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

BRIEF FOR DEFENDANT-APPELLEE LARRY D. THOMPSON

JOHN J. CASSIDY
STEPHEN L. BRAGA
JEFFREY A. LAMKEN
JAMIE S. KILBERG
ALLYSON N. HO
STEPHANIE R. DOURADO
BAKER BOTTS LLP
Attorneys for Defendant-Appellee Larry D. Thompson
1299 Pennsylvania Avenue NW
Washington, D.C. 20004
(202) 639-7700

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

STATEMENT OF THE ISSUES

Plaintiff-Appellant Maher Arar was stopped by immigration officials at John F. Kennedy International Airport ("JFK") in the fall of 2002. Based largely on classified information, the Executive Branch determined that Arar was inadmissible on national security grounds. Arar, a Syrian-Canadian dual citizen born in Syria, was removed to Syria. Arar alleges that, once there, he was tortured by Syrian officials. The questions presented are:

1. Did the district court have jurisdiction over this action against former Deputy Attorney General Larry Thompson for signing plaintiff's removal order, notwithstanding express provisions of the Immigration and Nationality Act and Illegal Immigration Reform and Immigrant Responsibility Act precluding suits that "aris[e] from" removal proceedings or challenge removal determinations?

2. Did the district court properly dismiss the claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because that implied cause of action should not be extended to an unadmitted, non-resident alien's due-process claim arising from his removal to and subsequent mistreatment in a foreign country?

3. Should the *Bivens* claims have been dismissed because they do not establish that Thompson violated Arar's constitutional rights given that:

(a) the Fifth Amendment does not extend extraterritorially to unadmitted, non-resident aliens; and (b) the allegations about domestic detention are insufficient to establish that Thompson violated Arar's alleged due-process rights?

4. Is Thompson entitled to qualified immunity on the *Bivens* claims because the complaint fails to allege facts showing a violation of "clearly established" constitutional rights?

5. Did the district court correctly dismiss Arar's claim under the Torture Victim Protection Act, 28 U.S.C. § 1350, note, because: (a) Arar cannot show that Thompson acted under color of foreign rather than U.S. law; (b) Arar was not subjected to torture while in Thompson's custody or physical control; and (c) Thompson is entitled to qualified immunity?

STATEMENT OF THE CASE

Maher Arar, a Syrian-born dual citizen of Syria and Canada, filed this lawsuit in the Eastern District of New York on January 22, 2004. Arar had been removed from the United States to Syria after the then-Regional Director of the Immigration and Naturalization Service ("INS") determined that Arar was a member of the terrorist organization al Qaeda and therefore inadmissible to the United States for national security reasons. The complaint asserts claims against eight named Executive Branch officials—including former Attorney General John Ashcroft, former Deputy Attorney General Larry D. Thompson, former Secretary of Homeland Security Tom Ridge, and Director of the Federal Bureau of Investigation ("FBI") Robert Mueller—under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

On February 16, 2006, the district court dismissed Arar's complaint. 414 F. Supp. 2d 250 (E.D.N.Y. 2006). Arar declined to amend his complaint. Accordingly, on August 16, 2006, the district court entered a final judgment dismissing the action. This appeal followed.

FACTS AND PROCEEDINGS BELOW

I. ARAR'S REMOVAL TO SYRIA ON NATIONAL SECURITY GROUNDS

For purposes of the motion to dismiss, the well-pleaded, factual allegations of the complaint must be accepted as true.

A. Arar's Arrival And Detention

According to the complaint, Arar left Tunisia on September 25, 2002. The next day, he arrived at JFK Airport in New York after transiting through Zürich, Switzerland. Arar was booked on a connecting flight from JFK to Montreal, Canada. A.29.

When Arar presented his passport, an immigration officer entered Arar's name into a computer and discovered a "lookout" identifying Arar as a member of a known terrorist organization. A.27, A.88. Arar was questioned about his work and travel in the United States, his relationships with particular individuals, and connections to terrorist organizations. A.27. Arar acknowledged that he knew the individuals at issue but denied having connections to terrorist organizations. A.30-A.31. Arar was detained at the airport for the evening in solitary confinement before being transferred to a detention center in Brooklyn the next evening. A.31.

B. Arar's Removal To Syria

On October 1, 2002, the INS initiated removal proceedings against Arar on the ground that Arar was a member of a designated terrorist organization (al Qaeda) and therefore inadmissible to the United States under the Immigration and Nationality Act ("INA"). A.31. Based on classified information, as well as Arar's statements regarding his contacts with particular individuals, the INS Regional Director found that Arar was "clearly and unequivocally inadmissible" as a "member of a foreign terrorist organization," A.87, with which he "continues to meaningfully associate," A.92. The Regional Director determined that "there are reasonable grounds to believe that Arar is a danger to the security of the United States." *Id.*

On October 4, 2002, Arar asked to be removed to Canada, but was notified that the Regional Director had decided to remove him to Syria. A.47. Arar requested protection under the Convention Against Torture ("CAT"), but the INS determined he could be removed to Syria consistent with the CAT. A.33, A.86. On October 8, 2002, Arar was flown to Washington, D.C., and from there to Jordan; Jordanian officials then transported Arar to Syria. A.33.

Arar alleges that Jordanian authorities beat and questioned him before transporting him to Syria. He alleges that he was then detained in Syria,

where Syrian authorities tortured him for 12 days and then threatened him with torture thereafter. A.36. On October 5, 2003, Syria released Arar to the Canadian Embassy in Damascus. A.37.

II. THE COMPLAINT

The complaint in this case alleges that eight named Executive Branch officials, including former Deputy Attorney General Larry D. Thompson, engaged in a conspiracy with each other and with Syrian officials to remove Arar to Syria, knowing or intending that he would be tortured there by the Syrians. A.20-A.21. It also challenges Arar's treatment while in U.S. custody for 13 days. A.21.

A. The *Bivens* Claims (Counts II-IV)

Three counts of the complaint assert claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Counts II and III relate to Arar's removal to Syria and his treatment there. Count II alleges that defendants violated Arar's substantive due-process rights by, among other things, "detaining [Arar] . . . and by using government resources to transfer him to Syria" with the knowledge or intent that Arar would be "subjected to torture and coercive interrogation" there. A.39. Count III alleges that defendants violated substantive due process by conspiring among themselves and with Syrian officials to "deport [Arar] to

Syria for the purpose of arbitrary, indefinite detention in that country." A.40. Counts II and III repeatedly assert that defendants "act[ed] under color of law and their authority as federal officers." A.39, A.40-A.41.

Count IV addresses Arar's treatment while detained for 13 days in the United States. It alleges that defendants violated substantive due process by subjecting Arar to "outrageous, excessive, cruel, inhumane, and degrading conditions of confinement" in the United States. A.41. Arar alleges that he was kept overnight at the airport in a constantly lighted cell with no bed, A.30; was not given food until the next day, A.30; was interrogated aggressively, A.29, A.30; was not given access to counsel, A.32, A33; was misled about counsel's availability, A.33; and that his counsel was misled as well, A.33.

B. The TVPA Claim (Count I)

Count I asserts that defendants violated the Torture Victim Protection Act by "acting in concert with," "conspir[ing] with," or "aid[ing] and abett[ing]" unnamed Jordanian and Syrian officials "in bringing about" the violation of Arar's "right not to be tortured." A.38.

C. The Allegations Concerning Thompson

Although the complaint spans 19 pages and includes nearly 100 paragraphs, Thompson's actions are addressed in four sentences. Those four

sentences essentially assert that Thompson removed Arar to Syria. Two sentences state only that Thompson signed the removal order: "Defendant Thompson, Deputy Attorney General, in his capacity as Acting Attorney General, signed an order on or about October 8, 2002, removing Arar to Syria," A.33; and "Defendant Thompson signed the order removing Arar to Syria," A.24. The other two sentences add allegations about Thompson's knowledge or intent when doing so:

> Conspiring with and/or aiding and abetting Defendants Ashcroft, McElroy, Mueller, and others, as well as Syrian government officials, ***Defendant Thompson removed Arar to Syria so that Syrian authorities would interrogate him*** in ways they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, ***Thompson removed Arar to Syria knowing that*** Arar would be in danger of being subject to torture there.

A.24 (emphasis added). The complaint does not assert that Thompson knew of or had involvement in the conditions of Arar's detention in the United States. While it alleges a vague conspiracy with foreign officials, it does not state when that conspiracy arose or how.

Thompson is named only in his individual capacity. A.24. The complaint thus demands no relief from him other than damages. A.22.[1]

[1] Arar sought declaratory relief against other defendants, A.23-A.27, which the district court denied for lack of standing, SPA.18-SPA.19; U.S. Br. 19-26.

III. THE DISTRICT COURT'S DECISION

Judge Trager granted defendants' motions to dismiss for failure to state a claim. SPA.1-SPA.88.

A. Jurisdiction

The district court first rejected defendants' argument that the INA and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") preclude jurisdiction over Arar's claims. The district court concluded that neither 8 U.S.C. § 1252(b)(9), which limits judicial review of "all questions of law and fact" arising from "any action . . . to remove an alien from the United States" to the review provisions in the INA itself, nor 8 U.S.C. § 1252(g), which bars review of "any cause or claim . . . arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," precluded Arar's challenge to "the decision to send him abroad for torture." SPA.47. Arar's suit, the court stated, "raises issues collateral to the removal order." SPA.40.

Similarly, the district court held that, because Arar "does not challenge discretionary decision-making by the Attorney General," but rather "constitutional violations incident to his removal to Syria," his suit was not precluded by 8 U.S.C. § 1252(a)(2)(B)(ii). That provision bars review of discretionary decisions to disregard an alien's request to be

removed to a particular country if granting the request would prejudice the interests of the United States. SPA.52.

