06-4216-cv

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MAHER ARAR,

Plaintiff-Appellant,

- v.-

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. McELROY, formerly District Director of Immigration

(For Continuation of Caption See Inside Cover)

ON EN BANC REHEARING OF AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFF-APPELLANT

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and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, UNITED STATES,

Defendants-Appellees.

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STATEMENT OF INTEREST

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members, dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The New York Civil Liberties Union is the New York state affiliate of the ACLU. The ACLU's Immigrants' Rights Project engages in a nationwide litigation and advocacy program to enforce and protect immigrants' constitutional and civil rights. With the consent of all parties, *amici* write here to address the reasons why the jurisdictional provisions of the Immigration and Nationality Act (INA) do not preclude review of the constitutional claims raised in this case and why the statute should not be viewed as eliminating the remedy long afforded by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for federal immigration officers' violations of core constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is not a case about an alien challenging removal from the United States. It is rather a case about an individual seeking redress for the harm he suffered when federal officials acted in concert, first, to have him subjected to solitary confinement and coercive interrogation under harsh conditions in the United States and, then, when they failed to elicit the information sought, to hand him over to

foreign officials for the purpose of having him subjected to interrogation under torture.

Plaintiff-Appellant Maher Arar alleges that while transiting through John F. Kennedy International Airport on September 26, 2002, on his way home to Canada, he was seized by immigration officials, held largely incommunicado and interrogated for hours on end over the course of nearly two weeks, and then, without being allowed to petition a court for redress, rendered to Syria by Defendants-Appellees (hereafter "Defendants"), whose purpose was to have him interrogated under torture there. [Compl. ¶¶ 26-57, 59, 68-70] According to the complaint, Defendants sent Arar to Syria as part of the U.S. Government's "extraordinary renditions" program, pursuant to which noncitizens suspected of terrorist activity are taken to countries like Syria, where interrogations under torture are routine, "precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States." [Compl. ¶¶ 24, 57, Ex. C] In Syria, Arar was subjected to brutal physical and psychological abuse and was detained without charges – confined to a tiny, unsanitary, underground cell that he has likened to a grave – for nearly a year. [Compl. ¶¶ 51-52, 58, 61, 64-66]

After his release, Arar commenced the instant litigation, claiming that Defendants violated his substantive due process rights when they sent him to Syria

to be arbitrarily detained and tortured.[1] For the physical and psychological abuse he endured and the ten months he was kept in a grave-like hole in the ground, Arar seeks the only remedy available to him – damages. The vehicle for his claims is *Bivens*, 403 U.S. 388, which held that persons whom federal officers unconstitutionally seize and thereby deprive of liberty are entitled to redress in the form of money damages for their injuries.

Defendants maintain that, even accepting Arar's allegations as true, there is no remedy for him. Seeking in rather incredible fashion to characterize his case as simply a challenge to removal, Defendants urge that Arar's sole remedy lay with a petition for review of the removal order issued moments before he was taken to a plane for delivery to those who would torture him. According to Defendants, the avenue of review they allegedly made impossible for Arar to pursue should be deemed to preclude his *Bivens* action.

Defendants' attempt to frame Arar's claim as a challenge to a removal order defies any fair or reasonable reading of the complaint. The heart of his claim is not that U.S. officials declared him inadmissible or that they ordered him removed from the United States or even that they chose Syria as the country to which to send him – it is that they *conspired (successfully) to have him tortured and*

[1] Arar also raises claims under the Torture Victim Protection Act and the Fifth Amendment for, respectively, the torture he endured in Syria and the unconstitutional conditions of confinement, interrogations and impeded access to the courts he experienced in the U.S.

arbitrarily detained. [Compl. ¶ 69] That the individuals charged with this conduct opted to have Syrian officers do their dirty work, rather than torturing Arar themselves or handing him over to co-conspirators within the United States, does not make this an immigration case. Indeed, while they sought to immunize themselves by papering over their conduct with a removal order that they kept from the view of any court, Arar's "removal" to Syria (and Defendants' interference with his access to challenging that removal) was merely a means to an end – it was not the end itself as in an ordinary immigration case. And his detention and interrogation under torture in Syria was not merely the tragic outcome of a fairly reached but ultimately wrong decision by an immigration judge or appeals court – it was the very outcome Defendants are alleged to have sought.

Under these circumstances, the INA simply cannot be read to preclude any remedy for complicity in the basest constitutional and human rights violations.

First, the INA's jurisdictional provisions are concerned with having a streamlined approach to federal court review of administrative orders of removal. Arar is not seeking review of a removal order, but rather seeks review of claims that his constitutional rights were violated by Defendants acting in concert to have him interrogated under torture. By their terms, the provisions at issue do not apply to Arar's claims.

Second, even if the filing of a petition for review or a habeas petition might have thwarted the rendering of Arar for interrogation under torture, the complaint

plainly alleges that Defendants acted to create a situation in which Arar, as a practical matter, was precluded from filing such a petition. The statute cannot be construed to allow government officials to prevent an alien from seeking review of Executive action and then claim that their success in doing so precludes any future review.

Third, the statute flatly contradicts Defendants' claim that their conduct amounted to unreviewable exercises of discretionary authority. Executive officers, moreover, have no discretion to violate the Constitution. It is well established that claims that they have nonetheless done so are amenable to review by the courts.

Finally, the INA is not the type of scheme from which one can infer congressional intent to preclude *Bivens* claims. Even if only for the unique circumstances presented here, the panel erred in concluding otherwise. Nothing in the statute, plenary power doctrine, or any aspect of immigration enforcement suggests that Congress intended that immigration officers, alone among federal law enforcement officers, be absolutely immune from liability for even the most clearly established constitutional violations. Indeed, courts have been adjudicating *Bivens* claims against immigration officers for decades, and yet Congress has not signaled that it wishes a change in course. Against this backdrop, whatever may be the ultimate outcome of this case, it presents no occasion for changing the settled understanding that well-defined constitutional violations are actionable, even when committed in the name of immigration enforcement.

