No. 06-4216-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAHER ARAR,
Plaintiff-Appellant,
v.

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

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

REPLACEMENT BRIEF FOR JOHN ASHCROFT, THE OFFICIAL CAPACITY
DEFENDANTS-APPELLEES AND THE UNITED STATES

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[1] The official capacity claims against Ashcroft and Ridge should be denominated as against the current officeholders, Attorney General Michael Mukasey and Secretary of Homeland Security Michael Chertoff. *See* Fed. R. App. P. 43(c)(2). The office of Regional Director held by defendant Corrigan no longer exists.

STATEMENT OF JURISDICTION

Plaintiff asserted claims under the Fifth Amendment and the Torture Victim Protection Act ("TVPA"), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331, 2201, 2202, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, 559.

The district court entered judgment on July 28, 2006, dismissing three claims with prejudice and one claim without prejudice. Special Appendix ("SA") 89-90. Plaintiff asked the court to amend the judgment to dismiss all claims against the named defendants with prejudice, and the court did so on August 17, 2006. SA 91-93. On September 12, 2006, plaintiff filed a timely notice of appeal. Appendix ("App.") 470-471. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiff sued several federal officials under a *Bivens* theory of liability and the TVPA, and also sought declaratory relief. Having been removed to Syria under provisions of the Immigration and Nationality Act ("INA"), plaintiff alleged that one of the central findings of the removal order was fraudulent and violated the Convention Against Torture. The questions presented are:

1. Whether a court can properly assert jurisdiction and create a constitutional cause of action for damages with respect to allegations concerning plaintiff's removal

and, alternatively, whether those allegations fail to state a violation of a clearly established right by any defendant. (Counts 2 and 3)

2. Whether plaintiff's allegations regarding his treatment while in the United States state a violation of a clearly established right by any defendant. (Count 4)

3. Whether a Torture Victim Protection Act claim can be asserted against U.S. officials exercising authority under U.S. immigration law, and, alternatively, whether plaintiff's allegations state a violation of a clearly established right by any defendant. (Count 1)

4. Whether plaintiff has standing to seek declaratory relief.

STATEMENT OF THE CASE

Plaintiff Maher Arar was denied admission to the United States under the INA based on the finding that he was a member of al Qaeda, and he was removed to Syria, the country of his birth and of which he was a citizen, after the INS Commissioner determined that his removal to Syria was consistent with obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 ("CAT").[2] Plaintiff filed the present civil action against current and former federal officials in their official and individual capacities. App. 19-43. He asserted that the removal decision was made with knowledge that he

[2] S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

would be tortured in Syria, and he also complained about the conditions of his confinement while in the United States. Plaintiff asked the court to create a cause of action for damages with regard to the individual defendants for alleged violations of the Fifth Amendment, asserted claims under the TVPA, and also sought declaratory relief.

The district court held that plaintiff lacked standing to seek declaratory relief and that a *Bivens* action for the alleged constitutional violations relating to his removal to and treatment in Syria (Counts 2 and 3) was not available. The court further held that plaintiff's TVPA claim (Count 1) failed because the defendants had not acted under color of foreign law. As to Count 4, regarding plaintiff's detention in the United States, the court held that plaintiff had not sufficiently alleged the personal involvement of the individual defendants. Plaintiff refused the opportunity to replead that count and asked the district court to enter judgment, which it did. Plaintiff then filed this appeal.

A divided panel of this Court affirmed. The panel unanimously affirmed the dismissal of plaintiff's TVPA and declaratory relief claims. In addition, the majority concluded that it could not properly imply a *Bivens* remedy with respect to plaintiff's removal to and treatment in Syria, and that plaintiff had stated no violation of constitutional rights as to his detention in the United States. Judge Sack, dissenting

in part, would have implied a cause of action for damages with respect to the asserted constitutional violations.

STATEMENT OF THE FACTS

A. Statutory Background.

The INA authorizes removal based on national-security concerns without a hearing before an immigration judge, 8 U.S.C. § 1225(c)(1)-(2). The statute also confers discretionary authority on the Attorney General (now on the Secretary of Homeland Security) to override an alien's designation of a country of removal. 8 U.S.C. § 1231(b)(2)(C)(iv).

If an alien claims he will be tortured upon removal, the authorized officials must decide whether removal needs to be withheld pursuant to U.S. obligations under the CAT as implemented into U.S. law by the Foreign Affairs Reform and Restructuring Act ("FARR Act"), Pub. L. 105-277, § 2242(b), codified at 8 U.S.C. § 1231 note. Under the CAT and the FARR Act, removal to a given country must be withheld if the Government determines that it is more likely than not that the alien would be subjected to torture if removed there.[3]

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[3] *See* 8 C.F.R. 208.16(c)(3), 208.17(d)(3), 208.18(d); *see also* FARR Act, § 2242(b) (implementation of the United States' obligations under the CAT is "subject to any reservations, understandings, declarations, and provisos contained in the * * * Senate resolution of ratification"); *Sevoian v. Ashcroft*, 290 F.3d 166, 174-75 (3d Cir. 2002).

In 2002, when plaintiff was removed, the INA provided two avenues for seeking judicial review. First, the Act allowed an alien to challenge a final removal order by filing a petition for review in the court of appeals. *See* 8 U.S.C. § 1252. Second, at the time, an alien also could have filed a habeas petition in district court. Under *INS v. St. Cyr*, 533 U.S. 289, 309 (2001), habeas review remained available, at least when an alien was unable to file a petition for review.[4] In such a habeas filing, an alien could ask a district court to stay his removal. *See Michael v. INS*, 48 F.3d 657, 661 (2d Cir. 1995) (granting stay of removal in a *habeas* case filed pre-final removal order).

While Congress has provided for court review of removal orders through the INA, it has also expressly barred a court from entertaining a civil action collaterally attacking the validity of a removal order:

> 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 subchapter shall be available only in judicial review of a final order under this section.

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[4] After 2005, with the enactment of the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005), a court can no longer assert such habeas jurisdiction. *See Ruiz-Martinez v. Mukasey*, 516 F.3d 102 (2d Cir. 2008) (discussing the REAL ID Act and holding that it does not violate the Suspension Clause).

8 U.S.C. § 1252(b)(9). In that same section, Congress further made clear that "any cause or claim" relating to an asserted violation of the CAT can be asserted only through a petition for review under the INA:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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 any cause or claim under the [CAT], except as provided in subsection (e) of this section.

8 U.S.C. § 1252(a)(4).

B. Factual Background.

Consistent with Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the district court accepted the factual allegations of the complaint, and, for present purposes, we do so as well. In view of the nature of the allegations, however, we emphasize what is customarily taken for granted – that the acceptance of the allegations for purposes of this brief in no way suggests agreement with those statements. Indeed, the INS Commissioner expressly determined that plaintiff's removal was consistent with the CAT, App. 86, including its requirement that removal to another country must be withheld if it is more likely than not that the alien would tortured there. As former Attorney General Gonzales testified before the Senate Judiciary Committee, that finding was based upon communications between

U.S. and Syrian officials.[5] He explained: "we understand what our legal obligations are with respect to when someone is either removed, extradited or rendered to another country. We understand what our obligations are under the Convention Against Torture, and we do take the steps to ensure that those obligations are being met." Oversight Hearing at 99.[6]

1. Plaintiff Maher Arar is a dual citizen of Syria (the place of his birth) and Canada. On September 26, 2002, plaintiff sought to exit his flight from Tunisia and enter JFK Airport in New York. At JFK, plaintiff planned to take a flight to Canada. SA 2. As a matter of law, plaintiff, by arriving at and seeking entry into JFK Airport, was an applicant for admission. *See* 8 U.S.C. § 1225(a)(1) (arriving aliens are "applicants for admission").[7]

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[5] *See* Transcript of Senate Judiciary Committee Oversight Hearing (Jan. 18, 2007) ("Oversight Hearing"), 97-99 ("there were assurances sought that [Arar] would not be tortured from Syria.").

[6] At a congressional hearing in 2007, plaintiff's counsel recognized that this was a case in which "Government officials have asserted that the United States obtained assurances from Syria that it would not torture Mr. Arar." Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives, 110th Cong., 1st Sess., 101 (October 18, 2007) (Statement of David Cole). The counsel argued to the committee that it was not reasonable for U.S. officials to have relied on communications from Syrian officials. *Id.* at 101-102.

[7] As the panel majority noted, even if an alien is "eligible to transfer flights through the United States without obtaining a visa first," he is still subject to a full (continued...)

Upon presenting his passport to an immigration inspector, plaintiff was identified as being a suspected member of a known terrorist organization. SA 2; App. 88. Plaintiff was then detained in New York and claims that, during the first three days of his detention, officials ignored his requests to make a telephone call and see a lawyer. SA 2-7.

On October 1, 2002, the INS initiated proceedings against plaintiff, charging him with being a member of al Qaeda and thus inadmissible to the United States under 8 U.S.C. § 1182(a)(3)(B)(i)(V). SA 4; App. 88. Plaintiff was provided a copy of a document finding him inadmissable "because he belonged to" a terrorist organization, "namely, Al Qaeda." App. 31.

That same day, plaintiff telephoned his family, who immediately contacted the Canadian Consulate and retained an immigration attorney in New York. App. 31.

On October 3, an official from the Canadian Consulate visited plaintiff, and plaintiff expressed concern that he would be removed to Syria. App. 31. The next day, plaintiff met with immigration officers and he designated Canada as the country to which he wanted to be removed. App. 31-32.

On October 5, plaintiff visited with his immigration attorney. App. 32.

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[7](...continued)
border inspection process upon arrival in the United States. *Arar v. Ashcroft,* 532 F.3d 157, 186 n.25 (2d Cir. 2008).

On October 6, defendant McElroy left a message for plaintiff's attorney providing notice of INS's plan to question plaintiff regarding any objection he might have to his removal to Syria. App. 32. That same day, INS officials questioned plaintiff about whether he objected to being removed to Syria. *Ibid.* He alleges that he told the officials that he feared being tortured. *Ibid.*

2. On October 7, 2002, then-INS Regional Director J. Scott Blackman determined from classified and unclassified information that plaintiff was "clearly and unequivocally" inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(V), as a member of al Qaeda. SA 6; App. 87-88, 91. Concluding that "there are reasonable grounds to believe that [Arar] is a danger to the security of the United States," SA 6; App. 92, Blackman ordered plaintiff's removal without a hearing before an immigration judge pursuant to 8 U.S.C. § 1225(c)(2)(B). *See* App. 87-88, 108.

On October 8, 2002, the Acting Attorney General, Larry Thompson, exercised his discretionary authority under 8 U.S.C. § 1231(b)(2)(C)(iv), which provides that the "Attorney General may disregard a designation" if, *inter alia*, he "decides that removing the alien to the country is prejudicial to the United States." Syria was selected as the country of removal pursuant to 8 U.S.C. § 1231(b)(2)(D) as a country of which plaintiff "is a subject, national, or citizen." The Final Notice of Inadmissibility ordered him removed and incorporated the INS Commissioner's

"determin[ation] that [Arar's] removal to Syria would be consistent with the [CAT]." App. 86.[8]

The final removal order,[9] which includes the CAT determination, would have been subject to judicial review. 8 U.S.C. § 1252; FARR Act § 2242(d); 8 C.F.R. 208.18(e)(1). No petition for review or habeas petition was ever filed, however, either before or after plaintiff's removal.

Thereafter, plaintiff was flown to Jordan and handed over to Jordanian authorities, who delivered him to Syria. SA 7. Plaintiff claims that, while in Syria, he was subjected to harsh interrogation and torture by Syrian security officers and held in a "tiny underground cell." App. 35-36. On October 20, 2002, the Canadian Embassy in Syria confirmed that plaintiff was in Syria. The complaint notes that he met with Canadian officials on seven occasions while in Syria. *Ibid.* On October 5, 2003, Syria released plaintiff, and he returned to Canada. App. 37.

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[8] Plaintiff attached this document to his complaint and, by doing so, incorporated it into his pleading. *See* Fed. R. Civ. P. 10(c).

[9] The complaint incorrectly states that the removal order bars plaintiff's return to the United States for five years. App. 33. Plaintiff was removed as the result of proceedings under 8 U.S.C. § 1225. Pursuant to 8 U.S.C. § 1182(a)(9)(A)(ii), he is inadmissible for ten years from the date of his removal, absent consent from the Secretary of Homeland Security to plaintiff's reapplying for admission.