B. Count I—The TVPA Claim

The TVPA creates a cause of action against any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . ." 28 U.S.C. § 1350, note § 2(a)(1). Here, the district court ruled that defendants had not acted "under actual or apparent authority, or color of law, of [a] ***foreign nation***." SPA.37, SPA.87 (emphasis added). To the contrary, as U.S. officials, defendants had acted under color of U.S. law. SPA.32-SPA.33.

The district court also expressed doubt that Arar had sufficiently alleged that he was "in" defendants' "custody or physical control" when he was tortured, as required by section 3(b)(1) of the TVPA. SPA.26-SPA.28. The complaint located Arar in Syrian and Jordanian custody—not defendants' custody—when the torture occurred. SPA.27. But the court concluded that "the issue of custody or physical control need not be resolved" because Arar could not meet the "requirement that the tort be committed under 'color of law, of any foreign nation.'" *Id.*

C. Counts II And III—*Bivens* Claims Relating To Mistreatment Abroad

The district court also dismissed Arar's *Bivens* claims relating to his removal to and mistreatment in Syria (Counts II and III). The court did not decide whether the Fifth Amendment extended extraterritorially to unadmitted aliens claiming mistreatment in a foreign country. SPA.54-SPA.67. Instead, the district court ruled that the cause of action created in *Bivens* could not be extended to this new context, which implicates sensitive foreign-relations and national-security concerns. SPA.70-SPA.77.

The court explained that *Bivens* cannot be extended to new contexts where "doing so trammels upon matters best decided by coordinate branches of government," including "foreign policy and national-security" issues. SPA.68. This case, the court observed, "undoubtedly presents broad questions touching on the role of the Executive branch in combating terrorist forces—namely the prevention of future terrorist attacks within U.S. borders by capturing or containing members of those groups who seek to inflict damage on this country and its people." SPA.71. The court also found that the case implicates "'the complicated multilateral negotiations concerning efforts to halt international terrorism.'" SPA.72 (quoting *Doherty v. Meese*, 808 F.2d 938, 943 (2d Cir. 1986)). Extending *Bivens* to this new context thus "'could significantly disrupt the ability of the political branches to

respond to foreign situations involving our national interest.'" SPA.72-SPA.73 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990)).

The district court also observed that "[r]emoval decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" SPA.73 (quoting *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))). Because national policy toward aliens is "'exclusively entrusted to the political branches of government,'" the court declined to extend the judicially created *Bivens* remedy to cases, like this one, challenging an unadmitted alien's removal from the United States and alleged mistreatment abroad. SPA.74, SPA.76 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). "[J]udges should be hesitant to fill an arena that, until now, has been left untouched—perhaps deliberately—by the Legislative and Executive branches." SPA.76.

D. Count IV—The Domestic *Bivens* Claims

The court also dismissed Count IV, which challenged the conditions of Arar's 13-day detention within the United States. SPA.73-SPA.83. The court recognized that an "individual in Arar's shoes, detained at the U.S.

border and held pending removal, does not officially effect an 'entry into the United States.'" SPA.78 (quoting *Zadvydas v. Davis*, 533 U.S. 687, 693 (2001)). And the court acknowledged that, under *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Correa v. Thornburgh*, 901 F.2d 1166 (2d Cir. 1990), excludable aliens at the border have only the most limited due-process protections. SPA.78-SPA.79.

Under those standards, the district court concluded that Arar's allegations were "borderline." SPA.81. But it questioned whether *Correa* and *Mezei* should govern here. *Id.* In the end, however, the court concluded that a more concrete defect doomed the complaint: "[A]t this point, the allegations against the individually named defendants do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights" while Arar was detained in the United States; nor did the complaint allege "whether any of the defendants were otherwise aware, but failed to take action, while Arar was in U.S. custody." SPA.84-SPA.85. Therefore, the court dismissed Count IV with leave to add those allegations. SPA.87-SPA.88. Arar declined to replead. A.467-A.468.

Accordingly, on August 16, 2006, the district court entered a final judgment dismissing the action. Arar now appeals.

SUMMARY OF ARGUMENT

I. The district court did not err in holding that Arar is not entitled to recover money damages from former Deputy Attorney General Thompson. No fewer than three statutes expressly bar damages actions, like this one, that arise from the Deputy Attorney General's exercise of his removal authority under the immigration laws. *See* 8 U.S.C. §§ 1252(g); 1252(b)(9); 1252(a)(2)(B)(ii). Those statutes preclude this suit.

II. Arar's complaint, in any event, fails to state a claim.

A. With respect to Arar's *Bivens* claims, the Supreme Court has repeatedly cautioned against extending that implied cause of action to new contexts, and "special factors counseling hesitation" preclude it from being extended here. As the district court observed, this case implicates issues of foreign policy, international relations, and national security—highly sensitive areas long reserved to the nearly exclusive control of the political branches.

B. Even if *Bivens* did extend to this context, the complaint fails to allege facts establishing that Thompson violated Arar's constitutional rights with respect to his removal and mistreatment abroad. While Arar asserts substantive due-process violations, the Fifth Amendment's Due Process Clause does not apply to decisions to remove unadmitted aliens to particular

foreign countries; nor does it apply to aliens in the custody of foreign governments abroad. In any event, Thompson is entitled to qualified immunity because his actions did not violate clearly established law.

C. Arar has alleged neither sufficient personal involvement by Thompson nor sufficient allegations of "gross physical abuse" to state a claim for a due-process violation relating to Arar's domestic detention. In any event, Thompson is entitled to qualified immunity because his actions did not violate clearly established law.

III. Arar's TVPA claim also fails. The TVPA extends only to defendants acting under color of ***foreign*** law. But then-Deputy Attorney General Thompson acted under color of ***U.S.*** law. The TVPA applies only if the victim is tortured while in the defendant's custody or physical control. But Arar was allegedly tortured while in Syrian—not Thompson's—custody and physical control. And Thompson, in any event, is entitled to qualified immunity because it was not obvious at the time of the alleged conduct that such conduct would violate the TVPA.

STANDARD OF REVIEW

This Court generally reviews the district court's decision on a motion to dismiss *de novo*. *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999). The Court must accept as true all well-pleaded factual

allegations in the complaint. *Id.* But the Court need not—and must not—give credence to conclusory allegations posing as factual assertions. *Cantor Fitzgerald, Inc. v. Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002).

ARGUMENT[2]

I. CONGRESS EXPRESSLY BARRED SUITS ARISING FROM REMOVAL DECISIONS

In three different provisions of the immigration laws, Congress expressly precluded aliens from bringing damages actions that, like Arar's claims against Thompson, arise from the aliens' removal from the United States. First, 8 U.S.C. § 1252(g) expressly bars "any cause or claim by or on behalf of any alien ***arising from*** the decision or action by the Attorney General to commence proceedings, adjudicate cases, ***or execute removal orders against any alien*** under this chapter." (Emphasis added). Second, 8 U.S.C. § 1252(a)(2)(B)(ii), provides that, "[n]otwithstanding any other provisions of law, ***no court shall have jurisdiction to review*** . . . ***any*** . . . ***decision or action*** of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." (Emphasis added). Here, the Attorney General's (or his designee's) determination to remove an alien to a country other than the one

[2] Thompson also incorporates by reference the arguments made by the other defendants.

of his choosing is a discretionary decision within the meaning of that provision. *See* 8 U.S.C. § 1231(b)(2)(C)(iv). Finally, 8 U.S.C. § 1252(b)(9) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, ***arising from any action taken or proceeding brought to remove an alien*** from the United States . . . ***shall be available only in judicial review of a final order under [8 U.S.C. § 1252(d)]***." (Emphasis added).

Those provisions make it clear that, if an action "aris[es] from" an action or proceeding to remove an alien, or from the decision to "execute removal orders against any alien," the federal courts have no jurisdiction unless the action is brought under the immigration laws themselves. It is equally clear that this action against Thompson "arises from" his decision (as the Attorney General's designee) "to remove" Arar to Syria. In fact, the ***only*** action by Thompson mentioned in the complaint is his decision to remove Arar. The complaint alleges that Thompson "signed the order ***removing*** Arar to Syria," A.24, A.33 (emphasis added); that Thompson "***removed*** Arar to Syria so that Syrian authorities would interrogate him" using torture, A.24 (emphasis added); and, in the alternative, that Thompson "***removed*** Arar to Syria knowing that Arar would be in danger of being

subjected to torture there." *Id.* (emphasis added). No other conduct by Thompson is alleged.

Because challenges "arising from" removal decisions can be raised only under the immigration laws themselves, this suit must be dismissed. *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001) (suit claiming excessive force and equal-protection violations barred by § 1252(g) because they "arise from" Attorney General's decision to execute removal); *Van Dinh v. Reno*, 197 F.3d 427, 434 (10th Cir. 1999) (§ 1252's "specific statutory bar to district court review" precludes *Bivens* action challenging transfer to remote location). Any doubt that Arar's claims "arise from" his removal is dispelled by his own argument that, if he prevails in this case, "the ***removal order*** would be expunged as null and void." Arar Br. 53 (emphasis added). Arar thus admits that this action arises from (indeed, challenges) the decision to remove him—precisely the kind of action Congress barred.

