IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MAHER ARAR,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 04-CV-0249-DGT-VVP
	§	
JOHN ASHCROFT, Attorney General of the United States;	§	
LARRY D. THOMPSON, formerly Deputy Attorney General;	§	
TOM RIDGE, Secretary of the Department of Homeland Security;	§	
JAMES W. ZIGLAR, formerly Commissioner of the Immigration and Naturalization Service;	§	
J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the Immigration and Naturalization Service;	§	
PAULA CORRIGAN, Regional Director of the Bureau of Immigration and Customs Enforcement;	§	
EDWARD J. McELROY, formerly District Director of the Immigration and Naturalization Service for the New York District, now District Director of the Bureau of Immigration and Customs Enforcement;	§	
ROBERT MUELLER, Director of the Federal Bureau of Investigation; and	§	
JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,	§	
	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS PLAINTIFF'S CLAIMS AGAINST THE UNITED STATES OF AMERICA

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I. INTRODUCTION

Plaintiff Maher Arar, a nonresident alien, arrived at our border in the fall of 2002. Relying primarily on classified information, the Executive Branch determined Plaintiff to be a member of al Qaeda, the foreign terrorist organization whose members are responsible for multiple terrorist attacks on our Nation and continue to threaten it today. Acting within their constitutional and statutory authority, Executive Branch officials detained Plaintiff at the border while they determined whether to admit him into the country; they concluded that he was ineligible to enter given his membership in al Qaeda; and they removed him to Syria, the country of his birth and of which he is a citizen.

These actions, Plaintiff now contends, violated the Torture Victim Protection Act ("TVPA") (codified in 28 U.S.C. § 1350, note), the Fifth Amendment Due Process Clause, and "treaty law." COMPL., ¶ 3. As redress for these alleged violations, Plaintiff seeks money damages and declaratory relief from eight named Executive Branch officials, four of whom are sued in their official capacities.[1] As a claim nominally pleaded against a federal official in his or her official capacity in reality is a claim against the United States, *see Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), we refer to the movant herein as the United States. The complaint is unclear as to the relief Plaintiff seeks on his official-capacity claims, *see* DKT. NO. 5, but Plaintiff has clarified that the only form of relief he seeks against the United States is a declaratory judgment. *See* DKT. NO. 9. As explained below, Plaintiff's claims against the United States should now be dismissed under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

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[1] The complaint names Attorney General Ashcroft, Secretary Ridge, FBI Director Mueller, and Regional Director of Immigration and Customs Enforcement Corrigan in their official capacities. The Attorney General and FBI Director are also sued in their *personal* capacities, but the complaint contains nothing but sparse, conclusory allegations as to their involvement in this matter. Moreover, it is unclear what conceivable declaratory relief Plaintiff seeks as to these Defendants' respective agencies.

II. RELEVANT FACTUAL ALLEGATIONS

Plaintiff, a native of Syria, is a dual citizen of Syria and Canada and presently resides in Ottawa. COMPL., ¶ 11; *id.*, Ex. D, Decision of the Regional Director ("R.D. Dec.") at 2.[2] On September 26, 2002, he arrived at John F. Kennedy Airport ("JFK") in New York, on a flight from Switzerland, for the alleged purpose of transiting to Montreal. *Id.*, ¶¶ 25-26; R.D. Dec. at 2. Plaintiff presented his Canadian passport to a federal immigration inspector and was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." R.D. Dec. at 2; COMPL., ¶ 26. Plaintiff was detained and interrogated at JFK and then transferred the next day to the Metropolitan Detention Center ("MDC") in Brooklyn. *Id.*, ¶¶ 27-36.

On October 1, 2002, the Immigration and Naturalization Service ("INS") served Plaintiff with Form I-147 (Notice of Temporary Inadmissibility), initiating removal proceedings under 8 U.S.C. § 1225(c).[3] Plaintiff was charged with being temporarily inadmissible on the ground that he was a member of al Qaeda, an organization designated by the Secretary of State as a foreign terrorist

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[2] For the limited purpose of this motion, the United States does not dispute Plaintiff's factual allegations. The facts recited herein are taken from the complaint and documents attached to it at Exhibit D. *See* FED. R. CIV. P. 10(C)("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001)(in reviewing complaint under Rule 12(b)(6), court should analyze "not only the assertions made within the four corners of the complaint itself, but also those contained in documents attached to the pleadings or in documents incorporated by reference"); *Gould Elec. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)(same with respect to Rule 12(b)(1) motion).

[3] On March 1, 2003, the INS was abolished, and its enforcement and service functions were transferred to the new Department of Homeland Security ("DHS"). *See* 6 U.S.C. §§ 251, 291(a). Within the DHS, the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection now perform the immigration-enforcement function previously entrusted to the INS, and the Bureau of Citizenship and Immigration Services performs the former INS's benefits function.

organization. *Id.*, ¶ 38; R.D. Dec. at 2. On October 4, 2002, federal officials asked Plaintiff to designate the country to which he wished to be removed, and he designated Canada. COMPL., ¶ 41. Thereafter, Plaintiff claims, federal officials questioned him as to why he opposed being removed to Syria (having allegedly "refused" an earlier request that he "'volunteer' to be sent" there). Plaintiff allegedly responded that he feared he would be tortured if removed to Syria. *Id.*, ¶¶ 35, 43-44.

On October 7, 2002, INS Regional Director Blackman determined that Plaintiff was inadmissible to the United States. Based on classified and unclassified information, Blackman found that Plaintiff "is clearly and unequivocally" a member of al Qaeda, a designated foreign terrorist organization, and was therefore "clearly and unequivocally inadmissible to the United States" under 8 U.S.C. § 1182(a)(3)(B)(i)(V). R.D. Dec. at 1, 3, 5. Blackman further determined "that there are reasonable grounds to believe that [Plaintiff] is a danger to the security of the United States," and he ordered Plaintiff "removed from the United States." *Id.* at 6. Blackman signed Form I-148, which ordered Plaintiff's removal "without further inquiry before an immigration judge"; advised Plaintiff of the sanctions he would face if he entered the United States (or tried to do so) without prior authorization from the Attorney General; and advised him that the INS Commissioner had found that his "removal to Syria would be consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment" ("CAT"). COMPL., Ex. D, Final Notice of Inadmissibility ("Final Notice").

Plaintiff alleges that, on the morning of October 8, 2002, he learned that Blackman "had decided to remove [him] to Syria." COMPL., ¶ 47. Plaintiff was served with the Form I-148 and told "that he was barred from re-entering the United States for five years." *Id.* & Final Notice. He claims

that he was flown to Jordan, where he was allegedly turned over to Jordanian officials on October 9, 2002. COMPL., ¶ 49. After allegedly being interrogated and beaten by the Jordanians, Plaintiff was turned over to Syrian officials later that day. *Id.*, ¶ 50. Plaintiff then was detained in Syria and allegedly interrogated and tortured by Syrian officials. *Id.*, ¶¶ 50-67. In October 2003, Plaintiff was released and returned to Canada. *Id.*, ¶¶ 64, 66.

Based on these events, Plaintiff asserts four claims. In Count I, Plaintiff claims the Defendants violated the TVPA when they allegedly conspired with Jordanian and Syrian officials to bring about his torture. *Id.*, ¶¶ 72-75. In Counts II-III, Plaintiff claims his substantive due-process rights under the Fifth Amendment were violated when he was removed to Syria and allegedly subjected to "torture and coercive interrogation," *id.*, ¶¶ 76-82 (Count II), and to "arbitrary, indefinite detention in that country." *Id.*, ¶¶ 83-89 (Count III). In Count IV, Plaintiff claims his due-process rights were violated when, during his "domestic detention" in the United States, he was allegedly subjected to unconstitutional "conditions of confinement," "coercive and involuntary custodial interrogation," and interference with "his access to lawyers and the courts." *Id.*, ¶¶ 90-95.