C. District Court Proceedings.

1. Plaintiff's Complaint

Plaintiff filed the present action against current and former federal officials. App. 19-43. The complaint named as defendants former Regional Director Blackman, former INS Commissioner James Ziglar, former Deputy Attorney General Larry Thompson, and former INS District Director Edward McElroy, in their individual capacities; former Attorney General John Ashcroft and FBI Director Robert Mueller, in both their individual and official capacities; the Secretary of Homeland Security, and the Regional Director of Immigration and Customs Enforcement for the New York Region in their official capacities; and several unnamed employees of the FBI and INS in their individual capacities. App. 23-27.

The complaint asserts that plaintiff is not a member of al Qaeda or any other terrorist organization and that there was never any "reasonable suspicion to believe" he was engaged in terrorist activities. App. 20, 22, 23. He complains about his treatment by unidentified officers while detained in New York awaiting removal, and he alleges he was tortured by Syrian officials during his detention in Syria. App. 21, 29-37.

The complaint raises four claims for relief. In Count 1, plaintiff alleges that defendants violated the Torture Victim Protection Act by conspiring with or aiding

and abetting Syrian officials to bring about his torture in Syria. App. 38. In Counts 2 and 3, he claims that defendants violated his Fifth Amendment substantive due process rights by subjecting him to torture, coercive interrogation, and prolonged detention in Syria. App. 38-41. In Count 4, he asserts a Fifth Amendment challenge to the conditions of his confinement and his alleged deprivation of access to the courts while detained in the United States. App. 41-42.

The complaint sought a declaratory judgment that defendants' conduct violated plaintiff's "constitutional, civil, and international human rights." App. 42. It also sought compensatory and punitive damages from the individual defendants. *Ibid.*

2. Assertion of State-Secrets Privilege.

The United States and the named defendants moved to dismiss for want of jurisdiction and for failure to state a claim. In addition, the United States made a formal assertion of the state-secrets privilege. The United States explained that Counts 1-3 could not be litigated without disclosure of classified information and therefore must be dismissed. App. 126-38. The privilege assertion was supported by unclassified declarations from then-Acting Attorney General James Comey and then-Secretary of Homeland Security Tom Ridge. App. 129-37.

Acting Attorney General Comey explained: "Litigating Counts I, II and III of Arar's complaint would necessitate disclosure of classified information, including:

(1) the basis for the decision to exclude plaintiff from this country based on the finding that plaintiff was a member of * * * al Qaeda, * * *; (2) the basis for the rejection of plaintiff's designation of Canada as the country to which plaintiff wished to be removed, * * *; and (3) the considerations involved in the decision to remove him to Syria, * * *." App. 131-32. Mr. Comey further declared that "disclosure of the classified information used by government officials to reach each of the three noted decisions reasonably could be expected to cause exceptionally grave or serious damage to the national security interest of the United States." App. 133. Secretary Ridge added that the classified information relating to these three decisions "contains numerous references to intelligence sources and methods, the disclosure of which reasonably could be expected to cause exceptionally grave or serious damage to the national security of the United States and its foreign relations or activities." App. 136.

Both Acting Attorney General Comey and Secretary Ridge further supported the state-secrets privilege assertion in detailed classified declarations and explained that the basis for invoking the privilege could not be further elaborated on the public record. App. 133, 136. The government offered to provide the district court the classified declarations further supporting the assertion of the state-secrets privilege for its *ex parte, in camera* review. App. 127.

The named defendants also filed separate motions to dismiss based upon the state secrets assertion. App. 139-153.

3. District Court Decision.

Without reaching the state-secrets privilege assertion, the district court granted defendants' motions to dismiss.[10] The court held that plaintiff's declaratory-relief claims failed to present a case or controversy. SA 18. The only ongoing injury identified by plaintiff was the statutory bar on his reentering the United States. The court explained that the claimed injury could not supply standing for prospective relief because it is a legal consequence of the removal order, and plaintiff conceded he was not seeking to set aside that order. SA 19 (citing plaintiff's opposition to defendants' motions to dismiss ("Arar Memo. in Opp.") at 13). Because "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," the court dismissed plaintiff's claims for declaratory relief. SA 19-20.

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[10] The court found that the invocation of the state-secrets privilege was moot in light of its dismissal of Counts 1-3 on other grounds. SA 85-86. If this Court were to reverse the dismissal of any of these claims, the district court would be required to determine on remand whether any reinstated claim could proceed notwithstanding the assertion of the state-secrets privilege.

The district court also dismissed plaintiff's TVPA claim because the defendants acted under authority of U.S. law, not "under actual or apparent authority, or color of law, of any foreign nation." SA 31-37.

The court declined to recognize a constitutional damages remedy against the individual defendants with respect to plaintiff's removal to and treatment in Syria. The court explained that it should not create a *Bivens* remedy "in light of the national-security concerns and foreign policy decisions at the heart of this case." SA 70. The court noted that when Congress created a damages remedy in the TVPA, it did not extend that remedy to acts of U.S. officials acting under color of U.S. law, and Congress likewise did not provide any monetary remedy when it enacted the FARR Act to implement the CAT. SA 71. The court reasoned that "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 * * *." SA 75-76. In light of that holding, the court was not required to reach the questions of whether plaintiff had a clearly established constitutional right. SA 54-67.

With respect to plaintiff's claim regarding his treatment during his detention within the United States (Count 4), the court concluded that plaintiff failed to "adequately detail which defendants directed, ordered and/or supervised the alleged

violations." SA 81-82, 84. Thus, the court dismissed this claim without prejudice for plaintiff to replead. SA 85, 88.

Plaintiff did not wish to replead Count 4 and asked the court to enter final judgment, which it did, SA 92-93. Plaintiff then appealed to this Court. SA 470.

D. Panel Decision

A panel of this Court affirmed. The panel was unanimous in holding that plaintiff lacks standing to pursue declaratory relief because his claimed injury – an inability to reenter the United States – is neither traceable to the alleged wrongdoing of defendants nor redressable in this action. *See Arar v. Ashcroft,* 532 F.3d 157, 190-91, 201 (2d Cir. 2008). The panel also unanimously agreed that plaintiff failed to state a claim under the TVPA because the allegations in his complaint were insufficient to show that defendants were acting "under color of foreign law." *Id.* at 174-75, 201.

A majority of the panel upheld the dismissal of the *Bivens* claims. With respect to the removal-related claims (Counts 2 and 3), the panel majority declined to permit a *Bivens* action in light of Congress's decision to limit judicial review over any action taken to remove an alien. 532 F.3d at 180. The panel majority also found that the foreign-policy and national-security concerns implicated in this action constitute "special factors" counseling against creation of a *Bivens* remedy. *Id.* at 180-84. The

panel majority further held that the allegations in Count 4 (seeking damages for alleged treatment while in detention in the United States) failed to state a claim under the Fifth Amendment. *Id.* at 184.

Judge Sack dissented in part. He concluded that plaintiff's allegations in Counts 2, 3, and 4 "adequately allege[] a violation of his substantive due process rights," *id.* at 207, and that this Court's precedents "imply" that a *Bivens* action should lie for "alleged violations of substantive due process," *id.* at 210.

SUMMARY OF ARGUMENT

In light of the nature of plaintiff's allegations, it is appropriate to make clear what this case is *not* about. First, it is not about whether torture is unlawful. Indeed, it is a criminal offense under federal law to engage in torture or in a conspiracy to commit torture outside the United States. *See* 18 U.S.C. § 2340A. No party to this case is defending the use of torture. No one is arguing that it would have been proper to have conspired to torture plaintiff. And if any federal official had engaged in a plan to torture plaintiff, that would have been a felony.

Second, this case is not about whether an alien must have a judicial forum in which to contest a removal order. Plaintiff previously waived any challenge to his removal order, SA 19, and in any event, he had two separate avenues for contesting his removal. Represented by counsel, he could have filed a habeas action prior to his

removal, and he also could have filed a petition for review after his removal order was issued. He did neither.

Instead, what this case is about is whether the Court should assert jurisdiction that does not exist, recognize a cause of action that Congress did not create, and then conduct a review of intergovernmental communications that the Supreme Court has said is outside the judicial ken. Plaintiff's complaint, at bottom, asks this Court to re-examine the CAT determination that Executive Branch officials made in consultation with foreign officials. Baldly alleging a conspiracy, plaintiff contends that the Court should second-guess the motives and sincerity of those who determined he would not be tortured.

With respect, however, this Court should reject plaintiff's plea to encroach into the negotiations between U.S. officials and their foreign counterparts. The INA does not permit it, the Supreme Court expressly forbids it, and, irrespective of these threshold barriers to suit and the special factors counseling hesitation, plaintiff's unprecedented claims are barred by qualified immunity. Plaintiff nonetheless argues that the Court should award him money damages because otherwise, allegedly there will be no effective check to preclude Executive Branch officials from engaging in conspiracies to torture. But, even if the absence of a deterrent was a proper basis for the judiciary to assert jurisdiction and to intrude upon the Executive's sensitive

discussions with foreign officials, it is simply not true that there is no check without a damages remedy. Even setting aside the prospect of criminal liability, Congress examines allegations of abuse of authority by Executive Branch officers under its oversight authority and has done so with regard to the allegations in this case. Congress can, of course, also create monetary remedies as it believes appropriate. That, however, is properly left to Congress and does not suggest that the court should intervene and create a remedy on its own.

Each of plaintiff's claims against the former Attorney General and the United States fails. The district court so held, the panel majority agreed, and this Court should re-affirm the decision below.

I. Plaintiff's primary contention (Counts 2 and 3) is that defendants violated his due process rights by removing him to Syria, where he was allegedly tortured. As an initial matter, these claims should be rejected because they are jurisdictionally barred. The INA unambiguously precludes "[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," except as provided by the INA itself. 8 U.S.C. § 1252(b)(9). Claims regarding the Convention Against Torture can only be presented through a petition for review, "[n]otwithstanding any other provision of law (statutory or

nonstatutory)." 8 U.S.C. § 1252(a)(4). Neither of these provisions contains any exception for erroneous determinations or alleged conspiracies. Congress could not have been clearer in removing jurisdiction.

Moreover, as the Supreme Court emphasized just last term, it is "the political branches" that "are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf v. Geren*, 128 S.Ct. 2207, 2226 (2008). In accordance with that admonition, the Court declined to review claims that detainees would be tortured or killed if handed over to a foreign government. Plaintiff here nonetheless asks this Court to review the discussions with foreign officials that provided the basis for the determination that his removal was unlikely to result in torture – precisely the inquiry that the *Munaf* Court refused to undertake. As *Munaf* declared: allegations of torture "are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. *Munaf*'s rationale compels affirmance of the dismissal of plaintiff's claims.

II. Even if plaintiff's removal-related claims were not expressly foreclosed by statute and nonjusticiable, a court could not properly imply a *Bivens* remedy in the face of Congress's comprehensive scheme. Furthermore, as the panel majority stressed in its very thorough opinion, implication of a cause of action would be

particularly inappropriate in light of the standardless delving into matters of national security and diplomacy that such an inquiry would entail.

III. Even if the Court were to reach the merits of Counts 2 and 3, the Court should still affirm because plaintiff has not asserted a constitutional violation. Under controlling Supreme Court precedent, aliens outside the United States have no Fifth Amendment rights. *See Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Boumediene v. Bush*, 128 S.Ct. 2220 (2008), did not purport to overrule *Eisentrager* in this regard and, in any event, post dates the acts at issue in this case. At the very least, plaintiff has alleged no violation of clearly established constitutional rights, and thus defendants are entitled to qualified immunity.

IV. Plaintiff has also failed to adequately plead that any of the named defendants was personally involved in the alleged actions giving rise to Counts 2 and 3. The only specific acts attributed to any individual defendant are the decisions they are charged by statute with making. And with respect to former Attorney General Ashcroft, plaintiff makes no specific factual allegations at all. In fact, plaintiff admits that defendant Ashcroft was not even exercising the authority of his office at the time in question. Rather, as plaintiff recognized in his complaint, that authority was exercised by another official as Acting Attorney General at the time in question. App.

24. As this Court has made plain, department heads cannot be subject to personal liability in the absence of allegations suggesting their personal involvement. Naked assertions of conspiracies are inadequate.

V. Plaintiff's allegations with respect to his treatment while in the United States (Count 4) were properly dismissed as well. As the district court held, plaintiff has failed to plead any facts that link any of the named defendants to the conduct of which plaintiff complains. In addition, plaintiff has not stated a violation of any clearly established Fifth Amendment right with respect to the conditions of his treatment in the United States or with the asserted interference with access to courts.

VI. The panel unanimously affirmed the district court's dismissal of plaintiff's TVPA claim (Count 1). That decision is plainly correct. As an initial matter, we note that plaintiff's attempt to pursue a damages remedy against the individual defendants here is barred for many of the same threshold grounds that preclude Counts 2 and 3 of the complaint.

