06-4216-cv

In the

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,

(For continuation of caption see inside cover)

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

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL
(*See inside cover for list of* Amici Curiae)

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December 19, 2006

EDWARD J. McELROY, formerly District Director of Immigration and Naturalization Services for New York District, 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.

AMICI CURIAE

The Honorable John J. Gibbons

The Honorable Shirley M. Hufstedler

The Honorable Nathaniel R. Jones

The Honorable Timothy K. Lewis

The Honorable H. Lee Sarokin

The Honorable William S. Sessions

The Honorable Patricia M. Wald

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MISCELLANEOUS

Amici, retired federal judges, submit this brief *amici curiae* in support of appellant Maher Arar ("Arar") and urge reversal of the district court's order insofar as it dismissed, on the pleadings, Arar's claim, under the doctrine of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for damages resulting from the violation of his constitutional rights. *Amici* address the district court's conclusion that the judiciary must refrain from providing Arar with a damages remedy for an alleged violation of his constitutional right to be free from torture solely because the violation occurred in the course of government activities affecting national security or foreign relations. *Amici* show that this conclusion is inconsistent with the historic role of the judiciary in enforcing the Constitution as a check against Executive abuse of power, even in times of war and other crises and that the mere invocation of national security and foreign relations should not be considered a "special factor" counseling against a damages remedy in the circumstances of this case. This brief is filed with the consent of all parties.

Interest of the *Amici*

Amici are retired federal judges who share a deep respect for the system of separation of powers and checks and balances that is central to our constitutional democracy. Based on their long, combined experience as federal judges, *amici* have a particular interest in the preservation of the historic role of the judiciary in that constitutional system as the protector of rights guaranteed by the Constitution.

Amici curiae are:

- The Honorable John J. Gibbons, who served as a judge on the U.S. Court of Appeals for the Third Circuit from 1969 to 1987, and as chief judge of the court from 1987 to 1990.
- The Honorable Shirley M. Hufstedler, who served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979.
- The Honorable Nathaniel R. Jones, who served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.
- The Honorable Timothy K. Lewis, who served as a judge on the United States District Court for the Western District of Pennsylvania from 1991 to 1992, and as a judge on the United States Court of Appeals for the Third Circuit from 1992 to 1999.
- The Honorable H. Lee Sarokin, who served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and as a judge on the United States Court of Appeals for the Third Circuit from 1994 to 1996.
- The Honorable William S. Sessions, who served as a judge on the United States District Court for the Western District of Texas from 1974 to 1980, and as chief judge of the court from 1980 to 1987.
- The Honorable Patricia M. Wald, who served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and as chief judge of the court from 1986 to 1991.

Statement of the Issue

Whether "special factors" counsel against a *Bivens* damages remedy for an individual whose Fifth Amendment right protecting him from torture

inflicted with the complicity of federal officials was violated, solely on the ground that the torture was inflicted in the course of government efforts affecting national security and foreign relations.

Introduction and Summary of the Argument

Arar is a Canadian citizen, with dual Syrian citizenship, who has resided in Canada since he was a teenager. He alleges that while en route home to Canada he was seized at John F. Kennedy Airport by U.S. officials, who held him virtually incommunicado and then ordered his removal to Syria for the purpose of interrogation under torture. He further alleges that Syrian officials held him for almost a year in brutal conditions, tortured and interrogated him and finally released him after concluding that there was no evidence that he had terrorist ties. Arar brought this suit seeking damages against the U.S. officials he claimed were responsible for his torture, claiming, among other things, that their conduct violated his rights under the Fifth Amendment and that under *Bivens* he was entitled to damages for the resulting injuries he suffered. *Arar* v. *Ashcroft*, 414 F. Supp. 2d 250, 253-55, 266-67 (E.D.N.Y. 2006).

Amici submit that, in dismissing Arar's *Bivens* claim, the district court incorrectly concluded that "special factors" counseled against a damages remedy for these alleged injuries solely because the violation of Arar's rights purportedly occurred during efforts to protect national security and that affected foreign affairs.