Plaintiff's complaint does not specify which claims are brought against the United States. In his prayer for relief, Plaintiff makes a boilerplate demand for a "judgment . . . [d]eclaring that the actions" of the Defendants "are illegal and violate [his] constitutional, civil, and international human rights." *Id.* at 24, Prayer, ¶ 1; *see also id.* at 3-4, ¶ 5 (seeking "a declaration that his detention in the United States and the decision to remove him to Jordan and Syria were unjustified, unconstitutional, unlawful and without probable cause to believe that he was a member of or had any involvement with Al Qaeda or any other terrorist organization.").

III. ARGUMENT

Plaintiff's official-capacity claims should be dismissed for four reasons. First, as we show in Part A, Plaintiff lacks standing under Article III of the Constitution to bring a claim for declaratory relief – the only relief he seeks against the United States. Second, as we explain in Part B, the Immigration and Nationality Act ("INA") deprives the Court of subject-matter jurisdiction over Plaintiff's claims challenging his exclusion and removal. Third, we show in Part C that sovereign immunity bars any TVPA claim against the United States and that Plaintiff fails to state a TVPA claim in any event. Finally, in Part D, we demonstrate that Plaintiff fails to state a claim under the Due Process Clause.

A. PLAINTIFF LACKS ARTICLE III STANDING TO SEEK DECLARATORY RELIEF.

Federal courts lack jurisdiction under Article III unless a "case or controversy" is presented by a party with standing to litigate. U.S. CONST. art. III, § 2, cl. 1. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiff bears the burden of properly pleading facts that establish his standing. *Id.* at 561. This requires, at an "irreducible constitutional minimum," that Plaintiff satisfy the following "three elements":

> First, the plaintiff must have suffered an "injury in fact"–an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" . . . . Second, there must be a causal connection between the injury and the conduct complained of–the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . . .

Id. at 560-61 (citations and footnote omitted). To demonstrate standing to seek a declaratory judgment, it is not enough for Plaintiff to allege past injuries at the Defendants' hands; rather, he must

establish that he faces a "sufficiently real and immediate" threat of future injury that likely would be redressed by the specific relief sought. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

The requirement of an imminent threat of future injury as a jurisdictional prerequisite to equitable relief is aptly illustrated by the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The plaintiff in *Lyons* sued the City of Los Angeles and four of its police officers for injuries he allegedly sustained when he was stopped for a traffic violation and placed in a chokehold. He sought injunctive and declaratory relief, as well as money damages, and the district court issued a preliminary injunction barring the use of chokeholds. *Id.* at 97-99. The Supreme Court reversed, holding that the plaintiff lacked standing to seek equitable relief because he failed to show that "he was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105. The Court held that, even if the plaintiff's prior injury afforded him standing to seek retrospective relief in the form of damages, it did "nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him to unconsciousness without any provocation or resistance on his part." *Id.*[4]

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[4] For other Supreme Court decisions finding that plaintiffs lack standing to seek injunctive or declaratory relief because they face no imminent threat of future injury, see *Ashcroft v. Mattis*, 431 U.S. 171, 172 & n.2 (1977)(where police used deadly force against plaintiff's son pursuant to statute, and plaintiff sought declaratory judgment that statute was unconstitutional on theory that his other son "might" be threatened with such force "if" he were arrested and tried to flee, plaintiff lacked standing because his "speculation" was "insufficient to establish the existence of a present, live controversy"); *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976)(plaintiffs alleging widespread police misconduct lacked standing to seek injunction "overhauling police disciplinary procedures" because their "allegations of future injury" were too "attenuated" as they "rest[ed] . . . upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of department disciplinary procedures"); *O'Shea*, 414 U.S. at 496, 498 (where plaintiffs sought to enjoin allegedly discriminatory law-enforcement practices, but could "not point[] to any imminent prosecutions

Although the complaint is vaguely worded regarding the request for declaratory relief, *see* COMPL., ¶ 5; *id.* at 24, Prayer, ¶ 1, Plaintiff appears to seek such relief with respect to the finding that he was a member of al Qaeda and thus ineligible for admission to the United States; the order removing him from the United States to Syria; and his detention in the United States in allegedly unconstitutional conditions. Plaintiff lacks standing to seek declaratory relief as to these past actions because he faces no real and immediate threat of being subjected to them in the future.

First, Plaintiff lacks standing to seek a declaratory judgment that there was no "probable cause" to believe he was a member of al Qaeda. COMPL., ¶ 5. Even assuming Plaintiff were incorrectly or even *illegally* found to be an al Qaeda member and thus inadmissible, he nonetheless has not shown "a real and immediate threat of again" having such findings made with respect to him or "a sufficient likelihood that he will again be wronged in a similar way." *Lyons*, 461 U.S. at 110-11. Plaintiff may believe that, since the Executive Branch previously found him to be a member of al Qaeda and declared him inadmissible on that basis, it would do so again if he sought admission to the United States. Such speculation, however, does not support standing. Plaintiff does not even allege that he, in fact, intends

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contemplated against" them and did not suggest that they "expect[ed] to violate valid criminal laws," they lacked standing because the perceived "threat of injury" was not "sufficiently real and immediate" and was "simply too remote to satisfy the case-or-controversy requirement"); and *Golden v. Zwickler*, 394 U.S. 103, 109 (1969)(plaintiff seeking declaratory judgment regarding constitutionality of statute banning distribution of anonymous handbills during elections lacked standing as Congressman who was target of plaintiff's handbills left office, "it was wholly conjectural" that plaintiff would face prosecution for distributing handbills, and his claim "that the former Congressman can be 'a candidate for Congress again' is hardly a substitute for evidence that this is a prospect of 'immediacy and reality'"). *See also Allen v. Wright*, 468 U.S. 737, 760 (1984)(observing that plaintiffs in *Lyons*, *Rizzo*, and *O'Shea* lacked standing to seek injunctive relief as to law-enforcement practices because they alleged no "specific threat" of again "being subject to the challenged practices").

to seek admission to the United States in the immediate future. He says only that he "*wishes* to return to the United States for work and to visit relatives and friends . . . ." COMPL., ¶ 12 (emphasis added). Such speculative "'some-day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury" that Article III requires. *Lujan*, 504 U.S. at 564. Whether or not the prior finding of inadmissibility would bar Plaintiff's admission in the future, any number of other factors might render him ineligible to enter.[5] He therefore cannot seek equitable relief as to this immigration decision. *See United States v. Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001)(stating the "potential denial of . . . discretionary relief is entirely too speculative and abstract" for alien to establish Article III standing "[i]n light of the multitude of factors the INS judge might opt to take under consideration" and "the uncertainty of the weight he might decide to place on each factor").