For all these reasons, the Court should recognize and find jurisdiction over Arar's constitutional claims.[2]

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[2] While not focusing on the contours of Arar's claims, *amici* note that the panel's understanding of the substantive due process rights of one who is present in the U.S. without having effected an entry was fundamentally wrong. *See* 532 F.3d 157, 187 n.26 (2d Cir. 2008). The distinction between those who have effected an entry and those who have not applies "only where [it] makes . . . sense: with regard to the question of what *procedures* are necessary to prevent entry" into the United States. *Zadvydas v. Davis*, 533 U.S. 678, 703-04 (2001) (Scalia, J., dissenting); *see, e.g., Kwai Fun Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987). It does not bear on how they may be treated in other regards and in particular does not offer cover for their physical mistreatment. *See, e.g., Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623-24 (5th Cir. 2006); *cf. Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

The panel further erred in reading *Lynch v. Cannatella* as suggesting that conditions for one who has not "entered" violate due process only if they amount to "gross physical abuse." *Lynch* plainly held that such persons are entitled to "humane treatment." 810 F.2d at 1373; *see Bayo v. Chertoff*, 535 F.3d 749, 754 (7th Cir. 2008).

As a civil detainee, Arar was entitled to at least the level of due process afforded under *Bell v. Wolfish*, 441 U.S. 520 (1979). *Cf. Jones v. Blanas*, 393 F.3d 918, 931-33 (9th Cir. 2004). The panel concluded that the conditions Arar alleges were not punitive, yet failed to explain what legitimate goal was served by shackling, strip-searching, and depriving him of food and adequate sleeping facilities. The panel also failed to grapple with the serious concerns its approach raises for detained asylum seekers who have not effected an entry.

ARGUMENT

I. THE INA'S JURISDICTIONAL PROVISIONS DO NOT COVER ARAR'S CLAIMS.

Defendants have argued that Arar's claims had to have been brought by way of a petition for review (PFR) or a habeas petition filed before he was removed from the United States. This argument hinges on Defendants' characterization of Arar's claims as boiling down to a challenge to his removal order and nothing more. From this starting point, Defendants argue that certain of the INA's jurisdiction-limiting and -channeling provisions, 8 U.S.C. §§ 1252(a)(2)(B)(ii), (b)(9), (g), and the Foreign Affairs Reform and Restructuring Act (FARRA, codified at 8 U.S.C. § 1231 note) § 2242(d), preclude jurisdiction over Arar's constitutional claims.

Based on a fair reading of the complaint and a correct understanding of controlling principles of statutory construction, the district court properly rejected the proposition that any of these provisions divested it of jurisdiction. The court began with three precepts. First, jurisdictional statutes must "be interpreted in light of 'the strong presumption in favor of judicial review of administrative action.'" 414 F. Supp. 2d 250, 267 (E.D.N.Y. 2006) (citation omitted). Second, "'any lingering ambiguities in deportation statutes'" are to be construed "'in favor of the alien.'" *Id.* (citation omitted). Third, "'[w]here Congress intends to preclude judicial review of constitutional claims [of aliens] its intent to do so must be

clear.'" *Id.* (citation omitted). The court further understood that the INA's jurisdictional provisions were designed to consolidate and streamline judicial review of removal orders, so that properly ordered removals could proceed with greater alacrity but in a manner still consistent with due process. *See id.* at 268.

As the district court understood, Arar's case does not implicate the concerns that Congress sought to address with these provisions. His case is not a challenge to a removal but rather to a conspiracy to subject him to interrogation under torture. *See id.* Given the nature of his claims, the INA's jurisdictional provisions simply do not apply.

A. 8 U.S.C. § 1252(b)(9) & FARRA § 2242(d)

Neither 8 U.S.C. § 1252(b)(9) nor FARRA § 2242(d) (8 U.S.C. § 1231 note (d)) bars jurisdiction over Arar's *Bivens* claims.[3] First, § 1252(b)(9) is not a jurisdiction-stripping provision, but is rather a channeling provision. *See INS v. St. Cyr*, 533 U.S. 289, 313 (2001) ("Subsection (b)(9) simply provides for the

[3] Section 1252(b)(9) provides: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

FARRA § 2242(d) provides: "[N]othing in this section . . . shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . ., or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to [8 U.S.C. § 1252]."

consolidation of issues to be brought in petitions for judicial review." (internal quotation omitted)); *Aguilar v. U.S. ICE*, 510 F.3d 1 (1st Cir. 2007) (explaining that (b)(9) "is a judicial channeling provision, not a claim-barring one," that, "where applicable, only requires exhaustion of administrative procedures and the consolidation of claims for judicial review"); *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000); *cf., e.g., Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003) (characterizing FARRA § 2242(d) as a review-channeling zipper clause).

Second, § 1252(b)(9) applies only to questions "arising from" an action or proceeding to remove an alien – it does not cover claims that are independent of challenges to a removal order. *See Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007) (citing cases and H.R. Rep. No. 109-72, at 175, 2005 U.S.C.C.A.N. 240, 299); *see also Aguilar*, 510 F.3d at 11; *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006).