The district court assumed that Arar's claims of U.S. government involvement in his torture properly pleaded a violation of the Fifth Amendment.

Id. at 274-75, 279. The district court also concluded that no law enacted by Congress provided Arar with any alternative remedy. *Id.* at 281. In fact the district court emphasized that, according to the complaint, government officials deliberately prevented Arar from invoking any remedies that might have been available to prevent his unlawful removal to Syria to face torture. *Id.* at 269, 272. The district court thus recognized that Arar's *Bivens* claim was the only remedy available to vindicate the violation of his constitutional rights. *Id.* at 273. Nevertheless, it dismissed that claim and concluded that "special factors" counseled against adjudicating it. *Id.* at 279-80, 281-83. The district court reasoned that a judicial remedy might implicate matters of national security and foreign relations and that the "task of balancing individual rights against national security is one that the courts should not undertake without the guidance or authority of the coordinate branches in whom the Constitution imposes responsibility for our foreign affairs or national security." *Id.* at 283.

Amici submit that this decision is inconsistent with the role assigned by the Constitution to the judiciary to enforce the Constitution and to act as a check on Executive abuses of power that violate individual rights.

As Arar and other *amici* persuasively show, torture is absolutely forbidden by the Fifth Amendment, as well as by U.S. treaties, military law, and federal criminal law. Thus, there is no warrant for "balancing" the fundamental right to be free from torture against national security or foreign affairs concerns. And, in any event, it is the province of the judiciary to interpret and enforce constitutionally-guaranteed individual rights and to provide effective remedies for

their vindication. Whether Congress has the power to curtail judicial invocation of damage remedies, expressly or by implication, where, as here, no other remedy would be available to vindicate the constitutional right, is not before this Court. For, as Arar and other *amici* show, Congress has not done so.

The judicial power to protect constitutional rights against Executive abuse has properly been exercised in times of war and notwithstanding claims that the needs of national security or the conduct of foreign affairs require the judiciary to defer to the other branches' competence in these areas. On the other hand, the judiciary's failure to do so on some occasions has been cause for shame and regret.

In the circumstances of this case, *amici* submit, with all respect, that the district court abdicated its judicial responsibilities when it dismissed Arar's *Bivens* claims, thus depriving him of any remedy for alleged severe and flagrant violations of his constitutional rights.

Argument

I.

THE JUDICIAL BRANCH HAS THE ULTIMATE RESPONSIBILITY FOR PROTECTING CONSTITUTIONAL RIGHTS AND THE POWER TO PROVIDE REMEDIES FOR THEIR VIOLATION

The district court's reasoning reflects a view of the powers and competence of the judiciary fundamentally inconsistent with the role for the judiciary as envisioned by the Founders and that has evolved over two centuries. The judiciary has the ultimate obligation to enforce the Constitution's limits on Executive and Legislative power and the power to fashion remedies to vindicate

violations of individual rights. Most importantly, contrary to the views reflected by the district court, the judiciary has exercised those powers in times of war and crises, rejecting claims that national security or the conduct of foreign affairs renders the enforcement of individual rights beyond its competence.

A. The Constitution Entrusts the Judiciary with the Obligation to Enforce Constitutional Rights

Under our constitutional system of separation of powers and checks and balances, it has been recognized from the outset that ultimately it is the judicial branch that has the responsibility and authority to protect individual rights against infringements by the Executive or the Legislative branches. The Founders understood that a concentration of power could not be left to one branch of government, unchecked.

> Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.

N. Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (quoting *The Federalist No. 47*, at 300 (James Madison) (H. Lodge ed., 1888)). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at

57-58 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam)). It has been long recognized that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In its role as the final arbiter of the law, the judicial branch has a duty to ensure that the Constitution is the "fundamental and paramount law of the nation," *id.*, and to "declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78,* at 438 (Alexander Hamilton) (Isaac Kramnick ed., 1987). "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts." *Id.* "This is of the very essence of judicial duty." *Marbury*, 5 U.S. at 178.

