. Even a ruling sustaining state-secret-based objections to a request for interrogatories, discovery demand or questioning of a witness could be compromising. Depending on the context it could be construed as the equivalent of a public admission that the alleged conduct had occurred in the manner claimed - to the detriment of our relations with foreign countries, whether friendly or not. Hence, extending a *Bivens* remedy "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, 110 S. Ct. 1056, 1065, 108 L. Ed. 2d 222 (1990). It risks "producing what the Supreme Court has called in another context [*282] 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 208 (D.C. Cir. 1985)* (Scalia, J.) (quoting *Baker v. Carr, 369 U.S. 186, 226, 217, 82 S.Ct. 691, 715, 710, 7 L.Ed.2d 663 (1962)).* As the Supreme Court recently noted, "removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" *Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348, 125 S. Ct. 694, 704, 160 L. Ed. 2d 708 (2005)* (quoting *Mathews v. Diaz, 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)). See also Shaughnessy v. United States, 345 U.S. 206, 222, 73 S. Ct. 625, 634, 97 L. Ed. 956 (1953)* (Jackson, J., dissenting) ("Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion.").

The Supreme Court has further noted that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interfer-

ence." *Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952)* (footnote omitted); *see also Bertrand v. Sava, 684 F.2d 204, 211-12 (2d Cir. 1982).*

Third, with respect to these coordinate branch concerns, there 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. In the former situation, as in *Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434, No. 04-cv-1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)*, judges have not only the authority vested under the Constitution to evaluate the decision-making of government officials that goes on in the domestic context, whether it be a civil or a criminal matter, but also the experience derived from living in a free and democratic society, which permits them to make sound judgments. In the international realm, however, most, if not all, judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-a-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.

On a related point, despite plaintiff's counsel's contention to the contrary at oral argument, the qualified immunity defense, which works effectively

in the domestic sphere to protect officials in the performance of their duties, is not a sufficient protection for officials operating in the national-security and foreign policy contexts. This is because the ability to define the line between appropriate and inappropriate conduct, in those areas, is not, as stated earlier, one in which judges possess any special competence. Moreover, it is an area in which the law has not been developed or specifically spelled out in legislation. Nor can we ignore the fact that an erroneous decision can have adverse consequences in the foreign realm not likely to occur in the domestic context. For example, a judge who, because of his or her experience living in the community, rejects a police claim that a certain demonstration is potentially violent and, as a result, allows the demonstration to proceed over the objections of these law-enforcement officials faces a much smaller risk that this decision will result in serious consequences even if, with the benefit of hindsight, his or [*283] her judgment turns out to be wrong. On the other hand, a judge who declares on his or her own Article III authority that the policy of extraordinary rendition is under all circumstances unconstitutional must acknowledge that such a ruling can have the most serious of consequences to our foreign relations or national security or both.

Accordingly, 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, in whom the Constitution imposes responsibility for our for-

eign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched -- perhaps deliberately -- by the Legislative and Executive branches. To do otherwise would threaten "our customary policy of deference to the President in matters of foreign affairs." *Jama, 543 U.S. at 348, 125 S.Ct. at 704. See Chaser Shipping Corp. v. U.S., 649 F. Supp. 736, 739 (S.D.N.Y. 1986)*, *aff'd, 819 F.2d 1129 (2d Cir. 1987)* (affirming dismissal by district court of tort claims by foreign shipping company against United States under covert military operations in Nicaragua), *cert. denied, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 647 (1988)*, *rehrg. denied, 487 U.S. 1243, 108 S. Ct. 2921, 101 L. Ed. 2d 952 (1988)*. In sum, 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.

For these reasons, I conclude that a remedy under *Bivens* for Arar's alleged rendition to Syria is foreclosed.[80] Accordingly, Counts 2 and 3 of the complaint are dismissed.[81]

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[80] Under the Authorization for Use of Military Force, Pub.L. 107-40, §§ 1-2, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"), President Bush has been authorized to "use all necessary and appropriate force against those nations, organizations, or per-

(5)

Detention Within the United States

Count 4 of Arar's complaint challenges his thirteen-day period of detention within the United States, during which time he alleges he was denied access to counsel and subjected to coercive and involuntary custodial interrogation. This included being placed in a cell at JFK Airport with lights remaining on all night, the denial of telephone privileges and adequate food, denial of access to his consulate and verbal attacks by interrogators. Arar's complaint further alleges that he was involuntarily subjected to coercive interrogation "for excessively long periods of time and at odd hours of the day and night" and was "placed in solitary confinement, shackled, [*284]

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sons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Despite the breadth of this language, the AUMF is not a factor in the above analysis.

[81] Two of the individually named defendants, Larry Thompson and John Ashcroft, also raise a defense under the political-question doctrine. Under that doctrine, courts will not review "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Asso. v. American Cetacean Soc., 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166 (1986).* Having determined that no *Bivens* remedy is available here, there is no need to discuss the political-question doctrine.

chained, strip-searched and deprived of sleep and food for extended periods of time." Cplt. P4. The interrogation was "designed to overcome his will and compel incriminating statements from him." Cplt. P4.

An individual in Arar's shoes, detained at the U.S. border and held pending removal, does not officially effect an "entry into the United States." *Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500, 150 L.Ed.2d. 653 (2001).* Instead, such a person is "'treated,' for constitutional purposes, 'as if stopped at the border.'" *Id.* (citing *Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215, 73 S.Ct. 625, 629-31, 97 L.Ed. 956 (1953)). See Leng May Ma v. Barber, 357 U.S. 185, 188-90, 78 S.Ct. 1072, 1074-75, 2 L.Ed.2d 1246 (1958)* (alien "paroled" into the United States pending admissibility had not effected an "entry"); *Kaplan v. Tod, 267 U.S. 228, 230, 45 S.Ct. 257, 257-58, 69 L.Ed. 585 (1925)* (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States").

Defendants liken Arar's juridical status to that of the plaintiff in *Mezei. Mezei* concerned a lawful permanent resident who briefly left the country and, upon return, was refused entry for national security reasons and held on Ellis Island indefinitely while the Government attempted to find another country to accept him. Upon challenging his nearly

two-year detention on due process grounds, the Supreme Court held that the plaintiff enjoyed few, if any, procedural due process rights to challenge his incarceration. With *Mezei* as the starting point, defendants argue that Arar, too, is owed little or no due process protections. *See, e.g.,* Mueller Mem. at 27 (citing *Zadvydas* for proposition that "Arar['s] entitlement to constitutional protection is at best debatable").

But the precise relationship between *Mezei* and this case is unclear. For one thing, *Mezei* does not address the *substantive* due process claims raised here. Moreover, the plaintiff in *Mezei* was attempting to effect an entry (or, more precisely, reentry) into the United States, which potentially raises different national security questions from an individual like Arar, who was only "passing through the United States" on his way to Canada. Thompson Mem. at 15.

With this questionable starting point, defendants launch into an argument regarding the substantive due process rights of excludable aliens, a matter about which courts have said relatively little. The Second Circuit, citing *Mezei,* has mentioned, in a footnote, that "other than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection." *Correa v. Thornburgh, 901 F.2d 1166, 1171, n.5 (2d Cir. 1990).* Defendants cite *Correa* and *Mezei* as standing for the proposition that an individual in Arar's situation enjoys only the most lim-

ited due process protections while in the United States.

Assuming, *arguendo,* the aptness of *Correa* and *Mezei,* Arar's rights in the U.S. are by no means nonexistent. Although the federal courts have not fully fleshed out the contours an excludable alien's due process rights, certain developments since *Mezei* warrant mention.

Preliminarily, the First Circuit has noted that "outside the context of admission and exclusion procedures, excludable aliens do have due process rights." *Amanullah v. Nelson, 811 F.2d 1, 9 (1st Cir. 1987). Amanullah* involved a habeas petition by four Afghani men challenging their detention pending final resolution of their exclusion proceedings. The First Circuit, affirming a lower court denial of the habeas [*285] petitions, noted the various constitutional guarantees afforded excludable aliens. The court noted that excludable aliens "have *personal* constitutional protections against illegal government action of various kinds; the mere fact that one is an excludable alien would not permit a police officer savagely to beat him, or a court to impose a standardless death penalty as punishment for having committed a criminal offense." *Id. at 9* (emphasis in original).

The Fifth Circuit has equally rejected the notion that "excludable aliens possess no constitutional rights." *Lynch v. Cannatella, 810 F.2d 1363, 1372,*

1374 (5th Cir. 1987). Lynch, like *Amanullah,* addressed the question whether excludable aliens - here, stowaways discovered hiding aboard a barge bound for ports on the Mississippi river - could challenge their incarceration pending removal. Noting that the stowaways did "not possess a due process right to remain free of incarceration pending their deportation," *id. at 1370*, the Fifth Circuit, nevertheless, noted that excludable aliens were, at a minimum, "entitled under the *due process clauses of the fifth* and *fourteenth amendments* to be free of gross physical abuse at the hands of state or federal officials." *Id. at 1374.* The Eleventh Circuit has reached a similar conclusion as well. *See Jean v. Nelson, 727 F.2d 957, 972 (11th Cir. 1984)* (en banc) ("Of course, there are certain circumstances under which even excludable aliens are accorded rights under the Constitution."), *aff'd, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985).* More recently, my colleague has flatly rejected the proposition that continued presence of national security concerns make the treatment of aliens in our custody within the United States unreviewable under *Bivens. Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434, No. 04-cv-1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)* (Gleeson, J.).

As already noted, *Correa* and *Mezei* are of questionable relevance to the case at bar because Arar was not attempting to effect entry to the United States. Regardless, the deprivations Arar alleges with respect to his treatment while in U.S. custody

potentially concern the type of "gross physical abuse" that could trigger a due process violation. Arar's allegations indicate that he was treated quite differently than the usual illegal alien. Although plaintiff's allegations - as compared to those in *Elmaghraby* -- are presently borderline as to whether they constitute a due process violation of "gross physical abuse," an amended complaint might remedy this deficiency.

Arar also alleges that defendants interfered with his access to courts in part by lying to his counsel. In order to successfully bring a denial-of-access claim, Arar must identify "a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury, 536 U.S. 403, 414-15, 122 S.Ct. 2179, 2186, 153 L.Ed.2d 413 (2002).* This requirement pays tribute to the fact that one's access to court is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id. at 415, 122 S.Ct. at 2186-87.*

Those defendants taking up the denial-of-access issue argue that the only interference with Arar's access to court involved his ability to file "'a petition for habeas corpus or . . . otherwise challenge his detention.'" Ashcroft Reply Br. at 23 (citing Pl. Opp. at 32). Because they believe that any habeas petition would have been "doomed to fail," *id.* at 24, Arar's denial-of-access claim must fail, too. Whether any such petition would have been successful, *see supra* at footnote 12 of this opinion, it is clear that

Arar is not asserting any challenge to his removal as [*286] such. Thus, any denial-of-access claim must concern more than his removal.

In any event, I have concluded that, given the serious national-security and foreign policy issues at stake, *Bivens* did not extend a remedy to Arar for his deportation to Syria and any torture that occurred there. It would, therefore, be circular to conclude that a denial of access to counsel amounted to a violation of the *Fifth Amendment* when Arar cannot assert a "separate and distinct right to seek judicial relief" against defendants in the first place. Thus, I am inclined to deny any such claim unless plaintiff in repleading Count 4 can articulate more precisely the judicial relief he was denied.

In sum, Count 4, construed most favorably to plaintiff, alleges a possible "gross physical abuse" due process violation and perhaps a limited denial of access to counsel right (apart from the rendition aspect of the claim).[82]

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[82] In a footnote of his opposition brief, *see* Pl. Mem. at 27, n.9, plaintiff raises a claim under the "state-created danger doctrine," according to which defendants violated the Due Process clause by affirmatively placing Arar in a situation where he was likely to face torture. At oral argument, counsel for Arar pressed this claim, arguing that it applies to Counts 2, 3 and 4. The state-created danger doctrine is but a back-door approach for reaching the claims in Counts 2 and 3 and is, therefore, rejected.

(6)

Qualified Immunity

Having dismissed Counts 2 and 3 of the complaint under the special factors precluding *Bivens* relief, the only remaining question is whether Count 4, if still viable, is subject to a defense under the qualified immunity doctrine. Defendants argue that none of the claimed violations raised in Arar's complaint could have been deemed clearly established under law at the time the events took place.

"Government 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 v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).* Excluding the rendition aspect of the claim, the alleged "gross physical abuse" in the United States in Count 4 involved deprivations that would appear to violate clearly established rights. Such treatment, if true, may well violate the basic standards for a detainee in *any* context - civil, criminal, immigration, or otherwise - and possibly constitute conduct that a defendant could reasonably foresee giving rise to liability for damages. *See Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).*

(7)

Personal Involvement and Personal Jurisdiction

Defendants note, however, that the complaint lacks the requisite amount of personal involvement needed to bring a claim against them in their individual capacities or even to establish personal jurisdiction. *See, e.g.,* Ashcroft Mem. at 8. Indeed, at this point, the allegations against the individually named defendants do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights, as defined in section (5) of this opinion, or whether any of the defendants were otherwise aware, but failed to take action, while Arar was in U.S. custody. *See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).* Accordingly, all claims against the individual defendants are dismissed without prejudice with leave for plaintiff to replead Count 4.

[*287] **(8)**

State-Secrets Privilege

The United States, invoking the state-secrets privilege, has moved for summary judgment under *Fed. R. Civ. P. 56*, with respect to Counts 1, 2 and 3 of the complaint. *See* Memorandum in Support of the United States' Assertion of State Secrets Privilege. The government has submitted declarations from

former Deputy Attorney General James B. Comey and former Secretary of the U.S. Department of Homeland Security Tom Ridge, attesting that foreign affairs considerations are involved in this case. *See* Dkt. No. 91. Certain defendants, noting the invocation of that privilege, argue that it constitutes yet a further reason warranting dismissal of any *Bivens* claim. *See, e.g.,* Mueller Reply Mem. at 6.

I determined that before addressing the state-secrets privilege, it would be more appropriate to resolve the motions to dismiss the statutory and constitutional claims because it was not clear how the confidentiality of such information could be maintained without prejudicing my ability to hear and fairly respond to plaintiff's arguments. Now that those Counts have been dismissed on other grounds, the issue involving state secrets is moot.

The United States does not seek to dismiss Count 4 on grounds of state-secrets privilege. The individual defendants, however, have asserted that all counts - including 4 - must be dismissed against them in light of the invocation of privilege by the United States. Because, as this court construes Count 4, the issue of state secrets is of little or no relevance, the individually named defendants' assertion that Count 4 must be dismissed with respect to them in light of the privilege is denied at this time. Should an amended complaint alter that picture, the issue can be addressed at that time.

Conclusion

1. Arar lacks standing to bring a claim for declaratory relief against plaintiffs in their official capacities, and thus those claims are denied.

2. With respect to claims under the Torture Victim Protection Act against defendants in their personal capacities, plaintiff as a non-citizen is unable to demonstrate that he has a viable cause of action under that statute or that defendants were acting under "color of law, of any foreign nation." Accordingly, Count 1 is dismissed with prejudice.

3. With respect to claims alleging that defendants violated Arar's rights to substantive due process by removing him to Syria and subjecting him to torture, coercive interrogation and detention in Syria, the INA does not foreclose jurisdiction over plaintiff's claims. Nonetheless, no cause of action under *Bivens* can be extended given the national-security and foreign policy considerations at stake. Accordingly, Counts 2 and 3 are dismissed with prejudice.

4. With respect the claim that Arar was deprived of due process or other constitutional rights by the defendants during his period of domestic detention, prior cases holding that inadmissible aliens deserve little due process protection are inapplicable because Arar was not attempting to effect an entry into the United States; in any event, the circumstances and conditions of confinement to which Arar

was subjected while in U.S. custody may potentially raise *Bivens* claims. However, plaintiff must replead those claims without regard to any rendition claim and name those defendants that were personally involved in the alleged unconstitutional treatment; as to the denial of access to counsel claim, he must also identify the specific injury he was prevented from [*288] grieving. Count 4 is therefore, dismissed without prejudice.

5. Claims against all ten John Doe law enforcement agents named in connection with that Count 4 are dismissed without prejudice as well, with leave to replead.

Dated: Brooklyn, New York
February 16, 2006

ORDERED:
[signature]
David G. Trager
United States District Judge

APPENDIX D - UNDATED

TORTURE VICTIM PROTECTION ACT OF 1991

PUBLIC LAW 102-256 [H.R. 2092]

28 USC 1350

102 P.L. 256; 106 Stat. 73; 1992 Enacted H.R. 2092;
102 Enacted H.R. 2092

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1, SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation --

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3, DEFINITIONS.

(a) Extrajudicial Killing. For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as in-

dispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. For the purposes of this Act –

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

APPENDIX E – UNDATED

Foreign Affairs Reform and Restructuring Act of 1998

8 USCS § 1231

TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

*** CURRENT THROUGH PL 111-125, APPROVED 12/28/2009 ***

United States policy with respect to the involuntary return of persons in danger of subjection to torture. Act Oct. 21, 1998, P.L. 105-277, Div G, Subdiv B, Title XXII, Ch 3, Subch B, § 2242, 112 Stat. 2681-822, provides:

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

"**(b) Regulations.** Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

"**(c) Exclusion of certain aliens.** To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

"**(d) Review and construction.** Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, 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).

"(e) Authority to detain. Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act [8 USCS §§ 1101 et seq. generally; for full classification, consult USCS Tables volumes].

"(f) Definitions.

(1) Convention defined. In this section, the term 'Convention' means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

"(2) Same terms as in the Convention. Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.".

APPENDIX F – UNDATED

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of

which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted

by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application…

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights

…

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

…

APPENDIX G (Complaint with Exhibits)

CENTER FOR CONSTITUTIONAL RIGHTS
Barbara Olshansky
Michael Ratner
Jules Lobel
Robert Perry
Jeffrey Fogel
David Cole
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6439

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04-CV- 0249

COMPLAINT AND DEMAND FOR JURY TRIAL

----------x

MAHER ARAR, :

Plaintiff, :

v. :

JOHN ASHCROFT, Attorney General of the United States; LARRY D. THOMPSON, formerly Acting Deputy Attorney General; TOM RIDGE, Secretary of State for Homeland Security; JAMES W. ZIGLAR, :

Formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the 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 District Director of Immigration and Customs Enforcement; ROBERT MUELLER, Director of the Federal Bureau of Investigation; and JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,	:
Defendants.	:

Plaintiff MAHER ARAR, by and through his attorneys allege the following:

NATURE OF ACTION

1. This is a constitutional, civil, and human rights case challenging the decision by United States government ("Federal") officials to send Maher Arar, a Canadian citizen seized while he was transiting through JFK Airport to a connecting flight home, to Syria for interrogation under torture. After holding Mr. Arar in harsh and punitive conditions, coercively interrogating him for hours on end, and depriving

him of contact with his family, his consulate, and his lawyer, federal officials rushed Mr. Arar off in a private jet to Jordan and then Syria. Federal officials removed Mr. Arar to Syria with the full knowledge of the existence of state-sponsored torture in that country, and in direct contravention of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), a treaty ratified by the United States in 1994. Upon information and belief, federal officials removed Mr. Arar to Syria under the Government's "extraordinary renditions" program precisely because Syria could use methods of interrogation to obtain information from Mr. Arar that would not be legally or morally acceptable in this country or in other democracies.

2. On information and belief, the decision to remove Mr. Arar to Syria for interrogation under torture was based solely on Mr. Arar's casual acquaintance with individuals thought possibly to be involved in terrorist activity. On information and belief, there was never, and is not now, any reasonable suspicion to believe that Mr. Arar was involved in such activity.

3. Plaintiff Maher Arar brings this action against Defendants John Ashcroft, Larry D. Thompson, J. Scott Blackman, Edward J. McElroy, Robert Mueller, and others, for their role in the violation of his constitutional, civil and international human

rights. Defendants conspired with officials in the Syrian government and/or aided and abetted Syrian government officials in their plan to arbitrarily detain, interrogate and torture Mr. Arar. Defendants intentionally detained Mr. Arar and then removed him to Syria so that Syrian authorities could interrogate him under torture. Further or in the alternative, Defendants knew or ought reasonably to have known that by removing Mr. Arar to Syria there was a substantial likelihood that he would be subjected to torture. Defendants' conduct violates the Torture Victim Protection Act, the Fifth Amendment to the United States Constitution, and treaty law.

4. Prior to his removal, Defendants John Ashcroft, Larry D. Thompson, J. Scott Blackman, Edward J. McElroy, Robert Mueller, and others, unlawfully detained and interrogated Mr. Arar for thirteen days. During this time, Defendants denied Mr. Arar effective access to consular assistance, the courts, his lawyer, and family members. While confined, Defendants also subjected Mr. Arar to coercive and involuntary interrogation designed to overcome his will and compel incriminating statements from him. These interrogations were conducted for excessively long periods of time and at odd hours of the day and night. While in detention, Mr. Arar was subjected to unreasonable and excessively harsh conditions. He was held in solitary confinement, chained and shackled, subjected to invasive strip-searches, and deprived of sleep and food for extended periods

of time. By their actions Defendants Ashcroft, Thompson, Blackman, McElroy, Mueller, and others, violated rights guaranteed to Mr. Arar under the Fifth Amendment to the United States Constitution and treaty law.