In any event, as the unanimous panel held, plaintiff failed to state a claim under the TVPA. The defendants' alleged acts were not taken "under * * * color of law, of any foreign nation." TVPA § 2(a). Where, as here, U.S. officials exercised authority under U.S. law, there is no basis to deem their actions to have been taken under color of foreign law. Moreover, plaintiff's allegation of aiding and abetting or conspiracy

by U.S. officials does not state a TVPA claim, let alone a clearly established violation of the Act.

VII. The unanimous panel also properly affirmed the dismissal of the declaratory-judgment claims. Plaintiff claims that he has standing to seek a declaratory judgment because he is currently barred from reentering the United States. As the district court and panel held, however, there is no nexus between the reentry bar and the relief sought.

The reentry bar arose by operation of law, as an automatic consequence of plaintiff's removal under § 1225(c). The only way the reentry bar could be eliminated would be to vacate the removal order. In the district court, however, plaintiff conceded that he was *not* challenging his removal order. Given plaintiff's express waiver, the district court properly concluded that "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." SA 19-20. Plaintiff seeks to disregard his waiver, but it is too late in the litigation for him to change his strategy. In any event, his untimely challenge to his removal order fails.

STANDARD OF REVIEW

The district court's ruling on the motions to dismiss is subject to *de novo* review by this Court. *See Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005).

ARGUMENT

The panel unanimously and correctly affirmed the district court's conclusion that plaintiff lacks standing to pursue his claims for declaratory relief and that his Torture Victim Protection Act claim fails as a matter of law. It divided, however, on the question whether plaintiff could pursue constitutional damages claims against the individual defendants for his treatment in Syria and for his treatment while in detention in the United States. We first address the issues on which the panel members disagreed.

I. Plaintiff's Removal-Related *Bivens* Claims (Counts 2 and 3) Are Both Barred By The INA's Exclusive Review Provisions And Nonjusticiable.

A. Jurisdictional Limits In The INA.

1. As the Supreme Court has long recognized, removal decisions are "matters 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 (1952). Such decisions are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations * * *." *Ibid.*; *see also Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 348 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate our relations with foreign powers."); *United States v. Valenzuela-Bernal*,

458 U.S. 858, 864 (1992) ("The power to regulate immigration * * * has been entrusted by the Constitution to the political branches of the Federal Government"). And the authority to exclude "is a fundamental act of sovereignty," which "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

The INA, accordingly, affords the judiciary only a limited role in removal decisions. An alien who wishes to contest his removal can file a petition for review in the appropriate court of appeals, subject to the restrictions in the statute, *see* 8 U.S.C. § 1252, and until recently, he could also file a habeas petition in district court. *See St. Cyr*, 533 U.S. at 309 (allowing habeas review); REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) (eliminating habeas review). But, beyond that, the INA emphatically provides that federal courts lack jurisdiction to review "any action taken or proceeding brought to remove an alien," 8 U.S.C. § 1252(b)(9), including any CAT determination, § 1252(a)(4).

The INA declares, in sweeping terms, 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). Congress has similarly made clear that "a petition for review filed with an appropriate court of appeals * * * shall be the sole and exclusive means for judicial review of any cause or claim under the" CAT, "[n]otwithstanding any other provision of law (statutory or nonstatutory)." 8 U.S.C. § 1252(a)(4). Likewise the FARR Act limits judicial enforcement of the CAT. *See* FARR Act § 2242(d), 112 Stat. 2681–822 ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or *any other determination* made with respect to the application of the policy set forth * * * except as part of the review of a final order of removal") (emphasis added). *See also Mironescu v. Costner*, 480 F.3d 664, 676-77 (4th Cir. 2007) ("[FARR Act] § 2242(d) * * * preclude[s] consideration of CAT and FARR Act claims on habeas review of an extradition challenge").

These unambiguous provisions bar review over Counts 2 and 3, in which plaintiff seeks to collaterally challenge his removal and the CAT determination that he was not likely to be tortured in Syria. Indeed, each aspect of the conduct that resulted in plaintiff's removal to Syria implicates an "action taken or proceeding brought to remove an alien." 8 U.S.C. § 1252(b)(9). The statute authorizes removal based on national-security concerns without a hearing before an immigration judge,

8 U.S.C. § 1225(c)(1)-(2), and confers authority on the Attorney General (now the Secretary of Homeland Security) to override an alien's designation of a country of removal, § 1231(b)(2)(C)(iv). The determination of a substitute country of removal reflects INA criteria that favor removal to a country of which the alien is a "subject, national, or citizen." 8 U.S.C. § 1231(b)(2)(D).[11] And in deciding to remove plaintiff to Syria, the INS Commissioner made the finding required by statute that removal would be consistent with the CAT, a determination incorporated into the removal order (App. 86). *See* 8 C.F.R. 208.18(d); FARR Act § 2242(b). *See also* 8 C.F.R. 208.16(c)(3), 208.17(d)(3).

The extent to which plaintiff's claims challenge the removal decision is underscored by the acts attributed to the individual defendants. The only specific acts attributed to the named defendants are that defendant McElroy left a message for plaintiff's attorney providing notice of INS's plan to question plaintiff regarding any objection he might have to his removal to Syria; that Regional Director Blackman

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[11] Confirming that Congress did not intend the courts to exercise jurisdiction to review plaintiff's removal-related claims, Congress vested discretion in the Attorney General to select the country to which plaintiff would be removed, *see* 8 U.S.C. §1231(b)(2)(C), and further provided that such discretionary decisions are unreviewable, *see* 8 U.S.C. §1252(a)(2)(B)(iii). Congress also provided that nothing in §1231, including the selection of an alternative country of removal, "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).

decided both that plaintiff should be removed to Syria and that this removal would be consistent with the CAT; and that Acting Attorney General Thompson signed the removal order. App. 32-33.

Plaintiff frankly acknowledges that his suit is premised on the contention that the CAT finding in the removal order was wrong and indeed a sham. *See* Arar Replacement Brief ("Arar Br.") 40 (stressing that his complaint alleges a CAT violation). And, as plaintiff recognizes, the CAT determination was embodied in the removal order, which found that it was *not* more likely than not that Arar would be tortured if removed to Syria. App. 86. Ultimately, plaintiff even goes so far as to contend that he challenges not only the CAT determination but also "the validity of the removal order." Arar Br. 52. Accordingly, plaintiff's claims are barred by statute.

2. Plaintiff asks this Court to ignore these jurisdictional barriers. He contends that they should be deemed inapplicable because government officials prevented him from seeking review under the INA. Arar Br. 29-33. But even if this Court had authority to create jurisdiction where none exists, this case does not present an occasion for doing so. Under the facts alleged, there was no impediment to plaintiff's attorney filing a timely petition in this Court under the INA. It is established that a petition for review can be filed even after removal. *See Swaby v. Ashcroft*, 357 F.3d 156, 160 n.8 (2d Cir. 2004) (noting that effective April 1, 1997, Congress repealed

the provision that had barred petitions for review filed after removal). Here, the removal order was entered on October 8, 2002. Plaintiff's counsel could have filed a timely petition for review in this Court any time within 60 days thereafter (December 9, 2002). Plaintiff does not claim that his counsel did not have notice of the removal order within the 60 day period or that she was otherwise prevented from filing a petition.[12] In addition, even on the basis of plaintiff's allegations, there is no doubt that his counsel could have filed a habeas action in advance of the removal decision seeking to bar his removal. As noted earlier, at the time, an alien could have sought to invoke habeas jurisdiction to hear such a claim. *See INS v. St. Cyr*, 533 U.S. at 309.

3. Finally, plaintiff cannot circumvent the INA's jurisdictional provisions by alleging a conspiracy to torture him. Congress emphatically barred judicial review over "*any cause or claim* under the" CAT, except those made in a petition for review. 8 U.S.C. § 1252(a)(4) (emphasis added). And the CAT, in turn, broadly provides that "[n]o 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." Article III(1); *see also* FARR Act, § 2242(a) (implementing

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[12] Even if the unnamed "John Doe" defendants had prevented plaintiff's counsel from filing a timely petition for review, she could then have sought to toll the time for filing a petition.

CAT). The jurisdictional bar contains no exception for conspiracy, does not depend on the intent of the government officials, and is not limited to "tragic outcome[s] of a fairly reached but ultimately wrong decision." ACLU Amicus Br. at 4.

Moreover, contrary to the ACLU's suggestion, neither provision is limited to challenges to a "removal order" in an "immigration case," *ibid.* (although of course this is an immigration case). The scope of the jurisdictional bar is broad, it is clear, and this Court should affirm.

B. The Supreme Court's Decision in *Munaf v. Geren*.

1. Even if the Court disregarded the INA, there would still be no basis for extending jurisdiction to plaintiff's removal-related *Bivens* claims. These claims are nonjusticiable because, at their core, they require the Court not just to review a garden-variety administrative record, but to re-examine and second-guess the CAT determination made by Executive Branch officials in consultation with their foreign counterparts. As the Supreme Court made clear just last Term, this is something federal courts simply should not do. *See Munaf v. Geren*, 128 S.Ct. 2207, 2226 (2008).

In *Munaf*, the Supreme Court emphasized that it is "the political branches" that "are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there

is." 128 S.Ct. at 2226. Accordingly, even though the Court possessed habeas jurisdiction, it declined to review petitioners' contentions that they would be tortured or killed if handed over to a foreign government. The Court explained, "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Id.* at 2225. Noting the government's representation that the United States had consulted with foreign officials and determined that it was unlikely that individuals would be subject to torture, the Supreme Court declared: "[t]he Judiciary is not suited to second-guess such determinations – determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 2226. The Court stressed that allegations of torture "are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. *See also Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (holding that tort and TVPA claims against former National Security Advisor for summary execution and torture were nonjusticiable); *Schneider v. Kissinger*, 412 F.3d 190, 191, 194, 197 (D.C. Cir. 2005) (same).

The analysis in *Munaf* applies with full force here. Plaintiff would have this

Court review the dialogue that U.S. officials had with their counterparts in foreign countries, second-guess the credibility of the foreign officials and then question the motives and sincerity of the U.S. officials who concluded that plaintiff would not be tortured if removed to Syria. This Court would also be required to delve into the national security considerations relevant to the decision to remove plaintiff to Syria instead of Canada. *Munaf* makes clear that these inquiries are properly left to the political branches, even in the context of a U.S. citizen seeking release from detention and claiming that he would be tortured or killed if transferred to the custody of Iraq. *A fortiori*, they apply to plaintiff's claim seeking money damages

2. Plaintiff's opening replacement brief does not even cite *Munaf*. If plaintiff addresses the case in reply, he may argue that the Supreme Court did not consider the "more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 128 S.Ct. at 2226. Such an argument would be without force. In *Munaf*, the Court did not have to consider the "more extreme case" simply because the Solicitor General had "state[d] that it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result" and that the Executive's determination was based on an assessment of conditions in the foreign country and intergovernmental communications the Executive considered reliable. *See ibid.* That representation was

enough. The Court held, "[t]he Judiciary is not suited to second-guess such determinations." *Ibid.*

Plaintiff's conclusory allegations that defendants conspired to torture him and that the CAT determination was fraudulent cannot be sufficient to circumvent *Munaf*, lest the Supreme Court's decision become a dead-letter through artful pleading.

Indeed, plaintiff's allegations do not distinguish *Munaf*. In *Munaf*, the petitioners likewise alleged that, notwithstanding the Executive's determination that torture was unlikely, the Government was planning to transfer him to the custody of another country, knowing that he was likely to be tortured or killed. Thus, as in *Munaf*, plaintiff's claims are nonjusticiable and must be dismissed.

3. Plaintiff correctly notes that courts routinely consider CAT claims in their review of removal orders. Arar Br. 37-38. He does not and cannot assert, however, that, in considering a challenge to a removal order, an immigration judge or a reviewing court in such cases should second-guess any Executive Branch communications with foreign officials, and *Munaf* makes clear that they could not properly do so.

The overwhelming majority of immigration-review cases raising a CAT claim are adjudicated in immigration courts (and reviewed in the courts of appeals) based on country reports and other administrative record material compiled in accordance

with the statutory review scheme and involve no Executive Branch engagement with foreign officials. The regulations implemented pursuant to that scheme explicitly recognize that there will be instances in which the Executive Branch does engage with foreign officials and renders a CAT determination on the basis of those intergovernmental discussions. In such instances, the CAT claim may not even be considered by an immigration judge or the Board of Immigration Appeals. *See* 8 C.F.R. 208.18(c)(3), 208.18(d). Consistent with *Munaf*, the immigration regulations recognize that neither the immigration judge nor the reviewing bodies are in a position to "second-guess" such sensitive foreign-policy determinations. *See* 128 S.Ct. at 2226.