Therefore, this judicial authority "can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States* v. *Nixon*, 418 U.S. 683, 704 (1974) (citing *The Federalist No. 47*, at 313 (James Madison) (S. Mittell ed., 1938)).

It follows directly that the judiciary has the principal obligation of enforcing the guarantees in the Constitution and remedying abuses of power that

overstep constitutional limits by either the Executive or Legislative branches. When presenting the Bill of Rights to the Congress, James Madison stated that:

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

1 *Annals of Cong.* 457 (Joseph Gates ed., 1834). Alexander Hamilton also expected that the federal judiciary would particularly "guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves." *The Federalist No. 78* (Alexander Hamilton), at 440. In fact, the Framers justified the distinctive properties of an independent judiciary – lifetime tenure, salary insulation, two-thirds supermajority vote for impeachment – in part by the role the judiciary would have as a check on Congress and the Executive. *Id.* at 436-42.

The Founders were especially concerned that the Executive would overstep its bounds and threaten individual liberties. James Madison sought to "fix the extent of Executive authority" in creating the Presidency, addressing widespread fear that this office, if not carefully crafted and differentiated from the British monarchy, might become the most likely to abuse its bestowed powers. 1 *The Records of the Federal Convention of 1787*, at 66-67 (Max Farrand ed., 1911); *see also The Federalist No. 48*, at 309 (James Madison) (Isaac Kramnick ed.,

1987) (identifying the executive role "as the source of danger," but defending the Presidency as "carefully limited, both in the extent and the duration of its power").

Consequently, courts have repeatedly acted as a check on abuses by the Executive and Legislative branches. For example, in *United States* v. *United States District Court*, the Supreme Court considered whether warrantless domestic wiretaps authorized solely by the Executive violated the Fourth Amendment. 407 U.S. 297 (1972). The government asserted that these wiretaps were needed for national security reasons and that the Executive was best suited to judging whether, in light of those needs, the wiretaps met constitutional requirements. The Court flatly rejected that argument, holding that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates." *Id.* at 316-17. The Court recognized that the Executive could not be an adequate judge of its own actions: "Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *Id.* at 317 (citations omitted); *see also Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). And in *Clinton* v. *Jones*, 520 U.S. 681 (1997), the Supreme Court noted that it has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Id.* at 703.

Likewise, the judiciary acts as a check on Congressional action that exceeds constitutional limits. As Justice Harlan observed: "The Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities . . . ." *Bivens*, 403 U.S. at 411 (Harlan, J., concurring); *see also City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997) ("[T]he courts retain the power, as they have since *Marbury* v. *Madison*, to determine if Congress has exceeded its authority under the Constitution.").

It has also been recognized that in carrying out its responsibility to enforce constitutional rights against Legislative and Executive abuses, the judiciary necessarily has the power to devise effective remedies. This principle was eloquently enunciated early in our history by Justice Marshall in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (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. One of the first duties of government is to afford that protection.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

The Supreme Court has repeatedly found, under this principle, that courts have the authority to devise remedies adequate to redress violations of constitutional rights, including damage remedies. *See Davis* v. *Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be

enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."). That is, in fact, the rationale for the damages remedy in *Bivens*, where Justice Harlan recognized that "the judiciary has a particular responsibility to assure the vindication of constitutional interests." 403 U.S. at 407 (Harlan, J., concurring). The *Bivens* damages remedy is especially necessary where, as here, no other remedy is available to vindicate the plaintiff's rights and it is "damages or nothing." *Id.* at 409-10.

B. The Judicial Branch Has Enforced the Constitution Notwithstanding Claims of National Security or Foreign Affairs

The Supreme Court has made clear that the Executive's power to protect national security or conduct foreign affairs does not deprive the judiciary of its authority to act as a check against abuses of those powers that violate individual rights. As the Supreme Court has recently stated, "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 535 (plurality opinion); *see also Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934) ("even the war power does not remove constitutional limitations safeguarding essential

liberties"). Instead, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.