5. Mr. Arar seeks a judgment declaring that Defendants' actions, and those of all persons acting on their behalf including their agents and/or employees are illegal and violate Mr. Arar's constitutional, civil, and human rights. Mr. Arar also seeks a declaration that his detention in the United States and the decision to remove him to Jordan and Syria were unjustified, unconstitutional, unlawful and without probable cause to believe that he was a member of or had any involvement with Al Qaeda or any other terrorist organization.

6. Mr. Arar also seeks compensatory and punitive damages for violations of his constitutionally and internationally protected rights.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1350, note (the Torture Victim Protection Act), 5 U.S.C. §§ 551, 559 (Administrative Procedure Act), and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act).

8. This action is brought pursuant to the Torture Victim Protection Act. It is also an action brought directly under the Fifth Amendment to the United States Constitution and treaty law.

9. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to Mr. Arar's claims occurred in this District.

JURY DEMAND

10. Mr. Arar demands trial by jury in this action on each and every one of his claims.

PARTIES

11. Plaintiff MAHER ARAR is a 33 year old citizen of Canada. He currently resides in Ottawa, Canada. He and his parents came to Canada from Syria when he was seventeen years old. Mr. Arar obtained his Bachelors degree from McGill University, Montreal and his Masters degree in telecommunications from INRS-Telecommunications. Mr. Arar met his wife, Monia Mazigh, a Canadian citizen born in Tunisia, at McGill University, and they were married in 1994. They have two young children.

12. Since 1999, Mr. Arar has been employed by or worked on a consultancy basis with Math-

Works, a high-tech firm based in Massachusetts with clients all over the world, including the United States. Mr. Arar has substantial connections with the United States. At all material times, he had federal authorization to work in the United States. Mr. Arar lived in Boston when he was an employee of Mathworks. Mr. Arar has relatives and friends who live in the United States. Mr. Arar wishes to return to the United States for work and to visit relatives and friends but is prevented from doing so by the immigration order prohibiting his return.

13. Prior to the incidents complained of herein, Mr. Arar had never experienced any difficulties with either United States or Canadian authorities and had never been arrested. Mr. Arar is neither a member of nor involved with Al Qaeda or any other terrorist organization. Mr. Arar has never knowingly associated himself with terrorists, terrorist organizations or terrorist activity.

14. Defendant JOHN ASHCROFT is the Attorney General of the United States. In this capacity, Defendant Ashcroft, at the time of the actions complained of herein, had ultimate responsibility for the implementation and enforcement of United States immigration laws. Defendant Ashcroft was responsible for making the decision to remove Mr. Arar to Jordan and Syria. Conspiring with and/or aiding and abetting Defendants Thompson, Blackman, McElroy, Mueller, and others, as well as with Syrian

government officials, Defendant Ashcroft removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Ashcroft removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Ashcroft is sued in his official and individual capacities.

15. Defendant LARRY D. THOMPSON was Acting Attorney General when the unlawful actions complained of herein took place. In this capacity, Defendant Thompson signed the order removing Mr. Arar to Syria. Conspiring with and/or aiding and abetting Defendants Ashcroft, Blackman, McElroy, Mueller, and others, as well as Syrian government officials, Defendant Thompson removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Thompson removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Thompson is sued in his individual capacity.

16. Defendant TOM RIDGE is the Secretary of State for Homeland Security. In this capacity, Defendant Ridge is currently responsible for the implementation and enforcement of United States im-

migration laws. Defendant Ridge is sued in his official capacity.

17. Defendant JAMES W. ZIGLAR was the Commissioner of the Immigration and Naturalization Services at the time the unlawful actions complained of herein took place. At all material times, Defendant Ziglar had responsibility for the implementation and enforcement of United States immigration laws. He was the INS's chief executive officer. Conspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, Blackman, McElroy, Mueller, and others, as well as Syrian government officials, Defendant Ziglar removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Ziglar removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Ziglar failed to consider the provisions of Article 3 of CAT, as required by 8 C.R.F. §235.8(b)(4), in making the decision to remove Mr. Arar to Syria. Defendant Ziglar is sued in his individual capacity.

18. Defendant J. SCOTT BLACKMAN was Regional Director of the Immigration and Naturalization Services for the Eastern District when the unlawful actions complained of herein took place. In this capacity, Defendant was responsible for ensur-

ing that proper consideration was given to Article 3 of CAT as required by 8 C.R.F. §235.8(b)(4). Conspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, McElroy, Mueller, and others, as well as Syrian government officials, Defendant Blackman removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Blackman removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Blackman failed to properly consider the provisions of Article 3 of CAT as required by INA regulations in making the decision to remove Mr. Arar to Syria. Defendant Blackman is being sued in his individual capacity.

19. Defendant PAULA CORRIGAN is currently Regional Director of U.S. Immigration and Customs Enforcement for the Eastern Region. In this capacity, Defendant Corrigan is responsible for ensuring that proper consideration is given to Article 3 of CAT as required by 8 C.R.F. §235.8(b)(4) in deciding whether to remove persons from the United States. Defendant Corrigan is being sued in her official capacity.

20. Defendant EDWARD J. McELROY was formerly District Director for the Immigration and Naturalization Services for the New York City District and is presently District Director of U.S. Immi-

gration and Customs Enforcement. In these capacities, Defendant McElroy was, and is responsible for the enforcement of customs and immigration laws in the New York City area. Conspiring with and/or aiding and abetting Defendants Ashcroft, Blackman, Mueller, and others, as well as Syrian government officials, Defendant McElroy removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant McElroy removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant McElroy is sued in his individual capacity.

21. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. In this capacity, Defendant Mueller is responsible for law enforcement operations in the United States, including counter-terrorism operations. Conspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, Blackman, McElroy, and others, as well as Syrian government officials, Defendant Mueller removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Mueller removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Mueller is sued in his individual and official capacities.

22. Defendants JOHN DOE 1-10 are federal law enforcement agents who are employed by the FBI or the INS. Singly or collectively, the Doe Defendants have subjected Mr. Arar to coercive and involuntary custodial interrogation and unreasonably harsh and punitive conditions of detention. The Doe Defendants are being sued in their individual capacities.

STATEMENT OF FACTS

Background

23. The United States Department of State ("State Department") has long regarded Syria as a systematic practitioner of torture. The State Department lists Syria as a state sponsor of terrorism, and, for at least the past ten years, State Department Human Rights Country Reports on Syria have documented that the Syrian government practices torture. The most recent State Department report on Syria issued in March 2003, found, for example, that:

> there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners, detainees, and the London-based Syrian Human Rights Organization reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects

> into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine. . . . Although it occurs in prison, torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, especially while the authorities were attempting to extract a confession or information.

U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2002: Syria* § 1c (Mar. 31, 2003) (Exhibit A attached to this complaint). More recently, President Bush publicly condemned Syria dictators for "a legacy of torture, oppression, misery and ruin." *Remarks by the President at the 20th Anniversary of the National Endowment for Democracy*, United States Chamber of Commerce, Washington D.C., November 6, 2003 (Exhibit B attached to this complaint).

24. On information and belief, since September 11, 2001, the United States has undertaken covert "extraordinary renditions," removing non-U.S. citizens detained in this country and elsewhere and suspected -- reasonably or unreasonably – of terrorist

activity to countries, including Syria, where interrogations under torture are routine. The Federal officials who have adopted, ratified, and/or implemented the "extraordinary renditions" policy know full well that non-U.S. citizens removed under this policy will be interrogated under torture. On information and belief, U.S. officials remove these non-U.S. citizens to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies. Indeed, these officials have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed. *See e.g.*, Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terrorist Suspects*, WASH. POST, March 11, 2002 at A01; Dana Priest and Barton Gellman, *U.S Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01; Sebastian Rotella, *Key to U.S. Case Denies Iraq-Al Qaeda Link*, L.A. TIMES, Feb. 1, 2003, at A01; DeNeen Brown and Dana Priest, *Deported Syrian Suspect Details Torture in Syria*, WASH. POST, Nov. 5, 2003 at A01 (Exhibit C attached to this complaint).

Facts Specific to Plaintiff

25. While on a family vacation in Tunisia in late September 2002, Mr. Arar received an e-mail from his former employer, MathWorks, asking him to

return to Ottawa to consult with a prospective client. On September 25, 2002, Mr. Arar took a flight to Zurich, leaving his wife and two children behind to continue their vacation. After stopping overnight in Zurich, he boarded a flight to Montreal, with a transfer stop at John F. Kennedy Airport, New York ("JFK").

26. At around noon, on September 26, 2002, Mr. Arar debarked at JFK in order to catch his connecting flight. He was not applying to enter the United States at this time. Mr. Arar presented his valid Canadian passport to the immigration inspector on duty. Upon entering Mr. Arar's name into a computer, the inspector instructed Mr. Arar to wait nearby.

27. At about 2 p.m., an immigration officer fingerprinted and photographed Mr. Arar. Shortly thereafter, two uniformed men searched Mr. Arar's wallet, carry-on bags, and luggage, without his consent. Concerned that he would miss his connecting flight, Mr. Arar repeatedly asked to make a telephone call home. His requests were ignored.

28. At around 4 p.m., three or four men arrived in the area where Mr. Arar was being detained. One told Mr. Arar that he wanted to ask him some questions. He assured Mr. Arar that he would be permitted to make his connecting flight after answering the questions. When Mr. Arar asked if he could call a lawyer, he was told that only U.S. citizens were entitled to lawyers.

29. Mr. Arar was then interrogated for approximately five hours by an FBI agent. The agent constantly yelled and swore at Mr. Arar, calling him a "fucking smart guy" with a "fucking selective memory." When Mr. Arar took more than a few seconds to respond to the rapid-fire questions, the agent became angry.

30. Referring to an undisclosed report, the FBI agent interrogating Mr. Arar questioned him about his work and travel in the United States and his relationships with certain individuals including, in particular, Mr. Abdullah Almalki. Mr. Arar explained that Mr. Almalki was a casual acquaintance of his from Ottawa. In 1997, Mr. Almalki had witnessed an apartment rental agreement signed by Mr. Arar. Mr. Arar had last seen Mr. Almalki in October 2001 when they had lunch together.

31. Following the five-hour interrogation, Mr. Arar was questioned for another three hours, this time by an immigration officer who asked Mr. Arar about his membership in or affiliation with various terrorist groups. Mr. Arar vehemently denied any such membership or affiliation. That interrogation ended at about midnight.

32. Mr. Arar then was chained and shackled, put in a vehicle, and driven to another building at JFK, where he was placed in solitary confinement. There was no bed. The lights remained on all night.

Mr. Arar did not sleep at all.

33. The next morning, September 27, 2002, beginning at about 9 a.m., two FBI agents interrogated Mr. Arar for about five hours, asking him about Osama Bin Laden, Iraq, and Palestine, among other things. During the interrogation, the agents constantly yelled and swore at Mr. Arar. Mr. Arar vehemently denied any connection to terrorists or terrorist activity. He repeatedly asked to see a lawyer and to make a telephone call but these requests were ignored.

34. At about 2 p.m., Mr. Arar was taken back to his cell and chained and shackled. He was given a cold McDonalds meal -- his first food in almost two days.

35. Early that evening, an immigration officer came to Mr. Arar's cell. He asked that Mr. Arar "volunteer" to be sent to Syria. Mr. Arar refused, insisting that he be sent to Canada or Switzerland. Angered by this response, the officer stated that the United States government had a "special interest" in Mr. Arar. The officer instructed Mr. Arar to sign a form. Even though Mr. Arar was not allowed to read the form, he signed it, fearing adverse consequences if he did not do so.

36. Later that evening, Mr. Arar was taken from his cell in chains and shackles, put in a vehicle,

and driven from JFK to the Metropolitan Detention Center, a federal detention facility located in Brooklyn, New York ("MDC"). There he was strip searched, given an orange jumpsuit to wear, and placed in solitary confinement in a small cell.

37. Over the next three days, until October 1, 2002, Mr. Arar repeatedly asked to see a lawyer and make a telephone call but these requests were ignored.

38. On October 1, 2002, an MDC official handed Mr. Arar a document stating that the INS had found him inadmissible in the United States because he belonged to an organization designated by the Secretary of State as a Foreign Terrorist Organization, namely, Al Qaeda. Mr. Arar was never given a meaningful opportunity to contest this finding.

39. The same day, Mr. Arar finally was permitted to make a telephone call. He called his mother-in-law in Ottawa, Canada. Since September 26, 2002, Mr. Arar's family had been frantically searching for him. Upon learning that he was detained at MDC, they contacted the Office for Canadian Consular Affairs, which had not been informed by the United States of Mr. Arar's detention. They also retained Ms. Amal Oummih, a New York City immigration attorney.

40. On October 3, 2002, Mr. Arar was visited

by Maureen Girvan from the Canadian Consulate. Mr. Arar showed Ms. Girvan the document finding him inadmissible in the United States. He expressed concern that he might be removed to Syria. Ms. Girvan assured Mr. Arar that could not happen, noting that he was a Canadian citizen.

41. The next day, October 4, 2002, two immigration officers visited Mr. Arar's cell. They asked him to designate in writing the country to which he wished to be removed. Mr. Arar designated Canada.

42. On the evening of Saturday, October 5, 2002, Mr. Arar was visited by Ms. Oummih, who had requested permission from the MDC Warden the day before to meet with Mr. Arar.

43. Late the next evening, Sunday, October 6, 2002, Mr. Arar was taken in chains and shackles to a room where approximately seven INS officials questioned him about his opposition to removal to Syria. Mr. Arar had no prior notice of this interrogation. The only notice given Ms. Oummih was a message left by Defendant McElroy, District Director for Immigration and Naturalization Services for New York City, on her voice mail at work that same evening. Ms. Oummih did not retrieve the message until she arrived at work the next day, Monday morning, October 7, 2002 – long after Mr. Arar's interrogation had ended.

44. Initially, Mr. Arar told his interrogators that he would not answer questions without Ms. Oummih. He reluctantly changed his mind only after being falsely told by his interrogators that Ms. Oummih chose not to attend the session. Mr. Arar told his interrogators that he feared that if he was removed to Syria, he would be tortured. Mr. Arar fully substantiated his claims about the likelihood of being tortured there.

45. The interrogation lasted for six hours, until the very early morning of October 7, 2002. Throughout the interrogation, Mr. Arar was informed that his interrogators were discussing the issue with "Washington D.C." At the conclusion of the interrogation, although no decision was related to Mr. Arar, Mr. Arar was asked to sign what appeared to be a transcript. He declined to do so. Mr. Arar was taken back to his cell in chains and shackles.

46. On the morning of October 7, 2002, Ms. Oummih received a call from an INS official falsely notifying her that Mr. Arar had been taken to the INS's Varick Street offices "for processing" en route to a detention facility in New Jersey. Later that day, she received another call from an INS official falsely notifying her that Mr. Arar had arrived at the New Jersey detention facility. Ms. Oummih was told to call back the next day for the exact location. In fact, Mr. Arar remained at MDC for this entire period.

47. Early on October 8, 2002, at about 4 a.m., Mr. Arar was taken in chains and shackles to a room where two INS officials told him that, based on Mr. Arar's casual acquaintance with certain named individuals, including Mr. Almalki as well as classified information, Defendant Blackman, Regional Director for the Eastern Region of Immigration and Naturalization Services, had decided to remove Mr. Arar to Syria. Without elaboration, Defendant Blackman also stipulated that Mr. Arar's removal to Syria would be consistent with Article 3 of CAT. When Mr. Arar repeated his concerns about torture, the officials present simply stated that the INS is not governed by the "Geneva Convention." They further told Mr. Arar that he was barred from re-entering the United States for five years. (A copy of Defendant Blackman's decision is attached as Exhibit D.)

48. On information and belief, Defendant Thompson, Deputy Attorney General, in his capacity as Acting Attorney General, signed an order on or about October 8, 2002, removing Mr. Arar to Syria.

49. After the interrogation, Mr. Arar was taken from MDC in chains and shackles to a New Jersey airfield, placed on a small private jet, and flown to Washington, D.C. From there, Mr. Arar was flown to Amman, Jordan, where he was turned over to Jordanian authorities on October 9, 2002. On information and belief, Syrian officials refused to accept Mr. Arar directly from the United States.

50. After interrogating and beating him, on or about October 9, 2002, Jordanian authorities turned Mr. Arar over to Syrian authorities. For the next 10 months, until about August 19, 2003, Mr. Arar was detained in the Palestine Branch of Syrian Military Intelligence ("the Palestine Branch").

51. For the first 12 days of his detention in Syria, Mr. Arar was interrogated for 18 hours per day. He was also subjected to physical and psychological torture. Syrian security officers regularly beat him on the palms, hips, and lower back, using a two-inch thick electric cable. They also regularly struck Mr. Arar in the stomach, face, and back of the neck with their fists. The pain was excruciating. Mr. Arar pleaded with them to stop, to no avail.

52. Syrian security officers continued also subjected Mr. Arar to severe psychological torture. They placed him in a room where he could hear the screams of other detainees being tortured. They also repeatedly threatened to place him in the spine-breaking "chair," hang him upside down in a "tyre" and beat him, and give him electric shocks.

53. To minimize the torture, Mr. Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan. In fact, Mr. Arar has never been to Afghanistan and has never been involved in terrorist activity.

54. The questions asked Mr. Arar by Syrian security officers in the Palestine Branch bore a striking similarity to those asked Mr. Arar by FBI agents at JFK in September, 2002. As with the FBI agents, Syrian security officers focused on Mr. Arar's relationship with certain individuals, including in particular, Abdullah Almalki.

55. On information and belief, Defendants provided their Syrian counterparts with a dossier on Mr. Arar, compiled in part from the interrogations at JFK. On information and belief, Defendants suggested matters to be covered by Syrian security officers during Mr. Arar's interrogation. On information and belief, Defendants handed over Mr. Arar to Syrian officials intending that they interrogate him under torture or knowing full well that Mr. Arar would be tortured during those interrogations.

56. On information and belief, Syrian security officers turned over to the Defendants all information coerced from Mr. Arar during his interrogations under torture in Syria. A Syrian official familiar with Mr. Arar's case stated that during Mr. Arar's detention in Syria, the Syrian government shared information gleaned from its interrogation and investigation of Mr. Arar with the United States government. *See* 1/21/04 transcript of CBS's Sixty Minutes II: "His Year In Hell" (Exhibit E attached to this complaint).

57. On information and belief, United States officials removed Mr. Arar to Syria so that Syrian security officers could interrogate him under torture and thereby obtain information for United States counter-terrorism operations. On information and belief, United States officials removed Mr. Arar to Syria under the above "extraordinary rendition" policy.

58. When not being interrogated, Mr. Arar was placed in a tiny underground cell, measuring approximately six feet long, seven feet high, and three feet wide -- hardly enough room to even move. The cell was damp and cold, especially during the winter months. The only light came through a small aperture in the ceiling above -- an aperture which rats ran across and through which cats often urinated onto Mr. Arar.

59. Sanitary conditions were almost non-existent. Mr. Arar was allowed to bathe -- in cold water -- only once a week. He was not permitted to exercise. The food was barely edible. While detained at the Palestine Branch, Mr. Arar lost approximately 40 pounds.

60. The intensive interrogations and severe physical beatings of Mr. Arar ceased on or about October 20, 2002, the same day that the Canadian Embassy officials in Syria inquired about Mr. Arar. The next day, Syrian officials confirmed to Canadian

Embassy officials that Mr. Arar was in their custody. United States officials had refused even to acknowledge to Ms. Oummih, Mr. Arar's immigration attorney, or to Ms. Girvan, the Canadian Consulate staff person who visited Mr. Arar at MDC, that Mr. Arar had been removed to Syria.

61. Between October 23, 2002 and August 14, 2003, Syrian officials allowed Canadian Consular officials to visit Mr. Arar on seven occasions. Prior to each visit, Syrian security officers threatened Mr. Arar with additional torture if he complained about his mistreatment to his visitors. Mr. Arar complied until August 14, 2003. On that date, unable to bear the mistreatment any longer, Mr. Arar yelled out to a Canadian Consular official that he had been tortured and was being kept in a grave.

62. Approximately five days later, Mr. Arar was briefly transferred to the Syrian Military Intelligence's Investigations Branch. Prior to the transfer, Mr. Arar was forced to sign a false confession that he had undertaken terrorist training in Afghanistan. From the Investigation Branch, Mr. Arar was transferred to Sednaya Prison, an overcrowded Syrian prison facility where Mr. Arar remained for about six weeks.

63. On September 28, 2003, Mr. Arar was transferred back to the Palestine Branch. He was held in solitary confinement for a week. During this

time, Mr. Arar was confined in a room where, day and night, he could hear detainees screaming from torture.

64. On October 5, 2003, Mr. Arar was taken to the Syrian Supreme State Security Court. There, a prosecutor told him that he would be released without criminal charges. That same day, Mr. Arar was released into the custody of Canadian Embassy officials in Damascus, Syria.