II. Even If The Court Had Jurisdiction To Consider Plaintiff's Removal-Related *Bivens* Claims, A Court Could Not Properly Imply A Cause Of Action For Damages.

Even assuming that plaintiff's challenges to his removal were justiciable, the panel majority correctly held that it could not properly imply a *Bivens* damages action. *See Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (rejecting *Bivens* claims even assuming that the claims were not barred by the justiciability doctrine of *Totten v. United States*, 92 U.S. 105 (1875)). Both the existence of the comprehensive remedial scheme and the nature of the claims themselves constitute special factors counseling against the creation of a *Bivens* remedy. This is especially

true when the factors counseling hesitation are "[t]aken together." *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

A. Alternative Existing Process For Challenging Removal And False CAT Determinations.

The Supreme Court has explained that, because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," it must be exercised with great caution, if it is to be exercised at all. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-70 (2001). The Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).[13]

Indeed, the Court has made particularly clear that when Congress has established a comprehensive framework of judicial review, a court should not imply an additional non-statutory damages remedy against individual officials, even when

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[13] The dissenting opinion contends that plaintiff is not requesting that *Bivens* be extended into a new context because the Court has previously implied that federal detainees have a *Bivens* remedy for substantive due process violations. 532 F.3d at 209. With respect, the dissent's approach, which focuses at a high-level of generality on the constitutional right being asserted, cannot be squared with Supreme Court precedent. For example, in *Chilicky*, the Supreme Court refused to create a *Bivens* action to enforce the Due Process Clause in the context of a denial of social security benefits even though the Court had previously recognized a *Bivens* claim for a Due Process violation in the employment context, *see Davis v. Passman*, 442 U.S. 228 (1979). Likewise, in *Wilkie v. Robbins*, 127 S.Ct. 2588 (2007), the Supreme Court held that factors counseling hesitation precluded a Fourth Amendment claim notwithstanding recognition of a Fourth Amendment claim in *Bivens* itself.

a claimed constitutional injury would "go unredressed" within that statutory scheme. In *Bush v. Lucas*, 462 U.S. 367 (1983), for example, the Supreme Court held that the comprehensive procedural and substantive provisions of the Civil Service Reform Act ("CSRA") precluded a First Amendment *Bivens* claim, even though the Court recognized that the civil-service remedies might not be as effective as a *Bivens* suit and would not fully compensate the employee for the alleged First Amendment violation. *Id.* at 372. The Court underscored "Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy,'" and the Court noted that "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees.'" *Malesko*, 534 U.S. at 68 (quoting *Bush v. Lucas*, 462 U.S. at 380, 389).

Similarly, in *Chilicky*, the Court refused to imply a *Bivens* remedy for alleged procedural-due-process violations by Social Security officials, even though the Court recognized that the Social Security review scheme could provide the plaintiff with only retroactive disability benefits, and would offer no possibility of affording additional redress for the harms caused by the alleged due-process violations. *Chilicky*, 487 U.S. at 424-25. The Court stressed 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," it is inappropriate for a court to afford "additional *Bivens* remedies." *Id.* at 423. As the D.C. Circuit observed, "the *Chilicky* Court made clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Spagnola v. Mathis*, 859 F.2d 223, 226-27 (D.C. Cir. 1988) (holding that the comprehensive statutory scheme established by the CSRA precluded implication of a *Bivens* remedy even though the plaintiff had no remedy available).

Consistent with the Supreme Court's guidance, even when a party has no access to a damages remedy, this Court has refused to create a *Bivens* action when "'Congress' failure to create a remedy against the individual employees of the [federal agency] was not an oversight.'" *Hudson Valley v. IRS*, 409 F.3d 106, 110 (2d Cir. 2005) (quoting *Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994)). *See also Dotson v. Griesa*, 398 F.3d 156, 169 (2d Cir. 2005) (no damages remedy for alleged racial discrimination, even though terminated judicial branch employee would have no administrative or judicial review of the challenged employment action). Indeed, this Court has held that a statute providing for review of an agency decision exclusively in the court of appeals may foreclose recognition of a *Bivens* claim "'inextricably intertwined'" with such decisions. *Merritt v. Shuttle, Inc.*, 245 F. 3d

182, 189 (2d Cir. 2001) (citation omitted).

Plaintiff's request to have this Court create a constitutional damages action runs headlong into the principles repeatedly emphasized by the Supreme Court and this Court. Even assuming that plaintiff's claims are not expressly barred,[14] Congress could hardly have been clearer in expressing its intent to provide a single avenue for "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States * * *." 8 U.S.C. § 1252(b)(9). That Congress did not also provide for additional damages remedies cannot be deemed an "oversight." *Hudson Valley*, 409 F.3d at 110.

To the contrary, Congress unambiguously precluded general assertions of federal-question jurisdiction and claims under the Administrative Procedure Act, especially with respect to CAT determinations. The Senate specified that Articles 1 through 16 of the CAT would not be self-executing and, thus, the provisions are not privately enforceable in U.S. courts. *See* 136 Cong. Rec. S36,198 (Oct. 27, 1990);

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[14] Of course, under the "special factors" doctrine, courts frequently decline to recognize *Bivens* claims when jurisdiction *does* exist over the putative *Bivens* claims. See, e.g., *Hudson Valley*, 409 F.3d at 108-114. This Court, thus, need not hold that jurisdiction over plaintiff's *Bivens* claims is precluded in order to hold that those claims should not be recognized. Moreover, because the "special factors" doctrine is a threshold, non-merits issue, the Court may dismiss Counts 2 and 3 on that ground without reaching the question of jurisdiction, just as the Supreme Court did in *Chilicky*. *See* 487 U.S. at 429.

Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003). And in enacting the FARR Act, Congress limited judicial review over Article 3 CAT claims to "the review of a final order of removal." FARR Act § 2242(d). Finally, in 2005, Congress reemphasized that "[n]otwithstanding any other provision of law (statutory or nonstatutory), * * * a petition for review filed with an appropriate court of appeals * * * shall be the *sole and exclusive means* for judicial review of any cause or claim under the ["CAT"]." 8 U.S.C. § 1252(a)(4).

2. Plaintiff gets the matter precisely backwards in urging that this Court may imply a constitutional cause of action *because* Congress did not provide a damages remedy. The carefully delineated scheme of review commands the judicial deference that is appropriate where, as here, the failure to create a damages action "has not been inadvertent.'" *Hudson Valley*, 409 F.3d at 110 (quoting *Chilicky*, 487 U.S. at 423). As explained above, the absence of a damages remedy does not license courts to create one.

Plaintiff's claim that he was obstructed in making use of the statutory review mechanisms parallels, in significant part, the claims rejected in *Chilicky*. The *Chilicky* plaintiffs – recipients of disability benefits – alleged that government officials had violated their due-process rights by deliberately undermining the procedures used to determine their status, including intentional disregard of evidence

and selection of biased physicians. *Chilicky*, 487 U.S. at 428. Nevertheless, despite the claims of obstruction, the Supreme Court expressly rejected the request for "consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right." *Ibid.* *See also Stuto v. Fleishman*, 164 F.3d 820 (2d Cir. 1999).[15]

Moreover, even assuming the existence of obstruction, there is no doubt that plaintiff was not wholly "foreclosed" from filing an action under the procedures established by Congress. *See Stuto*, 164 F.3d at 826.[16] As discussed above (pp. 29-

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[15] *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980), relied on by plaintiff, predates *Chilicky* and *Bush v. Lucas*, and much of the decision does not survive the Eighth Circuit's post-*Chilicky* decision *McIntosh v. Turner*, 861 F.2d 524 (8th Cir. 1988) (declining to create *Bivens* claims for civil service employees deprived of fair consideration for promotion by concealment and destruction of records). In *Bishop*, the court found that the *Bivens* substantive due process claim was precluded by "the existence of civil service remedies, 622 F.2d at 357, but did not dismiss a separate due process claim relating to the claim of interference with access to the court. Even assuming that *Bishop* is still good law, that decision does not suggest that a claim of this kind permits creation of a constitutional remedy for Counts 2 and 3. Insofar as a claim for violation of procedural due process is presented here, it is considered with regard to Count 4 which, as we explain below, *see* pp. 63-70, *infra*, is independently without merit.

[16] The Court in *Stuto* distinguished two district court decisions, cited by plaintiff here, in which the plaintiff alleged he was wholly "foreclosed" from the congressionally-enacted review scheme due to the defendants' acts. 164 F.3d at 826 (discussing *Rauccio v. Frank*, 750 F.Supp. 566 (D. Conn. 1990); *Grichenko v. United States Postal Serv.*, 524 F.Supp. 672 (E.D.N.Y. 1981)).

Plaintiff also cites *dicta* from *Munsell v. Department of Agriculture*, 509 F.3d (continued...)

30), it is undisputed that plaintiff's counsel was able to file a timely petition for review even after plaintiff's removal. In addition, even on the basis of plaintiff's allegations, there is no doubt that his counsel (who was notified by a phone message two days prior to plaintiff's removal that the INS was questioning plaintiff as to whether he opposed removal to Syria, App. 32) could have filed a habeas action (and stay motion) in advance of the removal decision seeking to bar plaintiff's removal. Finally, as explained above, the particular claims that plaintiff would now like to raise – which would require the Court to examine intergovernmental communications and to second-guess the motives and credibility of officials in at least two countries – is non-justiciable under *Munaf*.

B. Other Special Factors Counseling Hesitation

In any event, the Supreme Court has made clear that courts should hesitate to fashion a *Bivens* remedy, even in the absence of "any alternative, existing process." *Wilkie*, 127 S.Ct. at 2598. Courts must be "cautious[]" in extending *Bivens* remedies to new contexts. *Schweiker*, 487 U.S. at 421, and should "pay[] particular heed * * * to any special factors counseling hesitation." *Wilkie*, 127 S.Ct. at 2598. As the

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[16](...continued)
572 (D.C. Cir. 2007), which he reads to allow a *Bivens* action, even when there is an administrative review scheme, if the defendants prevented access to that scheme. In fact, the court did not reach any final conclusion on that issue and instead dismissed the claims because plaintiff failed to exhaust his administrative remedies.

Supreme Court recently held, "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation." *Id.* at 2604-05. "Congress is in a far better a position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Id.* at 2605.

Courts have been particularly careful not to intrude upon quintessential sovereign prerogatives by creating a *Bivens* remedy in contexts involving national security and foreign policy. *See United States v. Stanley*, 483 U.S. 669, 678-85 (1987); *Chappell v. Wallace*, 462 U.S. 296, 298-304 (1983); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994). Manufacturing such a remedy would put at personal risk the officials involved in making the most sensitive and important decisions facing the nation. Moreover, creating a cause of action could deter other countries from engaging in dialog with U.S. officials. *See* SA 72 ("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"). As the panel recognized, permitting *Bivens* litigation in these contexts would "threaten[] to disrupt the implementation of our country's foreign and national security policies."

Arar, 532 F.3d at 182.

The D.C. Circuit's holding in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (Scalia, J.), cited by the panel majority (532 F.3d at 182), is 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.'" *Id.* at 208-09 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Likewise, as the panel here emphasized, adjudicating plaintiff's suit would diminish the federal government's ability to speak with one voice to its overseas counterparts and call into question the coherence and vitality of U.S. foreign policy. "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." 532 F.3d at 182. There can thus "be no doubt that litigation of this sort would interfere with the management

of our country's relations with foreign powers and affect our government's ability to ensure national security." *Ibid.* Needless to say, these concerns would presumably not be present in a case in which the Government allegedly conspired with a "Mafia family in New Jersey," *Id.* at 205. *See also Arar*, 414 F.Supp.2d at 282 (explaining "fundamental difference" between *Bivens* remedy in domestic arena and international realm).

Plaintiff correctly notes (Br. 33-37) that not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *City of New York v. Permanent Mission of India,* 446 F.3d 365 (2d Cir. 2006) (quoting *Baker*, 369 U.S. at 211). In *City of New York,* for example, this Court held that it was within judicial competence to determine the applicability of a treaty. This Court has also recognized, however, that resolution of "issues involving foreign relations * * * frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature" and, moreover, "many such questions uniquely demand [a] single-voiced statement of the Government's views." *767 Third Ave. Associates v. Consulate General of Socialist Federal Republic of Yugoslavia,* 218 F.3d 152, 160 (2d Cir. 2000) (quoting *Baker*, 369 U.S. at 211). Even assuming that consideration of plaintiff's *Bivens* claims is not barred by the political-

question doctrine,[17] the concerns animating that doctrine plainly preclude implication of a non-statutory damages remedy that would involve the Court in a standardless inquiry into whether removing plaintiff to Canada would have been prejudicial to the United States and whether the intergovernmental communications with Syrian officials were credible enough for our Government to rely on them.