Nor can Plaintiff establish equitable standing on the theory that the finding that he is an al Qaeda member is now causing him adverse effects in Canada. COMPL., ¶ 67 (alleging Plaintiff has nightmares and difficulties relating to family, that "[p]eople continue to call him a terrorist," and that "publicity surrounding his situation has made finding employment particularly difficult"). Allegations of "emotional

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[5] Here, "attempting to anticipate whether and when" Plaintiff would be in a position to enter the United States for employment purposes, as he says he wishes to do, "takes us" even further "into the area of speculation and conjecture." *O'Shea*, 414 U.S. at 497. For example, to gain admission for that purpose, Plaintiff generally would need to secure a job in the United States. *See, e.g.*, 8 C.F.R. § 214.6(e)(3)(ii); 8 C.F.R. § 214.2(h)(2)(i)(A)(requiring that, before alien can even apply for admission to work in the United States on a "H1B" temporary employee non-immigrant work visa, a U.S. employer must first file a petition on behalf of the alien for approval by the Bureau of Citizenship and Immigration Services). Plaintiff thus can show no "concrete plans" to return to the United States and work. *Lujan*, 504 U.S. at 564.

consequences" resulting from alleged past actions "simply are not a sufficient basis" for declaratory relief "absent a real and immediate threat of future injury" by federal officials. *Lyons*, 461 U.S. at 107 n.8. Moreover, an alleged injury will support standing for equitable relief only when the injury is fairly attributable to the actions of defendants in the litigation and likely would be redressed by a judicial order operating on the defendants. *Lujan*, 504 U.S. at 568-71 (plurality). The injury cannot be due to the "independent action of some third party not before the court" because courts lack authority to issue equitable relief controlling the actions of non-parties. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). It is wholly speculative that any of the third persons or entities allegedly harming Plaintiff would even learn of any decision of this Court, let alone be bound by it.[6]

Second, Plaintiff lacks standing to seek declaratory relief with respect to his removal to Syria and any alleged injury he sustained in Syria or Jordan. Plaintiff does not allege that he will be found *again* in the United States or on its border, detained *again* by Executive officials and declared inadmissible, removed *again* to Syria (rather than Canada or another country), and detained

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[6] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), cited in Plaintiff's pre-motion letter, is not to the contrary. DKT. NO. 22 (Pl.'s Ltr. at 10). The *McLaughlin* plaintiffs sought equitable relief with respect to a county policy whereby persons arrested without warrants were denied prompt probable-cause hearings. When they sued, the plaintiffs "had been arrested without warrants and were being held in custody without having received a probable cause determination," and they "alleged in their complaint that they were suffering a direct and current injury as a result of this detention, and would continue to suffer that injury until they received the probable cause determination to which they were entitled." 500 U.S. at 51. The plaintiffs were held to have standing since, *at the time the complaint was filed*, they were in custody pursuant to the challenged policy. "[A]t that moment," the Supreme Court emphasized, the plaintiffs' injury was "[p]lainly . . . capable of being redressed through injunctive relief." *Id.* Nothing in *McLaughlin* permits Plaintiff herein to seek declaratory relief with respect to *past* actions based merely on his claim that he *presently* suffers "adverse effects" from those completed actions.

improperly or tortured *again* by Syrian officials, and in any event there would be no basis beyond speculation to imagine that these events will recur. Such a sequence of events is particularly unlikely given Plaintiff's own allegation that Syrian officials released him when they were unable to find a "connection" between Plaintiff and al Qaeda or to "substantiate" the "allegations against him." COMPL., ¶ 65. According to Plaintiff, "Syria now considers [him] completely innocent." *Id.* Thus, even if Plaintiff could show that his rights were violated by these alleged past events, he cannot show he is "realistically threatened by a repetition" of them. *Lyons*, 461 U.S. at 109.[7]

This is so even accepting Plaintiff's claim that he was removed to Syria pursuant to an alleged "extraordinary renditions" policy whereby the United States purportedly removes aliens suspected of terrorist activity to such countries as Syria so that they can be interrogated and tortured. COMPL., ¶¶ 1, 24. In *Lyons*, the Court concluded that the plaintiff was not "realistically threatened by a repetition of his experience," 461 U.S. at 109, because, *inter alia,* there was no official policy that sanctioned an

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[7] Nor can Plaintiff manufacture standing to seek declaratory relief with respect to his removal by complaining about one of its consequences – *i.e.*, the prohibition on reentering the United States. *See* COMPL., ¶¶ 12, 47, 67; *id.*, Ex. D, Final Notice. Such a "collateral consequence" may well have precluded dismissal, on mootness grounds, of a suit commenced by Plaintiff prior to his removal. *See Swaby v. Ashcroft*, 357 F.3d 156, 159-61 (2d Cir. 2004)(appeal from denial of habeas challenge to removal was not mooted once alien was removed since bar to reentering the United States resulting from the removal order could be redressed by court and sufficed as a "collateral consequence" that prevented mootness). The "collateral consequences" exception, however, is an exception to the *mootness* doctrine. *Public Utilities Comm'n v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 1996); *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1246 n.6 (3d Cir. 1996). It cannot supply *initial standing* to seek declaratory relief with respect to any past conduct that Plaintiff cannot show is likely to be repeated in the future. As the Supreme Court has emphasized, mootness and standing are distinct doctrines whose elements should not be "confused." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 189-92 (2000). *See Smith v. St. Louis Hous. Auth.*, 132 F.Supp.2d 780, 783 n.6 (E.D. Mo. 2001)(noting Supreme Court in *Friends of the Earth* "made it very clear that standing and mootness, although related, require significantly different inquiries").

unjustifiable use of chokeholds and no showing of "a pattern of police behavior that would indicate that the official policy would permit" such. *Id.* at 110 & n.9. Plaintiff suggests that because he alleges his removal to Syria occurred pursuant to an "officially sanctioned policy of 'extraordinary rendition'" in "existence," *see* DKT. NO. 22 (Pl.'s Ltr. at 10), he *does* face "a real and immediate threat" of again being removed to Syria. But "to have a case or controversy with the [United States] that could sustain" his request for declaratory relief, the mere existence of a "policy" is not enough – Plaintiff would *also* "have to credibly allege that he faced a realistic threat from the future application of the . . . policy." *Lyons*, 461 U.S. at 106 n.7. This Plaintiff cannot do for the reasons previously explained. *See supra* pp. 9-10. Indeed, Plaintiff does not even show that he is likely to "have another encounter" with a federal official who might apply the claimed policy to him, *Lyons*, 461 U.S. at 105-06, or that, even if he were, any such "policy" is applied to *every* alien detained and suspected of being a terrorist. *Id.* at 108. Accordingly, Plaintiff's claim of a policy is not enough to supply him with standing to seek declaratory relief concerning his removal to Syria.[8]

Finally, Plaintiff lacks standing to seek declaratory relief with respect to his detention in the United States or the conditions of that detention. Plaintiff may have standing to seek monetary relief for

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[8] Nor may Plaintiff establish standing based on *Allee v. Medrano*, 416 U.S. 802 (1974), or *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939). *See* DKT. NO. 22 (Pl.'s Ltr. at 10). Those decisions, which predate *Lyons*, say nothing about Article III's case-or-controversy requirement. They merely address the prerequisites for seeking injunctive relief – *i.e.*, the necessity of showing irreparable injury and an inadequate remedy at law – and say that such requirements may be satisfied in suits against governmental actors who are shown to have engaged in "a persistent pattern" (as opposed to "[i]solated incidents") of misconduct. *Allee*, 416 U.S. at 814-15. Plaintiff may believe the United States is engaging in a "pattern" of unlawfully removing suspected terrorist aliens to countries where they will be tortured. Under Article III, however, he may not seek declaratory relief concerning such an alleged practice unless he shows he is likely to be subjected to it in the future.

alleged injuries sustained during his domestic detention, but his standing to seek declaratory relief against the United States for those injuries is another matter. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 185 (2000)("[A] plaintiff must demonstrate standing separately for each form of relief sought."). Plaintiff was not in federal custody or immigration proceedings when he filed this action, nor is he today. Even if Plaintiff could demonstrate *past* exposure to unlawful conditions of confinement, he cannot, as he must, show that he faces a real and immediate threat of *future* exposure to those same conditions. Whatever the conditions of his past detention, they cannot, consistently with Article III, entitle him to declaratory relief today. *See Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985)(where prisoner is no longer subject to conditions he seeks to improve, "he retains standing to bring his claims for monetary damages" but "does not have standing to seek declaratory relief").[9]

Ultimately, Plaintiff alleges no facts remotely suggesting that any of the allegedly unlawful actions he seeks to challenge are likely to be taken against him again in the future. He therefore lacks standing