Tellingly, our Constitution, unlike many other constitutions, does not contain broad "emergency powers" provisions that allow the Executive to override judicial authority when grave issues of national security or foreign affairs arise.[1] Instead, our Constitution contains only one discrete exception that allows the suspension of the writ of habeas corpus in cases of "rebellion or invasion." U.S. Const. art. I, § 9. The Constitution applies equally in times of war and in times of peace. *See, e.g., Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) ("The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations.") (internal citations omitted). Accordingly, the judiciary's power to enforce the Constitution has been exercised

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[1] For example, the French Constitution authorizes the President of the Republic to exercise emergency powers "[w]here the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat." La Constitution art. 16 (Fr.), *translated at* http://www.assemblee-nationale.fr/english/8ab.asp. The emergency provisions of the German constitution broadly authorize the central government to establish public order without regard to the powers normally reserved to the states or the limitations normally imposed on military operations. *See* Grundgesetz [GG] [Constitution] art. 1151(2) (F.R.G.). *See also* provisions for declaring state of emergency in: Constitución Política de la República de Chile art. 40(2), (6); Constituição da República Portuguesa art. 19(5) (Port.); S. Afr. Const. 1996 § 37; Türkiye Cumhuriyeti Anayasası [Constitution] arts. 120-21 (Turk.).

in times of crisis, even when the country was facing grave threats to its national security.

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a United States civilian successfully challenged his conviction by a military tribunal during the Civil War, and defeated a claim that federal courts lacked jurisdiction to consider his challenge. The Court rejected the government's argument that "[a]fter war is originated . . . the whole power of conducting it . . . is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration." *Id.* at 18. Rather, the Court held that the Executive Branch cannot "suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of [its] will." *Id.* at 124. The Court emphasized the importance of the judiciary's role in protecting constitutional rights during times of war:

> By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.
>
> . . . .
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> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Id. at 119, 120-21 (emphasis added).

In *Youngstown Sheet & Tube Co.* v. *Sawyer*, the possibility of a threatened strike crippling our Nation's military power in the middle of the Korean War did not deter the Court from limiting Executive power. 343 U.S. 579 (1952). Even though President Truman argued that the impact of a steel strike would have seriously undermined our military and the President's ability to conduct foreign affairs, the Court enjoined the President's seizure of the steel mills because the President overstepped his Executive powers under the Constitution. *Id.* at 587-88. In his concurring opinion, Justice Jackson noted that "[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Id.* at 646.

In the Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam), the Supreme Court vindicated the First Amendment rights of the press and refused to issue an injunction against the publication of classified documents concerning the prosecution of the Vietnam War, notwithstanding the government's claims that disclosure of the documents would undermine the war effort, damage national security and have an adverse impact on our foreign relations. *Id.* at 723 (Douglas, J., concurring), 741 (Marshall, J., concurring).

More recently, in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the Court rejected arguments that the prosecution of war justified denying basic due process to an American citizen captured in Afghanistan. The Court recognized that "history and common sense teach us that an unchecked system of detention carries

the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Id.* at 530 (plurality opinion) (citing *Ex parte Milligan*, 71 U.S. at 125). In balancing the competing interests in national security and liberty, the Court cautioned that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532 (citing *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 164-65 (1963); *United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile[.]")).

In *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), the Court held that military tribunals convened by the Executive to try terrorism suspects were unlawful, as "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure." *Id.* at 2759. The Court refused to permit the Executive branch to overstep its constitutional authority, despite the danger that the petitioner and other terrorism suspects may pose to the United States:

> We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge – viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity . . . . But in undertaking to try Hamdan and subject him

> to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

Id. at 2798. *See also Rasul* v. *Bush*, 542 U.S. 466, 487 (2004) (rejecting the government's contention that the judiciary had no jurisdiction over claims brought by detained terrorism suspects because the Executive's war powers are implicated).