With a proper understanding of these principles and Arar's claims, it is plain that § 1252(b)(9) does not preclude jurisdiction here. Arar is not challenging a removal order – he is not contesting a finding of inadmissibility or even the process by which he was deemed inadmissible, nor is he seeking to remain in the United States. *See* 8 U.S.C. § 1101(a)(47)(A) (defining "order of deportation").[4]

[4] Indeed, Arar was seeking only to return home to Canada from travel abroad, not to be admitted to the U.S. when he was seized. [Compl. ¶¶ 25-26] *See* 22 C.F.R. § 41.71 (defining "transit aliens"); 8 C.F.R. § 1.1(q) (showing that an

He is instead seeking redress for Defendants' alleged conspiracy to have him subjected to torture in Syria. Arar's claims thus are not inextricably intertwined with the merits of the removal order.

Moreover, Arar alleges that Defendants deliberately foreclosed any possibility of his filing a PFR or habeas petition before he was rendered to Syria. [Compl. ¶ 46-47, 49-50, Ex. D] In the face of these allegations, which must be taken as true at this stage, *see, e.g.*, *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008), Defendants cannot now posit that the INA has shut the courthouse doors for all time to any and all constitutional claims by Arar.[5] Congress could not have intended that result. *See Aguilar*, 510 F.3d at 19 (finding jurisdiction to review substantive due process claim that detention and transfers violated right to family integrity where contrary holding would "sound the death knell for

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alien seeking to transit through the U.S. at a port-of-entry is distinct from an applicant for admission attempting to come into the U.S.).

[5] Defendants' citation to *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999) (*Merritt I*), is both unavailing and illustrative of one of several ways in which Arar's case is distinguishable from virtually all others. Merritt *voluntarily* abandoned his pursuit of exclusive judicial review of the suspension of his pilot license and then sought to pursue, through *Bivens*, claims that in essence were the very matters that would have been the subject of judicial review of the administrative order and that were thus "inescapably intertwined" with the review of his license suspension. *See also Merritt v. Shuttle, Inc.*, 245 F.3d 182, 188-91 (2d Cir. 2001) (explaining *Merritt I*'s limited holding, setting forth test of whether claim is "inextricably intertwined" with review of administrative order, and finding that statute vesting exclusive judicial review of administrative orders with courts of appeals did not preclude FTCA claim).

meaningful judicial review," "contradict the presumption favoring judicial review of administrative actions," and leave petitioners "without any effective remedy"); *cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493, 495-97 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988).

The district court was thus correct to hold that § 1252(b)(9) cannot be interpreted to bar Arar from having any means of litigating his constitutional claims. *See* 414 F. Supp. 2d at 269. For essentially the same reasons, and because Arar's substantive due process claims do not arise under the Convention Against Torture (CAT) and are not limited to application of U.S. policy to abide by the CAT, FARRA's jurisdiction-channeling provision also does not apply here.

B. 8 U.S.C. § 1252(a)(2)(B)(ii)

Defendants claim that review of Arar's *Bivens* claims is precluded by 8 U.S.C. § 1252(a)(2)(B)(ii), which provides that courts do not have jurisdiction to review "any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ." This provision does not affect jurisdiction over Arar's claims.

First, neither the Attorney General nor the Secretary had discretion to render Arar to Syria for the purpose of having him tortured. Indeed, even if they lacked any nefarious purpose, the statute did not afford them discretion, let alone authority, to prevent Arar from accessing the courts for protection and remove him

to Syria when there was a substantial likelihood he would be tortured there. *See Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) ("[W]hen a statute authorizes the Attorney General to make a determination, but lacks additional language specifically rendering that determination to be within his discretion . . ., the decision is not one that is 'specified . . . to be in the discretion of the Attorney General' for purposes of § 1252(a)(2)(B)(ii)."). Defendants can cite no provision that confers the discretion they claim. *Cf, e.g.*, FARRA § 2242(c) (providing that regulations may exclude aliens deemed a danger to the U.S. only to the extent consistent with U.S. obligations under the CAT); 8 C.F.R. § 235.8(b)(4) (prohibiting execution of a removal order under circumstances violating Article 3 of CAT).[6]

Moreover, Arar's complaint raises serious constitutional claims. Congress has been clear, and courts have held, that the statute does not eliminate jurisdiction to review such claims. *See, e.g., Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004) ("[D]ecisions that violate the Constitution cannot be 'discretionary,' so claims of constitutional violations are not barred by § 1252(a)(2)(B)."); *see also* 8 U.S.C. § 1252(a)(2)(D); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329

[6] *Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986), is entirely distinguishable from Arar's case in that there was no claim of torture in *Doherty*, the discretion claimed there is lacking here, and Doherty sought to interrupt an ongoing administrative process.

(2d Cir. 2006). Section 1252(a)(2)(B)(ii) thus cannot be read to preclude jurisdiction over Arar's claims.

C. 8 U.S.C. § 1252(g)

Section 1252(g) also does not prelude jurisdiction here. Under subparagraph (g), except as provided in § 1252, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]." Arar's claims do not arise from any of the decisions or actions this subsection specifies.

Reno v. American-Arab Anti-Discrimination Committee (*AADC*) held that § 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" 525 U.S. 471, 482 (1999) (quoting § 1252(g) with emphasis). Congress focused on these three discrete acts because they "represent the initiation or prosecution of various stages in the deportation process," when "the Executive has discretion to abandon the endeavor." *Id.* at 483. A response to piecemeal litigation challenging the refusal to exercise this prosecutorial discretion favorably, § 1252(g) was "designed to give some measure of protection to [decisions not to abandon or defer the process] and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process" that

Congress designed. *Id.* at 485; *see id.* at 485 n.9; *id.* at 486 (describing (g) as a "discretion-protecting provision"); *id.* at 487 (explaining that (g) was intended to limit "deconstruction, fragmentation, and hence prolongation of removal proceedings").