Arar nonetheless contends (and the district court agreed) that "this case does not concern ***why*** defendants might have chosen to send Arar to Syria; neither does Arar appear to attack the bases for sending him there." SPA.40. But the complaint is predicated on—and identifies no conduct by Thompson other than—Thompson's decision to "remove Arar to Syria." A.24, A.33. The district court confirmed that when describing what this

case ***does*** concern: "[T]his case concerns ***whether defendants could legally send Arar to a country where they knew*** he would be tortured or arbitrarily detained." SPA.40 (emphasis added). Adding the allegation that Thompson removed Arar to Syria ***knowing*** (or ***intending***) that Arar would be tortured or detained there cannot alter the fact that the suit "arises from" Thompson's decision to remove Arar to Syria; it simply adds a putative motive for (or knowledge regarding) that removal. *See Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999) (§ 1252(g) bars courts from hearing claim even where the alien asserts that the decision to initiate proceedings was based on an unconstitutional, discriminatory purpose). Likewise, Arar's allegations that Thompson "conspir[ed] with" others when exercising his authority to "remove[]" Arar to Syria, A.24; p. 8, *supra*, does not alter the fact that Arar's claims "arise from" Thompson's exercise of his removal authority; it is instead just another effort to imply that the removal was wrongful.

Indeed, as the United States (Br. 40-41) and defendant Ashcroft (Br. 20-25) explain, those allegations merely reinforce the conclusion that this case, at bottom, seeks to challenge the removal order outside the mechanism created by the immigration laws. Arar in essence claims that Thompson signed the removal order despite knowing (or intending) that Arar would be

tortured in Syria. But the INS Regional Director's determination of inadmissibility includes an express finding that Arar's removal to Syria would not violate the Convention Against Torture ("CAT")—an official finding that it was not more likely than not that Arar would be tortured if sent to Syria. A.33, A.86. Arar's claim that Thompson in fact knew and intended that Arar would be tortured in Syria is just another way of saying that the CAT determination was wrong. A.33.

Equally unpersuasive is the assertion that Arar mounts a "collateral" challenge to "a ***policy*** under which he was sent to a country, either in spite of, or perhaps because of, the likelihood that he would be tortured upon arrival." SPA.40 (emphasis added). Arar disclaimed any "policy" challenge, clarifying that he challenged only the way he was treated in a single incident.[3] Indeed, Arar seeks only ***damages*** relief from Thompson. A.22-A.24. Arar cannot demand damages based on an abstract disagreement with a policy. His damages claims against Thompson arise—

[3] Arar stated that he "is not asking the Court to review any broad foreign policy decisions," but rather is "'narrowly focused on the lawfulness of the defendants' conduct in a single incident,' namely defendants' decision to torture Plaintiff Arar." Pl. Opp. to Mot. to Dismiss at 69 (Dkt. #60) (quoting *Linder v. Protocarrero,* 963 F.2d 332, 337 (11th Cir. 1992)).

if at all—from his claim that Thompson removed Arar to Syria. No quantity of verbal gymnastics can change that.[4]

II. THE DISTRICT COURT CORRECTLY DISMISSED THE *BIVENS* CLAIMS

Even apart from the express preclusion provisions of the INA and IIRIRA, Arar's *Bivens* claims (Counts II, III, and IV) were properly dismissed. The implied right of action recognized in *Bivens* has never been, and cannot be, extended to this new context. The complaint does not establish a violation of Arar's constitutional rights. And it certainly does not establish the violation of clearly established rights necessary to overcome Thompson's right to qualified immunity.

A. The District Court Properly Declined To Extend *Bivens* To Challenges By Unadmitted Aliens That Implicate Foreign Affairs And National Security

1. For more than 20 years, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

[4] Tossing in the word "collateral" likewise is insufficient to overcome the statutory bar. Interpreting the words "arising under" broadly, the Supreme Court has rejected the collateral-noncollateral distinction when the relevant statute, like the INA, precludes jurisdiction for all claims "arising under" an identified statute. *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13-14 (2000). This Court likewise has broadly construed the phrases "arising from" and "arising under" in the arbitration context. *See, e.g., Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001).

Indeed, in the more than 35 years since *Bivens* was decided, the Supreme Court "extended its holding" in *Bivens* beyond its origins in search-and-seizure cases "only twice." *Id.* at 70; *see, e.g.*, *Davis v. Passman*, 442 U.S. 228 (1979) (equal-protection component of Fifth Amendment Due Process Clause); *Carlson v. Greene*, 446 U.S. 14 (1980) (Eighth Amendment cruel-and-unusual-punishment claims).

Indeed, since 1980, the Supreme Court has rejected every proposed extension, declining to extend *Bivens* to First Amendment violations arising in the federal employment context, *Bush v. Lucas*, 462 U.S. 367 (1983); to claims against superior officers who allegedly injure enlisted personnel through unconstitutional conduct, *Chappell v. Wallace*, 462 U.S. 296 (1983); to military personnel if "the injury arises out of activity 'incident to service,'" *United States v. Stanley*, 483 U.S. 669, 681 (1987); to due-process violations in the Social Security context, *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); to suits against instrumentalities created by federal law, *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994); and to suits against corporations, *Malesko*, 534 U.S. at 68.

The Supreme Court's "reluctance to extend *Bivens* is not without good reason." *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006). Because the cause of action under *Bivens* "is implied" by courts "without any express

congressional authority whatsoever," it is "hardly the preferred course." *Id.* Rather, the "decision to create a private right of action is" generally "better left to legislative judgment," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004), because "Congress is in a better position to decide whether or not the public interest would be served" by imposing a "new substantive legal liability," *Chilicky*, 487 U.S. at 426-27. As this Court cautioned, "[b]ecause a *Bivens* action is a judicially created remedy," courts must "proceed cautiously in extending such implied relief." *Dotson v. Griesa*, 398 F.3d 156, 166 (2d Cir. 2005).[5]

2. One pre-condition to any expansion of *Bivens* is a finding that there are no "'special factors counseling hesitation.'" *Dotson*, 398 F.3d at 166 (quoting *Bivens*, 403 U.S. at 396-97). Here, special factors preclude the dramatic expansion of *Bivens* proposed by Arar. As the district court explained, this case—a suit by an unadmitted alien asserting that he was identified as a terrorist, removed to a foreign country, and subjected to coercive interrogation by foreign officials there—"raises crucial national-security and foreign policy considerations" that are entrusted almost

[5] Arar's assertions that *Bivens* relief is "presumptively available" (Arar Br. 37), and that the Supreme Court has found that "'special factors'" bar the *Bivens* remedy "in only limited circumstances" (Arar Br. 42 n.19), are exactly backwards. There is a strong presumption *against* extending *Bivens* to new contexts—as an unbroken line of Supreme Court precedent makes clear.

exclusively to the control of the political branches. SPA.71-SPA.72 (quoting *Doherty*, 808 F.2d at 943).

a. The foreign-affairs implications of this suit by themselves are sufficient to preclude expanding *Bivens* here. The Constitution commits "the entire control of" foreign affairs to the political branches. *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893). As a result, the "'propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)); *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 71 (2d Cir. 2005) (noting the "historic deference due to the Executive" in conducting "foreign relations"); *In re Austrian, German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir. 2001) (it is "beyond the authority of the courts to interfere with the Executive Branch's foreign policy judgments").

Arar's complaint draws the exercise of that foreign-affairs power directly into question, asserting that U.S. officials coordinated with foreign government officials to remove Arar to Syria where he would be detained and tortured. A.20. By its very terms, the complaint thus intrudes on "complicated multilateral negotiations." SPA.72. Any effort to effect discovery on those alleged international interactions and prove them—much

less condemn them—would invade the political branches' exclusive control over foreign relations. Even ordinary "removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers.'" *Jama*, 543 U.S. at 348 (quoting *Mathews*, 426 U.S. at 81).

Even in the area of government employment (hardly the political branches' exclusive domain), the Supreme Court has declined to extend *Bivens* because the political branches are "far more competent than the Judiciary to carry out the necessary 'balancing [of] governmental efficiency and the rights of employees.'" *Chilicky*, 487 U.S. at 423 (quoting *Lucas*, 462 U.S. at 398). The Supreme Court has thus held that it should be up to the political branches rather than the courts "to 'decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights.'" *Id.* (quoting *Lucas*, 462 U.S. at 390).

A fortiori, similar concerns preclude judicial establishment of a cause of action for unadmitted aliens asserting claims that touch on the political branches' unique and exclusive authority over foreign affairs. As the D.C. Circuit has explained, "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy

officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

b. Arar's claims, by their terms, also implicate national security. As the district court observed, this case concerns one particular set of "'complicated multilateral negotiations'"—those "'concerning efforts to halt international terrorism.'" SPA.72 (quoting *Doherty*, 808 F.2d at 943). Extending *Bivens* to this new context "'could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.'" SPA.72-SPA.73 (quoting *Verdugo-Urquidez*, 494 U.S. at 273-74).

In *Chappell*, the Supreme Court found that "special factors" precluded expanding *Bivens* to claims arising from military service, emphasizing "[t]he special nature of military life [and] the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel." 462 U.S. at 304. Those needs, the Court stated, "would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* Likewise here, a judicially implied cause of action against high-ranking Justice Department officials engaged in the daily battle to prevent terrorism—and

charged with immigration decisions affecting the security of our borders—could fatally undermine the special "need for unhesitating and decisive action." *Id.*; *see also Beattie v. Boeing Co.*, 43 F.3d 559, 563 (10th Cir. 1994) ("predominant issue of national security clearances" is "special factor counseling against recognition of a *Bivens* claim").