65. According to Imad Moustapha, Syria's highest-ranking diplomat in Washington, Syrian officials investigated every link and relationship in order to unvocer a connection between Mr. Arar and Al Qaeda, but could find no such connection. Mr. Moustapha said that Syria eventually released Mr. Arar because Syria wanted to make "a gesture of goodwill to Canada," and because Syrian officials "could not substantiate any of the allegations against him." Syria now considers Mr. Arar completely innocent. (*See* Exhibit E).

66. On October 6, 2003, Mr. Arar returned home to Ottawa to his family whom he had not seen in more than a year.

67. Mr. Arar continues to suffer the effects of his ordeal. He still experiences difficulties relating to his wife and two young children. He frequently has nightmares about his treatment in the United

States and Syria. People continue to call him a terrorist. The publicity surrounding his situation has made finding employment particularly difficult. His employment prospects have been further undermined by his inability to travel to the United States.

GENERAL ALLEGATIONS

68. Mr. Arar's treatment, including his torture in Jordan and Syria, was inflicted under color of law and under color of official authority, and/or in conspiracy with or on behalf of those acting under color of official authority.

69. At all relevant times, the Defendants were part of a conspiracy to interrogate Mr. Arar under torture. Other conspirators, including unnamed Jordanian and Syrian officials, planned and effected the aforementioned torture, together with the Defendants named herein.

70. At all relevant times, the Defendants acted in concert with unnamed Jordanian and Syrian officials so as to effect the torture described herein.

71. Defendants are liable for the acts of described herein in that Defendants directed, ordered, confirmed, acquiesced or conspired and/or aided and abetted in bringing them about.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Torture Victim Protection Act: Prohibition Against Torture)

72. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

73. The acts described herein constitute a violation of the right not to be tortured under color of foreign law. Violation of this right is actionable under the Torture Victim Protection Act, 28 U.S.C. § 1350, note.

74. Defendants Ashcroft, Thompson, Ziglar, Blackman, McElroy, Mueller, and others, are liable for said conduct in that acting in concert with unnamed Jordanian and Syrian officials they conspired in and/or aided and abetted in bringing about the violations of Plaintiff's right not to be tortured under color of Syrian law.

75. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

SECOND CLAIM FOR RELIEF

(Fifth Amendment: Substantive Due Process - Torture)

76. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

77. Defendants agreed amongst themselves and with unnamed Syrian officials to deport Plaintiff to Syria for the purpose coercive interrogation and torture in that country. In furtherance of their agreements, Defendants detained Plaintiff, denied him access to counsel, the courts, and his consulate, and used government resources to transfer Plaintiff to Syrian custody. By conspiring to consign and transport Plaintiff to Syria for the purposes of interrogation and torture there, Defendants, acting under color of law and their authority as federal officers, intentionally subjected Plaintiff to torture and coercive interrogation, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

78. At the time they seized Plaintiff and subsequently transported him to Syria, Defendants were fully aware of the policy of state-sponsored torture in that country and of Syria's plan to interrogate Plaintiff under torture, and knowingly gave substantial assistance to the Syrian government's plan by de-

taining Plaintiff, denying him access to counsel, the courts, and his consulate, and by using government resources to transfer him to Syria. By aiding and abetting Syria's plan to interrogate Plaintiff under torture, Defendants, acting under color of law and their authority as federal officers, knowingly or recklessly subjected Plaintiff to torture and coercive interrogation, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

79. By arbitrarily detaining Plaintiff and transporting him to Syria for interrogation and torture there, Defendants entered into a special relationship with Plaintiff and then placed Plaintiff in a position more vulnerable to danger than he would have been had Defendants not acted as they did. By doing so, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly subjected Plaintiff to torture and coercive interrogation, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

80. The harms that Plaintiff suffered were foreseeable to Defendants.

81. Plaintiff has no effective means of enforcing his Fifth Amendment due process rights other than by seeking declaratory and other relief from the Court.

82. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

THIRD CLAIM FOR RELIEF

(Fifth Amendment: Substantive Due Process - Detention)

83. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

84. Defendants agreed amongst themselves and with Syrian officials to deport Plaintiff to Syria for the purpose arbitrary, indefinite detention in that country. In furtherance of their agreements, Defendants detained Plaintiff, denied him access to counsel, the courts, and his consulate, and used their own resources to transfer Plaintiff to Syrian custody. By conspiring to consign and transport Plaintiff to Syria for the purposes of arbitrary, indefinite detention there, Defendants, acting under color of law and their authority as federal officers, intentionally subjected Plaintiff to arbitrary, indefinite detention, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

85. At the time they seized Plaintiff and subsequently transported him to Syria, Defendants were fully aware of Syria's practice of arbitrary and in-

definite detention without trial and of Syria's plan to arbitrarily detain Plaintiff without trial there, and knowingly gave substantial assistance to the Syrian government's plan by detaining Plaintiff denying him access to counsel, the courts, and his consulate and by using government resources to transport him to Syria. By aiding and abetting Syria's plan to arbitrarily detain Plaintiff, Defendants, acting under color of law and their authority as federal officers, knowingly or recklessly subjected Plaintiff to arbitrary detention without trial, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

86. By arbitrarily detaining Plaintiff and rendering him to Syria for arbitrary and indefinite detention without trial there, Defendants entered into a special relationship with Plaintiff and placed him in a position more vulnerable to danger than he would have been had Defendants not acted as they did. By doing so, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly subjected Plaintiff to arbitrary, indefinite detention without trial, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

87. The harms that Plaintiff suffered was foreseeable to the Defendants.

88. Plaintiff has no effective means of enforc-

ing his Fifth Amendment due process rights other than by seeking declaratory and other relief from the Court.

89. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

FOURTH CLAIM FOR RELIEF
(Fifth Amendment: Substantive Due Process – Domestic Detention)

90. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

91. By subjecting Plaintiff to outrageous, excessive, cruel, inhuman, and degrading conditions of confinement, Defendants, acting under color of law and their au thority as federal officers, intentionally or recklessly subjected Plaintiff to arbitrary detention, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

92. By subjecting Plaintiff to coercive and involuntary custodial interrogation designed to overcome his will and compel incriminating statements from him, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly violated Plaintiff's right to due process

under the Fifth Amendment to the Constitution.

93. By subjecting Plaintiff to a "communications blackout" and other measures while in custody that interfered with his access to lawyers and the courts, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly violated Plaintiff's right to obtain access to legal counsel and to petition the courts for redress of his grievances, and his right to due process under the Fifth Amendment to the Constitution.

94. Plaintiff has no effective means of enforcing his Fifth Amendment due process rights other than by seeking declaratory and other relief from the Court.

95. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

PRAYER FOR RELIEF

WHEREFORE, Mr. Arar respectfully requests that the Court enter a judgment:

1. Declaring that the actions of Defendants, their agents, and their employees, are illegal and violate Mr. Arar's constitutional, civil, and international human rights;

2. Awarding compensatory and punitive damages to Mr. Arar in an amount that is fair, just, and reasonable;

3. Awarding reasonable attorneys' fees and costs of suit, and

4. Ordering such further relief as the Court considers just and proper.

Dated: New York, New York
January 22, 2004

Respectfully submitted,
Center for Constitutional Rights

By: [Signature]
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EXHIBIT A

U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2002: Syria* § 1c (Mar. 31, 2003)

Syria
Country Reports on Human Rights Practices
Bureau of Democracy, Human Rights, and Labor
2002
March 31, 2003

Syria is a republic under a military regime with virtually absolute authority in the hands of the President. Despite the existence of some institutions of democratic government, the President, with counsel from his ministers, high-ranking members of the ruling Ba'th Party, and a relatively small circle of security advisers, makes key decisions regarding foreign policy, national security, internal politics, and the economy. All three branches of government are influenced to varying degrees by leaders of the Ba'th Party, whose primacy in state institutions and the Parliament is mandated by the Constitution. The Parliament may not initiate laws but only assesses and at times modifies those proposed by the executive branch. The Constitution provides for an independent judiciary, but security courts are subject to political influence. The regular courts generally display independence, although political connections and bribery may influence verdicts.

The powerful role of the security services in government, which extends beyond strictly security matters, stems in part from the state of emergency that has been in place almost continuously since 1963. The Government justifies martial law because of the state of war with Israel and past threats from terrorist groups. Syrian Military Intelligence and Air Force Intelligence are military agencies, while General Security, State Security, and Political Security come under the purview of the Ministry of Interior. The branches of the security services operated independently of each other and outside the legal system. The security forces were under effective government control. Their members committed serious human rights abuses.

The population of the country was approximately 17 million. The economy was based on commerce, agriculture, oil production, and government services. Economic growth was hampered by the still dominant state role in the economy, a complex bureaucracy, overarching security concerns, endemic corruption, currency restrictions, a lack of modern financial services and communications, and a weak legal system.

The Government's human rights record remained poor, and it continued to commit serious abuses. Citizens did not have the right to change their government. The Government used its vast powers to prevent any organized political opposition, and there

have been very few antigovernment manifestations. Continuing serious abuses included the use of torture in detention; poor prison conditions; arbitrary arrest and detention; prolonged detention without trial; fundamentally unfair trials in the security courts; an inefficient judiciary that suffered from corruption and, at times, political influence; and infringement on privacy rights. The Government significantly restricted freedom of speech and of the press. Freedom of assembly does not exist under the law and the Government restricted freedom of association. The Government did not officially allow independent domestic human rights groups to exist; however, it permitted periodic meetings of unlicensed civil society forums throughout the year. The Government placed some limits on freedom of religion and freedom of movement. Proselytizing by groups it considered Zionist was not tolerated, and proselytizing in general was not encouraged. Violence and societal discrimination against women were problems. The Government discriminated against the stateless Kurdish minority, suppressed worker rights, and tolerated child labor in some instances.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom From:

a. Arbitrary or Unlawful Deprivation of Life

There were no reports of political killings or other killings committed by government forces during the year.

In November 2000, a number of armed clashes occurred between Bedouin shepherds and Druze residents of Suwayda Province that required government military intervention to stop. Local press reported that between 15 and 20 Druze, Bedouin, and security forces personnel were killed (see Section 5). Some members of the security forces committed a number of serious human rights abuses. In its Annual Report, the Syrian Human Rights Commission stated that in 2001 and during the year three individuals died in detention (see Section 1.c.). The Government has not investigated previous deaths in detention.

b. Disappearance

There were no new confirmed reports of politically motivated disappearances during the year. Because security forces often did not provide detainees' families with information regarding their welfare or location, many persons who disappeared in past years are believed to be in long-term detention or to have died in detention. The number of new disappearances has declined in recent years, although this may be due to the Government's success in deterring opposition political activity rather than a loosening of the criteria for detention (see Section 1.d.).

Despite inquiries by international human rights organizations and foreign governments, the Government offered little new information on the welfare and whereabouts of persons who have been held incommunicado for years or about whom little is known other than the approximate date of their detention. The Government claimed that it has released all Palestinians and Jordanian and Lebanese citizens who reportedly were abducted from Lebanon during and after Lebanon's civil war. However, the Government's claim was disputed by Lebanese nongovernmental organizations (NGOs), Amnesty International (AI), and other international NGOs, as well as some family members of those who allegedly remain in the country's prisons (see Section 1.d.).

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

Despite the existence of constitutional provisions and several Penal Code penalties for abusers, there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners, detainees, and the London-based Syrian Human Rights Organization reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a

chair that bends backwards to asphyxiate the victim or fracture the victim's spine. In 2001 AI published a report claiming that authorities at Tadmur Prison regularly tortured prisoners, or forced prisoners to torture each other. Although it occurs in prisons, torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, especially while the authorities were attempting to extract a confession or information.

The Government has denied that it uses torture and claims that it would prosecute anyone believed guilty of using excessive force or physical abuse. Past victims of torture have identified the officials who tortured them, up to the level of brigadier general. If allegations of excessive force or physical abuse are to be made in court, the plaintiff is required to initiate his own civil suit against the alleged abuser. Courts did not order medical examinations for defendants who claimed that they were tortured (see Section 1.e.). There were no substantiated allegations of torture during the year.

In 2000 the Government apprehended Raed Hijazi, accused of a terrorist plot targeting American and Israeli tourists in Jordan during the millennium celebrations, and sent him to Jordan to stand trial. According to media accounts of the trial, doctors for both the defense and the prosecution testified that Hijazi's body showed signs of having been beaten,

but witnesses, including Hijazi, made contradictory and inconclusive claims regarding whether the alleged abuse occurred while he was in Jordanian or Syrian custody. The Jordanian court has rejected the allegations that Hijazi's confession was coerced. In February the Jordanian authorities sentenced Hijazi to death. He has appealed the decision but remained in custody at year's end pending a decision.

Prison conditions generally were poor and did not meet international standards for health and sanitation. However, there were separate facilities for men, women, and children. Pre-trial detainees, particularly those held for political or security reasons, were usually held separately from convicted prisoners. Facilities for political or national security prisoners generally were worse than those for common criminals.

At some prisons, authorities allowed visitation, but in other prisons, security officials demanded bribes from family members who wished to visit incarcerated relatives. Overcrowding and the denial of food occurred at several prisons. According to Human Rights Watch, prisoners and detainees were held without adequate medical care, and some prisoners with significant health problems reportedly were denied medical treatment. Some former detainees have reported that the Government prohibited reading materials, even the Koran, for political prisoners.

In 2001 the London-based Syrian Human Rights Commission reported that three detainees died in prison and that their remains bore evidence of torture and extreme medical neglect.

The Government did not permit independent monitoring of prison or detention center conditions, although diplomatic or consular officials were granted access in high profile cases.

d. Arbitrary Arrest, Detention, or Exile

Arbitrary arrest and detention were significant problems. The Emergency Law, which authorizes the Government to conduct preventive arrests, overrides Penal Code provisions against arbitrary arrest and detention, including the need to obtain warrants. Officials contend that the Emergency Law is applied only in narrowly defined cases, and in January 2001, the regional press reported that the Information Minister claimed that the authorities had frozen "martial law." Nonetheless, in cases involving political or national security offenses, arrests often were carried out in secret. Suspects may be detained incommunicado for prolonged periods without charge or trial and are denied the right to a judicial determination regarding the pretrial detention. Some of these practices were prohibited by the state of emergency, but the authorities were not held to these strictures. Additionally, those suspected of political or national security offenses may be arrested and

prosecuted under ambiguous and broad articles of the Penal Code, and subsequently tried in either the criminal or security courts, as occurred with the 10 civil society activists arrested in August and September 2001. During the year, two were tried and sentenced in criminal court and eight were tried and sentenced in secrecy in the Supreme State Security Court under the Emergency Law's authority. All were initially held incommunicado and in solitary confinement, though the criminal court trials and initial sessions of one of the other trials were open to the press and diplomats.

The Government detained relatives of detainees or of fugitives in order to obtain confessions or the fugitive's surrender (see Section 1.f.). The Government also threatened families or friends of detainees, at times with the threat of expulsion, to ensure their silence, to force them to disavow publicly their relatives, or to force detainees into compliance.

Defendants in civil and criminal trials had the right to bail hearings and the possible release from detention on their own recognizance. Bail was not allowed for those accused of state security offenses. Unlike defendants in regular criminal and civil cases, security detainees did not have access to lawyers prior to or during questioning.

Detainees had no legal redress for false arrest. Security forces often did not provide detainees' families

with information regarding their welfare or location while in detention. Consequently many persons who have disappeared in past years are believed to be in long-term detention without charge or possibly to have died in detention (see Section 1.b.). Many detainees brought to trial have been held incommunicado for years, and their trials often have been unfair (see Section 1.e.). In the past, there were reliable reports that the Government did not notify foreign governments when their citizens were arrested or detained.

Pretrial detention may be lengthy, even in cases not involving political or national security offenses. The criminal justice system is backlogged. Many criminal suspects were held in pretrial detention for months and may have their trials extended for additional months. Lengthy pretrial detention and drawn-out court proceedings are caused by a shortage of available courts and the absence of legal provisions for a speedy trial or plea bargaining (see Section 1.e.).

In May 2001, the Government released prominent political prisoner Nizar Nayyuf, who had been imprisoned since 1992 for founding an unlawful organization, disseminating false information, and undermining the Government; he immediately was placed under house arrest. In June 2001, the Government allowed Nayyuf to leave the country for medical treatment. In September 2001, Nayyuf was summoned to appear before an investigating court to re-

spond to a complaint against him filed by Ba'th party lawyers for "inciting confessionalism, attempting to illegally change the Constitution, and publishing false reports abroad." Nayyuf had not returned by year's end. The NGO Reporters Without Borders (RSF) claimed that the Government harassed and intimidated members of Nayyuf's family following the issuance of the summons. The Government reportedly fired two members of his immediate family from their jobs. The municipality threatened to expel members of Nayyuf's family if they did not disavow publicly his statements (see Section 4).

In August 2001, the Government arrested independent Member of Parliament Ma'mun Humsi during his hunger strike protesting official corruption, the excessive powers of the security forces, and the continuation of the Emergency Law. In a departure from previous practice, the Interior Ministry issued a statement justifying Humsi's arrest under Penal Code articles dealing with crimes against state security (see Section 3). In September 2001, the Government detained independent Member of Parliament Riad Seif shortly after Seif reactivated his unlicensed political discussion forum. The principal charge against both individuals was attempting to illegally change the Constitution (see Section 3). In March and April, Humsi and Seif were convicted in criminal court of attempting to change the Constitution illegally and each sentenced to 5 years in prison (see Section 1.e.).

In September 2001, the Government detained prominent political activist and longtime detainee Riad al-Turk for violations of Penal Code articles dealing with crimes against state security, after al-Turk made derogatory public comments about late President Hafiz al-Asad. In June Al-Turk was convicted in closed Supreme State Security Court of attempting to change the Constitution illegally and sentenced to 30 months in prison (see Section 1.e.). On November 16, President Asad ordered Al-Turk released on humanitarian grounds.

In September 2001, the Government detained seven additional prominent human rights activists who had issued statements in support of Humsi, Seif, and al-Turk. The Government reportedly charged the seven activists under Penal Code articles dealing with crimes against state security (see Section 2.a.). Although all of the 10 civil society activists were arrested for Penal Code violations, only Humsi and Seif were tried in criminal court while all the others were tried in the Supreme State Security Court under the authority of the Emergency Law (see Section 1.e.).

At year's end, the leaders of the Turkomen who reportedly were detained without charge in 1996, remained in detention.

In 1999 and 2000, there were reports of arrests of hundreds of Syrian and Palestinian Islamists. Most of those arrested reportedly were released after sign-

ing an agreement not to participate in political activities; however, some may remain in detention. At year's end, there were no new reports on those detained. There were no credible reports that the Government arrested Islamists on political charges during the year.

There were no reports of the arrests of minors on political charges during the year.

In January 2001, the Jordanian press reported the release from Syrian jails of six Jordanian prisoners of Palestinian origin, who had been imprisoned for membership in Palestinian organizations. Between May and July 2000, there were unconfirmed reports that a large number of Jordanian prisoners were released. However, according to AI, only three of the Jordanians released in 2000 had been held for political reasons.

In March 2001, Syrian intelligence officials in Lebanon arrested three Syrian Druze men who had converted to Christianity, possibly on suspicion of membership in Jehovah's Witnesses. The men were released after 2 months.

In July and August 2001, there were unconfirmed regional press reports that approximately 500 political detainees were moved from Tadmur Prison to Saydnaya Prison in preparation for the eventual closing of Tadmur. In 2000 the Government also

closed the Mazzah prison, which reportedly held numerous prisoners and detainees. In August, AI reported the release of Communist Action Party member Haytham Na'al after 27 years in prison.

In 2000 the Government declared an amnesty for 600 political prisoners and detainees and a general pardon for some nonpolitical prisoners. The highly publicized amnesty was the first time the Government acknowledged detention of persons for political reasons. There were no credible reports of transfers of political prisoners during the year.

Most of those arrested during crackdowns in the 1980s, in response to violent attacks by the Muslim Brotherhood, have been released; however, some may remain in prolonged detention without charge. Some union and professional association officials detained in 1980 may remain in detention (see Sections 2.b. and 6.a.).

The number of remaining political detainees is unknown. In June 2000, prior to the November 2000 prison amnesty, Amnesty International estimated that there were approximately 1,500 political detainees; many of the detainees reportedly were suspected supporters of the Muslim Brotherhood and the pro-Iraqi wing of the Ba'th party. There also were Jordanian, Lebanese, and Palestinian political detainees. Estimates of detainees are difficult to confirm because the Government does not verify publicly the number of detentions without charge, the release of

detainees or amnestied prisoners, or whether detainees subsequently are sentenced to prison (see Section 1.e.).

Former prisoners were subject to a so-called "rights ban," which begins from the day of sentencing and lasts until 7 years after the expiration of the sentence, in the case of felony convictions. Persons subject to this ban are not allowed to vote, run for office, or work in the public sector; they often also are denied passports.

The Constitution prohibits exile; however, the Government has exiled citizens in the past. The Government refused to reissue the passports of citizens who fled the country in the 1980s; such citizens consequently are unable to return to the country.

There were no known instances of forced exile during the year.

e. Denial of Fair Public Trial

The Constitution provides for an independent judiciary, but the two exceptional courts dealing with cases of alleged national security violations were not independent of executive branch control. The regular court system generally displayed considerable independence in civil cases, although political connections and bribery at times influenced verdicts.