Since *AADC*, courts have taken care to follow the Court's direction that § 1252(g) be narrowly construed to apply to only the three delineated discretionary decisions. For example, *Madu v. U.S. Attorney General*, 470 F.3d 1362 (11th Cir. 2006), found jurisdiction over a habeas petition that disputed whether a removal order had ever come into being because the challenge – while technically to the decision to remove the petitioner – was not to an exercise of discretion but was rather of a constitutional nature. *Madu* explained that, "[w]hile [§ 1252(g)] bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions." *Id.* at 1368; *see also Wong*, 373 F.3d at 964-65 (finding (g) inapplicable to "'claims aris[ing] from the discriminatory animus that motivated and underlay the actions of the individual defendants which *resulted in* the INS's decision to commence removal proceedings and ultimately to remove'" plaintiff (citation omitted)); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question – a description of the relevant law – forms

the backdrop against which the Attorney General later will exercise discretionary authority."); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120-21 (9th Cir. 2001); *cf. Humphries v. Various Fed. USINS Employees*, 164 F.3d 936 (5th Cir. 1999) (holding that (g) covered retaliatory exclusion claim, but not claims of involuntary servitude and mistreatment in detention).[7] Notably, both the Eighth and Ninth Circuits found § 1252(g) inapplicable where individuals challenged their impending removal to Somalia on the ground that the statute did not authorize their removal to a country lacking a government that could accept them.[8] *See Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003), *aff'd, Jama v. ICE*, 543 U.S. 335 (2005); *Ali v. Ashcroft*, 346 F.3d 873, 878-79 (9th Cir. 2003), *withdrawn on other grounds*, *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005).

Particularly given § 1252(g)'s purpose and the requirement that it be narrowly construed, Arar's claims cannot be regarded as arising from any of the

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[7] Notwithstanding *AADC*'s repeated emphasis that § 1252(g) is a discretion-protecting provision, the Fifth Circuit asserted in *Foster v. Townsley*, 243 F.3d 210, 214 (5th Cir. 2001), that (g) covers nondiscretionary decisions, but it then held in *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005), that (g) does not preclude jurisdiction over a constitutional challenge to placement in expedited removal instead of regular removal proceedings.

Section 1252(g) in any event does not preclude review but rather channels claims into PFRs. *See Humphries*, 164 F.3d at 945. And jurisdiction remains for constitutional claims and questions of law raised in PFRs. *See* 8 U.S.C. § 1252(a)(2)(D).

[8] Both courts *additionally* found that habeas jurisdiction was not eliminated by the version of § 1252(g) then in effect. *See Ali*, 346 F.3d at 879-80; *Jama*, 329 F.3d at 632-33.

three specified acts, including the decision to execute a removal order against him.[9] Rather, his challenge arises from Defendants' rendition policy and conspiracy to send him to Syria for interrogation under torture (and, toward that end, to block his access to the courts). Had Defendants pushed Arar out of a plane over the Atlantic, they could not colorably claim they were merely executing his removal order. They can no more characterize the claim here of a conspiracy to inflict torture as arising from the decision to remove Arar from the United States.[10] The abuse he complains of is simply not bound up with a discretionary determination of whether to allow him to remain here. *See AADC*, 525 U.S. at 482 ("It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings."); *see also id.* (citing decision regarding what provisions to put in final order as example not covered by (g)). Section 1252(g) thus does not apply.

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[9] The focus in this litigation has been on whether Arar's claims arose out of the decision to execute a removal order since Defendants went straight to ordering him removed without commencing proceedings or allowing an adjudication.

[10] *Sissoko v. Rocha*, 509 F.3d 947, 949-50 (9th Cir. 2007) (reh'g petition pending), is distinguishable in this regard. Sissoko challenged detention that was not independent of, but rather mandated by, the commencement of proceedings in his case. In the panel's view, his claim therefore effectively challenged directly the decision to commence proceedings. In contrast, nothing that Arar challenges is inherent in the decision to commence proceedings, adjudicate cases, or execute removal orders. Also, a statutorily provided means of review of the cause of Sissoko's detention had been available to him, so the interpretation of (g) in that case did not mean that all avenues for review of a constitutional claim were foreclosed. *See id.*

II. *BIVENS* IS AN ESTABLISHED VEHICLE FOR REMEDYING CONSTITUTIONAL VIOLATIONS BY IMMIGRATION OFFICIALS.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), held that a plaintiff may recover money damages for injuries caused by federal officers' violations of the Fourth Amendment. Although no enactment of Congress specifically authorized damages actions for constitutional violations, the Court reasoned that "'it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Id.* at 396 (citation omitted); *see id.* at 397 (emphasizing that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

Since *Bivens*, courts have without hesitation accepted and adjudicated damages actions against immigration officers alleged to have violated the Constitution. *See, e.g., Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006); *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002); *Franco-de Jerez v. Burgos*, 876 F.2d 1038 (1st Cir. 1989); *Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986); *Jasinski v. Adams*, 781 F.2d 843 (11th Cir. 1986); *Sanchez v.*

Rowe, 651 F. Supp. 571 (N.D. Tex. 1986). *Bivens* has thus been utilized in the immigration context for decades.

