No. 06-4216-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAHER ARAR,
Plaintiff-Appellant,
v.

JOHN ASHCROFT, formerly Attorney General; LARRY D. THOMPSON, formerly Deputy Attorney General, TOM RIDGE, Secretary of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, and UNITED STATES,
Defendants-Appellees.

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

BRIEF FOR THE OFFICIAL CAPACITY DEFENDANTS-APPELLEES AND
UNITED STATES AS *AMICUS CURIAE*

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JOHN ASHCROFT, formerly Attorney General; LARRY D. THOMPSON, formerly Deputy Attorney General, TOM RIDGE, Secretary of Homeland Security,[1] J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, and UNITED STATES,
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[1] Because defendant Ridge was sued only in his official capacity (*see* Appendix ("App.") 24), this Court should substitute the current Secretary of Homeland Security, Michael Chertoff. *See* Fed. R. App. P. 43(c)(2). In addition, as to the defendants sued in both their official and personal capacities, the official-capacity aspect of the claims should also be denominated as against the current office holders. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity").

STATEMENT OF JURISDICTION

Plaintiff asserted claims under the Fifth Amendment and the Torture Victim Protection Act ("TVPA"), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331, 2201, 2202, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, 559. As we detail below, the district court properly held that the declaratory relief claims failed to present a case-or-controversy within the court's Article III jurisdiction.

The district court entered judgment on July 28, 2006, dismissing three claims with prejudice and one claim without prejudice. Special Appendix ("SA") 89-90. Plaintiff asked the court to amend the judgment to dismiss all claims with prejudice, and the court did so on August 17, 2006. SA 91-93. On September 12, 2006, plaintiff filed a timely notice of appeal from the amended judgment. Appendix ("App.") 470-471. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiff failed to demonstrate Article III standing for declaratory relief, where the only ongoing injury that plaintiff asserts would not be redressed by the relief sought and is not traceable to the alleged violations.

2. Whether the declaratory relief sought on plaintiff's substantive due process claims regarding alleged torture and detention in Syria (counts 2 and 3) fails because the Fifth Amendment does not apply to aliens outside the United States.

3. Whether a court-created *Bivens*[2] remedy should be recognized on counts 2 and 3 where those claims pertain to foreign-policy and national-security matters and where Congress did not provide for a damages remedy in its comprehensive statutory scheme specifically governing enforcement of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[3] and removal of aliens.

4. Whether U.S. officials exercising responsibilities under U.S. immigration law in the United States may be sued under the TVPA for alleged torture by Syrian officials in Syria.

STATEMENT OF THE CASE

Plaintiff Maher Arar was denied admission to the United States under the Immigration and Nationality Act ("INA") based on the finding that he was a member of al Qaeda, and he was removed to Syria, the country of his birth and of which he was a citizen. He complains about his treatment while awaiting his removal in the

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[2] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] U.N. Doc. A/RES/39/708, reprinted in 23 I.L.M. 1027 (1984).

United States and asserts that he was tortured by Syrian officials after he arrived in Syria.[4] Arar filed the present civil action against current and former federal officials in their official and individual capacities. App. 19-43. Arar alleged that defendants' actions violated the TVPA and the Fifth Amendment to the U.S. Constitution. On his constitutional claims, plaintiff sought declaratory relief and also asked the district court to recognize a *Bivens* cause of action against the individual defendants for compensatory and punitive damages. The district court held that Arar lacked standing to seek declaratory relief and that a *Bivens* damages action for the alleged constitutional violations was not available in the context of counts 2 and 3, Arar's claims relating to his treatment in Syria. The court further held that plaintiff's TVPA claim (count 1) failed because the defendants had not acted under color of foreign law. As to count 4, the claim regarding plaintiff's detention while awaiting removal,

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[4] Consistent with Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the district court correctly examined whether, accepting the factual allegations of the complaint, plaintiff stated a valid claim and properly invoked the court's jurisdiction. It should not be inferred from this procedural posture, however, that the United States agrees with plaintiff's allegation of a conspiracy to have him tortured in Syria. There was no such conspiracy. To the contrary, the INS Commissioner determined that Arar's removal was consistent with the CAT, and that determination was incorporated into the removal order. App. 86. And as the Attorney General recently testified, "there were assurances sought that [Arar] would not be tortured from Syria." Transcript of Senate Judiciary Committee Oversight Hearing (Jan. 18, 2007), 97. The Attorney General added: "we understand what our legal obligations are with respect to when someone is either removed, extradited or rendered to another country. We understand what our obligations are under the Convention Against Torture, and we do take the steps to ensure that those obligations are being met." *Id*. at 99.

the court held that Arar had not sufficiently alleged the personal involvement of the individual defendants. Arar refused the opportunity to replead that count and asked the district court to enter judgment, which it did. Arar then filed this appeal.

STATEMENT OF THE FACTS

A. Arar's Removal To Syria.

Maher Arar is a dual citizen of Syria and Canada. On September 26, 2002, Arar had a flight layover in New York on his way from Tunisia to Canada. SA 2. Upon presenting his passport to an immigration inspector, Arar was identified as being a suspected member of a known terrorist organization. SA 2; App. 88. Arar was then detained in New York and claims that, during the first three days of his detention, officials ignored his requests to make a telephone call and see a lawyer. SA 2-7.

On October 1, 2002, the INS initiated removal proceedings against Arar. The INS charged Arar with being as a member of al Qaeda and thus inadmissible to the United States under 8 U.S.C. § 1182(a)(3)(B)(i)(V), which renders ineligible for admission an alien who is a "member of a terrorist organization." SA 4; App. 88. That same day, Arar telephoned his family. App. 31. His family immediately contacted the Office of Canadian Consular Affairs and retained an immigration attorney in New York. On October 3, an official from the Canadian Consulate visited

Arar. Arar showed that official the document charging him with being inadmissible. *Ibid*. On October 4, Arar was asked to designate the country to which he wished to be removed, and he designated Canada. App. 31-32; *see* 8 U.S.C. § 1231(b)(2)(A). On October 5, Arar visited with his immigration attorney. App. 32.

On October 6, INS officials questioned Arar about whether he objected to being removed to Syria. He alleges that he told the officials that he feared being tortured if removed to Syria. App. 31.

On October 7, 2002, then-INS Regional Director J. Scott Blackman determined from classified and unclassified information that Arar is a member of al Qaeda and, therefore, inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(V). SA 6; App. 88, 91. Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." SA 6; App. 92. Based on that finding, Blackman, acting under authority delegated by the Attorney General, invoked 8 U.S.C. § 1225(c)(2)(B), *see* App. 87-88, 108, to order Arar's removal without a hearing before an immigration judge. Section 1225(c) provides in relevant part:

> (c) Removal of aliens inadmissible on security and related grounds
>
> (1) Removal without further hearing
>
> > If an immigration officer * * * suspects that an arriving alien may be inadmissible under subparagraph * * *(B) * * * of section 1182(a)(3) of this title, the officer * * * shall—

> (A) order the alien removed, subject to review under paragraph (2);
> (B) report the order of removal to the Attorney General; and
> (C) not conduct any further inquiry or hearing until ordered by the Attorney General.
>
> (2) Review of order
>
> (A) The Attorney General shall review orders issued under paragraph (1).
> (B) If the Attorney General—
> (i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph * * *(B) * * * of section 1182(a)(3) of this title, and
> (ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, *the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge* * * *.