On those occasions when the Court deferred to claims of national emergency and the exigencies of war, later generations have looked back upon these decisions with shame and regret. One of the most notorious examples of the judiciary's failure to discharge its constitutional obligations is *Korematsu* v. *United States*, 323 U.S. 214 (1944). On February 19, 1942, two months after the attack on Pearl Harbor, President Roosevelt signed Executive Order 9066, which authorized the forced relocation of Japanese-Americans to internment camps. Despite sparse evidence of the alleged national security threat posed by these individuals, the Supreme Court deferred to arguments of military necessity by the "war-making branches" of government and upheld the constitutionality of the relocation order. *Id.* at 218-20, 223-24. Forty years later, the judiciary lamented its earlier decision:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive, and judicial, must be prepared to

> exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu v. *United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating Korematsu's conviction on writ of *coram nobis*).

Nevertheless, the district court denied Arar his *Bivens* remedy – even though it acknowledged that it was his "sole remaining avenue for legal challenge" – because "the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches . . . ." *Arar*, 414 F. Supp. 2d at 273, 283. As discussed below, we respectfully submit that this was an abdication of the judiciary's constitutional responsibilities to protect against the blatant constitutional violations by the Executive alleged here.

II.

THE MERE FACT THAT THE ALLEGED CONSTITUTIONAL VIOLATION WAS PURPORTEDLY INFLICTED IN THE COURSE OF EFFORTS TO PROTECT NATIONAL SECURITY OR IMPLICATED FOREIGN RELATIONS SHOULD NOT BE CONSIDERED A "SPECIAL FACTOR" COUNSELING AGAINST A DAMAGES REMEDY IN THIS CASE

As noted, the district court recognized that Arar had no alternative remedy under any legislative scheme established by Congress. *Arar*, 414 F. Supp. 2d at 281. Nor has Congress expressly or impliedly indicated an intention to deprive torture victims like Arar of a damages remedy. For example, while the recently-enacted Detainee Treatment Act, Pub. L. No. 109-148, § 1003, 119 Stat.

2680, 2739 (2005),[2] does not provide a damages remedy, the legislative history makes clear that Congress did not intend to preclude other available private damages remedies, such as a *Bivens* remedy. *See* 151 Cong. Rec. S14,269 (2005) (statement of Sen. McCain) (observing that the provisions of the DTA "do not eliminate or diminish any private right of action otherwise available"); *id.* (statement of Sen. Levin) ("I do not believe that the [McCain amendment to the Detainee Treatment Act] was intended either to create such a private right of action, or to eliminate – or undercut any private right of action"). The recently enacted Military Commissions Act, Pub. L. No. 109-366, §§ 3, 7, 120 Stat. 2600, 2623, 2636 (2006) ("MCA") strips courts of jurisdiction to hear claims brought by persons determined to be unlawful enemy alien combatants, or those awaiting such a determination, against federal officials arising from their treatment in detention. Conspicuously, however, the MCA does *not* strip the court's power to hear private claims like those asserted by Arar, who does not fall within that class of persons.

Moreover, as the decision below establishes, it is alleged that the government deliberately took steps that prevented Arar from availing himself of injunctive relief or any of the remedies that might have been available to him under the immigration statutes. *Arar*, 414 F. Supp. 2d at 253-54. For example, Arar alleges that the government intentionally deprived him of the opportunity to obtain

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[2] The Detainee Treatment Act provides, in relevant part, that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd(a) (West 2006).

an adequate review of his claim under the Convention Against Torture, and was denied access to counsel while held in the United States.[3] *Id.* at 269. The district court found that if Arar's allegations are true, then he would not have had an adequate opportunity to litigate his claim: "[c]ertainly, Arar was not in a position similar to ordinary deportees who can 'wait until their administrative proceedings come to a close and then seek review in a court of appeals.'" *Id.* (citation omitted). The district court also rejected the government's contention that Arar's claims should be barred because he failed to institute a review of a final order of removal under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). The district court held that review under FARRA was not an alternative for Arar because "defendants by their actions essentially rendered meaningful review an impossibility." *Id.* at 273.