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[9] *Accord Barney v. Pulsipher*, 143 F.3d 1299, 1306 & n.3 (10th Cir. 1998)(former inmates lacked standing to seek declaratory or injunctive relief as to conditions in jail as they failed to show, and court "decline[d] to speculate," that they "will likely end up" there "again some time in the future"); *Knox v. McGinnis*, 998 F.2d 1405, 1413 (7th Cir. 1993)(prisoner lacked standing to seek injunction against future use of "black box" restraining device, as it was only used in segregation, prisoner had returned to general population, and "mere possibility" that he "may sometime in the future be returned to the segregation unit" did not "establish a real and immediate threat that he again will be subject to use of the black box"); *Nelsen v. King County*, 895 F.2d 1248, 1250, 1252 (9th Cir. 1990)(former residents of alcoholic-treatment center lacked standing to seek injunctive relief as to its "harmful conditions," as they could not show that they would "begin drinking uncontrollably several years after their discharge from the Center," "commit an alcohol-related offense, be prosecuted for that offense, be convicted, be offered the choice to reenter the Center, make that choice, *and* find that the conditions at the Center were the same as they allegedly were when [plaintiffs] were there" previously).

to seek declaratory relief with respect to those claimed actions.[10]

B. CONGRESS HAS PRECLUDED REVIEW OF ANY DECISION OR ACTION TO COMMENCE PROCEEDINGS, ADJUDICATE CASES, OR EXECUTE REMOVAL ORDERS, AND OF ANY DECISION OR ACTION IN THE ATTORNEY GENERAL'S STATUTORY DISCRETION.

The immigration decisions related to Plaintiff's exclusion from the United States based on his al Qaeda membership and his removal to Syria were all governed by the INA and its implementing regulations. Although Plaintiff dresses his claims in constitutional garb, Counts I-III of the complaint fundamentally ask this Court to review and consider the propriety of those decisions. Congress, however, has provided a comprehensive scheme governing the manner and scope of judicial review under the INA. Specifically, 8 U.S.C. § 1252, governing "judicial review of orders of removal," provides in pertinent part:

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[10] Plaintiff suggests that his claims for declaratory relief are not subject to the standing principles enunciated in *Lyons* because that case "involved an attempt by the plaintiff to entangle federal courts in the operations of city law enforcement practices," whereas this suit is against federal officials and thus raises none of "the comity and federalism concerns" that "influenced" the *Lyons* Court. DKT. NO. 22 (Pl.'s Ltr. at 10-11). Plaintiff fails, however, to acknowledge that the Court's discussion of "comity and federalism concerns" was not part of its holding on standing. In Part IV of its decision, the Court held that the plaintiff lacked standing to seek equitable relief. *Lyons*, 461 U.S. at 105-110. Then, in Part V, the Court went on to consider, in the alternative, the separate question of whether the plaintiff had satisfied the traditional prerequisites for equitable relief, concluding he had not. *Id.* at 111-13. There, the Court said that it would not "slight" these traditional requirements given the general need to show "restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws" and "the normal principles of equity, comity and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *Id.* at 112. *Lyons*'s Article III standing holding thus stands apart from the Court's discussion of comity and federalism in the context of the different question of whether, *if* Lyons had Article III standing to seek prospective relief, he could satisfy the substantive standards for such relief. *Lyons*'s Article III standing holding has been routinely applied to claims seeking equitable relief from the United States or its agencies and officials, *see, e.g.*, *Blakely v. United States*, 276 F.3d 853, 873-74 (6th Cir. 2002); *Park v. Forest Serv. of the United States*, 205 F.3d 1034 (8th Cir. 2000), and it applies fully here.

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9); *see also* 8 U.S.C. § 1252(a)(2). The only exception to the general exclusivity of the INA's judicial scheme is habeas corpus petitions raising "pure questions of law," an exception that Plaintiff has not pleaded and that is not applicable here in any event. *INS v. St. Cyr*, 533 U.S. 289, 297-98, 314 (2001).[11]

In addition to the exclusivity provision, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review" decisions or actions of the "Attorney General the authority for which is specified under this subchapter [Title 8, Subchapter II, "Immigration"] to be *in the discretion* of the

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[11] In *St. Cyr*, the Supreme Court distinguished writs of habeas corpus from other vehicles allowing aliens entry into federal court to seek review of immigration decisions, observing, "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings." 533 U.S. at 311. Because denying habeas altogether would present "difficult and significant" constitutional questions, the Court declined to construe the INA's jurisdiction-limiting provisions in a way that would wholly preclude habeas. *Id.* at 304; *see* U.S. CONST., art. I, § 9, cl. 2. The Court specifically distinguished habeas proceedings from far-reaching APA review of the kind Plaintiff seeks here. *St. Cyr*, 533 U.S. at 309-12; *accord Wang v. Ashcroft*, 320 F.3d 130, 142 (2d Cir. 2003)(habeas is the appropriate vehicle to review claim that alien's deportation violated CAT); *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000)(stating § 1252(b)(9) concerns "judicial review in a civil action brought under 28 U.S.C. § 1331 rather than review under habeas corpus"), *aff'd*, 533 U.S. 348 (2001); *Bakhtriger v. Elwood*, 360 F.3d 414, 423 (3d Cir. 2004)(while habeas review of immigration decisions otherwise insulated from judicial review is permissible, "the broader species of review for substantial evidence and abuse of discretion typical of APA challenges must be wholly out of bounds"); *see also* 5 U.S.C. § 701(a)(judicial review precluded under the APA "to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law"). Recently, the Ninth Circuit held that the INA does not preclude a *Bivens* action challenging certain immigration decisions, although it declined to consider whether one should be implied in the first instance. *Wong v. United States*, 373 F.3d 952, 962-66 (9th Cir. 2004). *Wong* wholly fails to consider the Supreme Court's almost exclusive reliance on the unique nature of habeas relief in construing the scope of the INA's jurisdiction-limiting provisions.

Attorney General, other than the granting of relief under section 1158(a) of this title [regarding certain applications for asylum]." 8 U.S.C. § 1252(a)(2)(B)(ii)(emphasis added). The statute provides further:

> Except as provided in this section and notwithstanding any other provisions of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g); *see Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 485 (1999) (finding no jurisdiction to review selective-enforcement claim and noting that decisions within ambit of § 1252(g), "if they are reviewable at all, . . . at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed")(footnote omitted).

Although the particular relief sought against the United States is unclear, the Plaintiff is seeking judicial review of the finding of inadmissibility (based on membership in al Qaeda) and the decision to remove him to Syria. Review of those decisions in this forum at this time is statutorily barred.[12] Section 1225(c) of the INA states that, if "*the Attorney General . . . is satisfied* on the basis of confidential information that the alien is inadmissible" based on certain provisions related to national security – in this case reasonable grounds to believe the Plaintiff was a member of a foreign terrorist organization, specifically al Qaeda, 8 U.S.C. § 1182(a)(3)(B)(i)(V) – "the Attorney General *may order* the alien removed without further inquiry or hearing by an immigration judge." 8 U.S.C. § 1225(c)(2)(B) (emphasis added). Because the italicized statutory language places this admissibility determination within the Attorney General's discretion, review of it is precluded by 8 U.S.C. § 1252(a)(2)(B)(ii).

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[12] The United States does not, as Plaintiff suggests, maintain that the INA precludes the fourth count of his complaint, concerning his allegedly "unconstitutional mistreatment while in immigration custody" in the United States. DKT. NO. 22 (Pl.'s Ltr. at 5).

Moreover, any challenge to INS's conclusion under the authority of § 1225(c) that Plaintiff was a member of al Qaeda (and particularly the claim that such a finding was made without "probable cause," COMPL., ¶ 5), is fundamentally a challenge to the manner in which his removal was "adjudicated." By statute, then, review is independently barred by 8 U.S.C. § 1252(g).