The judicial system is composed of the civil and criminal courts, military courts, security courts, and religious courts, which adjudicate matters of personal status such as divorce and inheritance (see Section 5). The Court of Cassation is the highest court of appeal. The Supreme Constitutional Court is empowered to rule on the constitutionality of laws and decrees; it does not hear appeals.

Civil and criminal courts are organized under the Ministry of Justice. Defendants before these courts were entitled to the legal representation of their choice; the courts appoint lawyers for indigents. Defendants were presumed innocent; they are allowed to present evidence and to confront their accusers. Trials are public, except for those involving juveniles or sex offenses. Defendants may appeal their verdicts to a provincial appeals court and ultimately to the Court of Cassation. Such appeals are difficult to win because the courts do not provide verbatim transcripts of cases--only summaries prepared by the presiding judges. There are no juries.

Military courts have the authority to try civilians as well as military personnel. A military prosecutor decides the venue for a civilian defendant. There have been reports that the Government operates military field courts in locations outside established courtrooms. Such courts reportedly observed fewer of the formal procedures of regular military courts.

In September a military court charged lawyer and Chairman of the Syrian Human Rights Committee, Haytham al-Maleh, and three of his associates in abstentia for spreading false news outside of the country, belonging to a political association of an international nature without government approval, and publishing material that causes sectarian friction.

The two security courts are the Supreme State Security Court (SSSC), which tries political and national security cases, and the Economic Security Court (ESC), which tried cases involving financial crimes. Both courts operated under the state of emergency, not ordinary law, and did not observe constitutional provisions safeguarding defendants' rights.
Charges against defendants in the SSSC often were vague. Many defendants appeared to be tried for exercising normal political rights, such as free speech. For example, the Emergency Law authorizes the prosecution of anyone "opposing the goals of the revolution," "shaking the confidence of the masses in the aims of the revolution," or attempting to "change the economic or social structure of the State." Nonetheless, the Government contends that the SSSC tries only persons who have sought to use violence against the State.

Under SSSC procedures, defendants are not present during the preliminary or investigative phase of the trial, during which the prosecutor presents evidence.

Trials usually were closed to the public. Lawyers were not ensured access to their clients before the trial and were excluded from the court during their client's initial interrogation by the prosecutor. Lawyers submitted written defense pleas rather than oral presentations. The State's case often was based on confessions, and defendants have not been allowed to argue in court that their confessions were coerced. There was no known instance in which the court ordered a medical examination for a defendant who claimed that he was tortured. The SSSC reportedly has acquitted some defendants, but the Government did not provide any statistics regarding the conviction rate. Defendants do not have the right to appeal verdicts, but sentences are reviewed by the Minister of Interior, who may ratify, nullify, or alter them. The President also may intervene in the review process.

Accurate information regarding the number of cases heard by the SSSC was difficult to obtain, although hundreds of cases were believed to pass through the court annually. Many reportedly involved charges relating to membership in various banned political groups, including the Party of Communist Action and the pro-Iraqi wing of the Ba'th Party. Sentences as long as 15 years have been imposed in the past. Since 1997 there have been no visits by human rights NGOs to attend sessions of the SSSC (see Section 4).

The 10 civil society activists arrested in August and September 2001 were tried in criminal and state security courts. In February independent Parliamentarians Mamun Humsi and Riyad Seif were tried in criminal court proceedings that were open, for the first time, to foreign observers and the press. AI noted that their parliamentary immunity was lifted without due attention to the procedures established by law. Humsi and Seif were denied confidential access to their lawyers throughout their detention and observers noted a number of procedural irregularities during the trials. In March and April, respectively, the Government sentenced Humsi and Seif to 5 years' imprisonment each for attempting to change the constitution illegally and inciting racial and sectarian strife.

During the year, the eight other civil society activists arrested in August and September 2001 were tried in secrecy by the Supreme State Security Court under authority of the Emergency Law. Only the first session of former political prisoner Riad al-Turk's trial was open to the media and international observers. Al-Turk was sentenced to 30 months for attempting to change the Constitution illegally but was released by presidential decree in November (see Section 1.d.). Lawyer and member of Seif and Humsi's defense team, Habib Issa, and physician and cofounder of the Syrian Human Rights Society, Walid al-Buni, were each sentenced to 5 years in prison for attempting to change the Constitution illegally. Economist and re-

gime critic Arif Dalila was sentenced to up to 10 years for the same offense. Civil society activist Habib Saleh received a 3-year sentence for opposing the objectives of the revolution and inciting ethnic and sectarian strife. Hassan Sa'dun, physician and member of the Committee for the Defense of Human Rights, Kamal al-Labwani, and engineer Fawaz Tillu were sentenced respectively to 2, 3, and 5 years in prison for instigating armed mutiny against the Government (see Sections 1.d., 2.a., and 3).

The ESC tried persons for alleged violations of foreign exchange laws and other economic crimes. The prosecution of economic crimes was not applied uniformly. Like the SSSC, the ESC did not ensure due process for defendants. Defendants were not provided adequate access to lawyers to prepare their defenses, and the State's case usually was based on confessions. High-ranking government officials may influence verdicts. Those convicted of the most serious economic crimes do not have the right of appeal, but those convicted of lesser crimes may appeal to the Court of Cassation. The Economic Penal Code allowed defendants in economic courts to be released on bail. The bail provision does not extend to those accused of forgery, counterfeiting, or auto theft; however, the amendment is intended to provide relief for those accused of other economic crimes, many of whom have been in pretrial detention for long periods of time. These amendments to the Economic Penal Code also limit the categories of cases that can be

tried in the ESC. In November 2001, the Government approved a general pardon for nonpolitical prisoners and a reduction of sentences by one-third for persons convicted of economic crimes, with a provision to commute sentences entirely for persons who return embezzled funds to investors within 1 year of the law's effective date.

At least two persons arrested when late President Asad took power in 1970 may remain in prison, despite the expiration of one of the prisoners' sentences.

The Government in the past denied that it held political prisoners, arguing that although the aims of some prisoners may be political, their activities, including subversion, were criminal. The official media reported that the 600 beneficiaries of the November 2000 amnesty were political prisoners and detainees; this reportedly was the first time that the Government acknowledged that it held persons for political reasons. Nonetheless, the Emergency Law and the Penal Code are so broad and vague, and the Government's power so sweeping, that many persons were convicted and are in prison for the mere expression of political opposition to the Government. The Government's sentencing of 10 prominent civil society and human rights activists for "crimes of state security" represented a retreat from recent modest attempts at political liberalization (see Sections 1.d. and 2.a.).

The exact number of political prisoners was unknown. Unconfirmed regional press reports estimated the total number of political prisoners at between 400 and 600. In April 2001, a domestic human rights organization estimated the number to be nearly 800, including approximately 130 belonging to the Islamic Liberation Party, 250 members and activists associated with the Muslim Brotherhood, 150 members of the pro-Iraq wing of the Ba'th Party, and 14 Communists. In its report for the year, the Syrian Human Rights Committee estimated that there were approximately 4,000 political prisoners still in detention.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

Although laws prohibit such actions, the Emergency Law authorizes the security services to enter homes and conduct searches without warrants if security matters, very broadly defined, are involved. The security services selectively monitored telephone conversations and fax transmissions. The Government opened mail destined for both citizens and foreign residents. It also prevented the delivery of human rights materials (see Section 2.a.).

The Government continued its practice of threatening or detaining the relatives of detainees or of fugitives in order to obtain confessions, minimize outside interference, or prompt the fugitive's surrender (see

Section 1.d.). There have been reports that security personnel force prisoners to watch relatives being tortured in order to extract confessions. According to AI, security forces also detained family members of suspected oppositionists (see Section 1.d.).

In the past, the Government and the Ba'th Party monitored and attempted to restrict some citizens' visits to foreign embassies and cultural centers.

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Constitution provides for the right to express opinions freely in speech and in writing, but the Government restricted these rights significantly in practice. The Government strictly controlled the dissemination of information and permitted little written or oral criticism of President Asad, his family, the Ba'th Party, the military, or the legitimacy of the Government. The Government also did not permit sectarian issues to be raised. Detention and beatings for individual expressions of opinion that violate these unwritten rules at times occurred. The Government also threatened activists to attempt to control their behavior. In January 2001, novelist Nabil Sulayman was attacked outside his apartment in Latakia. Some observers believed the attack was a message from the Government to civil society advocates to moderate their pressure for reform. The at-

tack came just after Information Minister Adnan 'Umran publicly criticized civil society advocates.

In a speech in February 2001, President Asad explicitly criticized civil society advocates as elites "from outside" who wrongly claim to speak for the majority and said that openness would only be tolerated as long as it "does not threaten the stability of the homeland or the course of development." The Government required all social, political, and cultural forums and clubs to obtain advance official approval for meetings, to obtain approval for lecturers and lecture topics, and to submit lists of all attendees (see Section 2.b.). During the year, several unapproved forums met, which while technically unhindered, were under government observation.

In January 2001, the regional press reported on a "Group of 1,000" intellectuals that issued a statement calling for more comprehensive reforms than those demanded by a group of 99 intellectuals in September 2000. The group's statement called for lifting martial law, ending the state of emergency that has been in effect since 1963, releasing political prisoners, and expanding civil liberties in accordance with the provisions of the Constitution. Although the Government did not take action immediately against any of the signatories, in September 2001 it detained seven prominent human rights figures, reportedly charging them under articles in the Penal Code dealing with crimes against state security. A number of

those detained were signatories of the "Group of 1,000" petition. The Government tried the 10 civil society and human rights activists in criminal and state security courts and sentenced them to 2 to 10 years in prison for crimes against state security (see Section 1.e.). In December 2000, a local human rights organization published an open letter in a Lebanese newspaper calling for the closure of the notorious Tadmur Prison.

The Emergency Law and Penal Code articles dealing with crimes against state security allow the Government broad discretion in determining what constitutes illegal expression. The Emergency Law prohibits the publication of "false information", which opposes "the goals of the revolution" (see Section 1.e.). Penal Code articles prohibit "attempting to illegally change the Constitution," "preventing authorities from executing their responsibilities," and "acts or speech inciting confessionalism." In August 2001, the Government amended the Press Law to permit the reestablishment of publications that were circulated prior to 1963 and established a framework in which the National Front Parties, as well as other approved private individuals and organizations, would be permitted to publish their own newspapers. However, the same amendments also stipulated imprisonment and stiff financial penalties as part of broad, vague provisions prohibiting the publication of "inaccurate" information, particularly if it "causes public unrest, disturbs international relations, vio-

lates the dignity of the state or national unity, affects the morale of the armed forces, or inflicts harm on the national economy and the safety of the monetary system." Persons found guilty of publishing such information were subject to prison terms ranging from 1 to 3 years and fines ranging from $10,000 to $20,000 (500,000 to 1 million Syrian pounds). The amendments also imposed strict punishments on reporters who do not reveal their government sources in response to government requests. Critics claimed that the amendment would increase self-censorship by journalists, and that it strengthened, rather than relaxed, restrictions on the press.

The Government imprisoned journalists for failing to observe press restrictions. Official media reported that journalist Ibrahim Hamidi was arrested on December 23 on charges of "publishing unfounded news," a violation of Article 51 of the 2001 Publication Law. Although the announcement did not specify the violation, it was believed to be a December 20 article in the London-based al-Hayat discussing the Government's contingency planning for possible hostilities in Iraq. At year's end, Hamidi still was detained by authorities and denied contact with his family. State security services were known to threaten local journalists, including with the removal of credentials, for articles printed outside the country. In April and May the Government refused to renew the press credentials and/or residency permits of several journalists for reasons including "ill-

intentioned reporting" and "violating the rules for accrediting correspondents and the tradition of the profession of journalism."
The Ministry of Information and the Ministry of Culture and National Guidance censored domestic and imported foreign press. They usually prevent the publication or distribution of any material deemed threatening or embarrassing by the security services to high levels of the Government. Censorship usually was stricter for materials in Arabic. Commonly censored subjects included: The Government's human rights record; Islamic fundamentalism; allegations of official involvement in drug trafficking; aspects of the Government's role in Lebanon; graphic descriptions of sexual activity; material unfavorable to the Arab cause in the Middle East conflict; and material that was offensive to any of the country's religious groups. In addition most journalists and writers practiced self-censorship to avoid provoking a negative government reaction.

There were several new private publications in 2000 and 2001, but only one appeared during this year. In January 2001, the Government permitted publication of the National Progressive Front's (NPF) Communist Party newspaper, The People's Voice. It became the first private paper distributed openly since 1963. In February 2001, the Government permitted publication of the NPF's Union Socialist Party's private newspaper, The Unionist. Also in February 2001, the Government permitted the publication of a

private satirical weekly newspaper, The Lamplighter, which criticized politically nonsensitive instances of government waste and corruption. In June 2001, the Government permitted the publication of the private weekly newspaper The Economist, which was critical of the performance of the Government.
In his July 2000 inaugural speech, President Bashar Al-Asad emphasized the principle of media transparency. Since July 2000, both the print and electronic media at times have been critical of Ba'th Party and government performance and have reported openly on a range of social and economic issues. While this relaxation of censorship did not extend to domestic politics or foreign policy issues, it was a notable departure from past practice. Some Damascus-based correspondents for regional Arab media also were able to file reports on internal political issues, such as rumored governmental changes, new political discussion groups, and the possible introduction of new parties to the Ba'th Party-dominated National Progressive Front.

The media continued to broaden somewhat their reporting on regional developments, including the Middle East peace process. The media covered some peace process events factually, but other events were reported selectively to support official views. The government-controlled press increased its coverage of official corruption and governmental inefficiency. A few privately owned newspapers published during

the year; foreign-owned, foreign-published newspapers continued to circulate relatively freely.

The Government or the Ba'th Party owned and operated the radio and television companies and most of the newspaper publishing houses. The Ministry of Information closely monitored radio and television news programs to ensure adherence to the government line. The Government did not interfere with broadcasts from abroad. Satellite dishes have proliferated throughout all regions and in neighborhoods of all social and economic categories, and in 2001 the Minister of Economy and Foreign Trade authorized private sector importers to import satellite receivers and visual intercommunication systems.

The Ministry of Culture and National Guidance censored fiction and nonfiction works, including films. It also approved which films may or may not be shown at the cultural centers operated by foreign embassies. The Government prohibited the publication of books and other materials in Kurdish; however, there were credible reports that Kurdish language materials were available in the country (see Section 5).

In 2000 cellular telephone service was introduced although its high cost severely limited the number of subscribers. Internet access and access to e-mail was limited but growing. The Government blocked access to selected Internet sites that contained information

deemed politically sensitive or pornographic in nature. The Government also consistently blocked citizens' access to servers that provide free e-mail services. The Government has disrupted telephone services to the offices and residences of several foreign diplomats, allegedly because the lines were used to access Internet providers outside the country.

The Government restricted academic freedom. Public school teachers were not permitted to express ideas contrary to government policy, although authorities allowed somewhat greater freedom of expression at the university level.

b. Freedom of Peaceful Assembly and Association

Freedom of assembly does not exist under the law. Citizens may not hold demonstrations unless they obtain permission from the Ministry of Interior. Most public demonstrations were organized by the Government or the Ba'th Party. The Government selectively permitted some demonstrations, usually for political reasons. The Government applied the restrictions on public assembly in Palestinian refugee camps, where controlled demonstrations have been allowed.

During the year there continued to be numerous demonstrations, most of which were permitted or organized by the Government, and some of which

were directed against diplomatic missions and international agencies in reaction to the Israeli Government's use of force against Palestinians in Israel, the West Bank, and Gaza.

In 2000 there were large demonstrations in Suwayda province following violent clashes between Bedouin shepherds and Druze residents of the province (see Sections 1.a. and 5).

The Government restricted freedom of association. During the year, it required private associations to register with authorities and denied several such requests, presumably on political grounds. The Government usually granted registration to groups not engaged in political or other activities deemed sensitive. The Government required political forums and discussion groups to obtain prior approval to hold lectures and seminars and to submit lists of all attendees. Despite these restrictions, during the year several domestic human rights and civil society groups held meetings without registering with the Government or obtaining prior approval for the meetings.

The authorities did not allow the establishment of independent political parties (see Section 3).

The Government sentenced 10 human rights activists who had called for the expansion of civil liberties and organized public dialogue to lengthy prison stays

for committing crimes against state security (see Sections 1.d. and 2.a.).

In 1980 the Government dissolved, and then reconstituted under its control, the executive boards of professional associations after some members staged a national strike and advocated an end to the state of emergency. The associations have not been independent since that time and generally are led by members of the Ba'th Party, although nonparty members may serve on their executive boards. At year's end, there was no new information on whether any persons detained in 1980 crackdowns on union and professional association officials remained in detention (see Sections 1.d. and 6.a.).

c. Freedom of Religion

The Constitution provides for freedom of religion, and the Government generally respected this right in practice; however, it imposed restrictions in some areas. The Constitution requires that the President be a Muslim. There is no official state religion; Sunni Muslims constitute the majority of the population.

All religions and orders must register with the Government, which monitors fund raising and requires permits for all meetings by religious groups, except for worship. There is a strict separation of religious institutions and the state. Religious groups tended to avoid any involvement in internal political affairs.

The Government in turn generally refrained from becoming involved in strictly religious issues.

The Government considers militant Islam a threat and follows closely the practice of its adherents. The Government has allowed many new mosques to be built; however, sermons are monitored and controlled, and mosques are closed between prayers.

In 1999 and 2000, there were large-scale arrests, and torture in some cases, of Syrian and Palestinian Islamists affiliated with the Muslim Brotherhood and the Islamic Salvation Party (see Sections 1.c. and 1.d.).

Officially all schools are government run and nonsectarian, although some schools are run in practice by Christian, Druze, and Jewish minorities. There is mandatory religious instruction in schools, with government-approved teachers and curriculums. Religion courses are divided into separate classes for Muslim, Druze, and Christian students. Although Arabic is the official language in public schools, the Government permits the teaching of Armenian, Hebrew, Syriac (Aramaic), and Chaldean in some schools on the basis that these are "liturgical languages."

Religious groups are subject to their respective religious laws on marriage, divorce, child custody, and inheritance (see Section 5).

Government policy officially disavows sectarianism of any kind. However, in the case of Alawis, religious affiliation can facilitate access to influential and sensitive posts. For example, members of the President's Alawi sect hold a predominant position in the security services and military, well out of proportion to their percentage of the population, estimated at 12 percent (see Section 3).

For primarily political rather than religious reasons, the less than 100 Jews remaining in the country generally are barred from government employment and do not have military service obligations. Jews are the only religious minority group whose passports and identity cards note their religion.

There generally was little societal discrimination or violence against religious minorities, including Jews.

For a more detailed discussion see the 2002 International Religious Freedom Report.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

The Government limited freedom of movement. The Government restricted travel near the Golan Heights. Travel to Israel was illegal. Exit visas generally no longer were required for women, men over 50 years old, and citizens living abroad. Individuals have been denied permission to travel abroad on po-

litical grounds, although government officials deny that this practice occurs. The authorities may prosecute any person found attempting to emigrate or to travel abroad illegally, or who has been deported from another country, or who is suspected of having visited Israel. Women over the age of 18 have the legal right to travel without the permission of male relatives. However, a husband or a father may file a request with the Ministry of Interior to prohibit his wife or daughter's departure from the country (see Section 5). Security checkpoints continued, although primarily in military and other restricted areas. There were few police checkpoints on main roads and in populated areas. Generally the security services set up checkpoints to search for smuggled goods, weapons, narcotics, and subversive literature. The searches took place without warrants.

The Government has refused to recognize the citizenship of or to grant identity documents to some persons of Kurdish descent. Their lack of citizenship or identity documents restricts them from traveling to and from the country (see Section 5). Emigres who did not complete mandatory military service may pay a fee to avoid being conscripted while visiting the country.

As of June, 401,185 Palestinian refugees were registered with the U.N. Relief and Works Agency (UNRWA) in the country. In general Palestinian refugees no longer report unusual difficulties travel-

ling in and out of the country, as has been the case in the past. The Government restricted entry by Palestinians who were not resident in the country.

Citizens of Arab League countries may enter the country without a visa for a stay of up to 3 months, a period that is renewable on application to government authorities. Residency permits require proof of employment and a fixed address in the country.

The law does not provide for the granting of asylum or refugee status in accordance with the 1951 U.N. Convention Relating to the Status of Refugees or its 1967 Protocol. The Government cooperates on a case-by-case basis with the office of the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian organizations in assisting refugees. The Government provides first asylum but is selective about extending protection to refugees; 2,260 persons sought asylum during the year. Although the Government denied that it forcibly repatriated persons with a valid claim to refugee status, it apparently did so in the past. In September there were 3,018 non-Palestinian refugees in the country, all of whom were receiving assistance from the UNHCR, including 1,812 refugees of Iraqi origin.