8 U.S.C. § 1225(c) (emphasis added).

Where, as here, § 1225(c) is invoked to remove an alien based on national-security concerns without a hearing before an immigration judge, if the alien claims he will be tortured upon removal, the immigration officials must decide whether removal must be withheld pursuant to U.S. obligations under Article 3 of the CAT as implemented into U.S. law by the Foreign Affairs Reform and Restructuring Act ("FARR Act"), Pub. L. 105-277, § 2242(b), codified at 8 U.S.C. § 1231 note. Under

the CAT and the FARR Act, removal to a given country must be withheld if it is more likely than not that the alien will be subjected to torture if removed there.[5]

On October 8, 2002, Arar was informed of the decision to remove him to Syria and of the determination that his removal there was consistent with the CAT. SA 6; App. 33. In disregarding Arar's designation of Canada as the country to which he wished to be removed, the Acting Attorney General exercised his discretionary authority under 8 U.S.C. § 1231(b)(2)(C)(iv), which provides that the "Attorney General may disregard a designation" if, *inter alia*, "the Attorney General decides that removing the alien to the country is prejudicial to the United States." Syria was then selected as the country of removal pursuant to 8 U.S.C. § 1231(b)(2)(D) as a country of which Arar "is a subject, national, or citizen."

Arar's Final Notice of Inadmissibility ordered him removed without further inquiry before an immigration judge (under 8 U.S.C. § 1225(c)(2)) and incorporated the INS Commissioner's "determin[ation] that [Arar's] removal to Syria would be consistent with the [CAT]." App. 86. The final removal order, including the CAT determination, would have been subject to review in a petition for review of the

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[5] *See* 8 C.F.R. 208.16(c)(3), 208.17(d)(3); FARR Act, § 2242(b) (directing appropriate agencies to implement the United States' obligations under the CAT "subject to any reservations, understandings, declarations, and provisos contained in the * * * Senate resolution of ratification"); *Sevoian v. Ashcroft*, 290 F.3d 166, 174-75 (3d Cir. 2002).

removal order. 8 U.S.C. § 1252; FARR Act, § 2242(d); 8 C.F.R. 208.18(e)(1). No petition for review was filed, however, either before or after Arar's removal.[6]

Thereafter, Arar was flown to Jordan and handed over to Jordanian authorities, who delivered him to Syria. SA 7. On October 20, 2002, the Canadian Embassy in Syria confirmed that Arar was in Syria, and Arar's complaint notes that he met with Canadian officials on seven occasions. App. 36. On October 5, 2003, Syria released Arar, and he returned to Canada. App. 37, SA 6, 10.

B. The District Court Proceedings.

1. Arar filed the present action against current and former federal officials in their official and individual capacities. App. 19-43. Arar asserts that he is not a member of al Qaeda or any other terrorist organization and that there was never any "reasonable suspicion to believe" he was engaged in terrorist activities. App. 20, 22, 23. He complains about his treatment by unidentified officers while detained in New

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[6] Arar's complaint incorrectly states that the removal order bars his return to the United States for five years. App. 33. Pursuant to § 1182(a)(9)(A)(ii) Arar is inadmissible to the United States for *ten years* from the date of his removal, absent consent from the Secretary of Homeland Security to his reapplying for admission. Under § 1182(a)(9)(A)(i), a previously removed arriving alien is inadmissible for five years from the date of his removal if the removal was the result of proceedings under § 1229a or § 1225(b)(1). Arar, however, was removed as the result of proceedings under § 1225(c). Arar thus is subject to the ten-year bar set out in subclause (ii) of § 1182(a)(9)(A), not the five-year bar set out in subclause (i). In addition to this ten-year inadmissibility ground, if at any time Arar were to reenter the United States without the permission of the Secretary of Homeland Security, he would be subject to prosecution under 8 U.S.C. § 1326(a).

York awaiting removal, and he alleges he was tortured during his detention in Syria. App. 21, 29-37.

Arar raises four claims for relief. In count 1, he alleges that defendants violated the TVPA by conspiring with and/or aiding and abetting Syrian officials to bring about his torture. App. 38. In counts 2 and 3, he claims that defendants violated the Fifth Amendment by knowingly and intentionally subjecting him to torture, coercive interrogation, and prolonged detention in Syria. App. 38-41. Finally, count 4 is a Fifth Amendment challenge to the conditions of Arar's confinement and his alleged deprivation of access to the courts while detained in the United States. App. 41-42. Arar seeks compensatory and punitive damages on all four counts from the defendants in their individual capacity and declaratory relief on the Fifth Amendment claims (counts 2-4) from the official-capacity defendants. SA 16.

2. All defendants moved to dismiss. In addition, the United States made a formal claim of the state-secrets privilege, asserting that counts 1-3 could not be litigated without disclosure of classified information and therefore must be dismissed. App. 126-38. The privilege assertion was supported by unclassified declarations from then-Acting Attorney General James Comey and then-Secretary of Homeland Security Tom Ridge. App. 129-37. Acting Attorney General Comey explained: "Litigating Counts I, II and III of plaintiff's complaint would necessitate disclosure

of classified information, including: (1) the basis for the decision to exclude plaintiff from this country based on the finding that plaintiff was a member of * * * al Qaeda, * * *; (2) the basis for the rejection of plaintiff's designation of Canada as the country to which plaintiff wished to be removed, * * *; and (3) the considerations involved in the decision to remove him to Syria, * * *." App. 131-32. He further declared that "disclosure of the classified information used by government officials to reach each of the three noted decisions reasonably could be expected to cause exceptionally grave or serious damage to the national security interest of the United States." App. 133. Secretary Ridge added that the classified information relating to these three decisions "contains numerous references to intelligence sources and methods, the disclosure of which reasonably could be expected to cause exceptionally grave or serious damage to the national security of the United States and its foreign relations or activities." App. 136.

Both Acting Attorney General Comey and Secretary Ridge further supported the state-secrets privilege assertion in detailed classified declarations and explained that the basis for invoking the privilege could not be further elaborated on the public record. App. 133, 136. The government offered to provide the district court the classified declarations further supporting the assertion of the state-secrets privilege for its *ex parte, in camera* review. App. 127.