Similarly, although Plaintiff sought removal to Canada, his designation was rejected and his removal "executed" under authority of 8 U.S.C. § 1231(b)(2)(C), which provides that the Attorney General "may disregard" an alien's designation of country for removal under certain circumstances. 8 U.S.C. § 1231(b)(2)(C)(iv). Where the alien's designation is disregarded, the statute favors removal to a country where an alien is a "subject, national, or citizen." 8 U.S.C. § 1231(b)(2)(D). The removal of Plaintiff to Syria was consistent with this provision because he is a Syrian national and citizen. Thus, the Executive Branch's decision to reject Plaintiff's designation of Canada and remove him to Syria was plainly within the range of discretion afforded by the INA.[13] The INA precludes judicial review of all such discretionary decisions by the Executive and particularly those involved in "executing" removal orders. 8 U.S.C. § 1252(a)(2)(B)(ii); 8 U.S.C. § 1252(g).

Finally, to the extent that Plaintiff is seeking a declaration that the United States' actions violated the CAT, Congress has foreclosed review of the sort sought here as well:

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[13] As the Second Circuit has observed, the Attorney General's decision to redesignate a country of removal "is essentially unreviewable" since the statute is "bereft of guiding principles" and the "requisite judgment requires an essentially political determination" and "inevitably affects United States relations with other nations" and, in some cases, as here, "the complicated multilateral negotiations concerning efforts to halt international terrorism." *Doherty v. Meese*, 808 F.2d 938, 941, 943-44 (2d Cir. 1986)(alien's designation of Irish Republic was disregarded as prejudicial to United States, and redesignation of UK was "clearly appropriate" as alien, though an Irish citizen, was also UK citizen).

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b) [requiring promulgation of regulations to implement CAT], no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT] or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, § 2242(d), 112 Stat. 2681, 2681-822 (1998), *codified in*, 8 U.S.C. § 1231, note.[14] The present action, of course, is not a petition for "review of a final order of removal." *Id.* The legislative history emphasizes that "[t]he provision agreed to by the conferees does not permit for judicial review of . . . the regulations or of most claims under the [CAT]." H.R. CONF. REP. NO. 105-432, 150, 105th Cong., 2nd Sess. (1998), 1998 WL 105466. Plaintiff's complaint thus does not state a judicially cognizable claim for review of any alleged infirmity under the CAT.[15]

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[14] In ratifying the CAT, the Senate conditioned its advice and consent on the declaration that Articles 1 through 16 were not to be self-executing. *See* 136 Cong. Rec., S17486-01 at S17492 (Oct. 27, 1990), 1990 WL 168442; *see also* S. Treaty Doc. No. 100-20 (1988), at 2; *Wang*, 320 F.3d at 140 (alien "concedes as he must, that CAT is not a self-executing treaty"). Thus, Plaintiff must first point to a statute entitling him to judicial consideration of a claim under the CAT.

[15] Certain aliens not entitled to raise CAT claims in petitions for review of final orders of removal may file habeas petitions. *See Wang*, 320 F.3d at 142. Plaintiff, however, is not "in custody" now and was not in custody when this suit was filed; thus, habeas jurisdiction cannot lie. 28 U.S.C. § 2241(c); *see, e.g., Patel v. U.S. Atty. Gen.*, 334 F.3d 1259, 1263 (11th Cir. 2003)(no habeas jurisdiction where alien files petition after his removal because "[w]hile his removal from the United States may limit his opportunities to re-enter this country, this does not constitute a severe restraint on his individual liberty" within meaning of § 2241(c)'s "in custody" requirement). In any event, challenges to factual findings and discretionary decisions, such as those of which Plaintiff seeks review here, are not cognizable by habeas. *See Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001)("We now join our sister circuits in holding that federal jurisdiction over § 2241 [habeas] petitions does not extend to review of discretionary determinations by the IJ and the BIA."), *cert. denied*, 536 U.S. 941 (2002); *Amadi v. Ashcroft*, 270 F.Supp.2d 336, 339 (E.D.N.Y. 2003)("[T]his court may not review the facts or the merits of INS's denial of petitioner's claim under CAT."), *appeal docketed*, No. 03-2573 (2d Cir.

Congress has "very broad" power "over the admission of aliens and their right to remain . . . ." *Galvan v. Press*, 347 U.S. 522, 530 (1954). In a legitimate exercise of that power, Congress has precluded review of the decisions challenged in this case in a manner other than that provided in the INA. None of the avenues pleaded is a permissible vehicle to address Plaintiff's claims.

C. SOVEREIGN IMMUNITY BARS ANY TVPA CLAIM THAT PLAINTIFF ASSERTS AGAINST THE UNITED STATES AND, IN ANY EVENT, PLAINTIFF FAILS TO STATE A TVPA CLAIM.

In Count I, Plaintiff alleges that "Defendants Ashcroft, Thompson, Ziglar, Blackman, McElroy, Mueller, and others" violated his rights under the TVPA when they allegedly conspired with foreign officials to "bring[] about" his torture "under color of Syrian law." COMPL., ¶ 74. Although the complaint names Attorney General Ashcroft and Director Mueller in both their official and individual capacities, it is unclear whether Count I is addressed to any official-capacity Defendant. If it is, it is barred by sovereign immunity, and its entirely conclusory allegations fail to state a claim in any event.

Any TVPA claim against an official-capacity Defendant is actually a claim against the United States and, as such, is barred by sovereign immunity absent a waiver. *See Graham*, 473 U.S. at 165-66; *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994). Any such waiver "must be unequivocally expressed in statutory text, and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996)(citations omitted). The TVPA supplies no clear or "unequivocal" waiver of sovereign immunity; by its terms, it does not apply to the United States. *See* TVPA, § 2(a)(1)(imposing liability on "[a]n *individual*")(emphasis added). Moreover, federal courts have long recognized analogous

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Aug. 27, 2003); *cf. St. Cyr*, 533 U.S. at 305, 312 (noting the "limited role played by the courts in habeas corpus proceedings," and finding habeas jurisdiction existed to review "pure questions of law").

language in the federal civil-rights statutes (which impose liability for conduct taken "under color of state law") as *not* applying to official-capacity claims against federal officials or waiving sovereign immunity. *See Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999) (sovereign immunity bars suits brought against United States under civil-rights statutes); *accord Davis v. United States Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000). For these reasons, any TVPA claim against the United States must be dismissed under Rule 12(b)(1).

Plaintiff's allegations are also insufficient, as a matter of law, to state a claim against the United States under the TVPA. The TVPA only applies to torture occurring "under actual or apparent authority, or color of law, of any *foreign* nation." TVPA, § 2(a)(emphasis added). Plaintiff does not allege that any Defendant took any action in any foreign nation or ever purported to act under color of the law or authority of any foreign nation. Allegations of conspiracy with foreign officials do not transform the conduct of federal officials in this Nation into conduct under the authority or "color of law" of a foreign nation. *See Schneider v. Kissinger*, 310 F.Supp.2d 251, 267 (D.D.C. 2004) (rejecting TVPA claim against former National Security Advisor Kissinger, based on his alleged conspiracy with Chilean officials, because "Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law."), *appeal docketed*, No. 04-5199 (D.C. Cir. May 28, 2004). For these reasons, any TVPA claim against the United States must be dismissed under Rule 12(b)(6).

D. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE DUE PROCESS CLAUSE.