Indeed, in this case, the government has asserted the state-secrets privilege. *See* A.126-A.138. The government's assertion of that privilege underscores the sensitivity of this area and is itself a "special factor" that precludes expanding *Bivens*. Absent guidance from the political branches, the judiciary should not create a cause of action that often will risk exposing sensitive, confidential, and secret information—concerning relations with foreign governments and national-security materials—to public view. *Cf. Tenet v. Doe*, 544 U.S. 1, 8 (2005) ("[P]ublic policy forbids the maintenance of ***any suit*** . . . which would inevitably lead to the disclosure of matters which the law itself regards as confidential.") (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)). Without access to that information, moreover, federal officials and former officials will find it difficult if not impossible to mount their defense and justify their conduct. Because Arar's proposed cause of action requires a careful balance between the rights of the

parties and protecting sensitive national-security and foreign-relations information, Congress—not the courts—must strike that balance.[6]

3. Arar's primary response is that "the Supreme Court regularly reviews statutory, constitutional, and international law challenges in wartime." Arar Br. 38. But the issue is not whether judicial review should be available, or whether the judiciary is competent to conduct review under standards established by Congress. It is instead whether the judiciary, without any express grant of authority from Congress, should ***on its own create*** a damages remedy in this area.[7] As the district court correctly recognized, the *Bivens* inquiry "involve[s] '. . . ***who should decide*** whether such a remedy should be provided.'" SPA.67 (quoting *Lucas*, 462 U.S. at 380) (emphasis added). The answer is that Congress must decide. Courts

[6] In asking the Court to take judicial notice of a report concerning a Canadian commission's inquiry into the Canadian government's role in Arar's removal to and detention in Syria, Arar implies that the ***Canadian*** government's publication of its findings casts doubt on the ***United States'*** assertion of national-security and state-secrets claims. *See*, *e.g.*, Arar Br. 41-42; Arar Reply Memo. in Support of Judicial Notice at 2-5. Any such suggestion is meritless. Canada does not necessarily have the United States' national-security information, and the United States perhaps for that reason declined to participate in the Canadian inquiry. More important, the fact that suits like this one often brush against national-security and state-secrets issues is reason enough for the judiciary to leave the creation of a damages action, and any necessary balancing of interests, to the political branches.

[7] In a footnote, Arar cites cases that purportedly "awarded damages on claims arising out of executive actions during wartime." Arar Br. 39 n.18. None of these cases involve the judicially created *Bivens* remedy.

should decline to "create a new substantive legal liability without legislative aid" in any situation where "Congress is in a better position to decide whether or not the public interest would be served by creating it." *Lucas*, 462 U.S. at 390. Given the foreign-affairs and national-security implications raised by suits like this one, that is clearly the case here.

Arar errs in asserting (Arar Br. 40) that *Mitchell v. Forsyth*, 472 U.S. 511 (1985), is to the contrary. That case addressed whether the Attorney General is entitled to ***absolute immunity*** from ***all*** civil liability for actions in furtherance of national security. The issue here is not absolute immunity. It is whether the ***judiciary should create*** a damages remedy that Congress has not provided, where national-security and foreign-policy concerns would be implicated. Likewise, the potential availability of qualified immunity (Arar Br. 42) hardly supports extending *Bivens* here. Qualified immunity is available "across the board" regardless of context, *Saucier v. Katz*, 533 U.S. 194, 203 (2001), but the Supreme Court has consistently refused to extend *Bivens* to any new context for 25 years. Besides, qualified immunity does not address the intrusion into the other branches' foreign-affairs or national-security powers. For that reason, the D.C. Circuit has held that, notwithstanding qualified immunity, "foreign affairs implications of suits such as this cannot be ignored—their ability to produce what the Supreme

Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza*, 770 F.2d at 209.

4. Even apart from national-security and foreign-policy implications, there is another "special factor" that precludes expanding *Bivens* here—the fact that Congress comprehensively regulated immigration review. *See Chilicky*, 487 U.S. at 423. Congress has established a complex regulatory scheme for the admission and removal of aliens that balances competing policy considerations. That regime creates an exclusive mechanism for challenging removal decisions, and expressly bars the assertion of other actions that, like this one, "aris[e] from" such decisions. *See* pp. 16-21, *supra*; U.S. Br. 37-43; Ashcroft Br. 30-35. Those mechanisms reflect Congress's deliberate decision to "drastically reduce" district-court review "with the intent of 'protecting the Executive's discretion from the courts.'" *Van Dinh*, 197 F.3d at 433 (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)); *Foster*, 243 F.3d at 213. Critically, in so doing, Congress "deliberately refused to provide a private cause of action for monetary damages within any provision of the INA." SPA.70.

Even if the INA's and IIRIRA's express statutory bars did not by their terms preclude this action—and they do, *see* pp. 16-21, *supra*—the complexity and comprehensiveness of the statutory regime precludes *Bivens'* expansion here. The federal courts ought not create a cause of action for damages that Congress "deliberately refused to provide." Nor should they expand jurisdiction that Congress intentionally "reduce[d]." That is particularly true in a case touching on foreign affairs, national security, and immigration policy. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Galvan v. Press*, 347 U.S. 522, 531 (1954). For those reasons, the Fifth and Tenth Circuits have declined to extend *Bivens* to the immigration context. *Van Dinh*, 197 F.3d at 434; *Foster*, 243 F.3d at 214-15. The district court did not err in doing likewise.

Arar's contention that the INA and IIRIRA can no longer provide him a remedy, Arar Br. 44-45, overlooks statutory relief that Arar never sought. For example, Arar did not seek review under the immigration laws; nor did he seek habeas corpus relief.[8] More important, the "absence of statutory

[8] As the United States has noted, Arar's attorney could have filed a petition for review under the immigration statutes at *any* time, including *after* Arar's removal. U.S. Br. 8-9. Additionally, she could have filed a

relief . . . does not by any means necessarily imply that courts should award money damages . . . ." *Chilicky*, 478 U.S. at 422-23. To the contrary, "the concept of 'special factors counseling hesitation'" necessarily "include[s] an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Dotson*, 398 F.3d at 167 (quoting *Chilicky*, 487 U.S. at 423). "[I]t 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." *Id.* at 166-67 (emphasis added).

This Court thus has repeatedly refused to imply *Bivens* remedies to supplement comprehensive statutory schemes. *See Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106 (2d Cir. 2005); *Sugrue v. Derwinski*, 26 F.3d 8 (2d Cir. 1994). Indeed, in *Dotson*, this Court found that the comprehensiveness of the Civil Service Reform Act ("CSRA") precluded a *Bivens* remedy for certain employees, even though the CSRA itself provided them no relief, because "Congress's omission . . . was not inadvertent." 398 F.3d at 168-69. Likewise here, Congress's omission of a damages remedy, and express contraction of district-court jurisdiction, were anything but inadvertent. *See* p. 30, *supra*.

---

petition for habeas review after meeting with Arar on October 5, 2002, and before his removal on October 8, 2002. U.S. Reply Mem. 9 (Dkt. #61).

B. Arar's *Bivens* Claims Relating To Detention And Mistreatment Abroad (Counts II and III) Plead Neither A Due-Process Violation Nor A Violation Of Clearly Established Rights

The Supreme Court has instructed that courts must address constitutional and qualified-immunity claims in two steps. *Saucier*, 533 U.S. at 201. First, the court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* Second, if a violation has been alleged, a court must decide whether the officer is entitled to qualified immunity. Government officials performing discretionary functions are entitled to such immunity so long as "their conduct does not violate 'clearly established' statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982). In determining whether the law was clearly established, the "dispositive inquiry" is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Arar's claims fail under both steps.[9]

[9] Although the district court did not reach the issue of immunity, "judicial economy warrants . . . doing so here to prevent unnecessary delay in deciding whether [Thompson] is entitled to qualified immunity." *Loria v. Gorman*, 306 F.3d 1271, 1283 n.5 (2d Cir. 2002). The Supreme Court has "repeatedly" warned that, because qualified immunity is an immunity from suit—not just liability—it must be addressed "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citing cases). Moreover, this Court is "free to affirm" dismissal "on any grounds supported in the record, even if it is not one on which the trial court relied." *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006).

1. Arar's Claims Of Detention And Mistreatment Abroad Do Not State A Due-Process Violation

To the extent that Count II and Count III of Arar's complaint assert *Bivens* claims relating to Arar's alleged detention and torture in Syria, they fail to state a claim. The Due Process Clause of the Fifth Amendment simply does not apply to aliens extraterritorially. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). As the Supreme Court has explained:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment [by the Constitution's Framers]. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

The Supreme Court re-affirmed that view in *Verdugo-Urquidez*. Quoting *Eisentrager*, the Supreme Court explained that its "rejection [in *Eisentrager*] of the extraterritorial application of the Fifth Amendment was emphatic." 494 U.S. at 269. The D.C. Circuit has thus recognized that "*Verdugo-Urquidez* controls" where, as here, the "conduct at issue—. . . torture [of a foreign national]—occurred outside the United States." *Harbury v. Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000), *rev'd in part on other grounds*, 536 U.S. 403 (2002).

a. Arar tries to avoid the force of *Verdugo-Urquidez* by construing Justice Kennedy's concurring opinion to require analysis of whether extraterritorial application would be "'impracticable and anomalous.'" Arar Br. 36. But Justice Kennedy did not establish impracticality as a pre-condition to refusing extraterritorial application. He simply added that justification to those asserted by the majority opinion. *See* 494 U.S. at 278 ("[I]n addition to the other persuasive justifications stated by the Court . . . .").

Nor does *Rasul v. Bush*, 542 U.S. 466 (2004), counsel otherwise. Arar Br. 36. In *Rasul*, the Supreme Court considered "whether the ***habeas statute*** confers a right to judicial review of the legality of ***executive*** detention of aliens ***in a territory over which the United States exercises plenary and exclusive jurisdiction***, but not 'ultimate sovereignty.'" *Id.* at 475 (emphasis added). The Court found it had jurisdiction in *Rasul* because the United States exercised "complete jurisdiction and control" over the Guantanamo Naval Base in Cuba where the detainees were held. *Id.* at 471, 481. In contrast, this case does not concern the scope of the habeas statute; it concerns the scope of the Fifth Amendment. Moreover, Arar was not held in Syria by the Executive; he was detained there by Syrian officials. Most

critical of all, Arar was held in foreign territory not subject to U.S. control. *Rasul* thus has no bearing here.