C. The District Court's Dismissal Of Arar's Claims.

Without reaching the state-secrets privilege assertion, the district court granted defendants' motions to dismiss.[7]

1. The court held that Arar's declaratory-relief claims failed to present a case-or-controversy. SA 18. The only ongoing injury identified by Arar was the statutory bar on his reentering the United States. That injury could not supply standing for prospective relief, because it is a legal consequence of the removal order and his ultimate removal, and Arar conceded he was not seeking to set aside that order. SA 19 (citing Arar's opposition to defendants' motions to dismiss ("Arar Memo. in Opp.") at 13). Concluding that "any judgment declaring unlawful the conditions of his detention or his removal to Syria would not alter in any way his ineligibility to reenter this country," the court dismissed Arar's claims for declaratory relief. SA 19-20.

2. The district court held that the TVPA claim failed that statute's requirement that the defendants have acted "under actual or apparent authority, or color of law, of any foreign nation," because the defendants' alleged conduct would have been done

[7] The court found that the invocation of the state-secrets privilege was moot in light of its dismissal of counts 1-3 on other grounds. SA 85-86. If this Court were to reverse the dismissal of any of these claims, the district court would be required to determine on remand whether any reinstated claim could proceed notwithstanding the assertion of the state-secrets privilege.

under color of U.S. law, not Syrian law. SA 31-37. The court rejected plaintiff's reliance on precedent discussing 42 U.S.C. § 1983. SA 34-36. The court reasoned that, even under § 1983, federal officials are deemed to act under color of state law when they act "under the control or influence of the State [officials]," not when the federal officials control or influence the state officials. SA 36. Thus, the court concluded, "plaintiff's analogy works only if Syrian officials ordered U.S. officials to torture Arar, not vice versa--as alleged." *Ibid*.

3. As to the *Bivens* claims regarding the detention and alleged torture in Syria, the court relied on Arar's statements that he was *not* challenging the removal order, SA 40, to reject defendants' arguments that the claims are directly barred by the jurisdictional provisions of the INA. SA 38-54.

The court examined whether Fifth Amendment rights extend to aliens outside the United States but did not resolve that issue. SA 54-67. Instead, the court held that the claims were "foreclosed" because there are special factors counseling hesitation against recognizing a non-statutory *Bivens* claim. SA 67-77. The court explained that it should not extend a *Bivens* remedy to this context "in light of the national-security concerns and foreign policy decisions at the heart of this case." SA 70. The court noted that when Congress created a damages remedy in the TVPA, it did not extend that remedy to acts of U.S. officials acting under color of U.S. law, and

Congress likewise did not provide any monetary remedy when it enacted the FARR Act to implement the CAT. SA 71. The court reasoned that "the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches * * *." SA 75-76.

4. As to count 4, Arar's claim regarding his treatment during his detention within the United States, the court found that Arar's allegations were "borderline," but even if they stated a due process violation in the abstract, Arar failed to "adequately detail which defendants directed, ordered and/or supervised the alleged violations." SA 81-82, 84. Thus, the court dismissed this claim, without prejudice for Arar to replead. SA 85, 88.

Arar did not wish to replead count 4 and asked the court to enter final judgment, which it did, SA 92-93. Arar then appealed to this Court. SA 470.

SUMMARY OF ARGUMENT

Plaintiff is a Syrian-Canadian who was determined by U.S. officials to be a member of al Qaeda, denied admission to the U.S. on that basis, and removed to Syria, pursuant to a removal order entered under the INA. The removal order incorporated the INS Commissioner's finding that Arar's removal to Syria was consistent with the CAT. Arar now seeks declaratory relief against the United States

and damages from individual federal officials for his alleged torture in Syria, all premised on that CAT determination having being made in bad faith. The district court properly rejected these claims.

I. The district court correctly dismissed Arar's claims for declaratory relief for want of standing. Arar claims that he has standing to seek a declaratory judgment because he is currently barred from reentering the United States. As the district court held, however, there is no nexus between the reentry bar and the relief sought.

The reentry bar arose by operation of law, as a direct and automatic consequence of Arar's removal based upon the removal order entered under § 1225(c). The only way the reentry bar could be eliminated would be to vacate the removal order. In the district court, however, Arar conceded that he was *not* challenging his removal order. Given Arar's express waiver, the district court properly concluded that "any judgment declaring unlawful the conditions of his detention or his removal to Syria would not alter in any way his ineligibility to reenter this country." SA 19-20.

On appeal, Arar now suggests he really is seeking to invalidate his removal order. Having waived any challenge to the removal order in district court, however, Arar is not free to raise that argument now. Even if Arar's waiver were overlooked,

the INA would bar jurisdiction over a claim seeking invalidation of his removal order. Thus, in any event, there is no jurisdiction over Arar's claim for declaratory relief.

II. A. Arar's claims 2 and 3 must also be rejected because he cannot invoke Fifth Amendment rights regarding his treatment in Syria. In *Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950), the Court emphatically held that aliens outside sovereign U.S. territory do not possess Fifth Amendment rights. Subsequent decisions have reaffirmed that holding. Thus, *Eisentrager* and its progeny require rejection of Arar's Fifth Amendment claims regarding his treatment in Syria. In his brief, plaintiff cites a footnote from *Rasul v. Bush*, 542 U.S. 466 (2004), as *sub silentio* overruling *Eisentrager*. As the D.C. Circuit recently held, *Rasul* did not even address the question of constitutional rights and plainly did not overrule *Eisentrager*.

B. Nor does Arar possess any Fifth Amendment rights in regard to his removal order. It is established that an alien stopped at a port of entry and denied admission has no constitutional rights in regard to his removal proceedings.

C. Arar errs in relying on cases finding a constitutional violation where the government has created a danger. Arar has no cognizable Fifth Amendment rights regarding his treatment in Syria. Moreover, the "state-created danger exception has no place in our immigration jurisprudence." *Kamara v. Attorney General*, 420 F.3d 202, 217 (3d Cir. 2005).

III. The district court properly rejected the creation of a *Bivens* remedy in this context.

A. On multiple occasions, the Supreme Court has declined to extend *Bivens* recognizing that Congress is in a better position to decide whether the public interest would be served by the creation of a cause of action for damages. Thus, where Congress has established a comprehensive statutory framework to handle a category of disputes with the federal government, the Court has held that it is improper to imply a *Bivens* remedy, even where a claimed constitutional injury would go unredressed within that statutory scheme. In particular, the courts of appeals have refused to recognize *Bivens* claims where Congress has not created for a monetary remedy but instead provided for judicial review of an agency decision under the APA. The rationale of these cases applies fully here. Congress has provided for judicial review of the agency decision at issue here, and Congress has specified (in the INA and the FARR Act) which kinds of challenges to such an agency decision are cognizable and in what manner.

Arar complains that he had no damages remedy under the INA and the FARR Act, but his quarrel is with Congress. Congress made a deliberate decision to limit enforcement of the CAT pursuant to the FARR Act, and its failure to create a private

right of action for damages for alleged constitutional violations occurring in the administration of the CAT was not an inadvertent oversight.