After *Bivens*, the Supreme Court held that the remedy its decision afforded is also available for Eighth Amendment violations and discrimination in violation of the Fifth Amendment. *See Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). Thereafter, the Court declined to afford the remedy of *Bivens* to military personnel injured in the course of or incident to service, *see United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983), when an otherwise "elaborate remedial scheme" designed by Congress did not include a damages action, *Schweiker v. Chilicky*, 487 U.S. 412, 414, 424 (1988); *see Bush v. Lucas*, 462 U.S. 367 (1983); and when doing so would have expanded the category of defendants amenable to *Bivens* suits in a manner that would not serve *Bivens*'s purpose of "deter[ing] individual federal officers from committing constitutional violations," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *see FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

Most recently, the Court declined to create a *Bivens* remedy for a newly proposed cause of action that it found not "workable." *Wilkie v. Robbins*, -- U.S. --, 127 S. Ct. 2588, 2604 & n.11 (2007). While rejecting an ill-defined, unbounded new claim, *see infra* note 12, *Robbins* showed that congressional intent to preclude *Bivens* actions cannot be inferred merely from there being some avenue of review for agency action, *see infra* p. 21-22. Fundamentally, *Robbins* did not alter the

basic understanding that damages may be sought when federal officers subject individuals to unconstitutional arrests, detention, physical abuse or the like. Indeed, *Robbins* contrasted the claim at issue there with the "popular *Bivens* remedy for a well-defined violation." 127 S. Ct. at 2604 n.11. The core holding of *Bivens* – that federal law enforcement officers may be held to answer when they subject an individual to an unconstitutional search, arrest, detention or other abuse – thus remains an integral part of the legal landscape.

Despite the entrenchment of *Bivens* and its longstanding application in the immigration context, Defendants argue that Arar should be deprived of any remedy for their alleged conspiracy to render him for detention and torture. Their argument is without merit and, if accepted as they frame it, could have serious implications for individuals whose injuries may not rise to the level of torture but whose constitutional rights are nonetheless violated in serious and substantial ways by immigration officials.

A. The INA Affords No Basis To Conclude That Congress Intended to Eliminate *Bivens* Actions For Constitutional Violations By Immigration Officials.

FARRA § 2242(a) forbids the involuntary return of any person to a country where there are substantial grounds to believe he would be in danger of being tortured. Characterizing Arar's claims as "removal-related," the panel found that this prohibition, along with FARRA § 2242(d)'s provision that claims under FARRA or CAT be made by a PFR of a final order of removal, amounted to an

"'alternative, existing'" review mechanism that would "normally provide a 'convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" 532 F.3d 157, 179 (quoting *Robbins*, 127 S. Ct. at 2598). This was error, even putting aside the arguments that Arar is not seeking recognition of a "new" cause of action and the allegations that Defendants made it impossible for him to petition a court for review before he was rendered.

In the broadest sense of the word, Arar might have had a partial "remedy" for some wrongs had Defendants not prevented his access to the courts in that he might have been able to prevent his removal to Syria.[11] But that does not lead to the conclusion that the remedy of *Bivens* should be withdrawn. As the Supreme Court has made clear, for determining the availability of a *Bivens* cause of action, the operative question is not merely whether some remedy exists. It is rather whether there is a sufficient basis from which to "infer that Congress expected the Judiciary to stay its *Bivens* hand." *Robbins*, 127 S. Ct. at 2600; *see id.* at 2598 (framing first step of two-step *Bivens* analysis as asking "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in

[11] A PFR, however, likely would not have unearthed the role federal officials allegedly took in having Syrian officials detain Arar without charges for interrogation under torture. For example, Arar could not have known prior to being rendered that U.S. officials would supply a dossier and questions for his interrogation in Syria. [Compl. ¶¶ 54-57]

damages"); *Chilicky*, 487 U.S. at 423 (identifying "indications that congressional inaction has not been inadvertent" as a "special factor" counseling hesitation when court considers new *Bivens* action). *Robbins* and the Court's earlier decisions show that the mechanism for review afforded by the INA is insufficient to demonstrate congressional intent to preclude a remedy under *Bivens*. *See, e.g.*, *Green*, 446 U.S. at 19-23.

In *Robbins*, the plaintiff sought recognition of a new cause of action – that of retaliation for exercise of property rights. Robbins alleged that, because he would not grant the federal government an easement, Bureau of Land Management employees mounted a campaign of harassment against him that included trespasses and other tort-like acts, revocation of an agency-granted right-of-way and use permit, and pursuit of administrative and criminal charges against him. *See* 127 S. Ct. at 2593-96, 2598. For virtually all of his complaints, however, Robbins had had a means of vindicating his interests – a civil remedy in damages for the torts, an opportunity to defend himself against charges of wrongdoing (and the possibility of recouping his costs in the case of the criminal charges), and the availability of both administrative and federal court review of adverse agency actions taken against him. *See id.* at 2598-2600. The existence of this collection of available avenues of redress, however, was not enough for the Court to conclude that Congress intended that the Court not infer a *Bivens* cause of action. *See id.* at

2600.[12] The same must be said here, where there is even less of a basis for concluding that Congress wanted this Court to stay its *Bivens* hand.

Bush v. Lucas, 462 U.S. 367 (1983), *Schweiker v. Chilicky*, 487 U.S. 412 (1988), and this Court's decisions following them make plain that the INA does not evince congressional intent that the remedy of *Bivens* be withheld from Arar or others who suffer constitutional violations at the hands of immigration officials. In *Bush*, a federal employee sought damages under *Bivens* for the violation of his First Amendment rights after he was demoted for publicly criticizing the agency that employed him. Reviewing the scheme of provisions allowing for review and redress for federal civil servants like Bush, the Court observed that Congress had provided for them to be "protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and

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[12] This conclusion led the *Robbins* Court to a second step of analysis for determining the availability of *Bivens*, which entails "mak[ing] the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." 127 S. Ct. at 2598 (citation omitted). As noted, *Robbins* ultimately did not infer a *Bivens* remedy because the cause of action proposed there was untenable, *see id.* at 2604 – the purpose behind the complained-of conduct (that of securing an easement for public use) was "perfectly legitimate," *id.* at 2601, and much of it fell well within the government's "discretion to enforce the law to the letter" and withhold access to its own property, *id.* at 2602; *see id.* at 2601-02, 2604 & n.11. This left the plaintiff with the claim that the defendants "demanded too much and went too far." *Id.* at 2601. Framed this way, the claim was one the Court found "unworkable" in contrast to the "well-defined" violations for which the *Bivens* remedy remains. *Id.* at 2602 n.9, 2604 n.11 ("We ground our judgment on the elusiveness of a limiting principle for Robbins's claim.").