Nor does it matter that, according to Arar (Arar Br. 29-30, 36-37), individuals in the United States had a role in the foreign conduct. The D.C. Circuit rejected similar claims in *Harbury*. The plaintiff there alleged that U.S. officials had violated her alien husband's Fifth Amendment rights by ordering, conspiring in, and participating in—through Guatemalan military officers paid by the CIA—his torture and execution in Guatemala. The court held that the plaintiff did not allege a valid claim because the Fifth Amendment does not apply extraterritorially. 233 F.3d at 604 (citing *Verdugo-Urquidez*, 494 U.S. at 269). The D.C. Circuit recognized that the challenged conduct was extraterritorial even though the U.S. defendants were in the United States when they allegedly conspired to have the plaintiff's husband tortured abroad. *Id.* at 603. The dispositive issue was the "location of the primary constitutionally significant conduct at issue . . . —. . . the torture." Here, as in *Harbury*, the torture and arbitrary detention occurred abroad. *Id.* Accordingly, here, as in *Harbury*, the Fifth Amendment does not reach the conduct.

In *Verdugo-Urquidez*, the Supreme Court similarly held that the Fourth Amendment did not apply to the search of the property of a

nonresident alien in Mexico—even though the search was performed at the behest of a U.S. official in the United States. *See* 494 U.S. at 262; *see also Harbury*, 233 F.3d at 603 (warrantless search in *Verdugo-Urquidez* was "conceived, planned, and ordered in the United States," and carried out abroad for "the express purpose of obtaining evidence for use in a United States trial"). Likewise here, the Fifth Amendment does not apply to mistreatment of an alien by Syrians in Syria.[10]

Arar's contrary view would all but destroy any territorial limits on the Constitution's scope. Because it will "virtually always be possible" to trace claimed injuries in a foreign country back to the United States if U.S. actors are involved, the Supreme Court has cautioned in another context that allowing claims for injury abroad, based solely on alleged links to the conduct of U.S. officials in the United States, would "swallow . . . whole" centuries of jurisprudence. *Sosa*, 542 at 702-03.

b. Arar attempts to circumvent those rules by shifting focus to his removal. He urges that, under the "state-created danger doctrine," his claim "arose in the United States" when the U.S. government made the decision to

[10] Arar is wrong that *United States v. Maturo*, 982 F.2d 57 (2d Cir. 1992), counsels otherwise. *See* Arar Br. 36-37. *Maturo* did not address, much less extend, the constitutional rights of unadmitted aliens. In any event, to the extent *Maturo* suggests that the Fourth Amendment applies abroad, it cannot be squared with *Verdugo-Urquidez*'s contrary holding. *See* p. 34, *supra*.

remove him—*i.e.*, that the government assumed and breached a duty not to send Arar where he might be harmed. Arar Br. 32-35. (Arar thus tacitly concedes that his claims ***do*** "aris[e] from" the decision to remove him Syria. *See* pp. 16-21, *supra*.) But this Court rejected that sort of "state-created danger" theory in *Linnas v. INS*, 790 F.2d 1024 (2d Cir. 1986). In that case, the plaintiff contended that deporting him to the Soviet Union, where he had been tried and sentenced to death *in absentia*, would violate his due-process rights. This Court rejected that claim because its jurisdiction "obviously does not extend beyond the borders of the United States. It is well established that the federal judiciary may not require that persons removed from the United States be accorded constitutional due process." *Id.* at 1031.

The First Circuit likewise has rejected the state-created-danger theory in the immigration context—even where the alien claimed he would be tortured. The First Circuit held the "state-created danger theory fails because an alien has no constitutional substantive due-process right not to be removed from the United States, nor a right not to be removed from the United States to a particular place." *Enwonwu v. Gonzales*, 438 F.3d 22, 29 (1st Cir. 2006). The state-created-danger theory, the First Circuit warned, represents an "impermissible effort to shift to the judiciary the power" over immigration that the "Constitution has assigned to the political branches."

Id. at 30-31. Arar's attempt to distinguish *Enwonwu* (Arar Br. 33 n.13) on its facts is unavailing. The First Circuit squarely held that the state-created-danger "theory itself simply is not viable; it does not state a claim on ***any*** facts." *Enwonwu*, 438 F.3d at 30 (emphasis added).

The Third Circuit likewise held that "the state-created danger exception has no place in our immigration jurisprudence." *Kamara v. Att'y Gen.*, 420 F.3d 202, 217 (3d Cir. 2005). In fact, "no court of appeals . . . has recognized the constitutional validity of the state-created danger theory in the context of an immigration case." *Id.*[11]

2. Even If The Fifth Amendment Applied Abroad, Thompson Would Be Entitled To Qualified Immunity

For similar reasons, Thompson is entitled to qualified immunity. The fact that the alleged conduct violates the Constitution is not sufficient to defeat immunity. Instead, the right allegedly violated must have been so clearly established by pre-existing law that, "on an objective basis, it is obvious that ***no reasonably competent officer***" in the defendant's circumstances "would have concluded" that the conduct was lawful. *Malley*

[11] None of the cases from this Circuit cited by Arar or his *amici* has anything to do with the rights of unadmitted aliens under the Constitution, removal to a foreign country, or the immigration powers. For example, *Peña v. DePrisco*, 432 F.3d 98 (2d Cir. 2005), was a suit against domestic police officers, and *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), was an action against a municipality and its police officers.

v. Briggs, 475 U.S. 335, 341 (1986) (emphasis added). If "officers of reasonable competence could disagree . . . immunity should be recognized." *Id.*

Under that standard, the "presumption in favor of finding qualified immunity is necessarily high." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 101-02 (2d Cir. 2003). It is not enough that "the relevant 'legal rule'" or "right" is "clearly established" at a high level of generality. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Instead, the "contours of ***the right*** must be sufficiently clear that a reasonable official would understand that ***what he is doing*** violates ***that right***." *Id.* at 640 (emphasis added). Unless the violation is so clear that "all but the plainly incompetent" would comprehend its illegality, immunity must be recognized. *Malley*, 475 U.S. at 343; *see also Williams v. Treen*, 671 F.2d 892, 896 (5th Cir. 1982) (qualified immunity overcome only if officer's "actions contravene 'settled indisputable' law") (quoting *Bogard v. Cook*, 586 F.2d 399, 411 (5th Cir. 1978)).

Arar's allegations do not come close to meeting that standard. Here, virtually any reasonable officer, at the time Thompson acted, would have thought that the Due Process Clause does ***not*** apply to aliens held by foreign governments abroad or to the removal of unadmitted aliens to foreign

countries. The Supreme Court's decisions in *Eisentrager* and *Verdugo-Urquidez* had "emphatically" declared that the Fifth Amendment does not apply abroad. This Court had rejected efforts to apply a "state-created danger" theory to removal decisions—as have the First and Third Circuits since. Given that, it surely cannot be said that, "on an objective basis, it is obvious that ***no reasonably competent officer*** . . . would have concluded" that Thompson's execution of the removal order was lawful when it occurred. *Malley*, 475 U.S. at 341 (emphasis added). Nor can it be said that the violation is so clear that only the "incompetent" would think the conduct lawful. *Id.* at 343; *Hunter*, 502 U.S. at 229.

Arar and his *amici* miss the point when they argue that a generalized right to be free from torture is evident in the Constitution. *See*, *e.g.*, Br. Am. Const'l Law Scholars 10-21. For purposes of qualified immunity, the "inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Thus, qualified immunity cannot be denied in a due-process case simply because "the right to due process of law is quite clearly established by the Due Process Clause." *Anderson*, 483 U.S. at 639. Instead, the law must have been so clear that "no reasonably competent officer" would have thought "***his conduct*** was unlawful ***in the situation he confronted***." *Malley*,

475 U.S. at 341; *Saucier*, 533 U.S. at 202 (emphasis added). Here, at the time Thompson acted, there was no clearly established law that any Fifth Amendment substantive due-process right applied abroad or precluded the removal of unadmitted aliens to particular locations.

Arar's reliance on *Rasul* only underscores that conclusion. Even apart from *Rasul*'s inapplicability (*see* p. 35, *supra*), official conduct must be "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639; *Brosseau v. Hagen*, 543 U.S. 194, 198 (2004); *Poe v. Leonard*, 282 F.3d 123, 132 (2d Cir. 2002) (qualified immunity must be "evaluated in the context of the legal rules that were 'clearly established' at the time"). *Rasul*, however, was decided after the conduct at issue here; it thus cannot show that the conduct was clearly unlawful before *Rasul* was issued. In any event, at the time of Thompson's alleged conduct, *Eisentrager*, *Verdugo-Urquidez*, and Circuit law all but precluded due-process claims by unadmitted aliens arising from their treatment by foreign nations outside the United States, even following removal.

"The very purpose of qualified immunity is to protect officials when their jobs require them to make difficult on-the-job decisions." *Zieper v. Metzinger*, 474 F.3d 60, 71 (2d Cir. 2007). Civil suits for damages "can

entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638. Confronted with a previously unanticipated terrorist threat, government officials in 2001 and 2002 were making "difficult on-the-job decisions" to maintain the security of the Nation as a whole. Then, no less than when the Supreme Court decided *Harlow*, the consequences of officials "err[ing] always on the side of caution" because they fear being sued, *Davis v. Scherer*, 468 U.S. 183, 196 (1984), were too grave to tolerate. As a result, officials are entitled to immunity unless no reasonable officer could have thought the challenged conduct lawful under then-existing law. Qualified immunity thus must be recognized here.