B. As the district court recognized, Arar's counts 2 and 3 raise matters that are typically reserved to the legislative and executive branches and as to which, therefore, courts should be especially unwilling to create non-statutory damages remedies. Arar challenges the motives of the officials who made the decision to remove him to Syria, and adjudication of these claims would involve the court deeply in sensitive matters. First, a court would have to inquire into the national-security and foreign-affairs concerns relevant to the decision to disregard Arar's designation of Canada as the country of removal. Likewise, a court would have to inquire into the national-security and foreign-affairs considerations relevant to the selection of Syria as the country of removal and the concomitant determination that that selection was consistent with the CAT, including examining any communications between the United States and foreign governments. Finally, a court would have to examine the classified material that supported finding Arar inadmissible as a member of al Qaeda. All these matters, by their nature, involve sensitive issues of foreign policy and national security. Thus, the district court properly held that counts 2 and 3 raise matters relating to foreign affairs and national security that are not the proper subject of a *Bivens* action.

IV. A. Arar failed to state a claim under the TVPA. The defendants' alleged acts were not taken "under * * *color of law, of any foreign nation." TVPA § 2(a). Where, as here, U.S. officials exercised authority under U.S. law, there is no basis to deem their actions to have been taken under color of foreign law.

B. Arar's allegation of aiding and abetting or conspiracy by U.S. officials does not state a TVPA claim. These theories of liability cannot be reconciled with the statute's terms. Moreover, as the Supreme Court has recognized, aiding-and-abetting liability effects a vast expansion of the scope of a civil cause of action that should not be undertaken without clear guidance from Congress.

STANDARD OF REVIEW

The district court's ruling on the motions to dismiss is subject to *de novo* review by this Court. *See Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED ARAR'S CLAIMS FOR DECLARATORY RELIEF BASED ON ARAR'S FAILURE TO DEMONSTRATE STANDING.

A. Under Article III, a plaintiff must establish the "irreducible constitutional minimum of standing:" first, that the plaintiff has suffered an *injury in fact*; second, that the challenged conduct *caused* that injury (or, alternatively, that the injury is "fairly traceable" to the challenged conduct); and third, that a favorable decision

would likely *redress* the injury. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff bears the burden of properly pleading facts that establish his standing. *Lujan*, 504 U.S. at 561.

Past injury may support standing to seek retrospective relief such as damages, but past injury does not support standing to seek prospective relief such as a declaratory judgment; rather, standing must be separately demonstrated for each form of relief sought. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Deshawn E. by Charlotte B. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (plaintiff "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future"). To have standing to seek a declaratory judgment, Arar must establish that he is suffering an ongoing injury, or faces a sufficiently real and immediate threat of future injury, and that such injury likely would be redressed or avoided by the specific declaratory relief sought. *Lyons*, 461 U.S. at 111.

B. Accordingly, while Arar's brief emphasizes his allegations of abuse in Syria, he does not attempt to rely on his alleged past injuries to support standing for his claims for declaratory relief (Arar Br. 53-55). Similarly, in the district court, Arar did not rely on the alleged past torture in Syria, or his claim regarding his treatment

while detained in the United States, to support his demand for declaratory relief. Instead, Arar claimed that he had standing to seek declaratory relief because he is currently barred from reentering the United States.

1. As the district court held, however, there is no nexus between the reentry bar and the relief sought that could support standing. SA 18-19. The reentry bar arose by operation of law under 8 U.S.C. § 1182(a)(9)(A)(ii), as a direct and automatic consequence of his removal pursuant to the removal order entered under § 1225(c), and the only way the reentry bar could be eliminated would be to vacate the removal order. *Cf. Swaby v. Ashcroft*, 357 F.3d 156, 160-61 (2d Cir. 2004) (post-removal habeas relief could redress reentry bar by "vacat[ing] [the] order of removal"); *Dickson v. Ashcroft*, 346 F.3d 44, 55 (2d Cir. 2003) (granting petition for review and vacating removal order).

But as the district court observed, Arar conceded that he was *not* seeking vacatur of the removal order. *See* SA 19. In his opposition to the motions to dismiss, Arar repeatedly protested that he was not challenging his removal order or inadmissibility determination. Arar stated:

- plaintiff's "suit does not challenge his removal order" (Arar Memo. in Opp. at 19);

- plaintiff's claims are "collateral" to the removal order and to its "validity" (*id*. at 15, 18-19);
- plaintiff's claims "stand[] wholly apart from the validity of the removal order" (*id*. at 19); and
- plaintiff "does not complain about the decision to classify him as inadmissible into the United States" (*id*. at 13).

Given these express waivers by Arar, the district court properly concluded that "any judgment declaring unlawful the conditions of his detention or his removal to Syria would not alter in any way his ineligibility to reenter this country." SA 19-20. With the only form of relief that could possibly redress the only ongoing injury that Arar asserted thus unavailable by virtue of Arar's concessions, it is plain that Arar lacks standing to seek prospective relief.

On appeal, Arar now contends that "if [he] prevails on his constitutional claims, the removal order would be expunged as null and void, thereby lifting the current barrier to re-entry into the U.S." Arar Br. 53. Arar is correct to the extent he acknowledges that the reentry bar is a legal consequence of the execution of the removal order that could be lifted only by vacating the removal order. But he is incorrect that he could obtain vacatur (or "expunge[ment]") of the removal order in this action, both because he waived any such relief in the district court by making the

concessions just described and because of the jurisdictional provisions of the INA (which prompted Arar to make those concessions in the first place).

It was not by inadvertence that Arar conceded that he was not challenging his removal order. To the contrary, these concessions were a calculated effort to evade the INA's jurisdictional prohibition on collateral challenges to removal orders. As explained below, if Arar were seeking vacatur of his removal order in this action collateral to his removal proceeding, this action would be barred by 8 U.S.C. § 1252(b)(9). The district court thus relied on Arar's concession that he was not challenging the removal order in holding that his claims were not barred by the INA as an impermissible collateral challenge to the removal order. SA 40. Indeed, even now, two pages before and contrary to his contention that success in this action would redress the reentry bar by "expung[ing]" the removal order, Arar Br. 53, Arar admits that he "could not in this action seek review of the removal order * * *." *Id.* at 51 n.23.

Having waived in the district court any challenge to the removal order, Arar is not free in this Court to seek its invalidation. *See United States v. Rodriguez,* 311 F.3d 435, 437 (1st Cir. 2002) ("a waived issue ordinarily cannot be resurrected on appeal"). And where, as here, the concessions were made to obtain a litigation advantage, Arar is judicially estopped from disavowing those concessions and

reversing course. *See Peralta v. Vasquez*, 467 F.3d 98, 105 (2d Cir. 2006) ("Judicial estoppel ensures, *inter alia*, that 'abandonment of a claim to obtain a litigation advantage precludes the later reassertion of that claim.'") (quoting *United States v. Levasseur*, 846 F.2d 786, 799 (1st Cir. 1988)).