procedures – administrative and judicial – by which improper action may be redressed." 462 U.S. at 385; *cf. id.* at 388 ("Congress intended that these remedies would put the employee 'in the same position he would have been in had the unjustified or erroneous personnel action not taken place.'" (citation omitted)). Constitutional challenges, including Bush's First Amendment claim, were "fully cognizable within th[at] system," which "provide[d] meaningful remedies," including reinstatement with retroactive seniority and back pay. *Id.* at 386-88 & n. 29. The Court concluded that, given that Congress had already "constructed step by step" an "elaborate remedial system" for federal employees, it ought not add a new judicial remedy on top of what Congress had provided. *Id.* at 388-89.

In *Chilicky*, the plaintiffs sought damages for the adoption of illegal policies that led to wrongful benefit terminations. For those affected, however, Congress had already devised an "elaborate remedial scheme" involving multiple layers of review, culminating in federal court review that encompassed constitutional claims, and allowing for retroactive reinstatement of wrongfully terminated benefits. 487 U.S. at 414, 417, 424. Congress thus "ha[d] not failed to provide meaningful safeguards or remedies for the rights" of those in the plaintiffs' position. *Id.* at 425. Because Congress had looked at the very problems about which the plaintiffs complained and enacted complex remedial legislation specifically to address those problems, but without providing consequential

damages for unconstitutional deprivations, the Court concluded it ought not revise Congress's decision. *See id.* at 425-26, 429.

Bush and *Chilicky* teach that it is from evidence of Congress having deliberated over the problems that arise in the course of administering government programs or regulating federal employment, and from the thoroughness of the scheme for review and redress that it devises, that courts may infer that Congress considered whether to provide a damages remedy for constitutional violations and declined to do so. *See, e.g.*, *Chilicky*, 487 U.S. at 423 (explaining that Court will not infer the additional remedy of *Bivens* "[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").

This Court's decisions have hewed carefully to this course. Thus, *Sugrue v. Derwinski* did not permit a *Bivens* remedy for a plaintiff whose action was based solely on Veterans Administration employees' "acts or omissions concerning the assigning of a disability rating, and hence a benefit level," to the plaintiff because "Congress ha[d] enacted a comprehensive remedial structure to address disputes regarding disability ratings and benefits claims by veterans." 26 F.3d 8, 12 (2d Cir. 1994) ("As in *Bush* and *Chilicky*, the scheme of review for veterans' benefit claims provides meaningful remedies in a multitiered and carefully crafted administrative process.").

Similarly, *Dotson v. Griesa* concluded a *Bivens* remedy could not be inferred for a federal probation officer who was not afforded relief under the Civil Service Reform Act because that statute reflected Congress's "comprehensive identification of the employment rights and remedies" available to federal civil service employees. 398 F.3d 156, 160 (2d Cir. 2005); *see id.* at 166-67 ("*Chilicky* made clear that it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying *Bivens* actions."); *see also Hudson Valley Black Press v. IRS*, 409 F.3d 106 (2d Cir. 2005) (finding that Congress's failure to include a damages action for tax assessment activities was not inadvertent where Congress provided means by which taxpayers could resist improper requests, challenge alleged tax deficiencies, and bring damages actions against the U.S. in certain circumstances; provided mechanisms for investigating and sanctioning IRS employee misconduct; and specifically considered and rejected cause of action for damages against individual IRS employees); *cf. Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) (reasoning that Congress's establishment of an exclusive statutory cause of action weighed strongly against judicial creation of a novel *Bivens* action).[13]

[13] Defendants have cited other circuit courts' holdings that remedies afforded by the APA preclude *Bivens* actions. *See Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005); *cf. Moore v. Glickman*, 113 F.3d 988, 992-94 (9th Cir. 1997) (finding *Bivens* remedy unavailable where CSRA provision of some remedies but not others for employees like plaintiff indicated that congressional action was not inadvertent and plaintiff had right to judicial review of termination

The INA contrasts sharply with the statutory schemes from which the Supreme Court and this Court have been able to infer congressional intent to preclude *Bivens* actions. Unlike the statutes at issue in cases like *Bush* and *Chilicky*, the INA is not a remedial scheme at all. It is rather an enforcement scheme, setting forth who is eligible to be in the United States and authorizing arrest, detention and removal for those not permitted to remain here. *See, e.g.*, *Turkmen v. Ashcroft*, No. 02CV2307, 2006 WL 1662663, at *29 (E.D.N.Y. June 14, 2006) ("Although . . . the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme."), *aff'd in part, rev'd in part sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (June 16, 2008). The statute affords no basis for any general pronouncement that Congress intended that *Bivens* be unavailable to persons whose core constitutional rights are violated by immigration officials.

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decision under the APA, but noting that "review of [plaintiff's] claim under the APA does not automatically preclude her *Bivens* claim"). Putting aside whether those decisions square with the Supreme Court's jurisprudence, *see, e.g.*, *Munsell v. Dep't of Agric.*, 509 F.3d 572, 590 (D.C. Cir. 2007) (stating "we are unaware of any Supreme Court decision holding that APA review *alone* is sufficient to eliminate the need for a *Bivens* remedy;" criticizing *Nebraska Beef*), the APA's provision for review and redress for a remarkably broad range of agency conduct contrasts sharply with the INA, *see, e.g.*, 5 U.S.C. §§ 701-706.