Moreover, with the exception of *Iqbal*, which did not concern judicial review of foreign affairs, the cases plaintiff cites for the proposition that the judiciary can resolve controversies that "touch" upon foreign relations were not even *Bivens* cases. Especially considering the "cautio[n]" that must be exercised before the extension of a *Bivens* remedy is permitted, this Court should decline to recognize a *Bivens*

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[17] This Court need not hold that plaintiff's claims raise nonjusticiable political questions in order to hold that separation-of-powers concerns are special factors that counsel against creating a *Bivens* remedy. Rather, because there is a presumption against recognizing non-statutory *Bivens* actions to begin with, *see Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), the special-factors doctrine sets a far-lower bar than the political-question doctrine. *See also Sanchez-Espinoza*, 770 F.2d at 206 (not reaching political question).

Likewise, the special-factors doctrine sets a much-lower bar than the state-secrets doctrine, which can compel the dismissal of even express causes of action. Whereas the state-secrets doctrine is concerned only with preventing the disclosure of state secrets, the special-factors doctrine is concerned with preserving the role of Congress in enacting causes of action, shielding Executive Branch officials from unwarranted judicially created liability, and limiting judicial second-guessing of actions committed to the Executive by the Constitution or Congress. *See also Wilson*, 535 at 710 ("Here, although *Totten* does not bar the suit, the concerns justifying the *Totten* doctrine provide further support for our decision that a *Bivens* cause of action is not warranted.").

challenge that would require the Court to review sensitive intergovernmental communications, question the credibility of foreign officials, and then second-guess the motives and integrity of high-level U.S. officials. *Cf. Munaf*, 128 S.Ct. at 2226.

In enacting the FARR Act, the INA, or the TVPA, Congress could have, but did not, provide for a damage action against federal officials for issuing an erroneous (or even a fraudulent) CAT determination. Congress has held oversight hearings relating to CAT determinations in general and the CAT determination in this case, but it has not enacted a damages remedy for CAT violations. This Court should not use Congress's silence as an opportunity to create an unprecedented cause of action requiring judicial scrutiny of sensitive discussions with foreign officials. The United States depends upon the cooperation of many nations in achieving national security and foreign policy goals, and it will be even more difficult to obtain the vital assistance of other countries in fighting international terrorism if they know that the nature and extent of their communications with our country will be subject to later judicial scrutiny. *Cf. Halkin v. Helms*, 690 F.2d 977, 993 (D.C. Cir. 1982) (revealing diplomatic communications could harm foreign relations by embarrassing governments that may wish their cooperation to remain secret). Thus, even if the asserted claims were justiciable, given the sensitivity of the inquiry required, Congress, and not the courts, should decide whether to permit a cause of action for

damages in this context.

III. In Any Event, Plaintiff's Removal-Related *Bivens* Claims Fail Because Defendants Are Entitled To Qualified Immunity.

The panel, like the district court, was not required to decide whether plaintiff's alleged treatment in Syria violated due process and instead dismissed Counts 2 and 3 on other grounds. This Court sitting *en banc* can and should do the same. But if this Court were to reach the issue, it should hold that plaintiff's assertion of Fifth Amendment rights fails as a matter of law and that, at a minimum, defendants did not trammel on any clearly established right.

A. Legal Background On Qualified Immunity.

Government officials performing discretionary functions 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 (1982). To defeat qualified immunity, the constitutional right invoked must be "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Importantly, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Underlying the right to qualified immunity is a recognition that damages actions "can entail substantial social costs" and "unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638; *see also Harlow*, 457 U.S. at 807. The immunity stems from the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974). It also ensures that able candidates for government office are not deterred by the threat of damage suits from entering public service. *Harlow*, 457 U.S. at 814.

The policy concerns reflected by the immunity doctrine are amplified where, as here, the plaintiff sues the heads of the departments and agencies based on their supervisory roles. *See Robertson v. Sichel*, 127 U.S. 507, 515 (1888) ("[c]ompetent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates"). *See also Mitchell v. Forsyth*, 472 US 511, 541-42 (1985) (Stevens, J., concurring) ("the passions aroused by matters of national security * * * and the high profile of Cabinet officers with functions in that area make them 'easily identifiable target[s] for suits for civil damages'").

B. Plaintiff Has Failed To Allege A Violation Of Constitutional Rights.

The usual first step in determining whether an official has qualified immunity is to inquire whether plaintiff has alleged the violation of a constitutional right at all. *See Saucier*, 533 U.S. at 201. If the court finds the violation of a constitutional right, the court must then address the questions relating to whether the defendants nonetheless have immunity – *i.e.*, whether the specific constitutional right, as applied to the context presented, was "clearly established" at the time of the conduct alleged, and whether reasonable officials could have, at that time, disagreed about whether that constitutional right was established and applied to the context presented. *Ibid.*

Plaintiff identifies no violation of constitutional rights implicated by the alleged abuse in Syria. Under controlling Supreme Court precedent, aliens outside the United States have no Fifth Amendment rights. *See Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950). In *Eisentrager*, the Supreme Court held that aliens outside U.S. sovereign territory possess neither "substantive constitutional rights" in general (*id.* at 781), nor Fifth Amendment rights in particular *(id.* at 781-85). Petitioners in *Eisentrager* were aliens imprisoned at a U.S. military base in Germany, which was controlled by the U.S. Army. *Id.* at 766. Despite the control exercised by the United States, the Court stressed that the aliens "at no relevant time were within any territory over which the United States is sovereign," *id.* at 778, and, on that basis, held that

application of the Fifth Amendment would be impermissibly "extraterritorial." *Id.* at 784. The Court declared:

> 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 ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85.

In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court reaffirmed that holding. In ruling that the Fourth Amendment does not apply to searches of an alien's property conducted abroad even if the searches were planned in this country, the Court explained that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 269. Citing *Eisentrager*, the Court described that rejection as "emphatic." *Ibid. See also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").[18]

Boumediene v. Bush, 128 S.Ct. 2220 (2008), post-dates the acts at issue here

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[18] Even as to aliens within sovereign U.S. territory, aliens only "receive constitutional protections when they have * * * developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 270-71.

by nearly six years and therefore would provide no basis for imposing liability on any defendant even if that case did bestow Fifth Amendment rights on aliens abroad, *see, e.g.*, *Saucier*, 533 U.S. at 201-02, which it certainly did not do. Government officials are not "expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1972).

In any event, *Boumediene* did not purport to overrule *Eisentrager*'s holding that aliens abroad lack Fifth Amendment rights. *Boumediene* addressed only the rights of aliens detained at Guantanamo Bay, territory which the Court deemed to be *de facto* sovereign territory of the United States, and the Court only addressed the Suspension Clause. Significantly, the Court distinguished Guantanamo from the U.S. military base in Germany, where the alien in *Eisentrager* was held and had no constitutional rights.[19] Moreover, even with respect to aliens held in *de facto* sovereign territory, the Court did not address the availability of Fifth Amendment or other substantive constitutional rights.

With respect to the alleged abuses in Syria, plaintiff cannot assert a Fifth

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[19] *See Boumediene*, 128 S.Ct. at 2257 ("because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, * * * it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility"); *ibid.* ("the [*Eisentrager*] Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it").

Amendment violation because he had no constitutional rights at all. In *Eisentrager*, the United States exercised plenary control over the plaintiffs, who were in U.S. custody; yet, they could not invoke the Fifth Amendment. *A fortiori*, Arar, who was allegedly subject to injuries inflicted by Syrian officials while in Syria, cannot invoke the Fifth Amendment either. Thus, even assuming that the Court were to imply a *Bivens* remedy, plaintiff's claim would fail.

Plaintiff also has not asserted a Fifth Amendment right in regard to any challenge relating to his removal order. An alien stopped at the border and denied entry has no constitutional rights in regard to his removal proceedings. Even when an alien stopped at the border or port of entry (such as the airport here) is located physically within the United States, such individuals are "on the threshold of initial entry" and never "pass[] through our gates." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *see also Chew v. Colding*, 344 U.S. 590, 600 (1953) (excludable aliens "are not within the protection of the Fifth Amendment").[20] As this Court has recognized, the rights of excluded aliens "are determined by the procedures established by Congress," not by the Fifth Amendment's "due process protections."

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[20] The ACLU amicus brief cites numerous cases addressing the seizure, confinement and/or treatment of aliens detained in the United States. *See* ACLU Br. 27 n.14, 30-31 & n.16. Those cases are inapposite. They recognize neither a constitutional right, nor a right to bring a *Bivens* action, to challenge removal decisions beyond the process provided by Congress.

Guzman v. Tippy, 130 F.3d 64, 66 (2d Cir. 1997).[21]

C. *A Fortiori*, Plaintiff Has Failed To Allege A Violation Of Clearly Established Constitutional Right.

1. At the very least, the Fifth Amendment rights of aliens outside the United States were not clearly established when the alleged conduct took place, and certainly were not established as to the context presented here. The importance of context most recently was reaffirmed in *Brosseau v. Haugen*, 543 U.S. 194 (2004), which rejected the Ninth Circuit's holding that the officer had "fair warning" as a result of "the general tests" established for use of deadly force. *Id.* at 199. Where extant decisional authority at the time of the conduct in question did not "squarely govern[]" the officer's actions, qualified immunity must be provided. *Id.* at 201

In the absence of any case law holding that government officials can violate the Fifth Amendment by removing an excludable alien, *Brosseau* mandates that defendants here are entitled to qualified immunity. Plaintiff alleges a conspiracy to have him tortured in Syria, notwithstanding the CAT determination to the contrary.

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[21] In his panel brief, plaintiff asserted another theory for invoking the Fifth Amendment – the state-created-danger theory. Plaintiff has now wholly abandoned that argument in his *en banc* brief. In any event, as we explained in our panel brief, plaintiff's argument is without merit and has been rejected in every circuit court that has addressed the issue (*see Enwonwu v. Gonzales*, 438 F. 3d 22, 30 (1st Cir. 2005); *Kamara v. Attorney General*, 420 F. 3d 202, 218 (3d Cir. 2005); *Vicente-Elias v. Mukasey*, 532 F. 3d 1086, 1094-95 (10th Cir. 2008)). Plainly, even if this now-abandoned theory could be maintained, the right was not clearly established, and defendants would have the right to qualified immunity.

Even so, he cites no authority holding that the substantive-due-process component of the Fifth Amendment applies to his removal to or treatment in Syria.

The concurring opinion in *Munaf* confirms that plaintiff has failed to assert a violation of clearly established rights. *Munaf* confronted the possible transfer of a United States citizen to the custody of the Iraqi government, in whose hands the citizen believed he was likely to be tortured. *See Munaf*, 128 S.Ct. at 2225. As stated earlier, the majority concluded that the federal courts could not "second-guess" the Executive Branch's determination based upon intergovernmental discussions. *See id.* at 2246. In the concurring opinion, Justice Souter opined "it would be appropriate to ask" whether constitutional limitations arise when a *citizen* is transferred where "the probability of torture is well documented." *Id.* at 2228 (Souter, J., concurring). If it is an open question whether substantive due process bars the Government from sending "its *own* people to torture," there can be little doubt that the constitutional issue as applied to excludable aliens such as plaintiff remains unresolved. *Ibid.* (emphasis added).

2. Typically, as noted, courts resolve the underlying constitutional question before addressing whether the asserted right was clearly established. But this Court has held that deviation from this customary framework is appropriate in "discrete cases" such that courts "may move directly to the second step of the *Saucier* test and

refrain from determining whether a constitutional right has been violated." *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57 (2d Cir. 2003); *compare Brosseau*, 543 U.S. at 201 (proceeding directly to the second step when the decisional authority at the time of that conduct was "by no means 'clearly establish[ed]'"). And, in granting review in *Pearson v. Callahan*, 128 S.Ct. 1702 (2008), the Supreme Court asked the parties to brief the question whether the traditional framework should be mandatory. The case was argued on October 14, 2008.

If the Court has any doubt on whether plaintiff has asserted a Fifth Amendment violation, then (subject to *Pearson*) it should simply hold that plaintiff has failed to allege a violation of clearly established rights. The confluence of executive, legislative, and judicial responsibilities that arises in this case counsels in favor of restraint. *Cf. Christopher v. Harbury*, 536 U.S. 403, 417 (2002). Indeed, it is a "fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008) (citations and internal quotation marks omitted). The wisdom of avoiding needless constitutional inquiry is fortified by *Munaf*, which recognized that the reliability of communications from foreign officials that a

transferee would not be subjected to torture raised matters best left to the political branches: "[t]he Judiciary is not suited to second-guess such determinations." *Munaf*, 128 S.Ct. at 2226.