C. Arar's *Bivens* Claim Relating To Domestic Detention (Count IV) Pleads Neither A Due-Process Violation Nor A Violation Of Clearly Established Rights

Arar's allegations arising from his domestic detention neither state a due-process claim nor overcome Thompson's qualified immunity.

1. Arar Fails To Allege Personal Involvement By Thompson

If there is an immutable principle of *Bivens* and constitutional liability, it is that an official may not be held liable for damages in his individual capacity absent personal involvement in the alleged conduct.

Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) (per curiam). Liability may not be imposed on the basis of a "mere linkage" in the command chain or under the doctrine of *respondeat superior*. *Id.* at 435. The official must be personally involved, and that involvement must be set forth in the complaint. *Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir. 1987).

Arar has not alleged that Thompson had ***any*** personal awareness of or involvement in his domestic detention. The district court expressly so found, *see* SPA.84-SPA.85, and Arar does not contend otherwise. Instead, Arar asserts in perfunctory fashion—in a footnote—that he met an abstract pleading standard. Arar Br. at 46 n.22. But Arar offers no meaningful explanation of ***how*** he met that standard. And he asserts no facts with respect to Thompson—or any other defendant—to support his assertion. In any event, "an argument mentioned only in a footnote" is not "adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). That alone is fatal to Count IV.

Arar also ignores the fact that, to ensure that qualified immunity may be resolved early—preserving the officer's immunity from ***suit***—district courts have discretion to "insist that the plaintiff put forward specific, nonconclusory allegations" sufficient to permit an assessment of immunity issues. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). The district court

did exactly that here, requiring Arar to plead sufficient facts to defeat qualified immunity and show personal involvement. SPA.83-SPA.85. Arar does not argue that the district court abused its discretion in requiring him to replead Count IV with that additional information. Nor does he claim he made any effort to replead. Having disputed in the body of his opening brief neither the district court's discretion to require greater detail nor his own failure to provide that detail, Arar has waived any challenge to dismissal of Count IV.[12]

2. Arar's Claims Relating To Domestic Detention Fail To State A Due-Process Violation

In any event, Arar's treatment in the United States did not exceed constitutional boundaries. The "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas*, 533 U.S. at 693 (emphasis added); *Mezei*, 345 U.S. at 212. Foreign nationals (like Arar) who have not been admitted "have ***little or no*** constitutional due process protection" "[o]ther than protection against gross physical abuse." *Correa*, 901 F.2d at 1171 n.5

[12] To the extent Arar raises a claim of denial of counsel, that suffers from similar defects. Arar nowhere alleges that Thompson had anything to do with such a denial. And the claim lacks merit for the reasons set forth in the briefs of defendants Mueller (Br. 44-46) and Ashcroft (Br. 59-59), which Thompson joins.

(citing *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987)) (emphasis added).[13]

In *Lynch*, the Fifth Circuit considered the due-process claims of 16 aliens held for several days at the port of New Orleans in cells with no beds, mattresses, or pillows, and who were doused with water hoses and threatened. 810 F.2d at 1367-68. The Fifth Circuit held that only a showing of severe physical injury can satisfy the stringent "gross physical abuse" standard. *Id.* at 1375. The court found allegations of verbal threats and forced participation in menial tasks "patently inadequate to state a claim of constitutional dimension." *Id.* at 1376; *see also Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990) (allegations of "insufficient nourishment" and "inadequate medical care" do not constitute "gross physical abuse").[14]

[13] The district court misunderstood immigration law when it suggested that *Mezei* and *Correa* "are of questionable relevance" because Arar was "not attempting to effect entry to the United States" but was "only passing through" (SPA.79). By operation of law, Arar was deemed an applicant for admission when he presented himself at the border. *See* 8 U.S.C. § 1225(a)(1); 8 C.F.R. § 1.1(q). In all events, "passers by" not seeking entry would appear to have even weaker claims to substantive due-process protections.

[14] The cases Arar cites from other jurisdictions do not help him. Both *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999) and *Sierra v. INS*, 258 F.3d 1213, 1218 n.3 (10th Cir. 2001), merely state that unadmitted aliens enjoy *some* level of substantive due-process protection. Neither case imposed liability for a due-process violation.

Those cases retain their vitality following *Zadvydas*, which took pains to explain that unadmitted aliens—like Arar—are not entitled to the same substantive due-process protections as persons who gain entry (lawfully or unlawfully) into the United States. 533 U.S. at 693. *Zadvydas* did not disturb *Mezei*'s holding that an alien "stopped at the border" has a status that "deprives him of any statutory or constitutional right." 345 U.S. at 215. To the contrary, it re-affirmed that Mezei's detention on Ellis Island "did not count as entry into the United States . . . [and] ***made all the difference***" in the constitutional analysis. *Zadvydas*, 533 U.S. at 693 (emphasis added).[15]

Notwithstanding Arar's contrary protestations (Arar Br. 49-50), his complaint does not allege the "gross physical abuse" required "to state a claim of constitutional dimension." *Lynch*, 810 F.2d at 1375-76. Arar does not claim that anyone beat him in domestic detention. He instead asserts that he was detained for 13 days, held in solitary confinement for a period, chained and shackled at times, strip-searched, deprived of sleep for one night (and food for the first 26 hours), interrogated in a "coercive manner" (using foul language), and denied access to his family, counsel, and consular representative. *See* p. 7, *supra*. None of these allegations involve physical

[15] *Zadvydas*, moreover, indicated that "terrorism or other special circumstances" might well argue for "heightened deference to the judgment of the political branches with respect to matters of national security," even when dealing with ***resident*** aliens. 533 U.S. at 696.

injury, much less the severe injury required in *Lynch*. They thus cannot satisfy the "gross physical abuse" standard.

Arar asserts that his due-process claims are "analogous to conditions-claims by pre-trial detainees," and therefore should be analyzed under the "unduly harsh and punitive" standard articulated in *Bell v. Wolfish*, 441 U.S. 520 (1979). Arar Br. 46-49. But neither this Court nor any other has proposed such a radical departure from the well-established standards in *Correa*, *Mezei*, and *Lynch*. For that reason alone, Arar's proposal should be rejected.[16]

[16] In a footnote, Arar attempts to argue that his status as an unadmitted foreign national does not deprive him of constitutional protection "outside the context of procedural-due-process challenges to exclusion proceedings." Arar Br. 31 n.12. In the first place, this Court foreclosed that argument in *Correa*, when it made clear that unadmitted aliens like Arar "have little or no constitutional due process protection" other than "protection against gross physical abuse." 901 F.2d at 1171 n.5. But even under Arar's narrow view, his claims still fail because he ***is*** challenging his "exclusion proceedings," *i.e.*, the immigration decisions that resulted in his removal to Syria, as well as the processes that allegedly denied him counsel. *See* pp. 16-20, *supra*. For this reason, the cases Arar cites do not help him. *See, e.g.*, *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006) (challenging use of excessive force, not immigration decisions). And in all events, Thompson would be entitled to qualified immunity because it surely was not clearly established at the time Thompson signed Arar's removal order that unadmitted aliens were entitled to the full panoply of substantive due process protections—indeed, quite the contrary. For this reason, Arar's reliance on *Wong v. United States*, 373 F.3d 952, 976 (9th Cir. 2004), actually undercuts his argument, because there the Ninth Circuit recognized an unadmitted alien's equal-protection rights but held that INS officials were

3. Thompson Is Entitled To Qualified Immunity

Finally, Thompson is entitled to qualified immunity. At the time Thompson allegedly acted, the governing law in this Circuit was clear: "Other than protection against gross physical abuse," an unadmitted alien such as Arar had "little or no constitutional due process protection." *Correa*, 901 F.2d at 1171 n.5. The Fifth Circuit's decision in *Lynch* made clear that even treatment more aggravated than Arar encountered in domestic detention does not violate due process. 810 F.2d at 1376. It would have been entirely reasonable, under then-existing law, to think Arar's treatment in domestic detention perfectly lawful.

In finding that Arar's allegations were "borderline," SPA.81, the district court effectively confirmed as much. Qualified immunity protects conduct that falls within the often "hazy border between" lawful and unlawful behavior. *Saucier*, 533 U.S. at 206. If a district court thought the conduct potentially lawful, or borderline, *a fortiori* a reasonable officer could have thought it lawful as well. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999).

---

entitled to qualified immunity because of the novelty of the court's ruling. Under *Wong*, Thompson would be entitled to qualified immunity even if Arar had properly alleged a constitutional violation, which he has not.

III. THE DISTRICT COURT CORRECTLY HELD THAT ARAR FAILED TO STATE A CLAIM UNDER THE TVPA

The district court also correctly concluded that Arar could not proceed under the TVPA. Thompson acted under color of U.S. law, not under the law of a "foreign nation." Arar was not subjected to torture while in Thompson's "custody or physical control." Arar's TVPA claim depends entirely on a theory of co-conspirator and aider-and-abettor liability that cannot be read into the TVPA.[17] And Thompson is entitled to qualified immunity.

