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 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.

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

REPLACEMENT BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF MAHER ARAR

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STATEMENT OF INTEREST

This case addresses whether courts are barred from providing judicial redress for allegations of torture caused by the actions of U.S. officials taken on U.S. soil. The professional interest of *amici*[1]—all of whom have written and taught extensively on the subjects of constitutional law and federal jurisdiction—is in the panel majority's error in concluding that the *Bivens* remedy was unavailable, especially given the important role of the federal courts in protecting fundamental individual rights in the context of the war on terror. *Amici curiae* have no personal, financial, or other professional interest, and take no position respecting any other issue raised in the case below.

SUMMARY OF ARGUMENT

This case—involving allegations that federal officials conspired to torture Maher Arar, a non-citizen passing through a U.S. airport—falls squarely within the purview of the *Bivens* doctrine, whose defining function is to ensure that some

[1] Names and affiliations of *amici curiae* are listed in the Appendix. All parties consented to the filing of this brief.

remedy is available to protect the fundamental rights of the powerless from abuse by government officials. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Despite the fact that Arar's claim centers on allegations that federal officials intentionally circumvented legal processes to subject Arar to torture and arbitrary detention, a majority of the panel nonetheless concluded that his claims were foreclosed by the FARRA. The panel next concluded that a *Bivens* remedy is not available in any event because Arar's case requires "extending Bivens not only to a new context, but to a new context requiring the courts to intrude deeply into the national security policies and foreign relations of the United States." *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008).

Amici respectfully submit that the majority was wrong on both counts. First, it defies logic that Congress intended to foreclose remediation of Arar's claims. The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 1681-822 (codified as 8 U.S.C. § 1231 *et seq*.) failed to provide Arar any "meaningful remed[y]," *Bush v. Lucas*, 462 U.S. 367, 368 (1983), to vindicate the rights at stake in this case. The Act codifies the international obligation of non-refoulement, the affirmative duty on states not to render individuals where they face a likelihood of torture. The Act does not address Arar's claims that individual federal officials *intentionally* sent him to Syria for the express purpose of subjecting him to torture and arbitrary detention (or,

alternatively with the full knowledge that he would be). Defendants denied Arar even the minimal process owed under the Act, but even had he received judicial review prior to removal he would not have been able to vindicate his rights at the heart of this suit. The abuses and Defendants' conspiracy to subject Arar to them simply were not ripe for adjudication at that point.

Second, the panel majority improperly invoked the "special factors" exception to the *Bivens* doctrine on the ground that "the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers." *Slip Op*. at 32. The application of such broad "special factors" exceptions is highly questionable in light of the guiding principle of *Bivens* and its progeny: Violations of otherwise unanswered constitutional rights merit redress. *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803)) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Moreover, the factors cited by the panel majority as foreclosing a *Bivens* action on separation of powers grounds would be insufficient to find the case non-justiciable under a traditional political question inquiry. In actions brought in the wake of the September 11, 2001 terrorist attacks—including *Bivens* claims—courts have time and again declined to dismiss for lack of justiciability, underscoring the presumption in favor of judicial

review and redress for violations of fundamental individual rights, even where national security and foreign affairs may be implicated.

At best, the panel decision's expansion of the "special factors" exception creates a legal "no man's land" whereby government officials can violate the fundamental rights of persons present on U.S. soil simply by outsourcing otherwise banned practices to foreign governments. At worst, it precludes future damages claims that merely touch upon anti-terrorism efforts. The panel majority's loose reasoning could be interpreted to bar a *Bivens* action for any case involving government abuse of individuals suspected of ties to terrorism, no matter how unfounded those suspicions might be or how grievous the violations. If this nation is to be a "government of laws and not of men," *Marbury,* 1 Cranch (5. U.S.) at 163, Arar—and all those like him who find themselves mistakenly swept up in its anti-terrorism efforts—must be afforded the opportunity to vindicate their most basic rights, which indisputably include the right to be free from torture and arbitrary detention.

ARGUMENT

I. THE BIVENS FRAMEWORK REQUIRES CAREFUL BALANCING OF ANY "SPECIAL FACTOR" AGAINST INDIVIDUAL RIGHTS AND THE NEED TO DETER CONSTITUTIONAL VIOLATIONS.