Thus, the district court acknowledged that damages pursuant to *Bivens* is the only remedy that Arar has to vindicate his constitutional right not to be tortured. *Id.* at 273 (recognizing that the *Bivens* remedy is Arar's "sole remaining avenue for legal challenge"). To paraphrase Justice Harlan in *Bivens*: "It will be a rare case indeed in which an individual in [Arar's] position will be able to obviate the harm by securing injunctive relief from any court . . . . For people in [Arar's] shoes, it is damages or nothing." 403 U.S. at 410 (concurring). And as the

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[3] Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment states that no party to the Convention "shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1990), 1465 U.N.T.S. 85.

government itself acknowledged in *Bivens*, at the very least, a judicial damages remedy is required to enforce constitutional rights where "the absence of alternative remedies renders the constitutional command a 'mere form of words.'" *Id.* at 399. To deny Arar a damages remedy here does indeed reduce his constitutional right to a "mere form of words."

As the Supreme Court noted in *Correctional Services Corporation* v. *Malesko*, so long as the plaintiff has an avenue for some redress, a *Bivens* remedy should be denied. 534 U.S. 61, 69 (2001). But the Court recognized that a *Bivens* remedy *is* appropriate where a plaintiff "lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Id.* at 70 (emphasis in original); *cf. Hudson Valley Black Press* v. *Internal Revenue Serv.*, 409 F.3d 106, 109, 113 (2d Cir. 2005) (holding that a *Bivens* claim for violation of First Amendment rights by I.R.S. officials is precluded by the "complex and comprehensive administrative regime that provides various avenues of relief for aggrieved taxpayers") (relying on *Bush* v. *Lucas*, 462 U.S. 367 (1983)). In this case, as the district court recognized, the administrative and legislative schemes afforded Arar no available avenue of relief. Accordingly, he "lacked any alternative remedy."[4]

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[4] The district court mistakenly read *Bush* v. *Lucas*, 462 U.S. 367 (1983), for the proposition that even where there is no alternative remedy, "courts will refrain from extending a *Bivens* claim if doing so trammels upon matters best decided by coordinate branches of government." *Arar*, 414 F. Supp. 2d at 279. As Justice Stevens makes clear in *Lucas*, however, it is the fact that Congress did provide a remedy – an elaborate civil service mechanism providing the

(continued on next page)

Nevertheless, the district court dismissed Arar's *Bivens* claim on the sole ground that the claim implicated matters of national security and foreign affairs, explaining that:

> [T]he task of balancing individual rights against national security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs or national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched – perhaps deliberately – by the Legislative and Executive branches.

Arar, 414 F. Supp. 2d at 283.

This reasoning is fundamentally flawed. To begin, protection from torture is not a right that can be balanced. As other *amici* discuss in greater detail, the prohibition against torture and cruel treatment is unequivocal and absolute under the Fifth Amendment, as well as U.S. military law and regulations, federal criminal law, and U.S. treaty obligations. The Supreme Court has noted:

> There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes

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disciplined employee with numerous protections and a right to appeal to the Civil Service Commission – that precluded a *Bivens* remedy. Justice Stevens made clear that the case required a choice between a judicial damage remedy and the more limited civil service remedies provided by Congress – and in that context, the Court left the choice of remedies to Congress. *Lucas*, 462 U.S. at 380.

> against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

Ashcraft v. *Tennessee*, 322 U.S. 143, 155 (1944).[5] Only recently, the U.S. government declared emphatically that there is no justification for torture, stating in a formal submission to the United Nations:

> No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture . . . . The U.S. Government does not permit, tolerate, or condone torture . . . by its personnel or employees under any circumstances.[6]

Equally important, the district court erroneously concluded that affording a judicial damage remedy to redress the constitutional violation where national security or foreign affairs are implicated is beyond judicial competence. As we demonstrated, this view conflicts with our constitutional tradition and has

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[5] While recognizing that the Constitution forbids the use of torture for interrogations in the criminal context, the district court indicated that "whether substantive due process would erect a *per se* bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack . . . remains unresolved from a doctrinal standpoint." *Arar*, 414 F. Supp. 2d at 274; *see also id.* at 274 n. 10. However, the district court nevertheless assumed that government-inflicted torture is always barred, as both parties agreed that government-inflicted torture always violates the Fifth Amendment. *Id.* at 274-75.