A. The District Court Correctly Held That Thompson Acted Under Color Of U.S. Rather Than Syrian Law

The TVPA creates a damages remedy against anyone "who, under actual or apparent authority, ***or color of law, of any foreign nation*** . . . subjects an individual to torture." 28 U.S.C. § 1350, note § 2(a)(1) (emphasis added). Here, the requirement that the defendant's conduct occur "under color of" the "law . . . of [a] foreign nation" has not been met. The complaint alleges that, when Thompson "signed an order on or about October 8, 2002, removing Arar to Syria," he acted as the "Deputy Attorney General, in his capacity as Acting Attorney General"—not as an agent of a foreign power. A.24, A.3l. The complaint further alleges that Thompson

[17] On this issue, Thompson will not submit separate briefing but instead joins the arguments submitted by defendant Mueller (Br. 20-32).

and the other defendants "act[ed] under color of law and their authority as federal officers." A.39, A.40-A.41. Thus, by Arar's own admission, the source of Thompson's authority was the Constitution and laws of the United States,[18] not the law of "any foreign nation."

1. Court after court has reached the same conclusion: Federal officials pursuing federal policy act under color of U.S., not foreign, law. For example, in *Harbury v. Hayden*, 444 F. Supp. 2d 19, 41-43 (D.D.C. 2006), *appeal docketed*, No. 06-5282 (D.C. Cir. Sept. 26, 2006), the district court held that CIA officers cooperating with the Guatemalan military were acting under color of U.S. law because they were acting "within the scope of their employment serving the United States" and "carrying out the policies and directives of the CIA." In *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005), the court similarly concluded that the U.S. national security adviser "was most assuredly acting pursuant to U.S. law . . . despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law."

The same is true here. Whatever else Arar may allege, Thompson derived his authority from, was acting pursuant to the law of, and in service

[18] *See, e.g.*, 8 U.S.C. §§ 5089(a), 1182(a)(3)(B)(i)(V), 1231(a)(1)(A), 1231(a)(2), 1231(b)(2)(C)(iv), 1231(b)(2)(D), 1225(c)(2)(B)(i)-(ii), 1231 n. (§ 2242(c)); *see also* 8 C.F.R. §§ 208.16(c,d), 208.17(a), 208.18(c,d).

of the interests of, the United States, not some foreign power. Not surprisingly, Arar does not—and cannot—point to "a single case that stands for the principle that a U.S. agent serving the interests of the United States and acting within his or her employment can be held liable pursuant to the TVPA." *Harbury*, 444 F. Supp. 2d at 42. The Supreme Court and this Court have long held that "a person acts under color of ***state law only*** when exercising power '***possessed by virtue of state law*** and made possible only because the wrongdoer is ***clothed with the authority of state law***.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (emphasis added); *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 744 (2d Cir. 2003). Here, Thompson's power was "possessed by virtue of ***federal*** law" and his actions were "made possible only because" he was "clothed with the authority of ***federal*** law." Thompson acted under color of U.S. law—not the law of "any foreign nation."

Arar's contrary claim—that the Deputy Attorney General of the United States acts "under color of" the law of a "foreign nation" when he signs an official U.S. government document ordering the removal of a nonresident alien, under authority of Acts of Congress codified in the U.S. Code, and in pursuit of U.S. policies—borders on the absurd. When President George H. W. Bush signed the TVPA into law, he confirmed that

understanding: "I do not believe it is the Congress' intent that [the TVPA] should apply to United States . . . law enforcement operations, ***which are always carried out under the authority of the United States***." Statement By Pres. George H. W. Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (emphasis added).

Arar's contrary view would also lead to absurd results:

> [It] would expose every federal employee working abroad daily with employees of foreign governments—*i.e.*, employees in intelligence agencies, military agencies, diplomatic and foreign aid agencies, and law enforcement agencies—to personal liability under the construct that they were somehow actually or apparently acting under foreign law.

Harbury, 444 F. Supp. 2d at 41. The notion that Thompson acted under color of the law of a "foreign nation" when removing Arar to Syria, pursuant to federal law, is a "far fetched proposition at best." *Id.* at 42.

2. Attempting to prove that "far fetched proposition," Arar invokes the TVPA's legislative history, which directs courts applying the TVPA's "under color of" requirement to look to cases applying the "under color of" requirement in 42 U.S.C. § 1983. *See* Arar Br. 22; *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Citing a handful of elderly cases that address whether ***federal*** officers acted under color of ***state*** or ***federal*** law—*e.g.*, *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969)—Arar then urges that federal officers such as Thompson can act "under color of" the

law of a ***foreign*** nation if that foreign nation "or its officials played a 'significant role in the result.'" Arar Br. 25. Arar's strained reasoning is not supported by the TVPA's history. It depends on an inapposite analogy. It relies on aged standards that the Supreme Court has disavowed. And it flies in the face of common sense.

a. The legislative history of the TVPA explains that the TVPA's "color of law" element requires plaintiffs to prove the requisite degree of "governmental involvement in the torture," because the statute "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87. Consistent with that understanding, this Court's decision in *Kadic* directs courts to look to "42 U.S.C. § 1983 i[n] construing . . . 'color of law.'" 70 F.3d at 245. But neither the House Report nor *Kadic* directs courts to do what Arar proposes—to look to § 1983 precedent to determine whether the law under which the defendant acted was "***of any foreign nation***" or instead the law of the United States.

There is good reason the TVPA's legislative history does not point to § 1983 precedent to distinguish domestic from foreign law. Although § 1983 cases have long addressed whether there is sufficient governmental involvement in otherwise private conduct to meet the "under color of"

requirement, *see, e.g.*, *Kadic*, 70 F.3d at 245 (addressing the sufficiency of governmental involvement in misconduct by self-proclaimed president of unrecognized Bosnian-Serb republic), § 1983 cases have ***never*** addressed whether domestic officials are acting under color of ***foreign*** or domestic law. And Arar cites ***no*** § 1983 decisions addressing that issue.

Instead, Arar relies almost exclusively on this Court's 1969 decision in *Kletschka*, which addresses whether ***federal*** officers were acting under ***state*** law. *See* Arar Br. 24-25. As the district court explained, any effort to analogize the dichotomy between state and federal law to the distinction between the laws of the United States and the laws of foreign nations "ultimately fails." SPA.35. It is not unthinkable that state officers and federal officers might act under authority of each other's laws. Both are "acting under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena." SPA.35. The law recognizes their reciprocal authority.[19] And the Framers long ago observed that "the national and State systems are to be regarded as ONE WHOLE." Federalist No. 82 (caps in original); *see also id.* ("[W]e consider the State governments

[19] State officers have "implicit authority to make federal arrests." *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983). Federal officers conversely are often given authority to arrest for state offenses. *See, e.g.*, Me. Rev. Stat. Ann. § 1502-A; Tex. Code Crim. Proc. Art. 2.122.

and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE.") (Caps in original).

But the United States and foreign nations are in no sense "ONE WHOLE." Nor are they bound together and governed by a single unified Constitution. Consequently, as the district court recognized, "it is by no means a simple matter to equate actions taken under the color of state law in the domestic front to conduct undertaken under color of foreign law." SPA.36. Simply put, it is improbable that Congress intended federal officers who pursue U.S. policy by executing federal statutes codified in the U.S. Code to be deemed to act under authority of "foreign law." To the contrary, since their authority derives from U.S. law, those officers act under color of U.S. law.

b. Even if the cases addressing whether federal officers may act under color of state law were relevant, they make it clear that Thompson and the other defendants acted under color of federal law. Even under § 1983, a federal official's act "pursuant to his or her federal authority . . . is not deemed" to have been "taken under color of state law," *Harbury*, 444 F. Supp. 2d at 42, unless the federal official was ***controlled by*** state officials such that his act can be said to have been ***their act***. *Kletschka* itself makes that clear: In *Kletschka*, this Court ruled for the federal defendants because

there was insufficient evidence that they acted "under the control or influence of the State defendants." 411 F.2d at 449. Likewise here, Thompson could not have acted under color of Syrian law because he was not "under the control or influence of" Syrian officials.

Billings v. United States, 57 F.3d 797 (9th Cir. 1995)—a case Arar himself invoked below, Arar Br. 27-28—yields the same result. In that case, the plaintiff brought a § 1983 claim against Secret Service agents who "initiated and effected" her arrest "pursuant to the procedures and protocols of their agency" before turning her over to the local sheriff's custody. 57 F.3d at 801. The court held that, even "[i]f the Secret Service Agents and the Sheriff's officers acted jointly, it was under the color of federal law . . . ." *Id.* Likewise here, federal officers "initiated and effected" Arar's detention under the "procedures and protocols" of federal law before Arar was sent abroad, under the "procedures and protocols" of the INA. Consequently, even if U.S. officials acted jointly with foreign officials, "it was under color of the federal"—not foreign—"law."

Arar suggests that, "[i]n *Billings* the plaintiff did not allege that federal and state officials 'conspired' or acted 'in concert' to deprive her of her civil rights." Arar Br. 27. Not true. The Ninth Circuit recognized that "Ms. Billings" made "allegations that the federal agents acted jointly with

state officials . . . under color of state law." *Billings*, 57 F.3d at 801. The district court thus correctly concluded that Arar's conspiracy allegations cannot save his otherwise deficient TVPA claim.

c. Arar's reliance on the language of old cases like *Kletschka* and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), is also problematic because the Supreme Court has explicitly disapproved their loose standards. *Kletschka* and many of Arar's other cases, for example, rely almost exclusively on the color-of-law formulation articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). *See* Arar Br. 22-23. The Supreme Court, however, has made it clear that its more recent cases "have refined the vague 'joint participation' test embodied in [*Burton*]," making it inappropriate to "fall[] back on language in . . . *Burton*" or even *Lugar*'s "general language about 'joint participation' as a test for state action." *Sullivan v. Am. Mfrs. Mut. Ins. Co.*, 526 U.S. 40, 57 (1999). *Sullivan* thus "clean[ed] up and rein[ed] in" those prior "'state action' precedent[s]." *Id.* at 62 (Ginsburg, J., concurring in part and concurring in the judgment).