Since its inception, the *Bivens* action has served a dual purpose: remediation and deterrence. *Bivens* itself rested upon the longstanding judicial tenet that

"where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). At its core, *Bivens* is a vehicle to provide a remedy for a government official's violation of individual constitutional rights, so that those rights do not "become merely precatory." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

In addition to providing an individual with an otherwise unavailable remedy, *Bivens* provides an essential deterrent and signaling function. *See Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter the [federal] officer from infringing individuals' constitutional rights."); *Polanco v. United States Drug Enforcement Admin.*, 158 F.3d 647, 653 (2d Cir. 1998) ("The causes of action established by … *Bivens* …are punitive in nature, because they are intended to prevent intentional violations of the Constitution.") (citations omitted). In doing so, a *Bivens* remedy affirms the principle of equality before the law: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Butz v. Economou*, 438 U.S. 478, 506 (1978) (internal citations omitted).

Thus, the dismissal of a *Bivens* action is appropriate only in certain, limited circumstances where (1) "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective," or (2) there are "'special factors counseling hesitation in the absence of affirmative action by Congress.'" *Carlson v. Green*, 446 U.S. 10, 18-19 (1980) (quoting *Bivens*, 403 U.S. at 396); *see also Wilkie v. Robbins*, 127 S.Ct. 2588, 2598 (2007) (describing the two-step inquiry as whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," and if not, "'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'") (quoting *Bush*, 462 U.S. at 378).

Even if a *Bivens* remedy is "not an automatic entitlement," *Wilkie*, 127 S.Ct. at 2597, the lack of an adequate alternate remedy must be considered. *Id*. at 2600 ("Here, the competing arguments boil down to one on a side: from [plaintiff], the inadequacy of discrete, incident-by-incident remedies . . ."). The federal courts' competence to provide damage remedies for violations of individual constitutional rights arises from their common law powers in conjunction with the general federal question jurisdiction provided by 28 U.S.C. § 1331, *Bivens*, 403 U.S. at 396, and

therefore flows from the same sources that give rise to the "*presumed availability* of federal equitable relief against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring) (emphasis added);[2] *see also Munsell v. Dep't of Agric.*, 509 F.3d 572, 590-91 (D.C. Cir. 2007) (rejecting defendants' argument that there is a presumption against a *Bivens* remedy and holding that principle to be at odds with the *Wilkie* weighing test). Damages actions are particularly necessary for victims of completed constitutional violations who lack recourse to effective alternative statutory remedies. For such victims, as Justice Harlan wrote, "it is damages or nothing." *Bivens*, 403 U.S. at 410; Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 258-67, 604 n.35 (3d. ed. 2000).[3]

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[2] Justice Harlan further noted that judicial review of constitutional damages actions was especially appropriate given the Court's role as ultimate protector of the Bill of Rights. *Id*. at 407 (Harlan, J., concurring); *see also Boyd v. United States*, 116 U.S. 616, 635 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

[3] *Amici* do not address whether such remedy is constitutionally mandated under all circumstances, but instead point to the vindication of individual rights as the guiding principle of *Bivens* and its progeny. *See Bush v. Lucas*, 462 U.S. 367, 379 n.14 (1983) ("We need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate.") (internal citations omitted); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991) (noting that even if subject to limited exceptions in practice such as qualified immunity, principle that "every wrong deserves a remedy" is normatively desirable).

The Supreme Court and the Second Circuit have held that only three factors justify denying a *Bivens* remedy: **(1)** Congressional preclusion, whether expressly or impliedly. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106, 111–13 (2d Cir. 2005); **(2)** intrusion upon "the unique disciplinary structure of the Military Establishment and Congress' activity in the field," by permitting a serviceman to sue his superior officers. *Stanley v. United States*, 483 U.S. 669, 683 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); and **(3)** "difficulty in defining a workable cause of action." *Wilkie*, 127 S.Ct. at 2601.[4] The relatively limited scope of special factors is unsurprising, given that any special factor must be balanced against *Bivens*' founding principle that every wrong deserves a remedy. *Bivens*, 403 U.S. at 410; *see also McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) (rejecting defendants' special factors defense on the basis that they incorrectly "confuse the presence of *special* factors with *any* factors counseling hesitation") (emphasis in original). None of those situations is present in this case.