2. In any event, even if Arar's waiver were overlooked, invalidation of his removal order still would not be available relief in this civil action, because the INA bars civil actions in district court challenging removal orders. Specifically, 8 U.S.C. § 1252, governing "[j]udicial review of orders of removal," provides in pertinent part:

> 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) (emphasis added); *see also* 8 U.S.C. § 1252(g) (claims "arising from the decision or action by the Attorney General to * * * execute removal orders" may be brought only by petition for review under the INA).[8] The only exception to this consolidation of review of removal orders in the courts of appeals by way of petitions for review was for habeas corpus petitions raising "pure questions of law," *INS v. St. Cyr*, 533 U.S. 289, 297-98, 314 (2001), an exception that Arar did not

[8] As permitted by the FARR Act, aliens routinely raise CAT claims when petitioning for review from a removal order under 8 U.S.C. § 1252. *See* 8 C.F.R. 208.18(e)(1); FARR Act, § 2242(d).

invoke.[9] Accordingly, there is no jurisdiction under 28 U.S.C. § 1331 or the APA for a declaratory-judgment action in district court challenging a removal order. *See Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000) (holding that § 1252(b)(9) bars "a civil action brought under 28 U.S.C. § 1331 rather than review under habeas corpus"), *aff'd*, 533 U.S. 348 (2001).[10]

Arar's concession that he is not challenging his removal order thus cost him nothing, for there would be no jurisdiction even if he attempted to do so in this civil action. Because the only relief that could redress the only claimed ongoing injury is not available in this action, Arar lacks standing to seek a declaratory judgment.

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[9] In 2005, Congress repealed this habeas exception. *See* Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302; *Alrefae v. Chertoff*, 471 F.3d 353, 357 n.6 (2d Cir. 2006) ("the REAL ID Act requires that motions for relief under 28 U.S.C. § 2241 * * * be transferred to the court of appeals" for review under § 1252).

[10] Arar relies on *Swaby*, 357 F.3d at 159-61, for the proposition that the reentry bar "is a collateral consequence of a removal order sufficient to sustain a case or controversy." Arar Br. 54. The alien in *Swaby*, however, *was* directly challenging his removal order (in a habeas petition, as permitted under *St. Cyr* at the time). The question there was whether the alien's removal mooted his petition, and this Court held that it did not, precisely because the reentry bar could be redressed "if we were to, as petitioner requests, grant a writ of habeas corpus and vacate his order of removal." 357 F.3d at 160. *Swaby* thus confirms that redressability of a reentry bar turns on the court's authority to vacate the removal order from which the bar flows. *Swaby* also shows that if Arar, who was represented by counsel, had petitioned for review of his removal order even after his removal, his petition would not have been moot. *See id*. at 160 n.8 (noting that Congress repealed in 1996 the provision that had barred petitions for review filed after removal).

C. For similar reasons, Arar fails the traceability requirement for standing to seek declaratory relief. The reentry bar is traceable, as a matter of law, to his removal pursuant to the removal order entered under § 1225(c) (based on a finding of inadmissibility under 8 U.S.C. § 1182(a)(3)(B)(i)(V)) and to nothing else. The same reentry bar would exist if Arar had been removed under that provision to Canada, as he wished, rather than to Syria. The reentry bar is not connected to any alleged abuses Arar suffered in Syria. The reentry bar thus is not "'fairly * * * trace[able] to the challenged action of the defendant.'" *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

* * * *

For these reasons, a judgment declaring the conditions of Arar's domestic detention and his removal to Syria unconstitutional would still leave Arar barred from reentering the United States. Accordingly, the district court correctly held that Arar failed to establish standing to seek declaratory relief. SA 18-20.[11]

[11] Although Arar relies on the reentry bar as the ongoing injury that allegedly supports his standing to seek declaratory relief, he also asserts that declaratory relief would "alleviate some of his mental suffering and * * * reputational harm." Arar Br. at 56. The Supreme Court has squarely rejected the proposition that declaratory relief can provide Article III redress for these alleged injuries. *See Steel Co.*, 523 U.S. at 107.

II. ARAR'S CLAIMS 2 AND 3 MUST ALSO BE REJECTED BECAUSE HE CANNOT INVOKE FIFTH AMENDMENT RIGHTS REGARDING HIS TREATMENT IN SYRIA OR THE DECISION TO REMOVE HIM TO SYRIA.

A. The district court did not decide whether Arar's alleged treatment in Syria stated a violation of the Due Process Clause and instead dismissed claims 2 and 3 on other grounds. Arar's assertion of Fifth Amendment rights in regard to events in Syria fails, however, as a matter of law to support any claim for declaratory or monetary relief. If this Court reaches the issue, it should hold that Arar, as an alien outside the United States, cannot invoke rights under the Fifth Amendment regarding alleged injuries suffered in a foreign country.[12]

Aliens are accorded constitutional rights only as a consequence of their presence within sovereign U.S. territory. Aliens *outside* our Nation without any significant voluntary connection to the United States have no rights under our Constitution. *Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950). In *Eisentrager*, the Supreme Court addressed whether aliens outside U.S. sovereign territory possess "substantive constitutional rights" in general (*id*. at 781), and Fifth Amendment rights in particular *(id*. at 781-85), and held that they do not. The Court observed that:

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[12] If this Court holds that Arar lacks standing to seek declaratory relief and also agrees (as we argue below pp. 35-49) that a *Bivens* cause of action should not be recognized in this context, then there would be no need to address underlying constitutional issues on counts 2 and 3.

> 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. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85.

In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court reaffirmed that holding. In ruling that the Fourth Amendment does not apply to searches of an alien's property conducted abroad even if the searches were planned in this country, the Court explained that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," and, citing *Eisentrager*, it described that rejection as "emphatic." *Id*. at 269.

The courts of appeals have followed the holding of *Eisentrager* in multiple contexts. *See, e.g.*, *Boumediene v. Bush*, 2007 WL 506581 *6-*8 (D.C. Cir. Feb. 20, 2007) ("Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence in the United States."); *32 County Sovereignty Comm*. v. *Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (quoting *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)); *Cuban Am. Bar*

Ass'n v. *Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (aliens detained at Guantanamo Bay, Cuba "have no First Amendment or Fifth Amendment rights"); *Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000) (alien claiming torture outside the U.S. had no rights under Fifth Amendment), *rev'd in part on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

Under *Eisentrager* and its progeny, the Fifth Amendment does not apply to an alien outside of sovereign U.S. territory.[13] In *Eisentrager*, the petitioners were aliens imprisoned at a U.S. military base in Germany, which was controlled by the U.S. Army. 339 U.S. at 766. Despite that control, the Court stressed that the aliens "at no relevant time were within any territory over which the United States is sovereign," *id*. at 778, and, on that basis, held that application of the Fifth Amendment would be impermissibly "extraterritorial." *Id*. at 784. The same is all the more true here where Arar was being held by a foreign country, Syria, and the alleged injuries were inflicted by Syrian officials.