3. Finally, it is no response that "[t]orture is universally condemned." Arar Br. 23. We agree that torture is illegal and can be subject to criminal prosecution. The relevant inquiry here, however, is whether it was clearly established in 2002 that aliens outside the United States possessed Fifth Amendment rights. As this Court's sister circuit recently held in analogous circumstances:

> [P]laintiffs argue that a reasonable person would have been on notice that the defendants' alleged conduct was unconstitutional because the "prohibition on torture is universally accepted." The issue we must decide, however, is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established [to apply at Guantanamo] at the time of the alleged violations.

Rasul v. Myers, 512 F.3d 644, 666 (D.C. Cir. 2008) (emphasis in original) (citations omitted). *See also Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides *the basis* for the cause of action sued upon.") (emphasis added).

With the proper inquiry thus framed, it is significant that plaintiff has not cited a single decision applying the Fifth Amendment to any removal decision concerning

an excludable alien or to any conduct that occurs abroad – let alone in territory over which another nation has complete sovereignty – and at the hands of officials of that separate sovereign. As in *Rasul,* because the application of the Fifth Amendment to aliens outside the United States was not clearly established at the time in question, immunity must be recognized. *See Rasul*, 512 F.3d at 666-667. *See also Mitchell*, 472 U.S. at 534-35 (qualified immunity protected Attorney General for decisions made before their constitutionality was considered by the Court "for the first time").

IV. Plaintiff Failed To Adequately Plead Personal Involvement Or Establish Personal Jurisdiction.

A. Plaintiff Failed To Adequately Plead Personal Involvement.

Plaintiff's removal-related *Bivens* claims against the named defendants fail for the additional reason that plaintiff failed to allege personal involvement. "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite" when asserting a *Bivens* claim. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *see also Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006) ("Because the doctrine of respondeat superior does not apply in *Bivens* actions, a plaintiff must allege that the individual defendant was personally involved in the constitutional violation"). A lack of personal involvement is not only a ground "for dismissing a claim on the merits." *Iqbal v. Hasty*, 490 F.3d 143, 153

(2d Cir. 2007), *cert. granted sub nom., Ashcroft v. Iqbal*, 128 S.Ct. 2931 (2008).[22] It is also "relevant to a defense of qualified immunity because it goes to the question of whether a defendant's actions violated a clearly established right." *Ibid.*

The vigorous application of this principle is particularly important in actions against department heads, such as former Attorney General Ashcroft. Under this Circuit's precedent, supervisors cannot be held liable for the wrongs committed by their subordinates in carrying out their duties, absent a showing of "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates."[23] *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996). A rule that did not require personal involvement would deter qualified individuals from accepting high-level positions with the federal government because it would subject them to personal liability in *Bivens*-style suits for any missteps of their subordinates, no matter how far removed the high-level officials were from those actions.

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[22] *Iqbal* is set for argument in the Supreme Court on December 10, 2008. Because the Supreme Court is likely to address the applicable pleading standard for personal involvement in *Bivens* cases, this Court may wish to wait for the Supreme Court's ruling prior to resolving the personal involvement issues presented here.

[23] Although not relevant here, we note that the United States does not agree with the dicta in this and other Circuit rulings that suggest that "gross negligence" would be sufficient to establish supervisory *Bivens* liability.

Morever, as this Court recognized in *Iqbal*, "a pleader [will be required] to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." 490 F.3d at 152-53. Bald legal conclusions regarding personal involvement are generally not sufficient to subject high-level government officials to suit.

Here, beyond his stated legal conclusions, plaintiff does not allege any specific facts that would support the notion that the named defendants conspired to have him tortured in Syria. Indeed, as noted, the only specific acts attributed to the named defendants are the claims that defendant McElroy left a voicemail for plaintiff's attorney; that defendant Blackman decided that plaintiff should be removed to Syria and that this removal would be consistent with the CAT; and that defendant Acting Attorney General Thompson signed the removal order.[24] App. 32-33. At bottom, the specific acts described in the complaint show nothing more than federal officers carrying out their official duties. Plaintiff cannot turn these allegations into a plausible claim of conspiracy simply by asserting in a conclusory fashion that it must be so. *See Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 154 (2d Cir. 2006) (affirming dismissal of conspiracy claim and explaining, "[c]ooperation

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[24] While plaintiff alleges that the order was signed by defendant Thompson, the the removal order attached to the complaint was signed by defendant Blackman. App. 86.

between state and federal bureaucracies acting in their regulatory spheres supports no inference that the federal actors acted with an improper motive").

That is plain from the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). There, the plaintiffs had alleged that regional phone companies conspired with one another to restrict competition from smaller competitors. In support of that allegation, the plaintiffs alleged that the companies had engaged in parallel conduct designed to prevent competition amongst the phone companies and with their smaller rivals. The Court held, however, that these allegations were insufficient to make out a claim for conspiracy, since the parallel business conduct might have resulted from the companies' similar conclusions about the best way to conduct business in the market place. "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 127 S.Ct. at 1966. The same is true here; the defendants' actions in carrying out their lawful duties do not, by themselves, suggest an illegal conspiracy. Especially considering the presumption of regularity, which applies here,[25] but did not apply in *Twombly*, plaintiff cannot proceed simply by asserting there must have been an "agreement at some unidentified point." *Ibid.*

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[25] *See, e.g., Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

The absence of any factual allegation regarding a conspiracy is particularly glaring with respect to former Attorney General Ashcroft. Plaintiff does not allege that Ashcroft made even a single decision related to his removal. On the contrary, plaintiff alleges that Defendant Thompson "was acting Attorney General when the unlawful action complained of herein took place." App. 24. Thus, under the terms of plaintiff's complaint, defendant Ashcroft was not even exercising the authority of his office when this matter occurred. Plaintiff's constitutional claim against Ashcroft in his individual capacity is premised entirely on the assertion that the former Attorney General should be liable because he "had ultimate responsibility for the implementation and enforcement of United States immigration laws" and thus "was responsible for making the decision to remove Mr. Arar to Jordan and Syria." App. 23. This is nothing more than a bare assertion of supervisory liability in a case in which plaintiff admits defendant Ashcroft was not even acting as the Attorney General. These allegations are entirely insufficient under *Iqbal* and *Twombly* to carry the conclusory allegations of Ashcroft's personal responsibility "[a]cross the line [between] possibility and plausibility." *Twombly*, 127 S.Ct. at 1966. *See also Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2008) ("a bare allegation that the head of a Government agency * * * knew that her statements were false and 'knowingly' issued false press releases is not plausible in the absence of some

supporting facts").

B. The Allegations Fail To Establish Personal Jurisdiction.

For these same reasons, plaintiff has failed to establish personal jurisdiction over defendant Ashcroft. "Personal jurisdiction cannot be predicated solely on a defendant's supervisory position." *Iqbal*, 490 F.3d at 177. "Rather, a plaintiff must show that a defendant 'personally took part in the activities giving rise to the action at issue.'" *Ibid.* Here, where plaintiff has failed to make allegations sufficient to tie defendant Ashcroft to an alleged conspiracy to send him to be tortured in Syria, there is no plausible basis to assert personal jurisdiction over him in New York, where he is not a resident. *See, e.g., Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981) (concluding that "a bare conclusory allegation of conspiracy" between high-level supervisory officials and unnamed employees carrying out their duties under federal law is not sufficient to establish personal jurisdiction under New York's long-arm statute).

V. Count 4 Provides No Basis For Holding Any Individual Defendant Liable For Plaintiff's Treatment While In The United States.

In Count 4, plaintiff alleges that defendants violated his substantive due process rights by mistreating him while he was detained in the United States. In his replacement brief, plaintiff maintains that defendants obstructed his access to court and subjected him to unconstitutional conditions of confinement. *See* Arar Br. 38-44,

49-50.[26] As the district court concluded, plaintiff did not adequately allege the personal involvement of the named defendants. SA 84-85. Nor, as the panel majority concluded, would any such claim have merit. 532 F.3d at 184-90.

A. Count 4 Fails To Allege Personal Involvement By Defendant Ashcroft And The Other Individual Defendants.

Count 4 does not adequately allege personal involvement by defendant Ashcroft or the other named defendants. The complaint makes no effort whatsoever to tie then to the facts relevant to Count 4: there is no mention of any act they took or any role they played in regard to plaintiff's conditions of confinement or his access to the courts. These omissions are particularly significant because the district court provided plaintiff the opportunity to replead this claim to add additional facts connecting defendants to the alleged acts. SA 84-85. *See also DiVittorio v. Equidyne Extractie Indus., Inc.*, 822 F. 2d 1242, 1247 (2d Cir. 1987).

In setting out the purported bases for the named defendants' liability, the complaint merely alleges that defendants were either responsible for overseeing the implementation and enforcement of immigration laws, or that they made specific

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[26] Arar's replacement brief no longer presses the argument that defendants violated his right to counsel access. Therefore, it is not properly before this Court. But even if it were, it too lacks merit. Plaintiff met with his lawyer prior to his removal. And, as the panel majority noted, as an unadmitted alien, he had neither a constitutional nor statutory right to counsel. *See Arar*, 532 F3d at 185-88.

decisions with respect to plaintiff's removal – neither of which is at issue in Count 4. *See* App. 24-26. This is in sharp contrast to the unnamed John Doe defendants, who plaintiff asserts personally subjected him "to coercive and involuntary custodial interrogation and unreasonably harsh and punitive conditions of detention." App. 27. Defendant Ashcroft and the other named defendants are tied to Count 4 only through the most general of averments. In Count 4, plaintiff generally asserts that the acts were undertaken by "Defendants," with no effort to identify the defendants or what they did. App. 41-42.

As the district court properly determined, these allegations are insufficient to state a claim against the named defendants. Simply noting the defendants' supervisory authority, without more, is not sufficient to make out a claim in the *Bivens* or 42 U.S.C. § 1983 context. *Thomas*, 470 F.3d at 496; *Wright*, 21 F.3d at 501. As discussed above, plaintiff must plead facts sufficient to show that the supervisory figures were personally involved in the alleged constitutional violation. Indeed, the allegations against defendant Ashcroft are particularly defective. Plaintiff concedes that Ashcroft was not acting as Attorney General at the time these events occurred.[27] App. 24.

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[27] We note that the DHS Inspector General report, cited by plaintiff, confirms that the Attorney General was out of the country at the time of plaintiff's removal. OFFICE OF INS. GEN. (DHS), *The Removal of a Canadian Citizen to Syria* (June 5, (continued...)

Although the panel majority believed that plaintiff's allegations of personal involvement were sufficient to survive dismissal under *Iqbal,* the allegations here are meaningfully distinguishable from those in *Iqbal.*[28] There, the plaintiff challenged, among other things, an alleged "*policy* of holding detainees 'of high interest' in highly restrictive conditions until they were 'cleared' by the FBI." *Iqbal*, 490 F.3d. at 148 (emphasis added). This Court found only that "it is plausible to believe that senior officials of the Department of Justice would be aware of [such] 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. In other words, the Court found a plausible basis to conclude that the specific supervisory defendants would have known about the alleged policy issue challenged there. The Court concluded that "sustaining the adequacy of a pleading of personal involvement in these circumstances runs no risk that every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a motion to dismiss simply by alleging that the Attorney General knew of or condoned the

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[27](...continued)
2008), 5.

[28] The Government continues to believe that *Iqbal* was incorrectly decided in regard to the sufficiency of the pleading in that case, and the Supreme Court has granted review to examine that matter. In any event, even under *Iqbal*, Count 4 fails.

alleged violation." *Id.* at 166.

The claim here creates precisely the concern that the Court believed was absent in *Iqbal*. Plaintiff has asserted no "plausible" basis – because there is none – to assume that high-level Department of Justice officials were aware of the specific conditions of plaintiff's confinement and how he was treated. *See Benzman*, 523 F.3d at 129 ("[A] bare allegation that the head of a Government agency * * * knew that her statements were false and 'knowingly' issued false press releases is not plausible in the absence of some supporting facts."). If plaintiff's vague allegations are sufficient to satisfy this "plausibility" standard, then any prisoner could similarly and successfully allege a claim against the Attorney General without any factual basis for doing so.[29]

B. Count 4 States No Violation Of A Clearly Established Right.

In any event, even if plaintiff had adequately pled personal involvement of the named defendants, Count 4 would still fail because it states no violation of a clearly established constitutional right.