Section 3 Respect for Political Rights: The Right of Citizens to Change Their Government

Although citizens vote for the President and Members of Parliament, they did not have the right to change their government. The late President Hafiz Al-Asad was confirmed by unopposed referenda five times after taking power in 1970. His son, Bashar Al-Asad, also was confirmed by an unopposed referendum in July 2000. The Government is headed by a Cabinet, which the President has the discretion to change. Political opposition to the President is vigorously suppressed. The President and his senior aides, particularly those in the military and security services, ultimately make most basic decisions in political and economic life, with a very limited degree of public accountability. Moreover the Constitution mandates that the Ba'th Party is the ruling party and is ensured a majority in all government and popular associations, such as workers' and women's groups. Six smaller political parties are permitted to exist and, along with the Ba'th Party, make up the National Progressive Front (NPF), a grouping of parties that represents the sole framework of legal political party participation for citizens. While created to give the appearance of a multiparty system, the NPF is dominated by the Ba'th Party and does not change the essentially one-party character of the political system. Non-Ba'th Party members of the NPF exist as political parties largely in name only and conform strictly to Ba'th Party and government poli-

cies. In 2000 there were reports that the Government was considering legislation to expand the NPF to include new parties and several parties previously banned; however, at year's end, there were no new developments.

The Ba'th Party dominates the Parliament, which is known as the People's Council. Although parliamentarians may criticize policies and modify draft laws, the executive branch retains ultimate control over the legislative process. The Government has allowed independent non-NPF candidates to run for a limited allotment of seats in the 250-member People's Council. The allotment of non-NPF deputies was 83, ensuring a permanent absolute majority for the Ba'th Party-dominated NPF. Elections for the 250 seats in the People's Council last took place in 1998.

In March and April, the Government sentenced independent Members of Parliament Ma'mun Humsi and Riad Seif to 5 year prison terms for attempting to illegally change the Constitution (see Section 1.d.).

Persons convicted by the State Security Court may be deprived of their political rights after they are released from prison. Such restrictions include a prohibition against engaging in political activity, the denial of passports, and a bar on accepting government jobs and some other forms of employment. The duration of such restrictions is 7 years after expiration of the sentence in the case of felony convictions; how-

ever, in practice the restrictions may continue beyond that period. The Government contends that this practice is mandated by the Penal Code; it has been in effect since 1949.

Women and minorities, with the exception of the Jewish population and stateless Kurds (see Section 5), participated in the political system without restriction. There were 2 female cabinet ministers, and 26 of the 250 members of Parliament were women. No figures of the percentage of women and minorities who vote were available; however, citizens are required by law to vote.

Section 4 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

The Government did not allow domestic human rights groups to exist legally. Human rights groups have operated legally but ultimately were banned by the Government. The Government's sentencing of 10 civil society leaders this year to lengthy prison sentences stifled the activities of human rights activists and organizations (see Sections 1.d., 1.e., and 2.a.).

In February 2001, Human Rights Watch criticized the Government for restricting civil society groups from meeting. Human Rights Watch claimed that such groups had grown in popularity in the preceding months, but that on February 18, 2001 the Gov-

ernment informed many leaders of such groups that their meetings could not be held without government permission.
The Government has met only twice with international human rights organizations: Human Rights Watch in 1995 and Amnesty International in 1997.

As a matter of policy, the Government in its dealings with international groups denied that it commits human rights abuses. It has not permitted representatives of international organizations to visit prisons. The Government stated that it responds in writing to all inquiries from NGOs regarding human rights issues, including the cases of individual detainees and prisoners, through an interagency governmental committee established expressly for that purpose. The Government usually responds to queries from human rights organizations and foreign embassies regarding specific cases by claiming that the prisoner in question has violated national security laws.

Section 5 Discrimination Based on Race, Sex, Disability, Language, or Social Status

The Constitution provides for equal rights and equal opportunity for all citizens. However, in practice membership in the Ba'th Party or close familial relations with a prominent party member or powerful government official can be important for economic, social, or educational advancement. Party or government connections paved the way for entrance into

better elementary and secondary schools, access to lucrative employment, and greater power within the Government, the military, and the security services. Certain prominent positions, such as that of provincial governor, were reserved solely for Ba'th Party members. Apart from some discrimination against Jews and stateless Kurds, there were no apparent patterns of systematic government discrimination based on race, sex, disability, language, or social status. However, there were varying degrees of societal discrimination in each of these areas.

Women

Violence against women occurred, but there were no reliable statistics regarding the prevalence of domestic violence or sexual assault. The vast majority of cases likely were unreported, and victims generally were reluctant to seek assistance outside the family. Battered women have the legal right to seek redress in court, but few do so because of the social stigma attached to such action. The Syrian Women's Federation offers services to battered wives to remedy individual family problems. The Syrian Family Planning Association also attempts to deal with this problem. Some private groups, including the Family Planning Association, have organized seminars on violence against women, which were reported by the government press. There are a few private, nonofficial, specifically designated shelters or safe havens for battered women who seek to flee their husbands.

Rape is a felony; however, there are no laws against spousal rape.

Prostitution is prohibited by law, and it was not a widespread problem.

The law specifically provides for reduced sentences in "honor" crimes (violent assaults with intent to kill against a female by a male for alleged sexual misconduct). Instances of honor crimes were rare and occurred primarily in rural areas in which Bedouin customs prevail.

The law prohibits sexual harassment and specifies different punishments depending on whether the victim is a minor or an adult. Sexual harassment was rarely reported.

The Constitution provides for equality between men and women and equal pay for equal work. Moreover the Government has sought to overcome traditional discriminatory attitudes toward women and encourages women's education. However, the Government has not yet changed personal status, retirement, and social security laws that discriminate against women. In addition, some secular laws discriminate against women. For example, under criminal law, the punishment for adultery for a woman is twice that as for the same crime committed by a man.

Christians, Muslims, and other religious groups are subject to their respective religious laws on marriage, divorce, and inheritance. For Muslims, personal status law on divorce is based on Shari'a (Islamic law), and some of its provisions discriminate against women. For example, husbands may claim adultery as grounds for divorce, but wives face more difficulty in presenting the same argument. If a woman requests a divorce from her husband, she may not be entitled to child support in some instances. In addition, under the law a woman loses the right to custody of boys when they reach age 9 and girls at age 12.

Inheritance for Muslims also is based on Shari'a. Accordingly Muslim women usually are granted half of the inheritance share of male heirs. However, Shari'a mandates that male heirs provide financial support to the female relatives who inherit less. If they do not, females have the right to sue.

Polygyny is legal but is practiced only by a small minority of Muslim men.

A husband may request that his wife's travel abroad be prohibited (see Section 2.d.). Women generally are barred from travelling abroad with their children unless they are able to prove that the father has granted permission for the children to travel.

Women participated actively in public life and were represented in most professions, including the military. Women were not impeded from owning or managing land or other real property. Women constituted approximately 7 percent of judges, 10 percent of lawyers, 57 percent of teachers below university level, and 20 percent of university professors.

Children

There was no legal discrimination between boys and girls in education or in health care. The Government provides free, public education from primary school through university. Education is compulsory for all children, male or female, between the ages of 6 and 12. According to the Syrian Women's Union, approximately 46 percent of the total number of students through the secondary level are female. Nevertheless, societal pressure for early marriage and childbearing interferes with girls' educational progress, particularly in rural areas, in which the dropout rates for female students remained high.

The Government provides medical care for children until the age of 18.

Although there are cases of child abuse, there is no societal pattern of abuse against children. The law provides for severe penalties for those found guilty of the most serious abuses against children.

Child prostitution and trafficking in children are rare; incidents that arise mainly involve destitute orphans.

The law emphasizes the need to protect children, and the Government has organized seminars regarding the subject of child welfare.

Persons with Disabilities

The law prohibits discrimination against persons with disabilities and seeks to integrate them into the public sector work force. However, implementation is inconsistent. Regulations reserving four percent of government and public sector jobs for persons with disabilities are not implemented rigorously. Persons with disabilities may not legally challenge alleged instances of discrimination. There are no laws that mandate access to public buildings for persons with disabilities.

National/Racial/Ethnic Minorities

The Government generally permitted national and ethnic minorities to conduct traditional, religious, and cultural activities; however, the Government's attitude toward the Kurdish minority was a significant exception. Although the Government contends that there was no discrimination against the Kurdish population, it placed limits on the use and teaching of the Kurdish language. It also restricted the publication of books and other materials written in Kurdish (see Section 2.a.), Kurdish cultural expression,

and, at times, the celebration of Kurdish festivals. The Government tacitly accepted the importation and distribution of Kurdish language materials, particularly in the northeast region where most of the Kurds in the country reside. Some members of the Kurdish community have been tried by the Supreme State Security Court for expressing support for greater Kurdish autonomy or independence. Although the Government stopped the practice of stripping Kurds of their Syrian nationality (some 120,000 had lost Syrian nationality under this program in the 1960s), it never restored the nationality to those who lost it earlier. As a result, those who had lost their nationality, and their children, have been unable to obtain passports, or even identification cards and birth certificates. Without Syrian nationality, these stateless Kurds, who according to UNHCR estimates number approximately 200,000, are unable to own land, are not permitted to practice as doctors or engineers or be employed by the Government, are ineligible for admission to public hospitals, have no right to vote, and cannot travel to and from the country. They also encounter difficulties in enrolling their children in school, and in some cases, in registering their marriages.

In November 2000, a number of armed clashes occurred between Bedouin shepherds and Druze residents of Suwayda Province that required government military intervention to stop. Local press reported that between 15 and 20 Druze, Bedouin, and security

forces personnel were killed. There were large demonstrations following the deaths (see Sections 1.a. and 2.b.).

In August President Asad became the first president in 40 years to visit Hasakeh province in the northeast, where most Kurds reside. In meetings with regional and Kurdish leaders, he reportedly acknowledged the importance of Kurds to the local cultural heritage and stated his willingness to discuss citizenship problems.

Section 6 Worker Rights

a. The Right of Association

Although the Constitution provides for this right, workers were not free to establish unions independent of the Government. All unions must belong to the General Federation of Trade Unions (GFTU), which is dominated by the Ba'th Party and is in fact a part of the State's bureaucratic structure. The GFTU is an information channel between political decision-makers and workers. The GFTU transmits instructions downward to the unions and workers but also conveys information to decision-makers about worker conditions and needs. The GFTU advises the Government on legislation, organizes workers, and formulates rules for various member unions. The GFTU president is a senior member of the Ba'th Party. He and his deputy may attend cabinet meetings on eco-

nomic affairs. The GFTU controls nearly all aspects of union activity.

There were no reports of antiunion discrimination. Since the unions are part of the Government's bureaucratic structure, they are protected by law from antiunion discrimination.

The GFTU is affiliated with the International Confederation of Arab Trade Unions.

In 1992 the country's eligibility for tariff preferences under the U.S. Generalized System of Preferences was suspended because the Government failed to afford internationally recognized worker rights to workers.

b. The Right to Organize and Bargain Collectively

The right to organize and bargain collectively does not exist in any meaningful sense. Government representatives were part of the bargaining process in the public sector. In the public sector, unions did not normally bargain collectively on wage issues, but there was some evidence that union representatives participated with representatives of employers and the supervising ministry in establishing minimum wages, hours, and conditions of employment. Workers serve on the boards of directors of public enter-

prises, and union representatives always are included on the boards.

The law provides for collective bargaining in the private sector, although past repression by the Government dissuaded most workers from exercising this right.

Unions have the right to litigate disputes over work contracts and other workers' interests with employers and may ask for binding arbitration. In practice labor and management representatives settle most disputes without resort to legal remedies or arbitration. Management has the right to request arbitration, but that right seldom is exercised. Arbitration usually occurs when a worker initiates a dispute over wages or severance pay.

The law does not prohibit strikes; however, previous government crackdowns deterred workers from striking. In 1980 the security forces arrested many union and professional association officials who planned a national strike. Some of them are believed to remain in detention, either without trial or after being tried by the State Security Court (see Sections 1.d. and 2.b.). During the year, there were no strikes.

There are no unions in the seven free trade zones. Firms in the zones are exempt from the laws and regulations governing hiring and firing, although they must observe some provisions on health, safety, hours, and sick and annual leave.

c. Prohibition of Forced or Bonded Labor

There is no law prohibiting forced or bonded labor, including that performed by children. There were no reports of forced or bonded labor by children, or forced labor involving foreign workers or domestic servants. Forced labor has been imposed as a punishment for some convicted prisoners.

d. Status of Child Labor Practices and Minimum Age for Employment

The Labor Law provides for the protection of children from exploitation in the workplace; however, the Government tolerated child labor in some instances. Independent information and audits regarding government enforcement were not available. The compulsory age for schooling is 6 to 12 years of age; however, in 2000 the Parliament approved legislation that raised the private sector minimum age for employment from 12 to 15 years for most types of nonagricultural labor, and from 16 to 18 years for heavy work. Working hours for youths of legal age do not differ from those established for adults. In all cases, parental permission is required for children under the age of 16. The law prohibits children from working at night. However, the law applies only to children who work for a salary. Those who work in family businesses and who technically are not paid a salary--a common phenomenon--do not fall under the

law. Children under the age of 16 are prohibited by law from working in mines, at petroleum sites, or in other dangerous fields. Children are not allowed to lift, carry, or drag heavy objects. The exploitation of children for begging purposes also is prohibited. The Government claims that the expansion of the private sector has led to more young children working.

The Ministry of Labor and Social Affairs monitored employment conditions for persons under the age of 18, but it does not have enough inspectors to ensure compliance with the laws. The Ministry has the authority to specify the industries in which children 15 and 16 years of age may work.

The Labor Inspection Department performed unannounced spot checks of employers on a daily basis to enforce the law; however, the scope of these checks was unknown. The majority of children under age 16 who work did so for their parents in the agricultural sector without remuneration. The ILO reported in 1998 that 10.5 percent of children under the age of 18 participate in the labor force, which amounts to 4.7 percent of the total work force.

The law does not prohibit forced or bonded labor by children; however, such practices were not known to occur.

e. Acceptable Conditions of Work

The Minister of Labor and Social Affairs is responsible for enforcing minimum wage levels in the public and private sectors. In May the Government increased public sector minimum wages by 20 percent to $69 (3,175 Syrian pounds) per month, plus other compensation (for example, meals, uniforms, and transportation). In August the Government announced a 20 percent increase in private sector minimum wages. The gain in minimum wage levels was largely cancelled out by the increase in prices. These wages did not provide a decent standard of living for a worker and family. As a result, many workers in both the public and private sectors take additional jobs or are supported by their extended families.

The statutory workweek for administrative staff is 6 days of 6 hours each, and laborers work 6 days a week of 8 hours each. In some cases a 9-hour workday is permitted. The laws mandate one 24-hour rest day per week. Rules and regulations severely limit the ability of an employer to dismiss employees without cause. Even if a person is absent from work without notice for a long period, the employer must follow a lengthy procedure of trying to find the person and notify him, including through newspaper notices, before he is able to take any action against the employee. Dismissed employees have the right of appeal to a committee of representatives from the

union, management, the Ministry of Labor and Social Affairs, and the appropriate municipality. Such committees usually find in favor of the employee. Dismissed employees are entitled to 80 percent of salary benefits while the dispute is under consideration. No additional back wages are awarded should the employer be found at fault, nor are wage penalties imposed in cases in which the employer is not found at fault. The law does not protect temporary workers who are not subject to regulations on minimum wages. Small private firms and businesses employ such workers to avoid the costs associated with hiring permanent employees.

The law mandates safety in all sectors, and managers are expected to implement them fully. In practice there is little enforcement without worker complaints, which occur infrequently despite government efforts to post notices regarding safety rights and regulations. Large companies, such as oil field contractors, employ safety engineers.

The ILO noted in 1998 that a provision in the Labor Code allowing employers to keep workers at the workplace for as many as 11 hours a day might lead to abuse. However, there have been no reports of such abuses. Officials from the Ministries of Health and Labor are designated to inspect work sites for compliance with health and safety standards; however, such inspections appear to be sporadic, apart from those conducted in hotels and other facilities

that cater to foreigners. The enforcement of labor laws in rural areas also is more lax than in urban areas, where inspectors are concentrated. Workers may lodge complaints about health and safety conditions, with special committees established to adjudicate such cases. Workers have the right to remove themselves from hazardous conditions without risking loss of employment.

The law provides protection for foreign workers who reside legally in the country; but not for illegal workers. There were no credible estimates available on the number of illegal workers in the country.

f. Trafficking in Persons

There are no laws that specifically prohibit trafficking in persons; however, there were no reports that persons were systematically being trafficked to, from, or within the country. Standard labor laws could be applied in the event of allegations of trafficking. The Penal Code penalizes prostitution and trafficking of citizen women abroad.

EXHIBIT B

20th Anniversary of the National Endowment for Democracy
For Immediate Release
Office of the Press Secretary
November 6, 2003

President Bush Discusses Freedom in Iraq and Middle East
Remarks by the President at the 20th Anniversary of the National Endowment for Democracy
United States Chamber of Commerce
Washington, D.C.

THE PRESIDENT: Thank you all very much. Please be seated. Thanks for the warm welcome, and thanks for inviting me to join you in this 20th anniversary of the National Endowment for Democracy. The staff and directors of this organization have seen a lot of history over the last two decades, you've been a part of that history. By speaking for and standing for freedom, you've lifted the hopes of people around the world, and you've brought great credit to America.

I appreciate Vin for the short introduction. I'm a man who likes short introductions. And he didn't let me down. But more importantly, I appreciate the invitation. I appreciate the members of Congress who are here, senators from both political parties, members of the House of Representatives from both political parties. I appreciate the ambassadors who are here. I

appreciate the guests who have come. I appreciate the bipartisan spirit, the nonpartisan spirit of the National Endowment for Democracy. I'm glad that Republicans and Democrats and independents are working together to advance human liberty.

The roots of our democracy can be traced to England, and to its Parliament -- and so can the roots of this organization. In June of 1982, President Ronald Reagan spoke at Westminster Palace and declared, the turning point had arrived in history. He argued that Soviet communism had failed, precisely because it did not respect its own people -- their creativity, their genius and their rights.

President Reagan said that the day of Soviet tyranny was passing, that freedom had a momentum which would not be halted. He gave this organization its mandate: to add to the momentum of freedom across the world. Your mandate was important 20 years ago; it is equally important today. (Applause.)

A number of critics were dismissive of that speech by the President. According to one editorial of the time, "It seems hard to be a sophisticated European and also an admirer of Ronald Reagan." (Laughter.) Some observers on both sides of the Atlantic pronounced the speech simplistic and naive, and even dangerous. In fact, Ronald Reagan's words were courageous and optimistic and entirely correct. (Applause.)

The great democratic movement President Reagan described was already well underway. In the early 1970s, there were about 40 democracies in the world. By the middle of that decade, Portugal and Spain and Greece held free elections. Soon there were new democracies in Latin America, and free institutions were spreading in Korea, in Taiwan, and in East Asia. This very week in 1989, there were protests in East Berlin and in Leipzig. By the end of that year, every communist dictatorship in Central America* had collapsed. Within another year, the South African government released Nelson Mandela. Four years later, he was elected president of his country -- ascending, like Walesa and Havel, from prisoner of state to head of state.

As the 20th century ended, there were around 120 democracies in the world -- and I can assure you more are on the way. (Applause.) Ronald Reagan would be pleased, and he would not be surprised.
We've witnessed, in little over a generation, the swiftest advance of freedom in the 2,500 year story of democracy. Historians in the future will offer their own explanations for why this happened. Yet we already know some of the reasons they will cite. It is no accident that the rise of so many democracies took place in a time when the world's most influential nation was itself a democracy.

The United States made military and moral commitments in Europe and Asia, which protected free

nations from aggression, and created the conditions in which new democracies could flourish. As we provided security for whole nations, we also provided inspiration for oppressed peoples. In prison camps, in banned union meetings, in clandestine churches, men and women knew that the whole world was not sharing their own nightmare. They knew of at least one place -- a bright and hopeful land -- where freedom was valued and secure. And they prayed that America would not forget them, or forget the mission to promote liberty around the world.

Historians will note that in many nations, the advance of markets and free enterprise helped to create a middle class that was confident enough to demand their own rights. They will point to the role of technology in frustrating censorship and central control -- and marvel at the power of instant communications to spread the truth, the news, and courage across borders.

Historians in the future will reflect on an extraordinary, undeniable fact: Over time, free nations grow stronger and dictatorships grow weaker. In the middle of the 20th century, some imagined that the central planning and social regimentation were a shortcut to national strength. In fact, the prosperity, and social vitality and technological progress of a people are directly determined by extent of their liberty. Freedom honors and unleashes human creativity -- and creativity determines the strength and wealth of

nations. Liberty is both the plan of Heaven for humanity, and the best hope for progress here on Earth.

The progress of liberty is a powerful trend. Yet, we also know that liberty, if not defended, can be lost. The success of freedom is not determined by some dialectic of history. By definition, the success of freedom rests upon the choices and the courage of free peoples, and upon their willingness to sacrifice. In the trenches of World War I, through a two-front war in the 1940s, the difficult battles of Korea and Vietnam, and in missions of rescue and liberation on nearly every continent, Americans have amply displayed our willingness to sacrifice for liberty.