[4] There is no suggestion that the claims in this case are unworkable. Unlike in *Wilkie*, there are no "line-drawing difficulties" in this case. 127 S.Ct. at 2601. To the contrary, the claims at issue in this case—*i.e.*, Arar's right to be free from torture, arbitrary detention and extraordinary rendition—are already prohibited by Congress and clearly sound in the Due Process Clause. *See infra* at nn. 8, 12 *Cf. Wilkie*, 127 S.Ct. at 2600-01 (noting that each of allegedly retaliatory acts was undertaken for a legitimate government purpose and that it was unclear that any individual act was itself impermissible).

II. NO "SPECIAL FACTORS" JUSTIFY DISMISSAL OF THIS CASE.

The majority's reasoning—that national security and foreign policy concerns constitute special factors justifying dismissal of this case—cannot be reconciled with either the Supreme Court's *Bivens* jurisprudence or separation of powers principles. First, there is no indication that Congress intended to preclude a damages remedy for the intentional outsourcing of torture to foreign governments. Second, there is virtually no support for the proposition that the amorphous concepts of national security and foreign affairs are "special factors counseling hesitation." Third, the mere assertion of the state secrets privilege does not itself justify dismissal, particularly at the pleadings stage where there has been no measured consideration of the factual record at issue in the case. Finally, dismissal of this case on the grounds of executive authority over national security and foreign affairs is particularly suspect where, as here, the alleged violations are in direct contravention of clear Congressional prohibitions against torture. Dismissal under these circumstances is not warranted and unnecessarily raises significant constitutional questions regarding the separation of powers and individual rights.

A. Congress has not preempted a Bivens remedy for extraordinary rendition and torture.

In this case, the majority purported "to defer to the determination of Congress as to the availability of a damages remedy in circumstances where the

adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers." *Arar*, 532 F.3d at 182. Yet the statutory framework and legislative history make clear that Congress has neither expressly nor implicitly preempted Arar's claims that Defendants' conspired to subject him to extraordinary rendition and torture.

The first step in the *Bivens* analysis is whether prior Congressional action explicitly or implicitly pre-empts or precludes a damage remedy for constitutional torts arising from a particular context, typically through the creation of a statutory remedial scheme. In *Bush v. Lucas*, the Court held that a *Bivens* remedy is inappropriate for claims arising out of a "relationship that is governed by comprehensive procedural and substantive provisions giving *meaningful remedies* against the United States." 462 U.S. at 368. (emphasis added). Similarly, in *Schweiker v. Chilicky*, the Court ruled that the special factors analysis requires "appropriate judicial deference to indications that congressional inaction has not been inadvertent," in particular when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." 487 U.S. at 423.

It is instructive to consider the alternative remedial mechanisms determined by the Supreme Court to be sufficient to foreclose the traditional judicial function of providing remedies. In *Bush*, the Court found that a civil servant's claim that he had been retaliated against for the exercise of free speech was adequately covered by numerous Congressionally-mandated regimes that together provided the hallmarks of due process: notice, hearing and an opportunity for judicial review. 462 U.S. at 387-88.[5] In a subsequent case, the Supreme Court found that intramilitary procedures provided similarly adequate means for both due process and to make a complainant whole. *Chappell*, 462 U.S. 303-04.[6]

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[5] The Court considered at length the "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures-administrative and judicial-by which improper action may be redressed." *Id.* Among the Court's observations were that petitioner had been afforded a "trial-type proceeding at which the employee could present witnesses, cross-examine the agency's witnesses, and secure the attendance of agency officials" and appeal any adverse decision to either the federal district court or the Court of Claims. *Id*. at 387. While the administrative process did not provide certain measures available in a *Bivens* action—namely, punitive damages and a jury trial— Congress intended that the statutory remedies would put the employee back in the position had the violation not occurred. Thus, a complainant could win reinstatement, back pay and other compensatory measures to place him "in the same position he would have been in had the unjustified or erroneous personnel action not taken place." *Id*. at 388 (internal quotations omitted).