[6] *See* Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America (May 6, 2005), U.N. Doc. CAT/C/48/Add.3 (2005) at 4, *available at* http://www.state.gov/g/drl/rls/45738.htm.

been flatly rejected, most recently in *Rasul*, *Hamdi*, and *Hamdan*. *See* pp. 14-16, *supra*; *see also Elmaghraby* v. *Ashcroft*, 04 CV 1409 (JG) (SMG), 2005 U.S. Dist. LEXIS 21434, at *44-46 (E.D.N.Y. Sept. 27, 2005) (rejecting claims that national security is a special factor counseling against a *Bivens* remedy, specifically relying on *Hamdi*).[7]

The ultimate responsibility for enforcing the guarantees of the Bill of Rights has historically been considered to be under the purview of the judicial branch, not the Executive and Legislative branches. *See* pp. 6-11, *supra.* It is the judiciary's role to enforce the Constitution against Executive and Legislative abuse, and as we have demonstrated, the fact that national security and foreign

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[7] In a 1985 D.C. Circuit case, then-Circuit Court Judge Scalia concluded that where a case implicated the conduct of foreign affairs, that alone was a factor militating against a *Bivens* remedy. *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). But that was an unusual case in which the plaintiffs claimed that by simply giving aid to the Contras, who in turn were committing various abuses against plaintiffs and others in Nicaragua, the United States was violating their constitutional rights; in fact, the plaintiffs were actually seeking an injunction that would have prevented the United States from supporting the Contras. The court viewed this as an effort by plaintiffs to stop U.S. support for the Contras, thereby preventing it from carrying out its foreign policy. *Id.* Nothing comparable is involved here. Arar seeks only damages suffered as result of a deliberate scheme of torture that is absolutely forbidden. And in any event, *Sanchez-Espinoza* long-preceded *Rasul*, *Hamdi* and *Hamdan*.

The D.C. Circuit also has invoked the political question doctrine to dismiss damage claims that included allegations of torture because they allegedly occurred in the conduct of foreign affairs. *See Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 270 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005); *Bancoult* v. *McNamara*, 370 F. Supp. 2d 1, 8 (D.D.C. 2004), *aff'd*, 445 F.3d 427 (D.C. Cir. 2006). For the same reasons discussed in this brief, we submit that the claim of torture does not raise a political question. Assuming that these D.C. Circuit cases are apposite, they are not persuasive and should not be followed by this Court.

affairs concerns are implicated has not acted as a bar to the judiciary's power and obligation to check such abuses. To the extent there is a need to consider the impact of a damages remedy on federal officials involved in the conduct of national security or foreign affairs, those are concerns that are addressed by the qualified immunity defense. But as Justice Harlan said in *Bivens*, whatever the scope of the immunity defense, "at the very least such a [damages] remedy would be available for the most flagrant and patently unjustified sorts of police conduct" for "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Bivens*, 403 U.S. at 411 (Harlan, J., concurring).

So too this case calls for a judicial remedy if the "flagrant and patently unjustified" conduct alleged here is proven.

Conclusion

For the reasons set forth above, the Court should reverse the district court's order insofar as it dismissed, on the pleadings, Arar's claims for damages resulting from the violation of his constitutional rights under the *Bivens* doctrine.

Dated: December 19, 2006

Respectfully submitted,

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I, Sidney S. Rosdeitcher, hereby certify pursuant to F.R.A.P 32(a)(7) that, according to the word-count feature of Microsoft Word 2002, the foregoing appellate brief contains 6,720 words (exclusive of the table of contents, table of authorities, and this certificate) and therefore complies with the 7,000 word limit for *amicus* briefs in the Federal Rules of Appellate Procedure for the Second Circuit.

Dated: December 19, 2006

/s/ Sidney S. Rosdeitcher
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