In his brief (Br. 35-36), Arar cites a footnote from *Rasul v. Bush*, 542 U.S. 466 (2004), as *sub silentio* overruling *Eisentrager* and *Verdugo* and holding that aliens outside the United States possess Fifth Amendment rights. As the D.C. Circuit

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[13] Even as to aliens within sovereign U.S. territory, the Court has made clear that aliens only "receive constitutional protections when they have * * * developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 270-71.

recently held, however, nothing in *Rasul* overruled these settled precedents. *See Boumediene*, 2007 WL 506581 at *7 n.10. In *Rasul*, the Supreme Court addressed only the extent to which the habeas statute (which has since been amended) applied extraterritorially to detainees held at the Naval Base in Guantanamo Bay, Cuba. The grant of review was specifically limited to that jurisdictional question, *Rasul v. Bush*, 540 U.S. 1003 (2003), and in its ruling the Court expressly reserved all substantive constitutional questions. The Court twice framed the "narrow" question presented as "whether United States courts lack jurisdiction to consider" habeas challenges brought by aliens held at the Naval Base in Guantanamo Bay, Cuba. 542 U.S. at 470; *see also id*. at 475. In its holding, the Court again made clear that it was only addressing the habeas *statutory* question: "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges * * *." *Id*. at 483. At the end of its opinion, the Court again emphasized that "only" the question of statutory jurisdiction was "presently at stake"; it declined to decide "[w]hether" any further proceedings would be necessary on remand; and it instructed the lower courts "to consider in the first instance the merits" on remand. *Id.* at 485. *See Boumediene*, 2007 WL 506581 at *7 n.10 (*Rasul* rested on "statutory interpretation" and "could not possibly have affected the constitutional holding of *Eisentrager*").

Against all of this, Arar places dispositive weight on a single, oblique footnote, which states: "Petitioners' allegations * * * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." *Rasul*, 542 U.S. at 483 n.15. That footnote cannot be read as a repudiation of the substantive holdings in *Eisentrager, Verdugo*, and their progeny. As an initial matter, such a reading would be inconsistent with the repeated statements throughout *Rasul* that habeas statutory jurisdiction was the "only" question raised in or resolved by the Court. Moreover, footnote 15 is appended to a paragraph focused entirely on the question of statutory jurisdiction under 28 U.S.C. § 2241, and to a sentence asserting what "[p]etitioners contend" for jurisdictional purposes. *Id*. at 483. The reading of footnote 15 that is strongly suggested by context is that the Court meant only that these allegations were sufficient for jurisdictional purposes, which establishes only that they are not "wholly insubstantial" or "frivolous" on the merits. *See Steel Co.*, 523 U.S. at 88. To construe footnote 15 as implicitly overruling the substantive Fifth Amendment holding of *Eisentrager*, thereby jettisoning decades of settled law, would be implausible in the extreme and would violate a slew of familiar interpretive principles: that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); that the Supreme

Court, like Congress, ordinarily "does not * * * hide elephants in mouseholes," *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001); and, perhaps most fundamentally, that if a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions," *Tenet v. Doe*, 544 U.S. 1, 10 (2005). *See also Boumediene*, 2007 WL 506581 at *7 n.10.

Moreover, even if Fifth Amendment protections extend to aliens at Guantanamo Bay, Cuba, based on the degree of control and jurisdiction exercised there by the United States, that would not does not speak to the question of whether, outside the specific context of Guantanamo, aliens in another country, like Syria, not under the control or jurisdiction of the United States, possess rights under the U.S. Constitution. *Eisentrager* holds that they do not. Nothing in *Rasul* overrules or even draws that authority into question.

B. Arar also cannot invoke Fifth Amendment rights in regard to any challenge relating to his removal order. An alien stopped at the border and denied entry has no constitutional rights in regard to his removal proceedings. Even when an alien stopped at the border or port of entry (such as the airport here) is located physically within the United States, such individuals are "on the threshold of initial entry" and

never "pass[] through our gates." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Generally, aliens at the border cannot invoke constitutional rights regarding the immigration decisions made by the United States. *Ibid.*; *Chew v. Colding*, 344 U.S. 590, 600 (1953) (excludable aliens "are not within the protection of the Fifth Amendment"). As this Court has recognized, the rights of excluded aliens "are determined by the procedures established by Congress," not by the Fifth Amendment's "due process protections." *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997).

C. Finally, Arar errs in relying on cases finding a constitutional violation where the government has created a danger. First, as discussed above, Arar has no cognizable Fifth Amendment rights regarding his treatment in Syria. Second, as the First and Third Circuits recently held, the "state-created-danger" doctrine is not properly extended to the removal context. In *Kamara v. Attorney General*, 420 F.3d 202, 217 (3d Cir. 2005), the court "h[e]ld that the state-created danger exception has no place in our immigration jurisprudence." The court explained that "[e]xtending the state-created-danger exception to final orders of removal would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the CAT." *Id*. at 217-18. The First Circuit was equally

categorical in rejecting the state-created-danger theory in the immigration context, holding that "[t]he theory itself simply is not viable; it does not state a claim on any facts." *Enwonwu v. Gonzales*, 438 F.3d 22, 30 (1st Cir. 2006). Relying "on the constitutional assignment of responsibilities among the three branches of the federal government over matters of immigration," the court held that entertaining a state-created danger claim in the removal context would take a court "outside its defined constitutional role and intrude[] into a realm reserved to the Executive and the Legislative Branches." *Ibid.*[14]

The First and Third Circuits were correct. The state-created danger theory is an exception to the rule of *DeShaney v. Winnebago Dep't of Social Servs.*, 489 U.S. 189 (1989), that the Due Process Clause does not make government responsible for citizens' safety. The Supreme Court has admonished courts to be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharte[d] area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1993). That caution applies with special force in the context of removal of aliens. First, "judicial self-restraint" is appropriate, *ibid.*,

[14] Arar tries to distinguish *Enwonwu* on the ground that it involved a prospective attempt to avoid removal, rather than (as here) a retrospective claim that a removal violated an alien's substantive-due-process rights. Arar Br. 33 n.13. The *Enwonwu* court itself, however, recognized that this is a distinction without a difference and declined to rely on the prospective posture of the case before it. 438 F.3d at 30.

because immigration law is "a realm reserved to the Executive and the Legislative Branches." *Enwonwu*, 438 F.3d at 30. Second, because aliens stopped at the border lack constitutional rights as a general matter, *see supra* pp. 32-33, it would be highly anomalous for courts to "break new ground in [the] field" of substantive due process, *Collins*, 503 U.S. at 125, by extending this exception to them. As we discuss in detail below (pp. 37-43), Congress has addressed the rights and remedies of those objecting to removal based on fear of persecution or torture. Given Congress' plenary control over immigration matters, this Court should reject Arar's attempt to import the state-created-danger theory into the immigration context.[15]