1. Plaintiff cannot succeed on his access-to-court claim. The gravamen of the access claim as pressed on appeal is that defendants prohibited him from challenging

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[29]As with Counts 2 and 3, the failure to plead sufficient personal involvement of defendant Ashcroft and the other named defendants also means that the district court lacked personal jurisdiction over those defendants. *See* p. 63, *supra.*

his pending removal to Syria. Arar Br. 42. This claim fails both as a factual and a legal matter.

As a factual matter, by his own account, "Arar did have an attorney working on his behalf" who "was in a position to inquire both about Arar's whereabouts and about the status of the proceedings that INS had initiated against him." *Arar*, 532 F.3d at 180 n.16. He met with that attorney while in custody in the United States, and discussed with her (and separately with a representative from the Canadian consulate) the possibility that he might be removed to Syria. At that time, prior to the enactment of the REAL ID Act (*see* pp. 26, 29-30, *supra*), his attorney could have filed a habeas petition seeking to block his pending removal. And, after his removal, plaintiff's attorney similarly could have filed a petition for review challenging the removal order. *See Swaby*, 357 F.3d at 160 n.8. Neither action was filed, however.

The claim also fails on legal grounds. In order to adequately allege this type of access-to-court claim, a plaintiff "must identify a 'nonfrivolous,' 'arguable' underlying claim" that was lost due to the alleged obstruction. *See Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The existence of such an underlying claim "is an element that *must be described in the complaint.*" *Ibid.* (emphasis added). Plaintiff failed to identify such a claim in Count 4 of his complaint, even after the district court invited him to replead that count. Instead, he merely alleged in

conclusory fashion that he was unable to "petition the courts for redress of his grievances." App. 42. Under *Harbury*, that pleading failure – failing to identify the cause of action he was precluded from asserting – is fatal to this claim.

Plaintiff now argues that it should have been obvious that he always meant to allege he was prevented from bringing a CAT claim. Arar Br. 42. But that cannot be squared with plaintiff's own district court motion, which, as the district court explained, insisted that Count 4 did "*not overlap in any way* with the dismissed first three counts, which dealt solely with plaintiff's removal and treatment abroad." App. 463 (emphasis added). *See also* Plaintiff's Rule 54(b) Motion (R.100), 6-7. The reality is that the only specific claim plaintiff argued that he "lost" due to the alleged obstruction was a claim relating to the lawfulness of "his detention" in the U.S.,[30] and that had nothing to do with the assertion of a CAT claim. *See* Plaintiff's Opp. to Motions to Dismiss (R.60) at 32 (asserting "Defendants * * * blocked Mr. Arar's efforts to secure counsel in order to file a petition for habeas corpus or to otherwise challenge his detention").

There is a good reason plaintiff never raised a claim of obstruction relating to a CAT claim. As noted above, his counsel could have filed a habeas petition or a

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[30] Plaintiff did not seek redress for that claim in his complaint, nor does he assert that claim on appeal. In any event, his detention was authorized by 8 U.S.C. § 1226(c) and he had counsel to challenge it.

petition for review to assert a CAT violation. Furthermore, the underlying CAT claim could not have succeeded, even if brought in a habeas petition or a petition for review, because courts are not permitted to "second-guess" the decision of the political branches to rely upon communications with foreign officials in finding that the removal would not violate the CAT. *Munaf*, 128 S.Ct. at 2225. That is exactly what a petition raising a CAT claim would have asked the court to do. *See* pp. 31-34, *supra.*

Thus, plaintiff's belated effort to transform this claim (after having refused to replead the claim in district court) should be rejected.[31]

2. Plaintiff's conditions-of-confinement claim likewise fails. The Fifth and Eleventh Circuits have held that excludable aliens detained "at the border" (as defined by the entry fiction) are entitled to be treated humanely, and therefore may not be subjected to gross physical abuse. *See, e.g.*, *Adras v. Nelson*, 917 F.2d 1552,

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[31] If this Court were to allow this effort to transform Count 4, however, then the claim would present a collateral attack on the removal order and the CAT determination within that order. Thus, the claim would fail for many of the same reasons as Counts 2 and 3: the claim would be jurisdictionally barred by statute; it would be nonjusticiable under *Munaf*; a *Bivens* remedy would not be available to review the CAT determination and removal decision; and defendants would have the right to qualified immunity. Moreover, the United States did not assert the state-secrets privilege with regard to Count 4 because plaintiff did not cast it as a challenge to his removal or as a CAT violation. If the Court permits plaintiff to reframe this claim and remands the case, the United States reserves the right to broaden the state-secrets assertion to cover this claim.

1559 (11th Cir. 1990); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987); *see also Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (noting in dictum, "[o]ther than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection").

Plaintiff's allegations do not state a violation of this nature. Plaintiff alleges only that he was subjected to long and involuntary interrogations at odd hours on three separate occasions over a two-week period; that he was deprived of sleep and food on his first day of incarceration;[32] and that he was held in solitary confinement, shackled, and subjected to a strip search. *See* App. 31-32; *Arar*, 532 F.3d at 189. As the panel held, "[t]hese allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse." *Ibid.*

Plaintiff seeks to create a circuit split and argues that the proper standard for determining his substantive due process rights is derived from *Bell v. Wolfish*, 441 U.S. 520 (1979). *See* Arar Br. 50. That case is entirely inapposite. It did not purport to define the limited substantive due process rights of excludable aliens detained at the border awaiting removal, as *Lynch* and *Adras* did. Instead, *Bell* concerned the

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[32] While his complaint suggests he was deprived of any food for "two days," App. 30, the facts asserted in the complaint show that it was at most 26 hours from the time plaintiff left the airplane at JFK to the time he was provided a meal. App. 29-30.

general question of when a prison policy (which would apply to U.S. citizens as well as aliens who made an entry) could be deemed sufficiently punitive that it could not be applied to pre-trial detainees. The "reasonably related to a legitimate goal" test that plaintiff relies upon was not a substantive due process litmus test for all circumstances but, instead, was a measuring stick used to determine whether a particular policy may be deemed punitive. *See id.* at 538-39 (applying test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).[33]

Finally, even if *Bell* did present the proper standard, which it does not, plaintiff's complaint does not allege a violation of this standard. Plaintiff alleges that his interrogation and detention were designed to gather information "about his membership in or affiliation with various terrorist groups." App. 30. As the panel majority correctly noted, this end is surely a legitimate one. *Arar*, 532 F.3d at 190.

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[33] Notably, the dissenting panel member neither adopted the standard from *Bell v. Wolfish* nor concluded that plaintiff's allegations met that standard. *See Arar*, 532 F.3d at 207 & n.24 (Sack, J., dissenting in part) (arguing that *Bell* is "unhelpful" because the question in this case is "not whether Arar was 'punished' as a pre-trial detainee"). The dissent concluded that plaintiff alleged a violation of the "gross physical abuse" standard, but that finding was based upon plaintiff's allegations concerning his alleged torture *in Syria* (Counts 2 and 3), not the allegations in Count 4 (regarding his treatment in the United States). *Id.* at 207.

VI. The Unanimous Panel Properly Affirmed The Dismissal Of The TVPA Claim (Count 1).

A. In Addition To The Grounds Cited by the Panel, The TVPA Claim Is Barred For Three Threshold Reasons.

The panel unanimously rejected plaintiff's claim under the Torture Victims Protection Act for failure to state a claim, and that decision is plainly correct. But we first note that plaintiff's attempt to pursue a damages remedy against the individual defendants is barred for three threshold reasons.[34]

First, like Counts 2 and 3, the TVPA claim is jurisdictionally barred by the INA. As explained, (pp. 25-31), the INA provides the exclusive mechanism for challenging "any action taken or proceeding brought to remove an alien from the United States," 8 U.S.C. § 1252(b)(9)," including any CAT determination, *see* 8 U.S.C. § 1252(a)(4). Count 1, like Counts 2 and 3, alleges that the CAT finding was a fraud, and that in reality defendants planned, or at least knew, that plaintiff would be tortured in Syria. App. 23-26. The TVPA claim thus presents a collateral challenge to plaintiff's removal and is barred under the plain terms of sections 1252(b)(9) and 1252(a)(4). *See* 8 U.S.C. § 1252(a)(4) (expressly barring jurisdiction

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[34] Plaintiff has abandoned any TVPA claim against the United States. The district court recognized that there is no waiver of sovereign immunity permitting TVPA claims against the United States, SA 20 n.5, and accordingly treated the TVPA claim as limited to the individual-capacity defendants. Plaintiff does not challenge that decision.

over other forms of statutory actions "[*n*]*otwithstanding any other provision of law* (statutory or nonstatutory)") (emphasis added).

Second, like Counts 2-3, the TVPA claim would require a court to examine and pass judgment on the communications between Syrian officials and U.S. officials that served as the foundation of the CAT determination – an inquiry which, as the recent decision in *Munaf* highlights, implicates separation-of-powers concerns. *See* pp. 31-34, *supra*. *See also Gonzalez-Vera*, 449 F.3d at 1263-1264 (holding TVPA claims against former National Security Advisor nonjusticiable); *see also Harbury v. Hayden*, 522 F.3d 413, 423 n.5 (D.C. Cir. 2008) ("Even if Harbury's complaint had asserted a TVPA claim, moreover, the claim would pose a nonjusticiable political question").

Third, as with regard to plaintiff's other claims, Count 1 does not adequately plead the personal involvement of defendant Ashcroft or the other named defendants in regard to plaintiff's alleged torture in Syria.

B. Plaintiff Failed to State a Claim For Violation Of The TVPA.

If the Court does reach the merits of plaintiff's contentions regarding the TVPA, dismissal is still appropriate because, as the unanimous panel recognized, Count 1 fails to state a claim.

1. All members of the panel recognized that plaintiff failed to state a claim

under the TVPA, *Arar*, 532 F.3d at 176; *id.* at 201 (Sack, J., dissenting in part), which creates liability only for defendants who act "under actual or apparent authority, or color of law, *of any foreign nation.*" TVPA, § 2(a) (emphasis added). *See also* H.R. Rep. No. 367 at 7 (1991) (the TVPA creates liability for "any person who, under the authority of any foreign nation, tortures or extrajudicially kills any person"). There is, of course, no question that the individual defendants were acting under the color of law. But that law was the law of the United States, not the law of Syria, Canada, or any other foreign nation. Indeed, plaintiff's own complaint repeatedly alleges that the same actions were taken "under color of law and their authority as federal officials." App. 39, 40, 41 (emphasis added). *See also* App. 38 (defendants "directed" and "ordered" the alleged acts). "Nowhere * * * does [plaintiff] 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 not have been able to undertake these culpable actions had they not possessed such power." 532 F.3d at 176. "[S]uch allegations are necessary to state a claim under the TVPA." *Ibid.*

As the panel recognized, defendants were not acting under Syrian authority or under color of Syrian law. To the contrary, as plaintiff's allegations make clear, defendants were senior U.S. officials working in the United States and administering

U.S. law. The decisions they are alleged to have made, individually and collectively, were made pursuant to federal law, including the INA, the FARR Act, and the implementing regulations. *See Schneider v. Kissinger*, 310 F.Supp.2d 251, 267 (D.D.C. 2004) ("Dr. Kissinger was most assuredly acting pursuant to U.S. law * * *, despite the fact that his alleged foreign coconspirators may have been acting under color of Chilean law"), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005).

Plaintiff suggests that it is sufficient to allege that defendants "abused federal authority" under United States law and "willfully participated in a plan to subject Arar to torture under color of Syrian law," whether or not defendants were acting on Syria's behalf. Arar Br. 49. But that argument disregards the requirement of the TVPA that a defendant must act "under actual or apparent authority, or color of law, of any foreign nation." TVPA, § 2(a). Plaintiff would rewrite the statute to encompass actions taken under the authority of "*any nation.*"

The phrase "color of law" was not intended to eliminate or somehow weaken the requirement that the authority required by the Act be derived from the law of a foreign nation. To the contrary, the "color of law" requirement was simply added to prevent foreign officials from evading TVPA liability by arguing that the unlawful nature of torture renders their alleged conduct *ultra vires* and therefore outside their official authority. *See* S. Rep. No. 102-249 at 8 (1991) ("[B]ecause no state officially

condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties.").

2. Plaintiff cannot properly transpose the analysis that would be relevant if a private party were alleged to have acted in concert with foreign officials. The private party possesses no authority under U.S. law; any governmental authority a non-governmental actor might exercise by virtue of his association with a foreign government would necessarily be the authority of that foreign government. In contrast, a U.S. official exercising his responsibilities necessarily acts under color of U.S. law. The official does not cease to act under U.S. law because he has allegedly violated that law or because his actions were taken in the course of conducting the nation's foreign affairs. *See Schneider*, 310 F.Supp.2d at 267.