[6] In that case, Navy enlisted men brought a race discrimination action against their superior officers. Aggrieved individuals could "avail themselves of the procedures and remedies created by Congress" under the Uniform Code of Military Justice, which provides the opportunity to present complaints before general courts-martial, "which shall examine into the complaint and take proper measures for redressing the wrong complained of." 10 U.S.C. § 938. The Board for the Correction of Naval Records permits an aggrieved member of the military to

There is no comparable evidence here that Congress intended federal officials to escape accountability for arbitrary detention and torture. The panel majority held that the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 1681-822 (codified as 8 U.S.C. § 1231 *et seq*.) provides such a basis. Yet that statute does not address extraordinary rendition or arbitrary detention at all, and does not create a remedial system sufficient to demonstrate Congressional intent to preclude judicial remedies for fundamental constitutional violations. FARRA merely implements Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, and the principle of non-refoulement—*i.e*., the duty not to remove a person "to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture …." 8 U.S.C. § 1231, at Note. It is not at all surprising that Congress would conclude that the process granted for typical removal proceedings is sufficient process to enforce the affirmative obligation that Congress chose to place on executive officials not to send persons subject to removal orders to any country where they were likely to be subjected to torture by

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"correct any military record ... when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Thus, although the military justice system provided no damages remedy per se, it did provide fundamental due process for complainants to present

foreign officials. 8 U.S.C. §1231 note (d). But it is particularly implausible to read this statute—designed to provide *affirmative* protections against the *possibility* of torture—as foreclosing any remedy for the *intentional* aiding and abetting of torture and arbitrary detention.

The difference between those two harms—the failure to meet the affirmative duty of non-refoulement on the one hand, and the intentional constitutional torts alleged in this case, on the other—is apparent when one considers what Arar might have proved at a removal hearing. Defendants blocked Arar from invoking even the minimal process owed under FARRA, but even had he received judicial review prior to removal he would not have been able to vindicate his rights at the heart of this suit. At most, he could have claimed that he was *likely* to be subjected to torture if returned to Syria. But, as alleged in the complaint, the torture itself and arbitrary detention he actually suffered, and Defendants' roles in subjecting Arar to those abuses, were not apparent until Defendants handed Arar over to Syrian officials. *See* Compl. at ¶¶54-55 (alleging that interrogations by Syrian officials "bore a striking similarity" to the questions asked by U.S. officials).[7] Thus, a

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complaints and to seek remedial action, including compensation in the form of back pay and reinstatement.

[7] The district court also cited the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350) as evidence that Congress intended to foreclose a *Bivens* damages remedy. In doing so, the district court seemed to base its conclusion on its holding that the TVPA does not apply to torture. *See Arar v. Ashcroft*, 414 F. Supp. 2d 250, 263-

hearing under FARRA could not have supplied the minimum protections afforded by the administrative proceedings at issue in *Bush* and *Stanley*, and that statute cannot be read to preclude judicial remedies for the grave constitutional violations at issue in this case.

Any argument that Congressional remedies preclude a *Bivens* action in this case is particularly specious in light of Arar's allegation that Defendants deliberately interfered with his access to any remedial mechanisms the immigration process might have provided him. Such interference itself rises to the level of a constitutional violation and must not redound to violators' benefit in subsequent *Bivens* claims. *See Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990) (permitting *Bivens* claim to go forward despite acknowledgement that Civil Service Reform Act's comprehensive remedial scheme normally would preclude such an action, because "assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress."); *Freedman v. Turnage*, 646 F. Supp. 1460, 1466 (W.D.N.Y. 1986) (similar); *see also Bounds v. Smith*, 430 U.S. 817, 822 (1977)

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66 (2006). Even assuming that is true, it is wholly inappropriate to infer further that Congress meant to exempt U.S. officials from *any* liability for using the rendition process for the purposes of torture. Instead, it seems that the most the district court's reasoning could show is that the TVPA says nothing at all about torture-related violations of the Fifth Amendment by U.S. officials—and therefore cannot be read to preclude a *Bivens* claim for such violations.

(finding that Constitution commands that "the state and its officers … not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.").

Thus, the omission of any statutory remedy for torture and arbitrary detention inflicted by U.S. officials under FARRA is no evidence that Congress deliberately chose to preclude a remedy to plaintiffs like Arar. To the contrary, it is more likely that Congress failed to provide a remedy for torture and arbitrary detention by federal officials in the FARRA because that statute was directed to another problem altogether, and because Congress believed that the Constitution *already* prohibits federal officials from inflicting such abuse, and that the *Bivens* action accordingly provides a damages remedy.[8] That interpretation is preferable, given that the majority's approach unnecessarily raises serious constitutional questions. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[A] serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); *Krueger v. Lyng*, 927 F.2d 1050, 1055 (8th Cir. 1991) ("To allow an administratively-created scheme to

[8] The State Department recently affirmed this position in its report under the CAT: "U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention [Against Torture] . . . these can include . . . suing federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts.'" U.S. State Department, *List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America* (May 5, 2006) (citing

foreclose a *Bivens* action, without some real indication that Congress intended the . . . result, would require us to hold that the legislative power to foreclose a *Bivens* action has been delegated . . . in violation of the separation of powers doctrine."); Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1227-28 (2007) ("[E]ven though the Court has become extremely reluctant to imply remedies generally, its refusal to recognize *Bivens* actions has always been in the context of some other remedial scheme. And the Court has continued to state that withdrawing all judicial remedies for claims of constitutional violations would raise 'grave' or 'substantial' constitutional questions.").