III. SPECIAL FACTORS PRECLUDE THE RECOGNITION OF A *BIVENS* CAUSE OF ACTION ON ARAR'S CLAIMS 2 AND 3.

The Supreme Court has explained that, because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," if it is to be exercised at all, it must be undertaken with great caution. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-70 (2001). Thus, the Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). As the Fourth Circuit recently explained, "[t]he Court's repeated reluctance to extend *Bivens* is not

[15] Because Arar does not even attempt to identify any ongoing or future injury that could support standing for declaratory relief on count 4, we do not separately address the merits of that claim.

without good reason. A *Bivens* cause of action is implied without any express congressional authority whatsoever." *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006). "The Supreme Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id*. at 289-90 (citation omitted). In *Malesko*, the Supreme Court likewise observed that, in *Bivens*, the Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes," decisions from which the Court has since "retreated" and that reflect an understanding of private rights of action that the Court has since "abandoned." 534 U.S. at 67 & n.3.[16] "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly*, 434 F.3d at 290 (internal quotation marks omitted). The Eighth Circuit has described the Supreme Court's recent decisions in this area as erecting a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees." *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (internal quotation marks omitted),

[16] *See Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress * * *. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy * * *. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.").

cert. denied, 126 S.Ct. 1908 (2006). That presumption should apply and bar the recognition of a *Bivens* claim here.[17]

A. Consistent with the admonitions set out above, the courts have consistently refused to imply a *Bivens* remedy where Congress has established a statutory remedial framework to handle a particular category of disputes with the federal government, even where a claimed constitutional injury would "go unredressed" within that statutory scheme. *Chilicky*, 487 U.S. at 425. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Id*. at 423; *see also Bush v. Lucas*, 462 U.S. 367 (1983).

Here, the district court sought to distinguish *Chilicky* on the ground that Congress did not see fit to include in the INA a cause of action for damages for constitutional violations. SA 68-70. As this Court recently observed, however, the same was true in *Chilicky*. *See Dotson v. Griesa*, 398 F.3d 156, 166-67 (2d Cir. 2005). In *Chilicky*, the plaintiff was limited to obtaining back benefits, and the Social

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[17] The United States is not a party to claims 2 or 3 to the extent they seek damages under *Bivens*. Because of the United States' strong interest in ensuring that federal officials are appropriately protected from personal liability and that the limits on the implied *Bivens* remedy are enforced, the United States addresses the "special factors" doctrine (and the TVPA claim discussed in Part IV, *infra*) as *amicus curiae*.

Security scheme offered no damages remedy for the alleged due-process violations. The Court nonetheless held that the comprehensive nature of the scheme created by Congress itself signaled that it was inappropriate for a court to supplement the scheme with an additional remedy. That reasoning is fully applicable here. *See Dotson*, 398 F.3d at 160 (*Bivens* claim precluded by the Civil Service Reform Act scheme even though the CSRA provides no administrative or monetary remedy to a judicial branch employee for alleged constitutional violations in termination of his employment); *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) ("*Bush [v. Lucas]* extends even to those claimants within the system for whom the [CSRA] provides 'no remedy whatsoever.'") (citation omitted).

Notably, the courts of appeals have refused to recognize *Bivens* claims where Congress has not provided for a monetary remedy but instead contemplated that judicial review of an agency decision would be afforded under the APA. "[T]he existence of a right to judicial review under the APA is[] alone sufficient to preclude * * * a *Bivens* action." *Miller v. U.S. Dep't of Agr. Farm Serv. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998); *see Robbins v. Wilkie*, 300 F.3d 1208, 1212 (10th Cir. 2002) (APA is the "proper avenue" for challenging "alleged constitutional violations committed while reaching a final agency decision," and, in such cases, "a *Bivens* action would not be available"); *Moore v. Glickman*, 113 F.3d 988, 994 (9th Cir.

1997). As the Eighth Circuit recently explained, "[w]hen Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the APA is sufficient to preclude a *Bivens* action * * *. Parties may not avoid administrative review simply by fashioning their attack on an agency decision as a constitutional tort claim against individual agency officers." *Nebraska Beef*, 398 F.3d at 1084.

The rationale of these cases applies fully here. As in those cases, Congress has provided for judicial review of the agency decision at issue here, and Congress has specified in the INA and the FARR Act which kinds of challenges to such an agency decision are cognizable and in what manner. *See* FARR Act, § 2242(d) ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. § 1252]"). Congress' careful attention to this subject matter and creation of the comprehensive and particularly calibrated and channeled review scheme of the INA and the FARR Act counsel against judicial creation of remedies going beyond what Congress chose to create. Just as the APA review available in the cases discussed above may not have included a monetary remedy, the fact that no damages remedy is available under the INA and the FARR Act is simply a function of Congress' conscious decision to limit

enforcement of Article 3 of the CAT to the specific manner permitted by the FARR Act.[18]

The decisions that plaintiff seeks to challenge via *Bivens* were made pursuant to the INA's comprehensive scheme. The INA specifically authorizes removal based on national-security concerns without a hearing before an immigration judge, 8 U.S.C. § 1225(c)(1)-(2), the type of removal proceedings in which plaintiff was placed. Plaintiff was found inadmissible as a member of al Qaeda under § 1182(a)(3)(B)(i)(V). Moreover, § 1231(b)(2)(C)(iv) conferred discretionary authority on the Attorney General (now the Secretary of Homeland Security) to disregard an alien's designation of a country of removal, as was done here. The selection of a substitute country of removal also was governed by the INA, which

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[18] Indeed, this Court has held that a statute providing for review of an agency decision exclusively in the court of appeals may foreclose jurisdiction over a *Bivens* claim. *Compare Merritt v. Shuttle, Inc.*, 187 F.3d 263, 270-72 (2d Cir. 1999) (Aviation Act precluded jurisdiction over *Bivens* claims that were inescapably intertwined with agency's decision), *with Merritt v. Shuttle, Inc.*, 245 F.3d 182, 189-91 (2d Cir. 2001) (Aviation Act did not preclude jurisdiction over Federal Tort Claims Act claims that were distinct from agency's decision). Under the "special factors" doctrine, of course, courts decline to recognize *Bivens* claims even where jurisdiction *does* exist over the putative *Bivens* claims. This Court thus need not hold that jurisdiction over Arar's *Bivens* claims is strictly precluded in order to hold that those claims should not be recognized. Moreover, because the "special factors" doctrine is a threshold, non-merits issue, the Court may dismiss counts 2 and 3 on that ground without reaching the question of jurisdiction, just as the Supreme Court did in *Chilicky*. *See* 487 U.S. at 429.

favored removal to Syria as a country of which plaintiff is a "subject, national, or citizen." 8 U.S.C. § 1231(b)(2)(D).