Indeed, for the types of constitutional violations most likely to arise in the putative *enforcement* of the INA, the statute provides *no remedy at all*. For the person subjected to an unlawful immigration arrest, search, detention, physical abuse or discrimination, there is no statutorily provided avenue for review or redress and thus no basis to infer that Congress in devising the INA had any intent to preclude *Bivens* remedies for the range of violations it could anticipate.[14]

Certainly Congress's provision for courts to review administratively issued orders of removal does not suffice to evince such intent. First, some mechanism for federal court review of an administratively issued order of removal is required under the Constitution. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 297, 314 (2001). There is no evidence that Congress, in providing for such review, even remotely

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[14] For examples of the types of constitutional violations that have been alleged against immigration officers, *see Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (false imprisonment and excessive force); *Wong v. United States*, 373 F.3d 952 (9th Cir. 2004) (denial of immigration benefits based on ethnicity, multiple strip searches, and denial of religious exercise rights); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) (unconstitutional search and seizure); *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986) (warrantless home entries and searches and detention and questioning of citizens and legal immigrants); *Jasinski v. Adams*, 781 F.2d 843 (11th Cir. 1986) (unconstitutional seizure and search of car); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007) (physical abuse during interrogation and use of false affidavit to perpetuate lengthy immigration detention); *Turkmen*, 2006 WL 1662663 ("no bond" policy, highly restrictive conditions of confinement, physical and verbal abuse in detention, unnecessary and humiliating strip searches, deprivations of sleep, exercise, hygiene items and adequate food and medical attention in detention, imposition of a communications black-out, including interference with access to counsel, and denial of consular rights); *Habeeb v. Castloo*, 434 F. Supp. 2d 899 (D. Mont. 2006) (arrest and detention for not following inapplicable registration requirements), *judgment vacated and opinion withdrawn by* 2007 WL 2122452 (D. Mont. July 16, 2007).

contemplated what remedies should or should not be allowed for persons suffering constitutional violations at the hands of immigration officials. Second, viewed against the range of constitutional violations that can occur, a PFR provides limited review and no remedy for what will typically be the core injury claimed in a *Bivens* action – the deprivation of liberty or similar constitutional injury that has already happened. Yet it was precisely that need – to look backward and remedy harm done – that gave rise to *Bivens*. *See Bivens*, 403 U.S. at 396; *id.* at 410 (Harlan, J., concurring); *see also Butz v. Economou*, 438 U.S. 478, 504 (1978) ("Injunctive or declaratory relief is useless to a person who has already been injured."); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (explaining need for damages remedy).[15] For virtually anyone who has already been constitutionally injured by an immigration officer, it is "damages or nothing." *Bivens*, 403 U.S. at 410; *Davis*, 442 U.S. at 245. And, as noted, it is the comphrehensiveness of the remedies afforded by a statutory scheme from which the Court has inferred that Congress's failure to provide explicitly for a damages cause of action was not inadvertent. Given the types of violations most likely to arise in the course of immigration law enforcement and the INA's lack of provision for review or remedies for such violations, that critical inference cannot be drawn.

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[15] Interestingly, in *Davis*, a remedy other than damages had been available when the case was filed, but the Court nonetheless determined that "[f]or Davis, as for Bivens, 'it is damages or nothing.'" *Id.* at 245 (citation omitted) (observing that equitable relief in the form of reinstatement would be unavailing as the defendant Congressman had lost his seat while Davis's suit was pending).

Further, there is no reason to think that Congress intended to immunize immigration officers, alone among all other federal law enforcement officers, from any review or accountability for constitutional violations. In addition to having authority to make arrests for immigration violations, immigration officers have among their powers the authority to make warrantless arrests "for any offense against the United States, if the offense is committed in the officer's or employee's presence" and "for any felony cognizable under the laws of the United States, if [there are] reasonable grounds to believe that the person to be arrested has committed or is committing such a felony" and there is a likelihood that the person will escape before an arrest warrant can be secured. 8 U.S.C. § 1357(a). The statute also authorizes immigration officers to "carry a firearm and . . . execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States." *Id.* At bottom, immigration officers are law enforcement officers, and like other officers, they "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Green*, 446 U.S. at 19; *cf. id.* (stating that qualified immunity "provides adequate protection" for officers who can be sued for damages).

A primary purpose of *Bivens*, and one that has been repeatedly recognized over the years, is to "deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70; *see FDIC v. Meyer*, 510 U.S.

471, 485 (1994). Nothing about immigration law enforcement suggests any less of a need for that deterrent effect. Indeed, the fact that the Fourth Amendment exclusionary rule generally does not apply in removal proceedings means there is even greater need in the immigration realm for the deterrent effect that flows from the availability of damages actions for constitutional violations. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *cf. Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, 2166-68 (2006) (citing availability of *Bivens* damages actions and their deterrent effect as a reason why evidence acquired after a "knock-and-announce" violation need not be suppressed). Again, had Congress intended that there be no deterrence or remedies at all for the type of constitutional violations most likely to arise in the enforcement of the INA, one would expect there to be evidence of such intent.