B. "National security and foreign affairs" concerns, standing alone, do not justify dismissal of Arar's Bivens claims.

As shown above, there is no evidence that Congress has expressly or implicitly preempted Arar's claims that Defendants' conspired to subject him to arbitrary detention and torture. In practice, separation-of-powers concerns have justified dismissal under the special factors analysis only where alternative remedial mechanisms exist or where the absence of any mechanism indicates that Congress *intentionally* omitted such remedies. Thus, any national security or

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Bivens, 403 U.S. at 388; *Davis*, 442 U.S. at 228), *available at* http://www.usmission.ch/Press2006/CAT-May5.pdf.

foreign affairs concerns must be weighed especially carefully against Arar's individual constitutional rights and Congressional prohibitions against torture.

The sole case cited by the panel majority for the notion that foreign affairs or national security concerns alone—absent Congressional preemption—may serve as "special factors" to justify dismissal of a *Bivens* claim is *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).[9] That case, decided more than twenty years ago, involved a broad array of claims brought by Nicaraguan and U.S. citizens against various federal officials for supporting the Contras. The question on appeal was whether Nicaraguan citizens could assert Fourth and Fifth

[9] In support of its broad assertion that "determinations relating to national security fall within an area of executive action in which courts have long been hesitant to intrude," the majority cites *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) and *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988), two cases that have little bearing on the question at hand. *Vigil* arises out of a suit for injunctive and declaratory relief with respect to a federal benefits program for Native American children; the question was whether agency actions were reviewable under the Administrative Procedure Act as "discretionary" executive actions. Thus, unlike this case, the national security interests in question in *Vigil* related to areas of executive discretion, not to violations of the Constitution. Indeed, the basis for *Vigil*'s language cited by the panel majority is *Franklin v. Massachusetts*, 505 U.S. 788, 819 (1992) (Stevens, J., concurring in part and concurring in judgment), which, in turn, pointed out that *Webster v. Doe* explicitly declined to foreclose review of constitutional claims, even where it did foreclose review of claims brought under the APA. And in *Egan*, the Court specifically declined to find a procedural due process right because there was no substantive property right at stake—*i.e.*, there was no right to have a top secret security clearance. These cases are easily distinguishable from the present case, where there is a clear Fifth Amendment right to be free from torture and arbitrary detention. Indeed, on highly contentious questions of habeas rights of detainees, the Court has not hesitated to review executive actions bearing directly on national security. *See infra*, at 21-22.

Amendment claims against federal officials to remedy injuries that occurred entirely within Nicaragua. Then-Judge Scalia expressed skepticism that non-resident, non-citizens possessed such rights, but refused to reach that question, instead dismissing the *Bivens* actions on special factors grounds. *Id*. at 209. He compared the "special needs of the armed forces" involved in cases such as *Chappell v. Wallace*, 462 U.S. 298 (1983), with "the special needs of foreign affairs [that] 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." *Id*.

Sanchez-Espinoza's suggestion that courts should bar a *Bivens* remedy merely on the basis of *executive* authority over foreign affairs and national security should be viewed with a great deal of caution. When faced with the question of judicial competence to provide a damages remedy for military personnel only three years later in *Stanley*, 483 U.S. at 679, newly appointed Supreme Court Justice Scalia did not repeat the broad assertion about executive authority that he had made in *Sanchez-Espinoza.* Indeed, he declined to cite *Sanchez-Espinoza* at all. Instead, Justice Scalia cited as the paramount consideration "the fact that *congressionally* uninvited intrusion into military affairs by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683 (emphasis added). As evidence that Congress intended to preclude implied judicial remedies in the military sphere, the

Court further pointed to Congress' creation of a "comprehensive internal system of justice to regulate military life." *Id.* at 679. As explained above, there is no parallel indication of Congressional intent here to foreclose a judicial remedy, and every indication that the executive abuses alleged here are contrary to the will of Congress. *Cf. Elmaghraby v. Ashcroft*, 2005 WL 2375202, at *14 (E.D.N.Y. Sept. 27, 2005) ("The problems posed by issues of national security are not akin to those posed by military service, where the need for a separate system of military justice precludes the provision of a *Bivens* remedy.") (citing *Chappell*, 462 U.S. at 304; *Stanley*, 483 U.S. at 683–84), *aff'd Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted*, *Ashcroft v. Iqbal*, --- S.Ct. ----, 2008 WL 336310 (Jun. 16, 2008) (NO. 07-1015).