The sacrifices of Americans have not always been recognized or appreciated, yet they have been worthwhile. Because we and our allies were steadfast, Germany and Japan are democratic nations that no longer threaten the world. A global nuclear standoff with the Soviet Union ended peacefully -- as did the Soviet Union. The nations of Europe are moving towards unity, not dividing into armed camps and descending into genocide. Every nation has learned, or should have learned, an important lesson: Freedom is worth fighting for, dying for, and standing for -- and the advance of freedom leads to peace. (Applause.)

And now we must apply that lesson in our own time. We've reached another great turning point -- and the resolve we show will shape the next stage of the world democratic movement.

Our commitment to democracy is tested in countries like Cuba and Burma and North Korea and Zimbabwe -- outposts of oppression in our world. The people in these nations live in captivity, and fear and silence. Yet, these regimes cannot hold back freedom forever -- and, one day, from prison camps and prison cells, and from exile, the leaders of new democracies will arrive. (Applause.) Communism, and militarism and rule by the capricious and corrupt are the relics of a passing era. And we will stand with these oppressed peoples until the day of their freedom finally arrives. (Applause.)

Our commitment to democracy is tested in China. That nation now has a sliver, a fragment of liberty. Yet, China's people will eventually want their liberty pure and whole. China has discovered that economic freedom leads to national wealth. China's leaders will also discover that freedom is indivisible -- that social and religious freedom is also essential to national greatness and national dignity. Eventually, men and women who are allowed to control their own wealth will insist on controlling their own lives and their own country.

Our commitment to democracy is also tested in the Middle East, which is my focus today, and must be a focus of American policy for decades to come. In many nations of the Middle East -- countries of great strategic importance -- democracy has not yet taken root. And the questions arise: Are the peoples of the Middle East somehow beyond the reach of liberty? Are millions of men and women and children condemned by history or culture to live in despotism? Are they alone never to know freedom, and never even to have a choice in the matter? I, for one, do not believe it. I believe every person has the ability and the right to be free. (Applause.)

Some skeptics of democracy assert that the traditions of Islam are inhospitable to the representative government. This "cultural condescension," as Ronald Reagan termed it, has a long history. After the Japanese surrender in 1945, a so-called Japan expert asserted that democracy in that former empire would "never work." Another observer declared the prospects for democracy in post-Hitler Germany are, and I quote, "most uncertain at best" -- he made that claim in 1957. Seventy-four years ago, The Sunday London Times declared nine-tenths of the population of India to be "illiterates not caring a fig for politics." Yet when Indian democracy was imperiled in the 1970s, the Indian people showed their commitment to liberty in a national referendum that saved their form of government.

Time after time, observers have questioned whether this country, or that people, or this group, are "ready" for democracy -- as if freedom were a prize you win for meeting our own Western standards of progress. In fact, the daily work of democracy itself is the path of progress. It teaches cooperation, the free exchange of ideas, and the peaceful resolution of differences. As men and women are showing, from Bangladesh to Botswana, to Mongolia, it is the practice of democracy that makes a nation ready for democracy, and every nation can start on this path.

It should be clear to all that Islam -- the faith of one-fifth of humanity -- is consistent with democratic rule. Democratic progress is found in many predominantly Muslim countries -- in Turkey and Indonesia, and Senegal and Albania, Niger and Sierra Leone. Muslim men and women are good citizens of India and South Africa, of the nations of Western Europe, and of the United States of America.
More than half of all the Muslims in the world live in freedom under democratically constituted governments. They succeed in democratic societies, not in spite of their faith, but because of it. A religion that demands individual moral accountability, and encourages the encounter of the individual with God, is fully compatible with the rights and responsibilities of self-government.

Yet there's a great challenge today in the Middle East. In the words of a recent report by Arab schol-

ars, the global wave of democracy has -- and I quote -- "barely reached the Arab states." They continue: "This freedom deficit undermines human development and is one of the most painful manifestations of lagging political development." The freedom deficit they describe has terrible consequences, of the people of the Middle East and for the world. In many Middle Eastern countries, poverty is deep and it is spreading, women lack rights and are denied schooling. Whole societies remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines.

As the colonial era passed away, the Middle East saw the establishment of many military dictatorships. Some rulers adopted the dogmas of socialism, seized total control of political parties and the media and universities. They allied themselves with the Soviet bloc and with international terrorism. Dictators in Iraq and Syria promised the restoration of national honor, a return to ancient glories. They've left instead a legacy of torture, oppression, misery, and ruin.

Other men, and groups of men, have gained influence in the Middle East and beyond through an ideology of theocratic terror. Behind their language of religion is the ambition for absolute political power. Ruling cabals like the Taliban show their version of religious piety in public whippings of women, ruth-

less suppression of any difference or dissent, and support for terrorists who arm and train to murder the innocent. The Taliban promised religious purity and national pride. Instead, by systematically destroying a proud and working society, they left behind suffering and starvation.

Many Middle Eastern governments now understand that military dictatorship and theocratic rule are a straight, smooth highway to nowhere. But some governments still cling to the old habits of central control. There are governments that still fear and repress independent thought and creativity, and private enterprise -- the human qualities that make for a -- strong and successful societies. Even when these nations have vast natural resources, they do not respect or develop their greatest resources -- the talent and energy of men and women working and living in freedom.

Instead of dwelling on past wrongs and blaming others, governments in the Middle East need to confront real problems, and serve the true interests of their nations. The good and capable people of the Middle East all deserve responsible leadership. For too long, many people in that region have been victims and subjects -- they deserve to be active citizens.

Governments across the Middle East and North Africa are beginning to see the need for change. Morocco has a diverse new parliament; King Moham-

med has urged it to extend the rights to women. Here is how His Majesty explained his reforms to parliament: "How can society achieve progress while women, who represent half the nation, see their rights violated and suffer as a result of injustice, violence, and marginalization, notwithstanding the dignity and justice granted to them by our glorious religion?" The King of Morocco is correct: The future of Muslim nations will be better for all with the full participation of women. (Applause.)

In Bahrain last year, citizens elected their own parliament for the first time in nearly three decades. Oman has extended the vote to all adult citizens; Qatar has a new constitution; Yemen has a multiparty political system; Kuwait has a directly elected national assembly; and Jordan held historic elections this summer. Recent surveys in Arab nations reveal broad support for political pluralism, the rule of law, and free speech. These are the stirrings of Middle Eastern democracy, and they carry the promise of greater change to come.

As changes come to the Middle Eastern region, those with power should ask themselves: Will they be remembered for resisting reform, or for leading it? In Iran, the demand for democracy is strong and broad, as we saw last month when thousands gathered to welcome home Shirin Ebadi, the winner of the Nobel Peace Prize. The regime in Teheran must heed the

democratic demands of the Iranian people, or lose its last claim to legitimacy. (Applause.)

For the Palestinian people, the only path to independence and dignity and progress is the path of democracy. (Applause.) And the Palestinian leaders who block and undermine democratic reform, and feed hatred and encourage violence are not leaders at all. They're the main obstacles to peace, and to the success of the Palestinian people.

The Saudi government is taking first steps toward reform, including a plan for gradual introduction of elections. By giving the Saudi people a greater role in their own society, the Saudi government can demonstrate true leadership in the region.

The great and proud nation of Egypt has shown the way toward peace in the Middle East, and now should show the way toward democracy in the Middle East. (Applause.) Champions of democracy in the region understand that democracy is not perfect, it is not the path to utopia, but it's the only path to national success and dignity.

As we watch and encourage reforms in the region, we are mindful that modernization is not the same as Westernization. Representative governments in the Middle East will reflect their own cultures. They will not, and should not, look like us. Democratic nations may be constitutional monarchies, federal republics,

or parliamentary systems. And working democracies always need time to develop -- as did our own. We've taken a 200-year journey toward inclusion and justice -- and this makes us patient and understanding as other nations are at different stages of this journey.

There are, however, essential principles common to every successful society, in every culture. Successful societies limit the power of the state and the power of the military -- so that governments respond to the will of the people, and not the will of an elite. Successful societies protect freedom with the consistent and impartial rule of law, instead of selecting applying -- selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions -- for political parties and labor unions and independent newspapers and broadcast media. Successful societies guarantee religious liberty -- the right to serve and honor God without fear of persecution. Successful societies privatize their economies, and secure the rights of property. They prohibit and punish official corruption, and invest in the health and education of their people. They recognize the rights of women. And instead of directing hatred and resentment against others, successful societies appeal to the hopes of their own people. (Applause.)

These vital principles are being applied in the nations of Afghanistan and Iraq. With the steady lead-

ership of President Karzai, the people of Afghanistan are building a modern and peaceful government. Next month, 500 delegates will convene a national assembly in Kabul to approve a new Afghan constitution. The proposed draft would establish a bicameral parliament, set national elections next year, and recognize Afghanistan's Muslim identity, while protecting the rights of all citizens. Afghanistan faces continuing economic and security challenges -- it will face those challenges as a free and stable democracy. (Applause.)

In Iraq, the Coalition Provisional Authority and the Iraqi Governing Council are also working together to build a democracy -- and after three decades of tyranny, this work is not easy. The former dictator ruled by terror and treachery, and left deeply ingrained habits of fear and distrust. Remnants of his regime, joined by foreign terrorists, continue their battle against order and against civilization. Our coalition is responding to recent attacks with precision raids, guided by intelligence provided by the Iraqis, themselves. And we're working closely with Iraqi citizens as they prepare a constitution, as they move toward free elections and take increasing responsibility for their own affairs. As in the defense of Greece in 1947, and later in the Berlin Airlift, the strength and will of free peoples are now being tested before a watching world. And we will meet this test. (Applause.)

Securing democracy in Iraq is the work of many hands. American and coalition forces are sacrificing for the peace of Iraq and for the security of free nations. Aid workers from many countries are facing danger to help the Iraqi people. The National Endowment for Democracy is promoting women's rights, and training Iraqi journalists, and teaching the skills of political participation. Iraqis, themselves -- police and borders guards and local officials -- are joining in the work and they are sharing in the sacrifice.

This is a massive and difficult undertaking -- it is worth our effort, it is worth our sacrifice, because we know the stakes. The failure of Iraqi democracy would embolden terrorists around the world, increase dangers to the American people, and extinguish the hopes of millions in the region. Iraqi democracy will succeed -- and that success will send forth the news, from Damascus to Teheran -- that freedom can be the future of every nation. (Applause.) The establishment of a free Iraq at the heart of the Middle East will be a watershed event in the global democratic revolution. (Applause.)

Sixty years of Western nations excusing and accommodating the lack of freedom in the Middle East did nothing to make us safe -- because in the long run, stability cannot be purchased at the expense of liberty. As long as the Middle East remains a place where freedom does not flourish, it will remain a

place of stagnation, resentment, and violence ready for export. And with the spread of weapons that can bring catastrophic harm to our country and to our friends, it would be reckless to accept the status quo. (Applause.)

Therefore, the United States has adopted a new policy, a forward strategy of freedom in the Middle East. This strategy requires the same persistence and energy and idealism we have shown before. And it will yield the same results. As in Europe, as in Asia, as in every region of the world, the advance of freedom leads to peace. (Applause.)

The advance of freedom is the calling of our time; it is the calling of our country. From the Fourteen Points to the Four Freedoms, to the Speech at Westminster, America has put our power at the service of principle. We believe that liberty is the design of nature; we believe that liberty is the direction of history. We believe that human fulfillment and excellence come in the responsible exercise of liberty. And we believe that freedom -- the freedom we prize -- is not for us alone, it is the right and the capacity of all mankind. (Applause.)

Working for the spread of freedom can be hard. Yet, America has accomplished hard tasks before. Our nation is strong; we're strong of heart. And we're not alone. Freedom is finding allies in every country; freedom finds allies in every culture. And as we meet

the terror and violence of the world, we can be certain the author of freedom is not indifferent to the fate of freedom.

With all the tests and all the challenges of our age, this is, above all, the age of liberty. Each of you at this Endowment is fully engaged in the great cause of liberty. And I thank you. May God bless your work. And may God continue to bless America. (Applause.)

EXHIBIT C

U.S. Behind Secret Transfer of Terror Suspects

By Rajiv Chandrasekaran and Peter Finn
Washington Post Foreign Service
Monday, March 11, 2002; Page A01

JAKARTA, Indonesia, March 10 -- Arriving here from Pakistan in mid-November, Muhammad Saad Iqbal Madni told acquaintances that he had come to Indonesia to disburse an inheritance to his late father's second wife. But instead of writing a check and leaving, he settled into a small boarding house in a crowded, lower-middle-class neighborhood, where he visited the local mosque and spent hours on end watching television at a friend's house.

Stocky and bearded, Iqbal, 24, betrayed little about his life in Pakistan, except to hand out business cards identifying him as a Koran reader for an Islamic radio station. In early January, however, the CIA informed Indonesia's State Intelligence Agency that Iqbal had another occupation, according to Indonesian officials and foreign diplomats. Iqbal, they said, was an al Qaeda operative who had worked with Richard C. Reid, the Briton charged with trying to detonate explosives in his shoes on an American Airlines flight from Paris to Miami on Dec. 22.

The officials and diplomats said the CIA provided information about Iqbal's whereabouts and urged Indonesia to apprehend him. A few days later, the Egyptian government formally asked Indonesia to extradite Iqbal, who carried an Egyptian as well as a Pakistani passport, a senior Indonesian official said. The Egyptian request alleged Iqbal was wanted in connection with terrorism, he said. It did not specify the crime, he said, but Indonesian officials were told the charges were unrelated to the Reid case.

By Jan. 9, Iqbal was in the hands of Indonesian intelligence agents. Two days later -- without a court hearing or a lawyer -- he was hustled aboard an unmarked, U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt, the Indonesian officials said.

Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics -- including torture and threats to families -- that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said.

"After September 11, these sorts of movements have been occurring all the time," a U.S. diplomat said. "It allows us to get information from terrorists in a way we can't do on U.S. soil."

U.S. officials would not comment on evidence linking Iqbal to Reid, but Western diplomats in Jakarta said Iqbal's name appeared on al Qaeda documents discovered by U.S. intelligence agents in Afghanistan. Indonesian officials said U.S. officials did not detail Iqbal's alleged involvement with terrorism other than to say he was connected to Reid, and as a consequence, he was highly sought by the U.S. government.

Iqbal remains in custody in Egypt, intelligence sources said. The sources said he has been questioned by U.S. agents but there was no word on his legal status, a situation that resembles that of other Islamic activists taken into custody in cooperation with the CIA.

In October, for instance, a Yemeni microbiology student wanted in connection with the bombing of the USS Cole was flown from Pakistan to Jordan on a U.S.-registered Gulfstream jet after Pakistan's intelligence agency surrendered him to U.S. authorities at the Karachi airport, Pakistani government sources said. The hand-over of the shackled and blindfolded student, Jamil Qasim Saeed Mohammed, who was alleged to be an al Qaeda operative, oc-

curred in the middle of the night at a remote corner of the airport without extradition or deportation procedures, the sources said.

U.S. forces seized five Algerians and a Yemeni in Bosnia on Jan. 19 and flew them to a detention camp at the U.S. naval base at Guantanamo Bay, Cuba, after they were ordered released by the Bosnian Supreme Court for lack of evidence -- and despite an injunction from the Bosnian Human Rights Chamber that four of them be allowed to remain in the country pending further proceedings. The Human Rights Chamber, created under the U.S.-brokered Dayton peace accords that ended the 1992-95 war, was designed to protect human rights and due process.

U.S. involvement in seizing terrorism suspects in third countries and shipping them with few or no legal proceedings to the United States or other countries -- known as "rendition" -- is not new. In recent years, U.S. agents, working with Egyptian intelligence and local authorities in Africa, Central Asia and the Balkans, have sent dozens of suspected Islamic extremists to Cairo or taken them to the United States, according to U.S. officials, Egyptian lawyers and human rights groups. U.S. authorities are urging Pakistan to take the same step with the chief suspect in the kidnapping and killing of Wall Street Journal reporter Daniel Pearl.

In 1998, U.S. agents spirited Talaat Fouad Qassem, 38, a reputed leader of the Islamic Group, an Egyptian extremist organization, to Egypt after he was picked up in Croatia while traveling to Bosnia from Denmark, where he had been granted political asylum. Qassem was allegedly an associate of Ayman Zawahiri, the number-two man in Osama bin Laden's al Qaeda network. Egyptian lawyers said he was questioned aboard a U.S. ship off the Croatian coast before being taken to Cairo, where a military tribunal had already sentenced him to death in absentia. Egyptian officials have refused to discuss his case.

U.S. intelligence officers are also believed to have participated in the 1998 seizure in Azerbaijan of three members of Egypt's other main underground group, Egyptian Islamic Jihad, according to testimony provided to their attorneys in Cairo.

Also in 1998, CIA officers working with Albanian police seized five members of Egyptian Islamic Jihad who were allegedly planning to bomb the U.S. Embassy in Tirana, Albania's capital.

After three days of interrogation, the five men were flown to Egypt aboard a plane that was chartered by the CIA; two were put to death. The five were among 13 suspects known to have been picked up in the Balkans with U.S. involvement and taken to Egypt for trial.

Between 1993 and 1999, terrorism suspects also were rendered to the United States from Nigeria, the Philippines, Kenya and South Africa in operations acknowledged by U.S. officials. Dozens of other covert renditions, often with Egyptian cooperation, were also conducted, U.S. officials said. The details of most of these operations, which often ignored local and international extradition laws, remain closely guarded.

Even when local intelligence agents are involved, diplomats said it is preferable to render a suspect secretly because it prevents lengthy court battles and minimizes publicity that could tip off the detainee's associates. Rendering suspects to a third country, particularly Muslim nations such as Egypt or Jordan, also helps to defuse domestic political concerns in predominantly Muslim nations such as Indonesia, the diplomats said.

Sending a suspect directly to the United States, the diplomats said, could prompt objections from government officials who fear that any publicity of such an action would lead to a backlash from fundamentalist Islamic groups.

In Iqbal's case, Indonesian government officials told local media that he had been sent to Egypt because of visa violations. A spokesman for the immigration department said Iqbal failed to identify a sponsor for

his visit to Indonesia on his visa application form, which was submitted in Islamabad, Pakistan.

A senior Indonesian government official said disclosing the U.S. role would have exposed President Megawati Sukarnoputri to criticism from Muslim-oriented political parties in her governing coalition. "We can't be seen to be cooperating too closely with the United States," the official said.

The official said an extradition request from Egypt and the discovery of Iqbal's visa infraction provided political cover to comply with the CIA's request. "This was a U.S. deal all along," the senior official said. "Egypt just provided the formalities."

Indonesian officials believe Iqbal, who arrived in Jakarta on Nov. 17, came to the vast Southeast Asian archipelago not to plan an attack but to seek refuge as the Taliban neared collapse and al Qaeda leaders sought to flee Afghanistan. Western officials said they do not have a full picture of what Iqbal was doing in Indonesia and they cannot rule out the possibility that he was engaged in terrorist activities here.

Iqbal had lived in Jakarta as a teenager while his father, who also was an expert Koran reader, taught at the Arab Language Institute. Shortly after Iqbal arrived in November, he returned to his old neighborhood, a district in east Jakarta with narrow, winding streets and open sewers. There he met up

with one of his father's former students, Mohammed Rizard, who helped him get a room at a nearby boarding house.

Rizard, a printer, said Iqbal often would spend afternoons at his house, watching television and singing Indian karaoke tunes. Although Iqbal said he came to Indonesia to distribute an inheritance to his father's second wife, he appeared to be in no hurry to perform the task, Rizard said.

"He was taking it easy," Rizard said. "He was more interested in talking about girls and singing karaoke."

Just before his arrest, Iqbal visited Solo, a city in central Java, Indonesia's main island, saying he was going to see his stepmother. The city is regarded by Western and Asian intelligence officials as a base for Jemaah Islamiah, a militant Muslim group with bases in Indonesia, Singapore and Malaysia that is alleged to be affiliated with al Qaeda. The group is accused of plotting to blow up Western embassies and U.S. naval vessels in Singapore and of aiding two of the Sept. 11 hijackers during a trip they made to Malaysia in 2000.

Rizard said he never discussed politics with Iqbal or inquired about his life in Pakistan. "He never talked about jihad or America," Rizard said. Rizard also

said he rifled through Iqbal's suitcase and "found nothing suspicious."

In December, Iqbal sent several letters to friends in Pakistan, Rizard said. Three replies arrived at Rizard's house, which Iqbal used as a return address, after he had been seized and sent to Egypt. Rizard gave the unopened letters to correspondents for The Washington Post and the Weekend Australian newspaper.

The handwritten letters, in the Urdu language, contain no incriminating details but do suggest that Iqbal's missives had expressed deep frustration and despair.

"Why have you lost all hope?" one of his friends, Hafiz Mohammad Riazuddin, wrote. "Please keep your head and spirits up."

"Surprisingly you have asked about the Taliban," Riazuddin continued. "How did you become interested in politics? Anyway, by the time you sent this letter, Taliban rule has ended in Afghanistan. U.S. and British troops have landed in Afghanistan. The U.S. has taken bases in Pakistan and Pakistan's nuclear program is in danger."

A lengthy letter from a woman who appears to be his girlfriend suggested Iqbal had left Pakistan suddenly and had not told those close to him where he was

going. "It gives great pleasure to know that you are alive," she wrote.