3. Plaintiff likewise errs in analogizing the present inquiry to that presented in § 1983 cases in which a federal official working side-by-side with a state official in a law-enforcement investigation might, in some circumstances, be acting under color of state law or vice-versa. In our federal system, federal and local officials are expected to act cooperatively, and federal law and state law frequently provide overlapping authority. It is quite another thing to suggest that U.S. officials, when acting within the scope of their federal offices, should be viewed as acting under the color of law of another sovereign nation. As the district court observed, the foreign

affairs "arena is animated by different interests and issues." SA 35.

Plaintiff provides no authority for the proposition that United States officials may act under authority of the law of a foreign state on the basis of their communications or cooperation with officials of the foreign state. On the contrary, applying the TVPA to such officials "would expose every federal employee working abroad daily with employees of foreign governments – *i.e.*, employees in intelligence agencies, military agencies, diplomatic and foreign aid agencies, and law enforcement agencies – to personal liability under the construct that they were somehow actually or apparently acting under foreign law." *Harbury v. Hayden*, 444 F. Supp. 2d 19, 41 (D.D.C. 2006), *aff'd on other grounds*, 522 F.3d 413 (D.C. Cir. 2008).

4. Plaintiff's reliance upon *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969) (Br. 47-48), is misplaced. In that case, plaintiff's basis for suing federal officials under § 1983 was that "they acted 'under color of state law' by virtue of their conspiracy with the state defendants *and* by virtue of the fact that their actions were partially the product of the *influence of the state defendants*." *Id.* at 448 (emphasis added). A central component of the claim was that the state officials were influencing the federal officers. The Court's decision, moreover, distinguished between two groups of federal officials, holding that one group may have been sufficiently influenced by state officials to be deemed to have acted under color of state law, *id.*

at 447-48, but that another group of federal officials could not be deemed state actors because their conduct was not "under the control or influence of the State defendants," *id.* at 449.

As the panel explained, *Kletschka* is fully consistent with its holding here: "[b]ecause federal officials cannot exercise power under foreign law without subjecting themselves to the control or influence of a foreign state," a viable TVPA claim would have to allege such control or influence. *Arar*, 532 F.3d at 177. By contrast, as the district court observed, plaintiff's entire theory is that the defendant U.S. officials influenced the Syrian officials who allegedly subjected him to torture, not that Syria directed or influenced U.S. officials to act. *See* SA 36, 38.

Thus, this case is analogous to *Billings v. United States*, 57 F.3d 797 (9th Cir. 1995). In that § 1983 case, the court held that when federal Secret Service agents direct state officials to arrest a suspect, the federal officials are *not* deemed to be acting under color of state-law authority. Rather, it is the state officials who are deemed to be clothed in federal authority. *Id.* at 801 ("If the Secret Service Agents and the Sheriff's officers acted jointly, it was under the color of federal law."). *See also Schneider*, 310 F.Supp.2d at 267. As the district court held, the rationale of *Billings* applies here and requires dismissal of Arar's TVPA claims. SA 36.

5. Plaintiff's allegation of aiding and abetting or conspiracy by U.S. officials

does not bring his claim within the scope of the TVPA. In essence, he urges a standard of TVPA culpability that would permit liability when a particular individual did not himself act under color of foreign law, but aided someone else who did. Likewise, plaintiff's aiding-and-abetting theory would impose liability on individuals who did not have "custody or physical control" of the alleged victim as required by the TVPA, § 3(b)(1), but who aided someone who did.

Plaintiff's theory would expand the statute well beyond its express terms. Whether to impose civil aiding-and-abetting or conspiracy liability is a legislative choice. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998). In *Central Bank*, the Court explained that, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, *there is no general presumption that the plaintiff may also sue aiders and abettors*." 511 U.S. at 182 (emphasis added). In the criminal-law context, "aiding and abetting is an ancient * * * doctrine," but its extension to permit civil redress is not well established and has been "at best uncertain in application." *Id.* at 181. While in the criminal context the government's prosecutorial judgment serves as a substantial check on the imposition of aiding-and-abetting liability, there is no similar check on civil aiding-and-abetting liability

claims. Significantly, *Central Bank* noted that "Congress has not enacted a general civil aiding and abetting statute – either for suits by the Government * * * or for suits by private parties." *Id.* at 182.

In *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761 (2008), the Supreme Court reaffirmed and elaborated upon the rationale of *Central Bank.* As the Court noted, "[t]he determination of who can seek a remedy has significant consequences for the reach of federal power." *Id.* at 773. Even when Congress provides a statutory cause of action, "concerns with the judicial creation of a private cause of action caution against its expansion." *Ibid.* As the Court emphasized, "[t]he decision to extend the cause of action is for Congress, not for [the courts]." *Ibid.*

Thus, under *Central Bank* and *Stoneridge*, a court must not presume that there is any right to assert an aiding-and-abetting claim under the TVPA. The reasoning of those decisions applies equally to conspiracy claims. *See Dinsmore*, 135 F.3d at 840-44. Accordingly, absent clear direction from Congress, a federal court should not recognize such claims under the TVPA.

The district court mistakenly believed that a plaintiff, based on adequate factual allegations, might pursue a theory of aiding-and-abetting liability under the TVPA, citing (SA 24) the statement in a Senate Report that "[t]he legislation is limited to

lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. 102-249 at 8-9 (1991). That bill, however, was never enacted. When it enacted the TVPA, Congress adopted the House bill, and the accompanying House Report, which contains no reference to "abetting." *See* H.R. Rep. 102-367, 102nd Cong., 2d Sess. 30 (1992).

Moreover, in context, it is evident that even the Senate Report did not intend "abetting" liability to vitiate the requirement that the defendant have acted under "actual or apparent authority, or color of law" of a foreign nation, or the TVPA's mandate that liability be limited to acts "directed against an individual in the offender's custody or physical control." TVPA, § 3(b)(1). The examples of liability cited in the Senate Report involved foreign commanders who ordered or otherwise authorized a subordinate to commit torture, a far narrower imposition of liability than that which would be created under theories of aiding and abetting. S. Rep. 102-249 at 8-9. As the Court recognized in *Central Bank*, the adoption of aiding-and-abetting liability effects "a vast expansion" of the scope of a civil cause of action beyond those principally responsible for the acts. 511 U.S. at 183.

In *Central Bank* and in *Stoneridge*, the Court further recognized that to expand the class of people who could be sued under plaintiff's theory would in practice enable plaintiffs to circumvent the statute's reliance requirement. *See Stoneridge*,

128 S.Ct. at 768-69 (discussing *Central Bank*). Likewise, to adopt the standard of TVPA culpability proposed by plaintiff would permit plaintiffs to circumvent the TVPA's requirements that the defendant himself have acted under color of foreign law, as well as the TVPA's requirement of "custody or physical control" of the alleged victim. As in *Central Bank* and *Stoneridge*, this Court should reject this invitation to adopt an interpretation that weakens the requirements for a cause of action set out by Congress.

C. Defendants Are, At A Minimum, Entitled To Qualified Immunity With Regard to Plaintiff's TVPA Claim.

At the very least, defendants are entitled to qualified immunity on the TVPA claim. Qualified immunity applies both to statutory as well as constitutional claims. *See, e.g.*, *Harlow*, 457 U.S. at 818 (holding that "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.") (emphasis added). Plaintiff cannot conceivably have alleged a "clearly established" right under the TVPA when both the district court and the panel held that he had failed to state a claim against the defendants under that statute and, to our knowledge, no court has ever adopted plaintiff's attempt to extend the TVPA to the acts of U.S. officials taken under the color of federal law.

VII. The District Court Correctly Dismissed The Claims for Declaratory Relief For Want Of Standing.

The foregoing sets out the critical legal defects in plaintiff's claims, including jurisdictional barriers to suit. In addition, as the district court held and the panel unanimously recognized, plaintiff has no Article III standing to seek declaratory relief as to any of his claims.

Under Article III, a plaintiff must establish, first, that he has suffered an *injury in fact*; second, that the challenged conduct *caused* that injury (or, alternatively, that the injury is "fairly traceable" to the challenged conduct); and third, that a favorable decision would likely *redress* the injury. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998).

Past injury may support standing to seek retrospective relief such as damages, but past injury does not support standing to seek prospective relief such as a declaratory judgment; rather, standing must be separately demonstrated for each form of relief sought. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Deshawn E. by Charlotte B. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998). To have standing to seek a declaratory judgment, plaintiff must establish that he is suffering an ongoing injury, or faces a real and immediate threat of future injury, and that such injury likely would be redressed or avoided by the specific declaratory relief sought. *Lyons*, 461 U.S. at 111.

Plaintiff's only claim of ongoing injury is that he is currently barred from reentering the United States, *see* Arar Br. 51-53. That allegation of injury is neither traceable to the defendants' actions challenged in the complaint, nor redressable through this action.

As the panel explained, plaintiff's inability to reenter the United States is traceable, as a matter of law, to his removal pursuant to the removal order entered under 8 U.S.C. § 1225(c) (based on a finding of inadmissibility under 8 U.S.C. § 1182(a)(3)(B)(i)(V)). The same reentry bar would exist even if plaintiff had been removed under that provision to Canada, as he wished, rather than to Syria.

Similarly, plaintiff's alleged injury is not redressable because no relief available to plaintiff in this proceeding could lift that ban on reentry. SA 18-19; 532 F.3d at 191-92, 201. The reentry bar arose by operation of law under 8 U.S.C. § 1182(a)(9)(A)(ii), as a direct and automatic consequence of his removal pursuant to the removal order entered under § 1225(c). The only way the reentry bar could be eliminated would be to vacate the removal order. *Cf. Swaby*, 357 F.3d at 160-61 (post-removal habeas relief could redress reentry bar by "vacat[ing] [the] order of removal"); *Dickson v. Ashcroft*, 346 F.3d 44, 55 (2d Cir. 2003) (granting petition for review and vacating removal order). Because that end could only have been achieved by filing a petition for review or a habeas petition, plaintiff cannot obtain that relief

in this proceeding.

Plaintiff's argument is particularly anomalous because, as the district court observed, plaintiff expressly conceded that he was *not* seeking vacatur of the removal order, *see* SA 19,[35] making it clear that "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." SA 19-20. In his replacement brief in this Court, plaintiff again concedes that he has not challenged "the determination that he was inadmissible." Arar Br. 52 n.41. And he admits that the failure to bring such a challenge was a deliberate tactical decision. *Ibid.*

Disregarding the analyses of the panel and the district court, plaintiff nevertheless declares that if he were to prevail on his constitutional claims, the removal order "would be invalid as a whole" and "the re-entry bar would be lifted." Arar Br. 53. But that is false because plaintiff does not contest the inadmissability finding or the fact that he was removable. Plaintiff does not even argue in his access-to-court claim that he would have had a viable challenge to the finding, which

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[35] In his opposition to the motions to dismiss, plaintiff stated:

- Arar's "suit does not challenge his removal order" (Arar Memo. in Opp. at 19);
- Arar's claims are "collateral" to the removal order and to its "validity" (*id.* at 15, 18-19); and
- Arar "does not complain about the decision to classify him as inadmissible into the United States" (*id.* at 13).

indisputably permitted his removal. Instead, he contests only the CAT determination. In any event, plaintiff's argument for prospective standing merely underscores that, despite his efforts to characterize his claims so as to avoid the INA's jurisdictional bars, the reality is that plaintiff's claims are an impermissible collateral challenge to the CAT determination incorporated within the removal order. *See supra,* pp. 25-31.[36]

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[36] Arar's replacement brief no longer relies on the alternative theory supporting standing to seek declaratory relief that appeared in his opening brief–namely, that declaratory relief would "alleviate some of his mental suffering and * * * reputational harm." Arar Original Br. 56. As the United States noted in its panel brief, the Supreme Court has squarely rejected the proposition that declaratory relief can provide Article III redress for these alleged injuries. *See Steel Co.*, 523 U.S. at 107.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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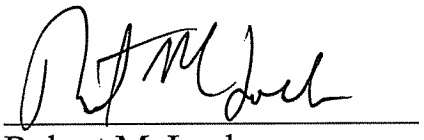
I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(c) and Second Circuit Rule 32(a)(2), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 2,090 words (which does not exceed the applicable 21,000 word limit).



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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2008, I filed and served the foregoing brief by causing an original and fourteen copies to be delivered to the Court via FedEx overnight delivery (and e-mail delivery) and to counsel of record via FedEx overnight delivery (and e-mail delivery):

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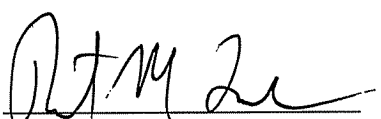

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