C. The mere possibility that this case involves sensitive information does not create a special factor in favor of dismissal on the pleadings.

The judicial function is particularly essential where, as here, the Executive asks the court to dismiss a suit at the outset on the mere basis of the *threat* of disclosures of state secrets. The state secrets privilege is a common-law evidentiary privilege, not a rule of justiciability, and "is not to be lightly invoked." *United States v. Reynolds*, 345 U.S. 1, 7 (1953); *see also Tenet v. Doe*, 544 U.S. 1 (2005) (distinguishing the "evidentiary state secrets privilege" from the related nonjusticiability rule of *Totten v. United States*, 92 U.S. 105 (1875)). The vital role

of the courts in assessing a claim of the privilege does not evaporate simply because the Executive contends unilaterally that its actions are too sensitive for judicial review. *See Reynolds,* 345 U.S. at 8, 9-10 ("[T]he court *itself* must determine whether the circumstances are appropriate for the claim of privilege.") (emphasis added). Accordingly, courts must require the Executive to invoke the state secrets privilege and then satisfy themselves that the information is not merely classified, sensitive, or embarrassing, but that "there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security." *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546-47 (2d Cir. 1991). As the Ninth Circuit recently observed, "[s]imply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege." *Al-Haramain Islamic Found., Inc.* v. *Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (noting that the privilege cannot be used to "shield any material not strictly necessary to prevent injury to national security."); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1957-58 (2007) (arguing that assertions of the state secrets privilege are akin to jurisdiction-stripping and must be balanced against separation of powers concerns, particularly where such assertions are made to

preclude judicial review of a category of executive abuses, such as extraordinary rendition).

It might well be that some of the evidence at issue in the case will be withheld, but it would be premature to rely on the government's untested assertion of the privilege to dismiss Arar's claims at the outset. To hold otherwise risks converting the privilege from a narrow evidentiary rule to be applied in extraordinary circumstances into a generalized principle of non-justiciability that would preclude virtually all litigation implicating amorphous "foreign policy and national security" interests.

D. Judicial review of this case is appropriate, particularly in light of Congressional prohibitions against torture.

The majority panel's approach improperly converts the *Bivens* "special factors" doctrine into a jurisdictional hurdle broadly based upon the factors relevant to justiciability, but without regard to essential separation of powers principles. Despite relying upon *Baker v. Carr*, 369 U.S. 186, 211 (1962),[10] the majority overlooks the Supreme Court's warning that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id*. at 211. Courts have repeatedly exercised judicial review of cases touching upon national security or foreign affairs where core individual rights are

[10] *Id*. at 185 (citing *Sanchez-Espinoza*, 770 F.2d at 209 and quoting *Baker v. Carr*, 369 U.S. 186, 226, 217 (1962)).

at stake. *See, e.g., Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2775 n.23 (2006) (finding that separation of powers bars Executive from unilaterally abrogating minimum requirements of Uniform Code of Military Justice in trying foreign alleged enemy combatants); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) ("The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive carte blanche to trample the most fundamental liberty and property rights of this country's citizenry."). Because "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," "[i]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion). To the contrary, "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008).[11]

[11] The majority's suggestion that the fact this case involved removal to a third country shrouds it from judicial review similarly disregards a long line of cases holding that constitutional violations in the immigration context are justiciable, even by *Bivens* remedy. Federal courts have historically engaged in significant review of immigration matters through a variety of statutory and other mechanisms—including the consideration of *Bivens* actions—especially when litigants allege violations of fundamental rights. *See, e.g.*, *Heikkila v. Barber*, 345