Sullivan, moreover, replaced the vague tests invoked by Arar with a more demanding standard. It held that, where the plaintiff claims that private action occurred under color of state law because of a "'close nexus'"

between the State and otherwise private actors, the plaintiff must show that "the State 'has exercised coercive power or has provided such significant encouragement'" to the private individual "'that the choice must in law be deemed to be that of the State.'" *Id.* at 52 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The complaint does not meet that standard. It does not suggest that a foreign nation "exercised such coercive power" over Thompson or provided "such significant encouragement" that Thompson's actions "must in law be deemed that of" the foreign nation rather than actions of the United States. Nor could it. Thompson at all times acted on behalf of, in pursuit of the interests of, and as an officer of the United States.

B. Arar Failed To Allege That Thompson Had "Custody Or Physical Control" Over Him In Syria

By its express terms, the TVPA applies only if the alleged torture was "directed against [the plaintiff] ***in the offender's custody or physical control***." 28 U.S.C. § 1350, note § 3(b)(1) (emphasis added). Here, Arar admits that Thompson did not have "custody" or "physical control" of him when he was subjected to the alleged torture in Jordan or Syria. *See* A.33-A.34. Accordingly, Arar's TVPA claim must fail.[20]

[20] While the district court ultimately did not resolve the issue of "custody or physical control," SPA.27, this Court can affirm dismissal on any ground supported by the record. *Thyroff*, 460 F.3d at 405.

Arar and one *amicus* nonetheless argue that Arar "was in the ***constructive*** custody of the defendants at the time of his torture." Br. of Center for International Human Rights 13-14 (emphasis added); SPA.27. But the statute does not contain a "constructive" or "near" custody standard. It requires actual "custody," 28 U.S.C. § 1350, note § 3(b)(1), *i.e.*, "[t]he care and control of . . . a person," *Black's Law Dictionary* 412 (8th ed. 2004). Arar was not, when in Syria, in Thompson's "care and control." Arar was not even in Thompson's "constructive custody" within the ordinary meaning of that phrase, *i.e.*, custody "of a person (such as a parolee or probationer) whose freedom is controlled by legal authority but who is not under direct physical control." *Id.* Arar's "freedom" in Syria was not curtailed by "legal impediments" (as with "a parolee or probationer"). He was subjected to direct physical custody and control. Dispositively here, that custody and control was exercised by the Syrians, not by Thompson.

Amicus's sole support for its so-called "constructive" custody standard is a district court case, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995). In *Xuncax*, the defendant had direct command over the military officials who had physical custody of the claimant. The defendant thus had the authority to address the claimant's treatment or even to order his release. *Id.* at 172, 178 n.15. It is not far-fetched to consider the claimant to be in the

custody of an official who controls the inferior officers conducting the detention, and who can order release. It ***is*** far-fetched to consider the claimant in the custody of an official—like Thompson—who had no such power. As the district court observed, "there is an obvious difference between the vertical control exercised by a higher official over his subordinates, as was the case [in *Xuncax*]" and cases like this one, in which "U.S. officials" did not have authority to issue orders to or otherwise exercise "control . . . over Syrian officials." SPA.27. Because Arar cannot satisfy the TVPA's "custody or physical control" requirement, the TVPA claim was properly dismissed.

C. Thompson Is Entitled To Qualified Immunity For Arar's TVPA Allegations

Finally, Thompson is entitled to qualified immunity on the TVPA claims as well.

1. Qualified immunity is available under the TVPA. *See Schneider*, 310 F. Supp. 2d at 267 (noting that qualified immunity appeared to bar TVPA claims brought against by Dr. Henry Kissinger). Officers executing their official duties are generally entitled to a qualified immunity from suit. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). That is true even where the statute is silent. *Id.* (holding that qualified immunity is available for § 1983 claims, even though that statute does not mention immunity);

Saucier, 533 U.S. at 203 (immunity available "across the board"). Courts will not presume from silence that Congress intends a "wholesale revocation of the common-law immunity afforded government officials." *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). Thus, qualified immunity is presumed available unless "the text" or "the legislative history" of the statute "indicates that Congress intended to abrogate" it. *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1299-1300 (11th Cir. 1998). This Court has repeatedly recognized qualified immunity for claims arising under numerous federal statutes. *See, e.g.*, *Brown v. City of Oneonta*, 106 F.3d 1125, 1132 (2d Cir. 1997) (Family Educational Rights and Privacy Act), *abrogated on other grounds by Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Christopher P. v. Marcus*, 915 F.2d 794, 798-802 (2d Cir. 1990) (Education of All Handicapped Children Act); *P.C. v. McLaughlin*, 913 F.2d 1033, 1041-42 (2d Cir. 1990) (Rehabilitation Act).

2. Thompson is entitled to qualified immunity. It surely is not "clearly established" that Thompson's actions occurred under color of Syrian law rather than U.S. law. *Harlow*, 457 U.S. at 801. To the contrary, each and every court to squarely address this issue has held that U.S. officials act under U.S. law, not foreign law. *See* pp. 51-53, *supra.* Where there is ***disagreement*** among courts about the law, the Supreme Court has

made it clear the officer is entitled to qualified immunity. "If judges thus disagree . . . it is unfair to subject police to money damages for picking the losing side . . . ." *Wilson*, 526 U.S. at 618. Those principles apply even more forcefully where, as here, the courts are ***in agreement*** that the conduct does not violate the law. If federal judges have unanimously agreed that U.S. officials act under U.S. not foreign law, surely a reasonable officer could so conclude as well. Moreover, it was hardly "clearly established" that Arar was, while in Syria, under Thompson's "custody or physical control." *See* pp. 59-61, *supra*. Because reasonable officers could have disagreed on that issue as well, immunity must be recognized.

CONCLUSION

For all the foregoing reasons—and those set forth in the briefs of all the other defendants, which Thompson joins—the judgment of the district court should be affirmed.

Dated February 22, 2007

Respectfully submitted,

BAKER BOTTS L.L.P.

_____
Stephen L. Braga

_____
John J. Cassidy

_____
Jeffrey A. Lamken

_____
Jamie S. Kilberg
Allyson N. Ho
Stephanie R. Dourado
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Attorneys for Larry D. Thompson

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains _____ words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman 14-point font.

Dated: February 22, 2007

_____
Jamie S. Kilberg

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Arar v. Ashcroft

DOCKET NUMBER: 06-4216-cv

I, Natasha S. Johnson, certify that I have scanned for viruses the PDF version of the

_____ Appellant's Brief

____xx__ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Symantec AntiVirus version 10.0 was used.

_____

Date: February 22, 2007

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK	)		**MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On

deponent served the within**: Brief for Defendant-Appellee Larry D. Thompson**

upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York and via email.

Sworn to before me on

LUISA M. WALKER
Notary Public State of New York
No. 01WA6050280
Qualified in New York County
Commission Expires Oct 30, 2010

Job # 206886

Service List:

Dennis Barghaan, Esq.
Larry L. Gregg, Esq.
Office of the U.S. Attorney
Eastern District of Virginia, Civil Division
Counsel for Defendant-Appellee John Ashcroft
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3700
dennis.barghaan@usdoj.gov
larry.gregg@usdoj.gov

Jeremy Maltby
O'Melveny & Myers
Counsel for Defendant-Appellee Robert Mueller
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000
jmaltby@omn.com

Thomas G. Roth, Esq.
Counsel for Defendant-Appellee J. Scott Blackman
395 Pleasant Valley Way, Suite 201
West Orange, New Jersey 07052
(973)736-9090
Tgroth395@aol.com

William A. McDaniel, Jr., Esq.
Bassel Bakhos, Esq.
Law Offices of
William A. McDaniel, Jr.
Counsel for Defendant-Appellee James Ziglar
118 West Mulberry Street
Baltimore, Maryland 21201
wam@wamcd.com
bb@wamcd.com

Robert M. Loeb, Esq.
Barbara L. Herwig, Esq.
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylavania Avenue, Rm. 7268, N.W.
Washington, D.C. 20530
(202) 514-4052
N.W.
Timothy.garren@usdoj.gov
Jeremy.brumbelow@usdoj.gov
Mary.mason@usdoj.gov

-and-

Debra L. Roth, Esq.
Thomas M. Sullivan, Esq.
Shaw, Bransford, Veilleux & Roth, P.C.
Counsel for Defendant-Appellee Edward J. McElroy
1100 Connecticut Avenue,

Suite 900
Washington, D.C. 20036
(202) 463-8400
droth@shawbransford.com
tsulliva@shawbransford.com

Scott Dunn, Esq.
United States Attorney's Office
Eastern District of New York
One Pierrepont Plaza, 14th Floor
Brooklyn, New York 11201
(718) 254-6029
Scott.dunn@usdoj.gov

Counsel for Defendants in Their Official Capacities

Maria Couri LaHood – mlahood@ccr-ny.org
Barbara J. Olshansky – bolshansky@ccr-ny.org
David Cole – cole@law.georgetown.edu
William Goodman – bgoodman@ccr-ny.org
Katherine Gallagher – kgallagher@ccr-ny.org
Jules Lobel – lobell@law.pitt.edu
Center for Constitutional Rights
Co-Counsel for Plaintiff-Appellant
666 Broadway, 7th Fl.
New York, New York 10012
(212) 614-6430

Robert F. Fink – Robert.fink@dlapiper.com
Stanley McDermott III – Stanley.mcdermott@dlapiper.com
Joshua S. Sohn – Joshua.sohn@dlapiper.com
Sarah J. Sterken – sarah.sterken@dlapiper.com
DLA Piper US LLP
Co-Counsel for Plaintiff-Appellant
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500