Plaintiff contends in Counts II-IV that his detention at the border, the conditions of his detention in the United States, and his removal to, and detention and alleged torture in, Syria violated his Fifth

Amendment substantive due-process rights. *See* COMPL., ¶¶ 76-82 (Count II); *id.*, ¶¶ 83-89 (Count III); *id.* ¶¶ 90-95 (Count IV); *see also* U.S. CONST. amend. V. As explained below, given his status as an alien outside the United States and well-settled principles regarding the constitutional rights of aliens abroad, Plaintiff possessed no constitutional protections in any foreign country and acquired no additional due-process rights with respect to immigration decisions made in the United States. Even if Plaintiff were entitled to some minimal level of due-process protection regarding his treatment while in federal custody in the United States, his allegations state no due-process violation.

1. The rights of aliens under the Due Process Clause

Due-process protections extend "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). But as the Supreme Court has emphasized, aliens (unlike citizens) are accorded constitutional rights only as a consequence of their *presence* within the sovereign territory of the United States. Aliens *outside* our Nation have no rights under our Constitution. *Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950)(Fifth Amendment does not apply extraterritorially to aliens abroad).[16]

The same is true of aliens who seek to enter the United States but are stopped at the border and denied entry because they are inadmissible or excludable.[17] Such individuals are "on the threshold

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[16] *See also United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)(holding that Fourth Amendment does not apply extraterritorially to search and seizure of property owned by nonresident alien in foreign country); *id.* at 269 (observing that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" and that its "rejection of extraterritorial application of the Fifth Amendment was emphatic").

[17] Under the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, aliens who seek admission to the United States but are ineligible to enter are "inadmissible." Pre-IIRIRA, such aliens were referred to as

of initial entry" and never "pass[] through our gates." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *see id.* (aliens at border "stand[] on a different footing" from those in United States); *accord Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)("In the eyes of the law," excludable aliens "have not yet entered the country . . ."); *see also Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). Immigration decisions made by the United States affecting aliens at the border, like its treatment of aliens abroad, are simply not constrained by the Constitution. *See Chew v. Colding*, 344 U.S. 590, 600 (1953)(excludable aliens "are not within the protection of the Fifth Amendment"); *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997) (rights of excluded alien "are determined by the procedures established by Congress," not by the Fifth Amendment's "due process protections").[18]

Even if the alien "seeking admission into the United States" is "*physically* . . . allowed within its borders pending a determination of admissibility," he is "*legally* considered to be detained at the border

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"excludable." *See Sierra v. INS*, 258 F.3d 1213, 1215 n.1 (10th Cir. 2001). In this Memorandum, we use the terms "inadmissible" and "excludable" interchangeably.

[18] *See also United States v. Flores-Montano*, 541 U.S. __, 124 S. Ct. 1582, 1585 (2004) ("The Government's interest in preventing the entry of unwanted persons . . . is at its zenith at the international border."); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993)("'our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry'")(citations omitted); *Chew*, 344 U.S. at 596 n.5 ("'The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.'")(citation omitted); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)("those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise").

and hence as never having effected entry into this country." *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995)(emphasis added; citation omitted). "This principle has become known as the 'entry fiction' doctrine." *Benitez v. Wallis*, 337 F.3d 1289, 1296 n.17 (11th Cir. 2003), *cert. granted*, 124 S. Ct. 1143 (2004). The Supreme Court has "long considered" such "temporary" detentions on our soil as "not affecting an alien's status" or "bestow[ing] . . . additional rights" because the alien is "treated as if stopped at the border." *Mezei*, 345 U.S. at 215; *see Kaplan v. Tod*, 267 U.S. 228, 230 (1925)(excluded alien temporarily detained in United States was "still in theory of law at the boundary line and had gained no foothold in the United States"). Like the alien abroad and the alien at the border, an alien who is temporarily on United States soil solely for the purpose of determining admissibility acquires no constitutional rights regarding his admission, exclusion, or removal.

Although aliens held temporarily in the United States pending an admissibility determination have no constitutional rights with respect to *immigration decisions*, some courts have suggested such aliens do acquire some minimal level of substantive due-process rights with respect to their *treatment* while in federal custody in this country. For example, the Fifth Circuit has held that, notwithstanding the entry-fiction doctrine, inadmissible aliens temporarily on U.S. soil have a substantive due-process right "to be free of gross physical abuse at the hands of state or federal officials." *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987); *see Gisbert v. United States Attorney General*, 988 F.2d 1437, 1442 (5th Cir.)(describing *Lynch* as creating "exception" to entry-fiction doctrine "for gross physical abuse"), *amended in part*, 997 F.2d 1122 (5th Cir. 1993). It is not altogether clear on what

constitutional basis *Lynch* and its progeny rest.[19] The Second Circuit has not squarely addressed the issue of whether inadmissible aliens temporarily detained in the United States for admissibility determinations have any substantive due-process rights, but it has indicated it would construe the due-process rights of such aliens very narrowly: "[o]ther than protection against gross physical abuse, the alien seeking initial entry appears to have *little or no* constitutional due process protection." *Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990)(emphasis added). It has held that even "[i]ndefinite detention of excludable aliens does not violate due process." *Guzman*, 130 F.3d at 66; *cf. Petition of Cahill*, 447 F.2d 1343 (2d Cir. 1971).[20] Under these principles, as shown below, Plaintiff fails to state a cognizable constitutional claim for any of the alleged actions he challenges.

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[19] Recognizing this exception to the general rule that aliens temporarily detained in the United States acquire no constitutional protections creates a somewhat nebulous hierarchy of substantive due-process rights. *See Lynch*, 810 F.2d at 1370, 1374 (recognizing substantive due-process right of inadmissible aliens to be free from gross physical abuse, but refusing to recognize substantive due-process right of such aliens to be free from prolonged detention). As the Supreme Court has observed, federal courts should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

[20] There is a split among federal courts of appeals on this issue, with the Second Circuit in the majority. *Compare Benitez*, 337 F.3d at 1296-98 ("legal status" of inadmissible alien paroled into country, and later subjected to indefinite detention pending removal, "is not altered by detention or parole," as he "is, and remains, an inadmissible alien and is similar to any other alien who has not gained entry and is stopped at this country's border," and has "no constitutional rights precluding indefinite detention"), *cert. granted*, 124 S. Ct. 1143 (2004); *Borrero v. Aljets*, 325 F.3d 1003, 1008 (8th Cir. 2003)(inadmissible alien paroled into country, and thus physically present, did not "effect[] an entry into the United States," and his detention did not violate due process); *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003)(*per curiam*); *Sierra v. Romaine*, 347 F.3d 559 (3d Cir. 2003), *petition for cert. filed*, Jan. 27, 2004 (No. 03-8662); *with Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir.)(en banc) (excludable aliens had due-process protections with respect to length of detention), *cert. denied*, 539 U.S. 941 (2003); *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002).

2. Plaintiff has no protection under the U.S. Constitution for alleged injuries sustained in Syria at the hands of Syrian officials.