The majority's conclusion that national security and foreign affairs concerns preclude Arar's *Bivens* claims is particularly inappropriate in light of the numerous Congressional statutes categorically prohibiting torture.[12] *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]"). Since *Youngstown*, it has been clear that the Constitution endows the judiciary with the power and obligation to review and enjoin unconstitutional executive action involving national security or foreign affairs. There is therefore no reason to conclude that the judiciary does not have the power to award the *less intrusive remedy* of money damages to deal with unconstitutional executive action in this context. Where, as here, there is no alternative means of

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U.S. 229 (1953) (noting that federal courts have consistently retained competence to review immigration matters, even when statutory regimes made executive decisions "nonreviewable to the fullest extent possible under the Constitution"); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (affirming denial of motion to dismiss *Bivens* claim brought against border guard for alleged use of excessive force during immigration detention); *Wong v. United States*, 373 F.3d 952 (9th Cir. 2004) (rejecting motion to dismiss *Bivens* claim against immigration officials for alleged violations of First, Fourth and Fifth Amendments arising out of detention and removal proceedings). *See generally* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

[12] *Cf.* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027; 18 U.S.C. § 2340A (criminalizing torture by U.S. nationals abroad); 18 U.S.C. § 2441 (criminalizing war crimes as specified in 1949 Geneva Conventions, including torture, by U.S. military personnel and U.S. nationals); Note to 8 U.S.C. § 1231 (adopting principle of *non-refoulement* as official U.S. policy).

remedying fundamental constitutional violations, and there is no evidence of Congressional intent to foreclose judicial redress for those rights, any foreign affairs or national security concerns must be very carefully weighed against *Bivens'* originating principle that constitutional rights not become "merely precatory." *Davis*, 442 U.S. at 242.

As this Court recognized just last year, "[t]he strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted, Ashcroft v. Iqbal*, 128 S.Ct. 2931 (Jun. 16, 2008) (NO. 07-1015). As in the present case, the plaintiffs in *Iqbal* were foreign nationals who alleged grievous violations of their constitutional rights committed by federal officers who detained them because of their suspected involvement in the September 11, 2001 attacks. That the federal officials defending Arar's claims chose to send the plaintiff to a foreign state to be tortured rather than detaining and abusing him in Brooklyn does not constitute sufficient grounds to distinguish his case and to justify foreclosing any remedy whatsoever. *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506-09 (D.C. Cir. 1984) (en banc), *rev'd on other grounds*, 471 U.S. 1113 (1985) (rejecting defendant's assertion of act of state doctrine, observing that "teaming up with foreign agents cannot exculpate officials of the United States from liability to United States citizens for the United States officials' unlawful acts.").

Arar is not challenging the wisdom of the "War on Terror." Nor is he questioning the effectiveness of the government's methods of combating terrorism. Rather, he seeks only to vindicate his Fifth Amendment right to be free from torture and arbitrary detention.[13] *Amici* respectfully urge this Court to reject the implication that the judiciary is incapable of performing its constitutional duties with respect to any national security claim that touches upon national security or foreign relations. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) ("[I]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested."). That conclusion is particularly important where, as here, the plaintiff alleges that U.S. officials not only purposefully deprived him of fundamental rights, but that they intentionally did so in a manner to evade public scrutiny and individual accountability. *Arar*, 414 F. Supp. 2d at 253-54 (summarizing allegations that defendants held Arar virtually incommunicado and misrepresented his status and whereabouts to his attorney). It is precisely in that context that a *Bivens* remedy is most appropriate—without it, Arar's right to be free from torture would be "merely precatory," *Davis*, 442 U.S. at 242, a result none of us can afford.

[13] Because Arar asks only for damages—a remedy that is "particularly judicially manageable [and] . . . nonintrusive"—there is little danger here that this Court will intrude on the Executive's constitutional prerogative to conduct foreign relations. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir., 1992).

CONCLUSION

For the reasons stated above, *Amici* respectfully request that the Court reverse the panel majority.

Dated: October 27, 2008
New York, New York

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CERTIFICATION OF COMPLIANCE WITH Fed. R. App. P. 32(a)

I certify that the foregoing brief complies with Fed. R. App. P. 32(a). It has been prepared using Microsoft WORD in 14-point type in Times New Roman font. According to the Word Count feature of WORD, the foregoing brief contains 6,461 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Nancy Morawetz

CERTFICATION OF BAR MEMBERSHIP

I certify that Nancy Morawetz, counsel of record herein, is admitted to practice and in good standing before the Bar of the United States Court of Appeals for the Second Circuit.

_____

Nancy Morawetz

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