Another letter, from a man named Shahid, refers to plans to visit an "uncle in America" and talk to an "Uncle Babar" in Malaysia.

Despite criticism from some U.S. officials as well as from neighboring Singapore and Malaysia that Indonesia is not moving aggressively enough against suspected terrorists, particularly members of Jemaah Islamiah, officials here quickly point to Iqbal's rendition as proof they are cooperating, albeit quietly, in the global fight against terrorism.

"The CIA asked us to find this guy and hand him over," the senior Indonesian official said. "We did what they wanted."

Finn reported from Berlin. Correspondent Howard Schneider in Cairo, special correspondent Kamran Khan in Karachi, Pakistan, and staff writers Dan Eggen and Walter Pincus in Washington contributed to this report.

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U.S. Decries Abuse but Defends Interrogations
'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities

By Dana Priest and Barton Gellman
Washington Post Staff Writers
Thursday, December 26, 2002

Deep inside the forbidden zone at the U.S.-occupied Bagram air base in Afghanistan, around the corner from the detention center and beyond the segregated clandestine military units, sits a cluster of metal shipping containers protected by a triple layer of concertina wire. The containers hold the most valuable prizes in the war on terrorism -- captured al Qaeda operatives and Taliban commanders.

Those who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights -- subject to what are known as "stress and duress" techniques.

Those who cooperate are rewarded with creature comforts, interrogators whose methods include feigned friendship, respect, cultural sensitivity and, in some cases, money. Some who do not cooperate are turned over -- "rendered," in official parlance -- to foreign intelligence services whose practice of torture

has been documented by the U.S. government and human rights organizations.

In the multifaceted global war on terrorism waged by the Bush administration, one of the most opaque -- yet vital -- fronts is the detention and interrogation of terrorism suspects. U.S. officials have said little publicly about the captives' names, numbers or whereabouts, and virtually nothing about interrogation methods. But interviews with several former intelligence officials and 10 current U.S. national security officials -- including several people who witnessed the handling of prisoners -- provide insight into how the U.S. government is prosecuting this part of the war.

The picture that emerges is of a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred.

While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view. The CIA, which has primary responsibility for interrogations, declined to comment.

"If you don't violate someone's human rights some of the time, you probably aren't doing your job," said one official who has supervised the capture and transfer of accused terrorists. "I don't think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA.."

The off-limits patch of ground at Bagram is one of a number of secret detention centers overseas where U.S. due process does not apply, according to several U.S. and European national security officials, where the CIA undertakes or manages the interrogation of suspected terrorists. Another is Diego Garcia, a somewhat horseshoe-shaped island in the Indian Ocean that the United States leases from Britain.

U.S. officials oversee most of the interrogations, especially those of the most senior captives. In some cases, highly trained CIA officers question captives through interpreters. In others, the intelligence agency undertakes a "false flag" operation using fake decor and disguises meant to deceive a captive into thinking he is imprisoned in a country with a reputation for brutality, when, in reality, he is still in CIA hands. Sometimes, female officers conduct interrogations, a psychologically jarring experience for men reared in a conservative Muslim culture where women are never in control.

In other cases, usually involving lower-level captives, the CIA hands them to foreign intelligence services -- notably those of Jordan, Egypt and Morocco -- with a list of questions the agency wants answered. These "extraordinary renditions" are done without resort to legal process and usually involve countries with security services known for using brutal means.

According to U.S. officials, nearly 3,000 suspected al Qaeda members and their supporters have been detained worldwide since Sept. 11, 2001. About 625 are at the U.S. military's confinement facility at Guantanamo Bay, Cuba. Some officials estimated that fewer than 100 captives have been rendered to third countries. Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.

At a Sept. 26 joint hearing of the House and Senate intelligence committees, Cofer Black, then head of the CIA Counterterrorist Center, spoke cryptically about the agency's new forms of "operational flexibility" in dealing with suspected terrorists. "This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11," Black said. "After 9/11 the gloves come off."

According to one official who has been directly involved in rendering captives into foreign hands, the understanding is, "We don't kick the [expletive] out

of them. We send them to other countries so they can kick the [expletive] out of them." Some countries are known to use mind-altering drugs such as sodium pentathol, said other officials involved in the process.

Abu Zubaida, who is believed to be the most important al Qaeda member in detention, was shot in the groin during his apprehension in Pakistan in March. National security officials suggested that Zubaida's painkillers were used selectively in the beginning of his captivity. He is now said to be cooperating, and his information has led to the apprehension of other al Qaeda members.

U.S. National Security Council spokesman Sean McCormack declined to comment earlier this week on CIA or intelligence-related matters. But, he said: "The United States is treating enemy combatants in U.S. government control, wherever held, humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949."

The convention outlined the standards for treatment of prisoners of war. Suspected terrorists in CIA hands have not been accorded POW status.

Other U.S. government officials, speaking on condition of anonymity, acknowledged that interrogators deprive some captives of sleep, a practice with ambiguous status in international law.

The U.N. High Commissioner for Human Rights, the authoritative interpreter of the international Convention Against Torture, has ruled that lengthy interrogation may incidentally and legitimately cost a prisoner sleep. But when employed for the purpose of breaking a prisoner's will, sleep deprivation "may in some cases constitute torture."

The State Department's annual human rights report routinely denounces sleep deprivation as an interrogation method. In its 2001 report on Turkey, Israel and Jordan, all U.S. allies, the department listed sleep deprivation among often-used alleged torture techniques.

U.S. officials who defend the renditions say the prisoners are sent to these third countries not because of their coercive questioning techniques, but because of their cultural affinity with the captives. Besides being illegal, they said, torture produces unreliable information from people who are desperate to stop the pain. They look to foreign allies more because their intelligence services can develop a culture of intimacy that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.

In a speech on Dec. 11, CIA director George J. Tenet said that interrogations overseas have yielded sig-

nificant returns recently. He calculated that worldwide efforts to capture or kill terrorists had eliminated about one-third of the al Qaeda leadership. "Almost half of our successes against senior al Qaeda members has come in recent months," he said.

Many of these successes have come as a result of information gained during interrogations. The capture of al Qaeda leaders Ramzi Binalshibh in Pakistan, Omar al-Faruq in Indonesia, Abd al-Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen were all partly the result of information gained during interrogations, according to U.S. intelligence and national security officials. All four remain under CIA control.

Time, rather than technique, has produced the most helpful information, several national security and intelligence officials said. Using its global computer database, the CIA is able to quickly check leads from captives in one country with information divulged by captives in another.

"We know so much more about them now than we did a year ago -- the personalities, how the networks are established, what they think are important targets, how they think we will react," said retired Army general Wayne Downing, the Bush administration's deputy national security adviser for combating terrorism until he resigned in June.

"The interrogations of Abu Zubaida drove me nuts at times," Downing said. "He and some of the others are very clever guys. At times I felt we were in a classic counter-interrogation class: They were telling us what they think we already knew. Then, what they thought we wanted to know. As they did that, they fabricated and weaved in threads that went nowhere. But, even with these ploys, we still get valuable information and they are off the street, unable to plot and coordinate future attacks."

In contrast to the detention center at Guantanamo Bay, where military lawyers, news reporters and the Red Cross received occasional access to monitor prisoner conditions and treatment, the CIA's overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies. In addition to Bagram and Diego Garcia, the CIA has other secret detention centers overseas, and often uses the facilities of foreign intelligence services.

Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques, said national security officials and U.S. and European intelligence officers.

Although no direct evidence of mistreatment of prisoners in U.S. custody has come to light, the prisoners are denied access to lawyers or organizations, such

as the Red Cross, that could independently assess their treatment. Even their names are secret.

This month, the U.S. military announced that it had begun a criminal investigation into the handling of two prisoners who died in U.S. custody at the Bagram base. A base spokesman said autopsies found one of the detainees died of a pulmonary embolism, the other of a heart attack.

Al Qaeda suspects are seldom taken without force, and some suspects have been wounded during their capture. After apprehending suspects, U.S. takedown teams -- a mix of military special forces, FBI agents, CIA case officers and local allies -- aim to disorient and intimidate them on the way to detention facilities.

According to Americans with direct knowledge and others who have witnessed the treatment, captives are often "softened up" by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep. The tone of intimidation and fear is the beginning, they said, of a process of piercing a prisoner's resistance.

The take-down teams often "package" prisoners for transport, fitting them with hoods and gags, and binding them to stretchers with duct tape.

Bush administration appointees and career national security officials acknowledged that, as one of them put it, "our guys may kick them around a little bit in the adrenaline of the immediate aftermath." Another said U.S. personnel are scrupulous in providing medical care to captives, adding in a deadpan voice, that "pain control in wounded patients is a very subjective thing."

The CIA's participation in the interrogation of rendered terrorist suspects varies from country to country.

"In some cases involving interrogations in Saudi Arabia we're able to observe through one-way mirrors the live investigations," said a senior U.S. official involved in Middle East security issues. "In others, we usually get summaries. We will feed questions to their investigators. They're still very much in control."

The official added: "We're not aware of any torture or even physical abuse."

Tenet acknowledged the Saudis' role in his Dec. 11 speech. "The Saudis are proving increasingly important support to our counterterrorism efforts -- from

making arrests to sharing debriefing results," he said.

But Saudi Arabia is also said to withhold information that might lead the U.S. government to conclusions or policies that the Saudi royal family fears. U.S. teams, for that reason, have sometimes sent Saudi nationals to Egypt instead.

Jordan is a favored country for renditions, several U.S. officials said. The Jordanians are considered "highly professional" interrogators, which some officials said meant that they do not use torture. But the State Department's 2001 human rights report criticized Jordan and its General Intelligence Directorate for arbitrary and unlawful detentions and abuse.

"The most frequently alleged methods of torture include sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions and extended solitary confinement," the 2001 report noted. Jordan also is known to use prisoners' family members to induce suspects to talk.

Another significant destination for rendered suspects is Morocco, whose general intelligence service has sharply stepped up cooperation with the United States. Morocco has a documented history of torture, as well as longstanding ties to the CIA.

The State Department's human rights report says Moroccan law "prohibits torture, and the government claims that the use of torture has been discontinued; however, some members of the security forces still tortured or otherwise abused detainees."

In at least one case, U.S. operatives led the capture and transfer of an al Qaeda suspect to Syria, which for years has been near the top of U.S. lists of human rights violators and sponsors of terrorism. The German government strongly protested the move. The suspect, Mohammed Haydar Zammar, holds joint German and Syrian citizenship. It could not be learned how much of Zammar's interrogation record Syria has provided the CIA.

The Bush administration maintains a legal distance from any mistreatment that occurs overseas, officials said, by denying that torture is the intended result of its rendition policy. American teams, officials said, do no more than assist in the transfer of suspects who are wanted on criminal charges by friendly countries. But five officials acknowledged, as one of them put it, "that sometimes a friendly country can be invited to 'want' someone we grab." Then, other officials said, the foreign government will charge him with a crime of some sort.

One official who has had direct involvement in renditions said he knew they were likely to be tortured. "I . . . do it with my eyes open," he said.

According to present and former officials with first-hand knowledge, the CIA's authoritative Directorate of Operations instructions, drafted in cooperation with the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries.

"Based largely on the Central American human rights experience," said Fred Hitz, former CIA inspector general, "we don't do torture, and we can't countenance torture in terms of we can't know of it." But if a country offers information gleaned from interrogations, "we can use the fruits of it."

Bush administration officials said the CIA, in practice, is using a narrow definition of what counts as "knowing" that a suspect has been tortured. "If we're not there in the room, who is to say?" said one official conversant with recent reports of renditions.

The Clinton administration pioneered the use of extraordinary rendition after the bombings of U.S. embassies in Kenya and Tanzania in 1998. But it also pressed allied intelligence services to respect lawful boundaries in interrogations.

After years of fruitless talks in Egypt, President Bill Clinton cut off funding and cooperation with the directorate of Egypt's general intelligence service,

whose torture of suspects has been a perennial theme in State Department human rights reports.

"You can be sure," one Bush administration official said, "that we are not spending a lot of time on that now."

Staff writers Bob Woodward, Susan Schmidt and Douglas Farah, and correspondent Peter Finn in Berlin, contributed to this report.

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Key to U.S. Case Denies Iraq-Al Qaeda Link
By Sebastian Rotella Los Angeles Times Staff Writer

February 1 2003
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http://www.latimes.com/la-fg-mullah1feb01,0,3525790.story

BRUSSELS -- The strangest thing about the strange story of Mullah Krekar, the leader of an Islamic terrorist group operating in the wilds of northern Iraq, is the fact that he remains a free man, living in peaceful Norway.

Krekar, who U.S. leaders charge could be proof of Al Qaeda's alleged links to Saddam Hussein, said Friday that he would be upset but not surprised if Secretary of State Colin L. Powell names him next week during a much-anticipated U.N. presentation of the case against Iraq.

"I can say to you that this is not true that I am a link between Saddam Hussein and Al Qaeda," Krekar, 47, said during a telephone interview from Oslo, the Norwegian capital. "I will wait until Wednesday, and if Powell says anything against me, I can use documents to prove it is not true. Everything: that we have chemical bombs, [ties to] Osama bin Laden, Saddam Hussein, all of those things."

Although some counter-terrorism officials in the U.S.

and Europe doubt that connections between Al Qaeda and the Iraqi president exist, U.S. authorities call Krekar a dangerous man. Moreover, Jordan wants to extradite him on drug trafficking charges. The Dutch locked him up for four months, then deported him to Norway, where he has refugee status. Norwegian police have spent days questioning him about alleged asylum fraud and terror activity related to his leadership of Ansar al-Islam, an armed Kurdish group.

"The U.S. has an interest in making sure people associated with terrorism can't facilitate terrorist acts," said a spokesman at the U.S. Embassy in Oslo. "We believe he is linked to terrorism generally and Al Qaeda specifically. We hope Norway will take some action regarding him."

Although the FBI has interviewed Krekar twice, U.S. officials acknowledge that they are not able to charge him with a crime or to request his extradition. The Norwegians and the Dutch say they don't have enough evidence to hold him.

That is the best defense, Krekar declares triumphantly, against anyone using him to argue that a war on Iraq would also be a war on terrorism. He challenges the Bush administration to grant him a visa so he can plead his case.

"I said to the FBI, 'I can come to America and prove

it's not true in your court,' " said Krekar, who studied Islamic theology with a founder of Al Qaeda and has publicly praised Bin Laden."I am not an enemy of America. Not Powell, but Rumsfeld and Wolfowitz want to push George Bush to war," he added, referring to Defense Secretary Donald H. Rumsfeld and Deputy Defense Secretary Paul D. Wolfowitz.

Rhetoric aside, Krekar is not the only notorious Islamic leader to elude arrest in Europe despite plenty of suspicion and effort in a number of countries. As his case shows, the global nature of Islamic extremism often combines with Europe's patchwork of conflicting justice systems and immigration policies to frustrate counter-terrorism investigators.

The debate about Iraq has thrown a divisive new element into the mix: the high-stakes politics of a world on the edge of war. Krekar accuses the United States of leaning on smaller countries to do its dirty work.

"I told the Norwegians, 'Don't let America touch me with your hand,' " Krekar said.

Krekar's odyssey has been confused and occasionally goofy. To the dismay of U.S. officials, the Dutch deported him last month thinking that Norwegian police would arrest him on the spot, according to knowledgeable officials. But nobody met the Dutch

police who walked Krekar off the plane Jan. 13; Norwegian police saw no reason to arrest him.

The mullah walked free.

Krekar's real name is Faraj Ahmad. The shaggy, bearded cleric claims to be the author of 30 books, including volumes of poetry, and says he became the leader of Ansar al-Islam in December 2001. Officials in Kurd-controlled northern Iraq call him a vicious terrorist whose Islamic marauders have imposed Taliban-style living conditions in the area they control and massacred Kurdish rivals.

Last year, Krekar traveled from Amsterdam, where he has relatives, to Iran. Authorities there arrested him and expelled him to the Netherlands. Dutch prosecutors held him based on a Jordanian extradition request for heroin trafficking, a charge he denies.

Shortly after the arrest, U.S. Atty. Gen. John Ashcroft expressed great interest in the case during a meeting with Dutch Justice Minister Piet Donner, according to Donner. Jordan has no extradition treaty with the Netherlands, but two countries may extradite drug suspects under a U.N. treaty.

Krekar's lawyers say they suspect that the U.S. and Jordan orchestrated the drug case in the hope that Krekar would end up in the hands of Jordanian in-

telligence agents. As part of a practice known as "rendering," the U.S. has steered suspected terrorists to Middle Eastern allies whose security services have reputations for harsh interrogation techniques.

"We suspected drugs was a cover-up," said Britta Bohler, a Dutch lawyer. "It's very strange. Maybe the U.S. government had an interest that Jordan interrogate him more."

FBI agents interviewed Krekar twice in Dutch custody. The agents asked about his activity in Iraq, Al Qaeda and Saddam Hussein, according to Krekar and his lawyers, but did not give the impression they were investigating a specific case.

U.S. officials did not comment on the interviews. They said there is no public indictment of Krekar. Asked if he was under investigation, a U.S. official said: "There is a lot of interest in him."

Krekar denies allegations of involvement with Al Qaeda figures such as Abu Musab Zarqawi, a chemical warfare expert whom investigators suspect was the mastermind of attack plots by an Algerian network in Britain and France. But U.S., Kurdish and European officials say Ansar's ties to Al Qaeda appear well documented.

Clear ties to Hussein seem more elusive. U.S. and Kurdish officials point to Abu Wael, a fellow leader of

Ansar accused of being an Iraqi intelligence liaison to the Islamic terrorists. Krekar claims that Iraqi agents tried to poison him in 1992 and would kill him if they could.

"Our aim has always been the toppling of the Iraqi Baath regime," he said. But he said he opposes a U.S. attack on Iraq because "Saddam attaches no importance to humanitarian values, and if he is cornered and realizes that he is going to be hit, he will sink the boat with everyone and everything in it."

As the international debate about Iraq mounted, Krekar's case became increasingly uncomfortable for Dutch authorities. Ten days before his scheduled extradition hearing, authorities decided to deport him to Norway, where his wife and four children live.

His lawyers assert that the Jordanian case was weak and that the Dutch government wanted to avoid another terrorism-related embarrassment. Late last year, a Dutch court acquitted accused members of an alleged Al Qaeda cell who prosecutors charged had plotted to bomb the U.S. Embassy in Paris.

Today, Krekar's Norwegian lawyer fears that Norway wants to strip the mullah of his refugee passport, leaving him stateless. The obstacle to a terrorism case in Oslo, however, is a law that says he must be a threat to Norway to be charged. "His fight is

against other Kurds," said the lawyer, Brynjar Meling. "That charge is hopeless."

Krekar sees himself as a pawn of the U.S. government. "This is only for a war against Iraq," he said. "Our group didn't do anything against America.

DEPORTED TERROR SUSPECT DETAILS TORTURE IN SYRIA
Canadian's Case Called Typical of CIA
November 5, 2003; Page A01

By DeNeen L. Brown and Dana Priest, Washington Post Staff Writers
TORONTO, Nov. 4 -- A Canadian citizen who was detained last year at John F. Kennedy International Airport in New York as a suspected terrorist said Tuesday he was secretly deported to Syria and endured 10 months of torture in a Syrian prison.

Maher Arar, 33, who was released last month, said at a news conference in Ottawa that he pleaded with U.S. authorities to let him continue on to Canada, where he has lived for 15 years and has a family. But instead, he was flown under U.S. guard to Jordan and handed over to Syria, where he was born. Arar denied any connection to terrorism and said he would fight to clear his name.

U.S. officials said Tuesday that Arar was deported because he had been put on a terrorist watch list after information from "multiple international intelligence agencies" linked him to terrorist groups.

Officials, speaking on condition of anonymity, said that the Arar case fits the profile of a covert CIA "extraordinary rendition" -- the practice of turning over low-level, suspected terrorists to foreign intelligence

services, some of which are known to torture prisoners.

Arar's case has brought repeated apologies from the Canadian government, which says it is investigating what information the Royal Canadian Mounted Police gave to U.S. authorities. Canada's foreign minister, Bill Graham, also said he would question the Syrian ambassador about Arar's statements about torture. In an interview on CBC Radio, Imad Moustafa, the Syrian chargé d'affaires in Washington, denied that Arar had been tortured.

Arar said U.S. officials apparently based the terrorism accusation on his connection to Abdullah Almalki, another Syrian-born Canadian. Almalki is being detained by Syrian authorities, although no charges against him have been reported. Arar said he knew Almalki only casually before his detention but encountered him at the Syrian prison where both were tortured.

Arar, whose case has become a cause celebre in Canada, demanded a public inquiry. "I am not a terrorist," he said. "I am not a member of al Qaeda. I have never been to Afghanistan."

He said he was flying home to Montreal via New York on Sept. 26, 2002, from a family visit to Tunisia.

"This is when my nightmare began," he said. "I was pulled aside by immigration and taken [away]. The police came and searched my bags. I asked to make a phone call and they would not let me." He said an FBI agent and a New York City police officer questioned him. "I was so scared," he said. "They told me I had no right to a lawyer because I was not an American citizen."