Plaintiff's challenge to his detention and alleged torture in Syria while in the custody of Syrian officials, *see* COMPL., ¶¶ 76-82 (Count II based on torture in Syria); *id.*, ¶¶ 83-89 (Count III based on detention in Syria), runs head-on into *Eisentrager*. There, the Supreme Court held that the Fifth Amendment confers no rights on aliens outside the sovereign territory of the United States. *Eisentrager*, 339 U.S. at 783 (rejecting lower court's holding that "the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"). The Court has since described *Eisentrager* as "emphatic[ally]" rejecting the extraterritorial application of the Fifth Amendment. *Verdugo*, 494 U.S. at 269; *id.* at 268 (rejecting lower court's "global view . . . of the application of the Constitution," and holding that the Fourth Amendment does not constrain the actions of federal officials as to nonresident aliens outside the United States); *see also Zadvydas*, 533 U.S. at 693 (observing that, whatever the "constitutional protections" afforded to "persons inside the United States," they "are unavailable to aliens outside of our geographic borders").[21] The Second

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[21] That the U.S. Constitution does not govern Plaintiff's detention or treatment in Syria was not altered by *Rasul v. Bush*, 542 U.S. __, 124 S.Ct. 2686 (2004). In *Rasul*, the Supreme Court held that federal courts have habeas jurisdiction to consider the legality of the ongoing detention of foreign nationals captured abroad and currently held in federal custody at the Guantanamo Bay Naval Base in Cuba. The Court considered the historic role of habeas "'as a means of reviewing the legality of Executive detention'" and found that the Guantanamo detainees had a *statutory* right to petition for habeas to review "the legality of Executive detention . . . in a territory over which the United States exercises *plenary and exclusive jurisdiction* . . . ." *Id.* at 2692-93 (emphasis added; citation omitted). The Court held that *Eisentrager* did "not preclude the exercise of § 2241 jurisdiction" as a matter of statutory interpretation, and left untouched *Eisentrager*'s core constitutional holding that the Fifth Amendment does not apply extraterritorially. *Id.* at 2695. While the Court at one point expressed the view that the allegations by the *Rasul* petitioners, who were aliens in federal custody in a "territory subject to the long-term, exclusive jurisdiction and control of the United States," described

Circuit has fully embraced the reasoning behind these holdings. *See Linnas v. INS*, 790 F.2d 1024, 1031 (2d Cir. 1986)(rejecting alien's claim that he would be denied due process by Soviet officials if removed to former Soviet Union, and stating "the jurisdiction of this court 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.").[22] Plaintiff's reliance on a "state-created danger" theory, COMPL., ¶¶ 79, 86; DKT. NO. 22 (Pl.'s Ltr. at 8), in the immigration context cannot be squared with these authoritative Supreme Court and Second Circuit

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"custody in violation of the Constitution or laws or treaties of the United States" under § 2241, *id.* at 2698 n.15, the Court was merely noting that the allegations were the proper subject for a habeas action under § 2241. The Court was not suggesting the petitioners' allegations, if proven, would ever constitute a violation of the Constitution, laws, or treaties of the United States, and it was not resolving the fundamental question of whether aliens in petitioners' circumstances would be entitled to the protection of those laws. Rather, *Rasul*, which by its terms does not involve the Executive's sovereign immigration power, repeatedly characterized its holding as narrow and limited to the question of whether § 2241 provided habeas jurisdiction for Guantanamo detainees. *Id.* at 2690, 2693-94, 2698-99. *Rasul* certainly did not disturb *Eisentrager*'s "emphatic" rejection of extraterritorial application of the Fifth Amendment. *Verdugo*, 494 U.S. at 269. In any event, Plaintiff was not in federal custody in Syria; rather, he seeks a declaration that his claimed constitutional rights were violated in a foreign country in which the United States plainly does not exercise "plenary and exclusive jurisdiction."

[22] *See also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (Constitution has no "force in foreign territory unless in respect of our own citizens"); *Ross v. McIntyre*, 140 U.S. 453, 464 (1891)("By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country.")(citation omitted); *Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000)(rejecting Fifth Amendment claim against federal officials based on torture of nonresident alien in Guatemala), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

precedents.[23] Whatever his theory of recovery, Plaintiff is foreclosed from asserting any substantive due-process claim for alleged injuries that occurred in a foreign country, particularly one based on injuries allegedly inflicted on him by foreign officials.[24]

3. As an alien at the border, Plaintiff had no substantive due-process protection with respect to any immigration decision made by federal officials.

As a citizen of Syria and Canada, and not of the United States, Plaintiff is clearly an "alien." *See* 8 U.S.C. § 1101(a)(3). Although he allegedly entered the United States on prior occasions and lived and worked here, COMPL., ¶¶ 12-13, Plaintiff is not, and has never been, a legal permanent resident (nor does he claim to have held such status). Thus, when Plaintiff presented himself to a JFK immigration inspector on September 26, 2002, he was an alien applying for admission to the United States. *See* 8 U.S.C. § 1225(a)(1)("An alien present in the United States who has not been admitted

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[23] The cases cited in Plaintiff's pre-motion letter for this proposition have nothing to do with aliens' rights under the Constitution or the United States' immigration powers. *See Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996)(approving "state created danger" theory in citizens' suit against city and city police officers); *Small v. City of New York*, 274 F.Supp.2d 271 (E.D.N.Y. 2003)(same), *as clarified*, 304 F.Supp.2d 401 (E.D.N.Y. 2004), *appeals docketed*, Nos. 03-7880 & 03-7940 (2d Cir. Aug. 27, 2003 & Nov. 14, 2003, respectively).

[24] Plaintiff's claim that foreign officials acted at the behest of federal officials in the United States is of no constitutional significance. Even were this true, as the Supreme Court recently observed in an analogous context, it would "virtually always be possible" to trace claimed injuries in a foreign country back to an act or omission in the United States so long as U.S. actors are somehow involved. *Sosa v. Alvarez-Machain*, 542 U.S. __, 124 S. Ct. 2739, 2749 (2004)(where FTCA barred claims arising in foreign country, there was no "exception" to this rule allowing claims where the foreign injury could be traced to conduct that occurred in the U.S.)(citation and internal quotation marks omitted). This rationale fully applies here. To create a due-process right where none has existed before, based solely on an alleged link between the conduct of federal officials in the United States and the conduct of foreign actors abroad, would "swallow . . . whole" centuries of constitutional jurisprudence. *Id.* For example, doing so would contravene *Verdugo*, where the Court held that a nonresident alien had no Fourth Amendment claim with respect to a warrantless search of his property in Mexico, even though the search was performed at the request of a DEA official in California. 494 U.S. at 262.

or who arrives in the United States . . . shall be deemed for purposes of this chapter an applicant for admission.").[25] Plaintiff was temporarily detained at JFK and MDC to determine his admissibility and, ultimately, was found inadmissible as a member of al Qaeda, a designated "foreign terrorist organization," 8 U.S.C. § 1182(a)(3)(B)(i)(V), and removed from the United States to Syria. Because he was an alien at the border, none of these actions implicated the Constitution.

Plaintiff denies that he is a member of al Qaeda and seeks a declaration that his detention in the United States and removal were "without probable cause to believe that he was a member of or had any involvement with Al Qaeda or any other terrorist organization." COMPL., ¶ 5. He also alleges that "there was never, and is not now, any reasonable suspicion to believe" that he was "involved" in "terrorist activity." *Id.*, ¶ 2. These complaints over his exclusion from the United States and the factual predicate underlying it are not cognizable under the Constitution.

For more than a century, the Supreme Court "has repeatedly emphasized that 'over 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)(citation omitted); *see Ping v. United States*, 130 U.S. 581, 603-07 (1889). "[T]he power to admit or exclude aliens is a sovereign prerogative."

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[25] Plaintiff alleges, with no citation to authority, that "[h]e was not applying to enter the United States at this time." COMPL, ¶ 26; DKT. NO. 22 (Pl.'s Ltr. at 7). By operation of law, however, Plaintiff was "deemed" an applicant for admission when he presented himself at the border. *See* 8 U.S.C. § 1225(a)(1). That Plaintiff may have sought entry in order to transit to Canada simply means that he was an arriving, nonimmigrant alien and does not alter his status as an applicant for admission to the United States. *See* 8 C.F.R. § 1.1(q)(an "arriving alien" is "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry"); 8 U.S.C. § 1101(a)(15)(C)("an alien in immediate and continuous transit through the United States" is a nonimmigrant alien).

Landon v. Plasencia, 459 U.S. 21, 32 (1982); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). It is exercised exclusively by the Legislature and implemented by the Executive. *Mathews v. Diaz*, 426 U.S. 67, 84 (1976); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'")(citation omitted). Although Congress normally "supplies the conditions of the privilege of entry into the United States," it "may in broad terms authorize the executive to exercise the power" since "the power of exclusion of aliens is also inherent in the executive department of the sovereign." *Knauff*, 338 U.S. at 543.