For all these reasons, it is not surprising that the courts that have considered the issue have agreed that the INA is *not* the type of statutory scheme from which congressional intent to preclude *Bivens* actions can be inferred. *See, e.g., Cesar v. Achim*, 542 F. Supp. 2d 897, 900-01 (E.D. Wis. 2008); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1073-74 (N.D. Ill. 2007); *Turkmen v. Ashcroft*, 2006 WL 1662663, at *29; *cf. Wang v. Reno*, 81 F.3d 808, 814 n.8 (9th Cir. 1996) (observing, in examining issue of exhaustion, that "the design of the INA does not suggest that

Congress has considered and provided mechanisms to remedy the constitutional violations alleged by [plaintiff]").[16]

Perhaps most telling of all, Congress has for decades watched courts adjudicate *Bivens* actions against immigration officers. *See supra* pp. 17-18 (citing cases). Yet, while repeatedly amending the INA over the years, Congress has not conveyed intent to preclude *Bivens* actions. Against this backdrop, this Court ought not wipe away this crucial means by which light can be shed on constitutional violations. *Cf. Bagola v. Kindt*, 131 F.3d 632, 643-44 (7th Cir. 1997) (highlighting the necessity of "provid[ing] *some* forum for . . . constitutional claims" so that unconstitutional conduct is not "insulated from review by any adjudicatory forum").

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[16] In briefing to the panel, Defendant Thompson asserted that the Tenth and Fifth Circuits had declined to extend *Bivens* to the immigration context. This is plainly not correct. The Tenth Circuit specifically instructed in a recent case that the remedy for an unconstitutional immigration arrest "would lie in a *Bivens* action." *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006). And the Fifth Circuit ruled in favor of the noncitizen plaintiff who brought *Bivens* claims against a border patrol officer in *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006), leaving no basis to conclude that that court was of the view that *Bivens* is unavailable in the immigration context. *See also Humphries*, 164 F.3d 936 (allowing two *Bivens* claims to proceed against immigration officers). The two cases that Defendant cited, *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999), and *Foster v. Townsley*, 243 F.3d 210, 214 (5th Cir. 2001), are properly understood as having found only that a jurisdiction-limiting provision covered the very specific claims raised in those cases. They did not remotely suggest that the INA as a general matter precludes a *Bivens* remedy for claims not covered by a jurisdiction-stripping provision.

B. Bivens Actions Are Available to Challenge Constitutional Violations By Officers Who Operate In Fields Over Which Congress Has Plenary Power.

Defendants' suggestion notwithstanding, no court has held that Congress's plenary power over a field categorically precludes claims under *Bivens*.[17] Defendants (and the panel) have invoked *Chappell v. Wallace*, 462 U.S. 296 (1983), which declined to infer for enlisted military personnel a *Bivens*-type remedy against their superiors, and *United States v. Stanley*, 483 U.S. 669 (1987), which extended that holding to preclude *Bivens* actions for injuries that "'arise out of or are in the course of activity incident to [military] service.'" *Id.* at 684 (citation omitted).

Both of these decisions concerned themselves with the "unique disciplinary structure of the military establishment" and the intolerable effect that allowing damages actions could have on that unique structure. *Chappell*, 462 U.S. at 304; *accord Stanley*, 483 U.S. at 683. The Court, however, did not disallow all *Bivens* actions by service members, *see* 483 U.S. at 681, and it explicitly rejected the proposition that "all matters within congressional power are exempt from *Bivens*," *id.* at 682. Indeed, courts have since allowed *Bivens* claims arising in the military sphere but not incident to service. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001) (adjudicating qualified immunity claim of military officer sued for using excessive

[17] Other *amici* address the inapplicability of other "special factors" asserted by Defendants.

force in army base arrest of demonstrator); *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (allowing *Bivens* claims alleging unconstitutional seizure and confinement by use of the Army); *Vu v. Meese*, 755 F. Supp. 1375, 1385 (E.D. La. 1991) (allowing Fourth Amendment and FTCA claims arising out of conduct of Coast Guard and Customs officers while noting that the "lawsuit is not one for injuries to servicemen, but is for injuries allegedly received by private citizens at the hands of servicemen"). *Chappell* and *Stanley* are thus plainly decisions tailored to the narrow sphere of the military and even then only to suits by service members for injuries arising out of or incident to active service.

Beyond the military sphere it is equally clear that mere invocation of "plenary power" does not suffice to eliminate the remedy of *Bivens*. In addition to the immigration area, courts have allowed *Bivens* claims to proceed in a number of areas over which Congress possesses plenary power. For example, Congress's power "to legislate upon the subject of patents is plenary by the terms of the Constitution," *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843), yet Patent and Trademark Office officials were not entitled to absolute immunity from *Bivens* claims in *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004). And, while Congress possesses plenary power over Indian affairs, *see, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1988), the Court in *Wilkinson v. United States*, 440 F.3d 970 (8th Cir. 2006), permitted plaintiffs to pursue *Bivens* claims alleging substantive and procedural due process claims against Bureau of Indian Affairs

officials. Thus, the bare fact of Congress having plenary power over immigration does not support preclusion of the remedy of *Bivens*, particularly here where the evidence indicates that Congress has determined to allow *Bivens* actions to proceed as a general matter.

CONCLUSION

For the reasons stated, the INA does not preclude jurisdiction or a *Bivens* remedy for Arar.

Dated: October 28, 2008

Respectfully submitted,

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Date: October 28, 2008

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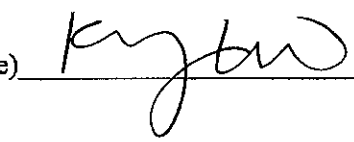
(Your Signature) 

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PROOF OF SERVICE

I, Konny Huh, the undersigned, say:

I am over the age of eighteen years and not a party to the within action or proceedings. My business address is: American Civil Liberties Union Foundation, Immigrants' Rights Project, 125 Broad Street, 18th Floor, New York, NY 10004.

I hereby certify that on October 28, 2008, I caused an electronic copy of the foregoing **BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFF-APPELLANT** to be e-mailed to each of the listed addresses. In addition, **two** copies were served by U.S. mail, first-class, postage pre-paid upon the following:

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