Arar said he was shackled, placed on a small jet and flown to Washington, where "a new team of people got on the plane" and took him to Amman, the capital of Jordan. Arar said U.S. officials handed him over to Jordanian authorities, who "blindfolded and chained me and put me in a van. . . . They made me bend my head down in the back seat. Then these men started beating me. Every time I tried to talk, they beat me."

Hours later, he said, he was taken to Syria and there he was forced to write that he had been to a training camp in Afghanistan. "They kept beating me, and I had to falsely confess," he said. "I was willing to confess to anything to stop the torture."

Arar said his prison cell "was like a grave, exactly like a grave. It had no light, it was three feet wide, it was six feet deep, it was seven feet high. . . It had a metal door. There was a small opening in the ceiling. There were cats and rats up there, and from time to

time, the cats peed through the opening into the cell."

Steven Watt, a human rights fellow at the Center for Constitutional Rights in Washington, said Arar's case raised questions about U.S. counterterrorism measures. "Here we have the United States involved in the removal of somebody to a country where it knows persons in custody of security agents are tortured," Watt said. "The U.S. was possibly benefiting from the fruits of that torture. I ask the question: Why wasn't he removed to Canada?"

A senior U.S. intelligence official discussed the case in terms of the secret rendition policy. There have been "a lot of rendition activities" since the Sept. 11, 2001, terrorist attacks in the United States, the official said. "We are doing a number of them, and they have been very productive."

Renditions are a legitimate option for dealing with suspected terrorists, intelligence officials argue. The U.S. government officially rejects the assertion that it knowingly sends suspects abroad to be tortured, but officials admit they sometimes do that. "The temptation is to have these folks in other hands because they have different standards," one official said. "Someone might be able to get information we can't from detainees," said another.

Syria, where use of torture during imprisonment has been documented by the State Department, main-

tains a secret but growing intelligence relationship with the CIA, according to intelligence experts.

"The Syrian government has provided some very useful assistance on al Qaeda in the past," said Cofer Black, former director of counterterrorism at the CIA who is now the counterterrorism coordinator at the State Department.

One senior intelligence official said Tuesday that Arar is still believed to have connections to al Qaeda. The Justice Department did not have enough evidence to detain him when he landed in the United States, the official said, and "the CIA doesn't keep people in this country."

With those limitations, and with a secret presidential "finding" authorizing theCIA to place suspects in foreign hands without due process, Arar may have been one of the people whisked overseas by the CIA.

In the early 1990s, renditions were exclusively law enforcement operations in which suspects were snatched by covert CIA or FBI teams and brought to the United States for trial or questioning. But CIA teams, working with foreign intelligence services, now capture suspected terrorists in one country and render them to another, often after U.S. interrogators have tried to gain information from them.
Renditions are considered a covert action. Congress, which oversees the CIA, knows of only the broad au-

thority to carry out renditions but is not informed about individual cases, according to intelligence officials.

[Priest reported from Washington. Staff writers John Mintz and Glenn Kessler in
Washington contributed to this report.]

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EXHIBIT D

U.S. Department of Justice
Immigration and Naturalization Service

Final Notice of Inadmissibility

Refer to the following file number:
File No. [Redacted]
Date: October 07, 2002

To:

ARAR, Maher Abdul Hamid, aka,
ARAR, Maher
ARAR, Maher Abdul Hamid
ARAR, Maher 'Abd Al-Hamid

This concerns your application for admission to the United States at the port of John F. Kennedy International Airport / NYC and the notice of temporary inadmissibility (Form I-147) previously served on you. I have determined that you are inadmissible under:

□ Section 212(a)(3)(A) (other than clause (ii))
x Section 212(a)(3)(B)(i)(v)
□ Section 212(a)((3)(C)

of the Immigration and Nationality Act (Act).

IT IS ORDERED that you be removed without further inquiry before an immigration judge, in accordance with section 235(c) of the Act and Title 8,

Code of Federal Regulations, part 235.8. If you enter or attempt to enter the United States for any purpose, without the prior written authorization of the Attorney General, you will be subject to arrest, removal, and possible criminal prosecution.

The Commissioner of the Immigration and Naturalization Service has determined that your 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.

[Signature]
(Signature of regional director)

(Printed name of regional director)

REGIONAL DIRECTOR

Certificate of Service

I have read and explained this notice to the above named alien.

[Redacted] □ Interpreter used: NONE
(language)

[Redacted] 10/8/02 4AM
(Printed name of officer) (Date)

I acknowledge that a copy of this notice has been given to me, read, and explained to me, and I understand it.

[Redacted] [Signature]
(Signature of alien)

In Removal Proceedings under Section 235(c) of the Immigration and Nationality Act;

FILE: [Redacted]	)
	)
IN THE MATTER OF:	)
	)
ARAR, Maher Abdul Hamid	)
a/k/a ARAR, Maher	)
a/k/a ARAR, Maher Abdul Hamid	)
a/k/a ARAR, Maher ' Abd Al-Hamid	)
	)
APPLICANT	)

Decision of the Regional Director

Introduction

In accordance with my responsibilities as Regional Director, I have, pursuant to section 235(c)(2)(B) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 235.8(b), reviewed the documentation submitted to me by the New York District Director concerning the application of Maher Abdul Hamid Arar (Arar) for admission to the United States. This review has included consideration of both classified and unclassified information concerning Arar.[83] As a

[83] Section 235(c)(2)(B)(i) of the INA states that a decision under this provision is to be based on "confidential" information. Throughout this decision, for the sake of clarity, the terms clas-

result of this review, I have concluded on the basis of classified information that Arar is clearly and unequivocally inadmissible to the United States under INA § 212(a)(3)(B)(i)(v) in that he is a member of an organization that has been designated by the Secretary of State as a Foreign Terrorist Organization, to wit: Al-Qaeda, a/k/a al-Qa'ida. In addition, pursuant to section 235(c) of the INA, and after consulting with appropriate security agencies of the United States, I have concluded that disclosure of the classified information upon which this decision is based would be prejudicial to the public interest, safety or security.

Background

Arar is a native of Syria and a citizen of Canada and Syria. Arar arrived at John F. Kennedy International Airport in New York, New York on September 26, 2002, via American Airlines [redacted] from Zurich, Switzerland. Upon arrival, Arar presented Canadian passport number [redacted] and applied for admission to transit to Canada. Upon secondary inspection, it was determined that Arar was the subject of a TECS/Nails lookout as being a member of a known terrorist organization.

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sified and unclassified are employed, rather than the term confidential.

On October 1, 2002, the Immigration and Naturalization Service initiated removal proceedings under section 235(c) of the INA against Arar with service of Form I-147, charging him with being inadmissible to the United States. Specifically, the Service charges Arar with being temporarily inadmissible under INA 212(a)(3)(B)(i)(V) in that he is an alien who is a member of a foreign terrorist organization.

On October 1, 2002, upon initiating removal proceedings against Arar under section 235(c), the INS, in accordance with 8 C.F.R. § 235.8 provided Arar with 5 days to respond to the charge. On October 1, 2002, the Service served upon Arar all unclassified documents that the Service relied upon in issuing the Form I-147. These documents included: (1) an executed I-147 noticing Arar of the requirement to respond within five days from October 1, 2002, to INS with a written statement and any accompanying information regarding the allegations and the charge of inadmissibility; (2) an attachment to the I-147 alleging Arar to be a member of an organization that has been designated by the Secretary of State as a Foreign Terrorist Organization, to wit: Al-Qaeda, and charging Arar with inadmissibility pursuant to section 212(a)(3)(B)(i)(V) of the INA; (3) a publication issued by the Department of State pursuant to section 219 of the INA listing Al-Qaeda as a Foreign Terrorist Organization; and (4) a publication from the Executive Office for Immigration Review of free legal service providers in the New York area.

Arar's Submissions

As of October 7, 2002, Arar failed to provide a written statement and any additional information in response to the charge.

Evidence of Inadmissibility

The documentation I have reviewed, including information received from other agencies, clearly and unequivocally reflects that Arar is a member of a foreign terrorist organization, to wit: Al-Qaeda, so designated by the Secretary of State pursuant to INA § 219. 66 FR 51088-01 (October 5, 2001).

The information I have reviewed is composed of both classified and unclassified materials. The following is a descriptive inventory of the more significant evidentiary materials that form the basis of my decision.

Unclassified

An INS immigration officer interviewed Arar on September 26, 2002 at JFK International Airport regarding his application for admission to the United Slates. Arar stated that he was a native of Syria and a citizen of Canada and Syria. Arar indicated that he used Canadian passport number [redacted] to apply for admission to the United States. Arar informed the immigration officer that he had lived in

Tunis, Tunisia for three months prior his application for admission. Arar denied having any affiliation or link to a terrorist organization.

The FBI interviewed Arar on September 27, 2002 at JFK International Airport. During the interview, Arar admitted his association with Abdullah Al-Malki and Abdullah Al-Malki's brother, Nazih Al-Malki. Arar advised the FBI that he was friendly with Nazih Al-Malki in Syria while they were in school together and that he [Arar] worked with Nazih Al-Malki at Nex Link Communications. Arar also advised the FBI that Al-Malki exports radios and one of his customers was the Pakistani military. Arar also advised that he had three business dealings with Al-Malki. Arar also admitted to the FBI about meeting Abdullah Al-Malki at the restaurant where he and Al-Malki went outside and talked in the rain in October 2001.

During the September 27, 2002 interview at JFK, Arar admitted knowing Ahman El-Maati.

Classified

A detailed discussion of the classified information I relied upon is contained in a separate, Classified Addendum.

Conclusions

Pursuant to section 240(c)(2) of the INA, an alien who is an applicant for admission has the burden of establishing clearly and beyond doubt that he or she is entitled to be admitted and is not inadmissible under section 212. Although Arar has denied the charge of inadmissibility, he has offered no evidence in support of his denial. Based upon all of the information made available to me, both classified and unclassified, I find that Arar is clearly and unequivocally inadmissible under INA § 212(a)(3)(B)(i)(V) in that he is a member of a foreign terrorist organization.

I have determined that Arar is a member of the designated foreign terrorist organization known as Al-Qaeda. Pursuant to section 219 of the INA, this organization could not be designated unless the "terrorist activity or terrorism of the organization threatens the security of United States' nationals or the national security of the United States." Specifically, Al-Qaeda has been found responsible for multiple terrorist attacks upon the United States, and is considered a "clear and imminent threat to the United States."[84]

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[84] "The most serious international terrorist threat to US interest today stems from Sunni Islamic extremists such as Usama bin Laden and individuals affiliated with his Al-Qaeda organization. Al-Qaeda leaders, including Usama bin Laden, had been harbored in Afghanistan since 1996 by the extremist Islamic regime of the Taliban. Despite recent military setbacks suffered by the Taliban and the apparent death of Al-Qaeda

As discussed above, and more fully in the Classified Addendum, Arar's membership in this organization bars him from admission to the United States, because he is presumed to share the goals and support methods of an organization which he freely joined and with which he continues to meaningfully associate. This organization has been determined responsible for acts of terrorism against the U.S. in the past, and represents a "clear and imminent threat to the United States."

Based upon the foregoing and upon the classified information referred to above, I further find that there are reasonable grounds to believe that Arar is a danger to the security of the United States [Redacted]

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operational commander Mohamed Atef resulting from a US bombing raid, Al-Qaeda must continue to be viewed as a potent and highly capable terrorist network. The network's willingness and capability to inflict large scale violence and destruction against US persons and interests--as it demonstrated with the September 11 attack, the bombing of the USS Cole in October 2000, and the bombings of two US embassies in east Africa in August 1998, among other plots--makes it a "clear and imminent treat to the United States." Statement for the record of J.T. Caruso, Deputy Executive Assistant Director Counterterrorism/Counterintelligence, Federal Bureau of Investigation, On Combating Terrorism: Protecting the United States Before the House Subcommittee on National Security, Veterans Affairs, and International Relations March 21, 2002. Less than one month ago, the Attorney General determined that Al-Qaeda might be planning specific attacks on the U.S. See Remarks of the Attorney General, Threat Level Press Conference, September 10, 2002.

Accordingly, for the reasons set forth above, I am satisfied that the evidence establishes that Arar is inadmissible, and I hereby ORDER that he be removed from the United States.

October 07, 2002
Date

[Signature]
J. Scott Blackman
Regional Director
Eastern Region
U.S Immigration and
Naturalization Service

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 2002, a copy of the foregoing was served by personal service upon the applicant at MDC Brooklyn, NY

[Redacted]
Witness: [Redacted]

EXHIBIT E

Jan. 21, 2004

His Year In Hell

Canadian Tells Vicki Mabrey That He Was Deported to Syria

By Rebecca Leung

Maher Arar is a Syrian-born Canadian citizen who was taken into custody, under suspicion of being connected with al Qaeda, while changing planes in New York.

Maher Arar is a Syrian-born Canadian citizen who was taken into custody, under suspicion of being connected with al Qaeda, while changing planes in New York. (CBS) It would be more than a year before Arar would see his wife, Monia, and two children again.

It would be more than a year before Arar would see his wife, Monia, and two children again. (CBS)

(CBS) Is it possible the United States sent an innocent man out of the country to be tortured?

That's the disturbing question at the heart of a case that may reveal a secret side of the war on terrorism -- one that the government does not want to talk about.

It involves an accusation that the justice department sent a man from the U.S. to Syria to be interrogated and tortured.

The man making the claim is a Syrian-born Canadian citizen who was taken into custody, under suspicion of being connected with al Qaeda, while changing planes in New York.

Now, Maher Arar tells Correspondent Vicki Mabrey about what became his year in hell, which began when federal agents stopped him for questioning at JFK International Airport. "I cooperated with them 100 percent. And they always kept telling me, 'We'll let you go on the next plane,'" says Arar. "They did not."

It would be more than a year before Arar would see his family again. In September 2002, he'd taken his wife and two children on a beach vacation in Tunisia. But he flew home alone early for his job as a software engineer.

What he didn't know is that he'd been placed on the U.S. immigration watch list. So when the agents began questioning him, he tells 60 Minutes II that he wasn't concerned – at least not at first.

"The interrogation lasted about seven or eight hours, and then they came, and shackled me and chained me," recalls Arar. "I said, 'What's happening here?'

And they would not tell me. They said, 'You are gonna know tomorrow.'"

He spent the night in a holding cell. The next day, he was shackled, driven to the Metropolitan Detention Center in Brooklyn and locked in solitary confinement. Agents told him they had evidence that he'd been seen in the company of terrorist suspects in Canada.

"What they accused me of being is very serious. Being a member of al Qaeda," says Arar, who denies any involvement with the organization.

Arar wasn't allowed to make a phone call, so when his wife, Monia, didn't hear from him, she called the Canadian embassy.

"Nobody knew at that time where he was. He vanished," says Monia, who didn't hear from him for six days. Then, American officials acknowledged they were holding Arar in Brooklyn. A Canadian consular official visited and assured Arar he'd be deported home to Canada.

But the justice department had a different plan. After two weeks in U.S.custody, Arar was taken from his cell by federal agents in the middle of the night.

"They read me the document. They say, 'The INS director decided to deport you to Syria,'" recalls Arar.

"And of course, the first thing I did was I started crying, because everyone knows that Syria practices torture."

Arar says he knows because he was born in Syria. He emigrated to Canada with his parents as a teenager. But, returning to Syria as an accused terrorist, he had good reason to be afraid. Torture in Syrian prisons is well-documented. The state department's own report cites an array of gruesome tortures routinely used in Syrian jails. And in a speech last fall, President Bush condemned Syria, alongside Iraq, for what he called the country's "legacy of torture and oppression."

Nevertheless, deportation agents flew Arar on a specially chartered jet to Jordan, and the Jordanians drove him to Syria.

"When I arrived there, I saw the photos of the Syrian president, and that's why I realized I was indeed in Syria," says Arar. "I wished I had a knife in my hand to kill myself."

The next morning, Arar says a Syrian intelligence officer arrived carrying a black electrical cable, two inches thick and about two feet long.

"He said, 'Do you know what this is?' I said, I was crying, you know, 'Yes, I know what it is. It's a cable.' And he said, 'Open your right hand.' I opened my

right hand … and he beat me very strongly," says Arar. "He said, 'Open your left hand.' And I opened my left hand. And he beat me on my palm, on my left palm. And then he stopped, and he asked me questions. And I said to him, 'I have nothing to hide.'"

Arar says the physical torture took place during the first two weeks, but he says he also went through psychological and mental torture: "They would take me back to a room, they call it the waiting room. And I hear people screaming. And they, I mean, people, they're being tortured. And I felt my heart was going to go out of my chest."

But Imad Moustapha, Syria's highest-ranking diplomat in Washington, says Arar was treated well. He also told Mabrey that Syrian intelligence had never heard of Arar before the U.S. government asked Syria to take him.

Did the U.S. give them any evidence to back up the claim that Arar was a suspected al Qaeda terrorist?

"No. But we did our investigations. We traced links. We traced relations. We tried to find anything. We couldn't," says Moustapha, who adds that they shared their reports with the U.S. "We always share information with anybody alleged to be in close contact with al Qaeda with the United States."

The Syrians allowed Canadian officials six short visits with Arar. But Arar says he was warned not to tell them about the torture or how he was being held – in an underground cell 3 feet wide, 6 feet long and 7 feet high. It was his home for a full 10 months.

"It's a grave. It's the same size of a grave. It's a dark place. It's underground," says Arar.

He says the Syrians were pressing him to confess he'd been to an al Qaeda training camp in Afghanistan: "They just wanted to find something that the Americans did not find -- and that's when they asked me about Afghanistan. They said, 'You've been to Afghanistan,' so they would hit me three, four times. And, if I hesitate, they would hit me again."

Arar says he signed a confession because he was "ready to do anything to stop the torture." But he claims that he had never been to Afghanistan, or trained at a terrorist camp. "Just one hit of this cable, it's like you just forget everything in your life. Everything," he says. Back in Canada, Monia was fighting for her husband's life. She marched in front of parliament, and protested in front of the U.S. embassy.

Eventually, she got the ear of then-Canadian Prime Minister Jean Chretien. On the floor of parliament, Chretian voiced mounting frustration with the U.S. The job eventually went to Gar Pardy, then one of

Canada's top diplomats, to get answers from the Americans.

"The American authorities acknowledged this was a Canadian citizen that they were dealing with. He was traveling on a Canadian passport. There was no ambiguity about any of these issues," says Pardy, who believes he should have been sent to Canada, or dealt with under American law in the United States. But not sent to Syria.

But while Canadian diplomats were demanding answers from the U.S., it turns out that it was the Royal Canadian mounted police who had been passing U.S. intelligence the information about Arar's alleged terrorist associations.

However, U.S. government officials we spoke to say they told Canadian intelligence that they were sending Arar to Syria – and the Canadians signed off on the decision.

Pardy says if that's true, it would have been wrong all around: "I would dispute that the people who were making any statements in this context were speaking for the Canadian government. A policeman talking to a policeman in this context is not necessarily speaking for the Canadian government.

And the Canadian government wanted Arar back. It took a year and a week from the time Arar was de-

tained in New York for Arar to be released. He arrived home in Canada dazed and exhausted.

Why did Syrian officials let him go? "Why shouldn't we leave him to go? We thought that would be a gesture of good will towards Canada, which is a friendly nation. For Syria, second, we could not substantiate any of the allegations against him," says Moustapha.

He added that the Syrian government now considers Arar completely innocent. But does he feel any remorse about taking a year out of Arar's life?
"If this was the case, it's not our problem," says Arar. "We did not create this problem." 60 Minutes II has learned that the decision to deport Arar was made at the highest levels of the U.S. justice department, with a special removal order signed by John Ashcroft's former deputy, Larry Thompson.

Ashcroft made his only public statement about the case in November. He said the U.S. deported Arar to protect Americans –- and had every right to do so.

"I consider that really an utter fabrication and a lie," says Michael Rather, Arar's attorney and head of the Center For Constitutional Rights. He plans to file a lawsuit against Ashcroft and several other American officials.

"They knew, when they were sending him to Syria, that Syria would use certain kinds of information-

gathering techniques, including torture, on him. They knew it," says Ratner. "That's why he was sent there. That's why he wasn't sent to Canada."

Before deporting Arar to Syria, American officials involved in the case told 60 Minutes II they had obtained assurances from the Syrian government that Arar would not be tortured –- that he would "be treated humanely"

"The fact that you went looking for assurances, which is reflected here, tells you that even in the minds of people who made this decision," says Pardy. "I mean, there were some second thoughts."

No one at the justice department would talk to 60 Minutes II on camera about Arar, but they sent us this statement saying:

"The facts underlying Arar's case… [are] classified and cannot be released publicly."

"We have information indicating that Mr. Arar is a member of al Qaeda and, therefore, remains a threat to U.S. national security."

Despite the American accusations, Arar has never been charged with a crime and, today, he's free in Canada. He's afraid, though, that he might never be able to clear his name.

Arar's case is unusual because he was sent directly from U.S. soil to Syria. But intelligence sources tell 60 Minutes II that since 9/11, the U.S. has quietly transported hundreds of terror suspects captured in different parts of the world to Middle Eastern countries for tough interrogations.

Produced by Michael Bronner and Wayne Nelson
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