Clearly, Plaintiff had no constitutional right to be admitted to the United States. *Kleindienst*, 408 U.S. at 762 ("unadmitted and nonresident alien . . . had no constitutional right of entry to this country as a nonimmigrant or otherwise").[26] Nor did he have any substantive due-process right not to be removed from the United States.[27] He therefore had no constitutional entitlement to have his admissibility or removal determined by the evidentiary standards suggested in the complaint ("probable cause" or "reasonable suspicion"). Plaintiff did not even have a *statutory* right to have his admissibility determined in accordance with these criminal-law standards. To the contrary, Congress specifically

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[26] *See Landon*, 459 U.S. at 32 ("alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"); *Knauff*, 338 U.S. at 542 ("[A]n alien who seeks admission to this country may not do so under any claim of right."); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945)(Murphy, J., concurring)("Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit.").

[27] Even admitted aliens have no substantive due-process right not to be removed or deported. *See Linnas*, 790 F.2d at 1031 ("[T]here is no substantive due process right not to be deported."). As an inadmissible alien, then, Plaintiff certainly had no such right.

provided that the *alien* applying for admission has "the burden of establishing" that he is "clearly and beyond doubt entitled to be admitted and is not inadmissible under [8 U.S.C. § 1182]." 8 U.S.C. § 1229a(c)(2)(A). Moreover, in cases like this one concerning inadmissibility on security-related grounds, the INA requires only that the Attorney General be "satisfied on the basis of confidential information that the alien is inadmissible . . . ." 8 U.S.C. § 1225(c)(2)(B)(i). Plaintiff's claim that he was entitled to have his admissibility determined under a standard of "probable cause" or "reasonable suspicion" is meritless.

That Plaintiff was removed *to Syria* raises no additional due-process concerns, even if that removal was in violation of the CAT, as he contends. COMPL., ¶¶ 1, 17-19.[28] As the CAT is not a self-executing treaty, Plaintiff did not even enjoy enforceable *treaty* rights with respect to his removal. *See supra* n.14. To the extent he had any *statutory* rights, those would be found in FARRA and its implementing regulations. *See Wang*, 320 F.3d at 133; 8 C.F.R. §§ 208.16-18.[29] In any event,

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[28] As previously discussed, *see supra* p. 16, the redesignation of Syria as Plaintiff's country of removal was authorized by statute.

[29] In FARRA, Congress expressly declared that aliens described in 8 U.S.C. § 1231(b)(3)(B), including those like Plaintiff for whom "there are reasonable grounds to believe" are "a danger to the security of the United States," § 1231(b)(3)(B)(iv), "shall" be excluded from FARRA's protections "[t]o the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention . . . ." FARRA § 2242(c). Thus, certain cases are subject to more limited regulatory processes and protections with respect to CAT claims. *See, e.g.*, 8 C.F.R. § 235.8(b)(4)("The Service shall not execute a removal order under this section [relating to arriving aliens found inadmissible on security grounds] under circumstances that violate . . . Article 3 of the [CAT]"; provisions "relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply"); *cf.* 8 C.F.R. § 208.16(d)(2)("if the applicant falls within" § 1231(b)(3)(B), "an application for withholding of removal" under CAT "shall be denied"). Here, the INS considered the applicability of Article 3 of the CAT and determined that Plaintiff's removal to Syria was consistent with its requirements. Ex. D, Final Notice.

neither treaty nor statutory rights can support Plaintiff's due-process claim, because "substantive due process rights are created only by the Constitution." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985)(Powell, J., concurring).[30]

In this case, the Executive Branch found as a matter of fact that Plaintiff was a member of a foreign terrorist organization and therefore was ineligible to enter the country, and it removed him to Syria rather than to the country of his choice. Those decisions are not subject to constitutional scrutiny by the Judiciary. *Knauff*, 338 U.S. at 543, 546. "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.*; *accord Ekiu*, 142 U.S. at 660. As an alien at the border, Plaintiff had no constitutional right that could have been infringed by the Executive's exercise of its immigration power.

4. To the extent that Plaintiff had any substantive due-process protection with respect to the conditions of his confinement while in the custody of federal officials in the United States, his allegations do not state a claim.

The final count of Plaintiff's complaint challenges various conditions of his confinement during his detention in the United States. For reasons explained above, *see supra* pp. 20-23, it is not clear that Plaintiff garnered *any* due-process rights during his brief, transitory detention in the United States while Executive Branch officials determined his admissibility. Like the alien's "harborage at Ellis Island"

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[30] *See also Doherty*, 808 F.2d at 944 (rejecting alien's argument that redesignation of United Kingdom as country of deportation violated due process, where alien faced life sentence in that country for terrorist activity, but faced lesser sentence in Republic of Ireland, which alien had designated); *Linnas*, 790 F.2d at 1030-31 (rejecting alien's argument that redesignation of Soviet Union as country of deportation violated due process, where alien, a Nazi official, faced death sentence upon return to that country, which had convicted him of war crimes *in absentia*).

in *Mezei*, Plaintiff's brief detention at JFK and MDC did not accomplish "entry into the United States." *Mezei*, 345 U.S. at 213. Such a "temporary arrangement[]," taken by the Executive in a legitimate exercise of its constitutional immigration power, should not "affect[]" Plaintiff's "status" or bestow constitutional rights on him. *Id.* at 215.

In the Second Circuit, the only *potential* substantive due-process right possessed by an alien like Plaintiff – that is, an inadmissible alien temporarily detained on United States soil while his right to enter is determined – is a *limited* right to be free, while in this country, from "gross physical abuse" by federal officials. *Correa*, 901 F.2d at 1171 n.5. Plaintiff's conclusory allegations concerning his conditions of confinement fall far short of meeting that standard. The challenge to his detention itself is plainly foreclosed by Supreme Court and Second Circuit precedent. Under *Zadvydas*, there is a presumptively reasonable *six-month* period in which aliens who have been admitted to the United States may be detained after a final removal order. 533 U.S. at 700-01. Thus, even if *Zadvydas* applied to the detention of an *inadmissible* alien like Plaintiff, the 13-day period of domestic detention at issue here would be clearly constitutional. Indeed, the Second Circuit has held that inadmissible aliens may be subjected to *indefinite* detention consistently with the Due Process Clause. *See Guzman*, 130 F.3d at 66; *see also, e.g.*, *Benitez*, 337 F.3d at 1298 ("inadmissible aliens . . . have no constitutional rights precluding indefinite detention"). Plaintiff's other allegations are also insufficient to state a due-process claim based on gross physical abuse. *See, e.g.*, COMPL., ¶ 1 (alleging federal officials held Plaintiff "in harsh and punitive conditions, coercively interrogat[ed] him for hours on end, and depriv[ed] him of contact with his family, his consulate, and his lawyer"); *id.*, ¶ 4 (alleging that, during "solitary confinement," he was "chained and shackled, subjected to invasive strip-searches, and

deprived of sleep and food for extended periods of time"). Similar allegations have been found insufficient to state a claim of "gross physical abuse." *See, e.g., Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990)(where excludable aliens complained of "severe overcrowding, insufficient nourishment, inadequate medical treatment and other conditions of ill-treatment arising from inadequate facilities and care," court found "no complaint here approaching the 'gross' physical abuse outlined in *Lynch*"); *Medina v. O'Neill*, 838 F.2d 800, 803 (5th Cir. 1988).

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court to dismiss with prejudice all claims against Attorney General Ashcroft, Secretary Ridge, FBI Director Mueller, and Regional Director Corrigan in their official capacities.

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