In particular, the determination that removing plaintiff to Syria was consistent with U.S. obligations under Article 3 of the CAT was governed by the FARR Act and the INA. When an alien in§ 1225(c) removal proceedings expresses a fear of torture, the immigration officials must decide whether the CAT precludes removal. Regulations set out the governing standard adopted by the Senate when it ratified the CAT, *viz*., whether it is more likely than not that the alien would be tortured if removed to a given country. *See* 8 C.F.R. 208.16(c), 208.17(a), (d)(3). In accordance with the INA, the FARR Act, and the implementing regulations, the removal order in Arar's case ordered him removed under 8 U.S.C. § 1225(c)(2) and incorporated the INS Commissioner's "determin[ation] that [Arar's] removal to Syria would be consistent with the [CAT]." App. 86.

In addition to being governed by and made pursuant to the comprehensive statutory scheme created by Congress, these decisions, including the CAT determination, were subject to judicial review through the mechanism established by Congress as part of that statutory scheme – a petition for review of the removal order. 8 U.S.C. § 1252(a); FARR Act, § 2242(d); 8 C.F.R. 208.18(e)(1). Plaintiff complains that he had no damages remedy under the INA and the FARR Act, but

plaintiff's quarrel is with the deliberate choices that Congress made concerning how to implement Article 3 of the CAT. Congress could have simply ratified the CAT and left interpretive questions to the courts, but Congress instead took pains to specify that the CAT would not be self-executing or privately enforceable. *See* 136 Cong. Rec. S36,198 (Oct. 27, 1990); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). In enacting the FARR Act, Congress could have created a cause of action cognizable through 28 U.S.C. § 1331, but instead it went out of its way to limit jurisdiction over Article 3 CAT claims to "the review of a final order of removal." FARR Act § 2242(d).

Here, as in *Nebraska Beef*, plaintiff seeks to "fashion[] [his] attack on an agency decision as a constitutional tort claim against individual agency officers." 398 F.3d at 1084. Although plaintiff is not directly seeking the vacatur of his removal order in this action, *see supra* pp. 21-23, he plainly challenges the motives behind the removal order and the CAT determination incorporated into it. The CAT determination on its face was a finding that it was *not* more likely than not that Arar would be tortured in Syria, but according to him, it was a sham designed to cover up a conspiracy to have him tortured.

Congress, however, made a deliberate decision to limit judicial enforcement of Article 3 of the CAT, and its failure to create a private right of action for damages

for alleged constitutional violations occurring in the administration of the CAT through the INA and the FARR Act can hardly be called an inadvertent oversight. This Court therefore should defer to the congressional design. *See Chilicky*, 487 U.S. at 421-22 ("The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); *Spagnola*, 859 F.2d at 229 ("After *Chilicky*, it is quite clear that if Congress has 'not inadvertently' omitted damages against officials in the statute at issue, then courts must abstain from supplementing Congress' otherwise comprehensive statutory relief scheme with *Bivens* remedies – unless, of course, Congress has clearly expressed a preference that the judiciary preserve *Bivens* remedies.").[19]

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[19] It also bears emphasis that recognizing a *Bivens* remedy in this context would open the door to claims by countless aliens who could allege that they were persecuted or tortured after being removed. Given the tens of thousands of times each year that aliens assert fears of persecution or torture, the threat of an avalanche of individual-capacity damages claims from unsuccessful CAT and asylum claimants could undermine the administration of the immigration laws. This threat is an additional reason to decline to create such a new non-statutory remedy. *Cf. Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.) (observing that fear of being sued could "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"); *Sinclair v. Hawke*, 314 F.3d 934, 942 (8th Cir. 2003) ("it is for Congress to decide whether the public interest in a sound national banking system would be furthered by a cause of action requiring bank regulators to pay damages personally unless they can convince a jury that their conduct in aggressively regulating a national bank was not the product of an unconstitutional motive").

B. The recognition of a *Bivens* cause of action would be especially inappropriate here. As the district court recognized, Arar's counts 2 and 3 raise matters that are typically reserved to the legislative and executive branches and as to which, therefore, courts should be especially unwilling to create non-statutory damages remedies.

Not surprisingly, courts have consistently refused to recognize a *Bivens* cause of action in contexts involving national security or foreign affairs. *See United States v. Stanley*, 483 U.S. 669, 678-85 (1987); *Chappell v. Wallace*, 462 U.S. 296, 298-304 (1983); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994). In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (Scalia, J.), the court refused to recognize a *Bivens* remedy where aliens alleged that senior U.S. officials provided "financial, technical, and other support" to the Nicaraguan Contras that resulted in the "summary execution, murder, abduction, torture, rape, [and] wounding" of "innocent Nicaraguan civilians." The court reasoned that

> considerations of institutional competence preclude judicial creation of damage remedies here. Just as the special needs of the armed forces require the courts to leave to Congress the creation of damage remedies against military officers for allegedly unconstitutional treatment of soldiers * * * so also 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.

Id. at 208-09 (citations omitted). *Cf. Schneider v. Kissinger*, 412 F.3d 190, 191, 194, 197 (D.C. Cir. 2005) (holding that claims against former National Security Advisor for "summary execution, torture, [and] cruel, inhumane, or degrading treatment" were nonjusticiable political questions, and cautioning that "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government" and that "whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking"), *cert. denied*, 126 S.Ct. 1768 (2006).[20]

Here, as the district court recognized, adjudication of Arar's claims 2 and 3 would necessarily implicate foreign-affairs and national-security interests. SA 70-76. Arar challenges the motives of the officials who made the decision to remove him to Syria, and adjudication of these claims would involve the court deeply in sensitive matters. First, a court would have to inquire into the national-security and foreign-affairs concerns relevant to the decision to disregard Arar's designation of Canada as the country of removal. *See* 8 U.S.C. § 1231(b)(2)(C)(iv). Likewise, a court would have to inquire into the national-security and foreign-affairs considerations relevant

[20] The teaching of *Schneider* applies here *a fortiori*, because the Court need not hold that Arar's claims raise non-justiciable political questions in order to hold that separation-of-powers concerns are special factors that counsel against creating a *Bivens* remedy on counts 2 and 3. Rather, because there is a presumption against recognizing non-statutory *Bivens* actions to begin with, the special-factors doctrine sets a far lower bar than the political-question doctrine. *See supra* pp. 35-37.

to the selection of Syria as the country of removal and the concomitant determination that that selection was consistent with the U.S. obligations under the CAT, including evaluating any communications between the United States and foreign governments. Finally, a court would have to examine the classified material based on which the United States found Arar to be inadmissible as a member of al Qaeda. All these matters, by their nature, involve sensitive issues of foreign policy and national security. *Cf. Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 348 (2005) ("[r]emoval decisions, including the selection of a removed alien's destination, may implicate our relations with foreign powers") (internal quotation marks omitted). Indeed, the United States asserted the state-secrets privilege and sought dismissal of counts 2-3 (as well as count 1) precisely because these claims so thoroughly implicate sensitive matters. App. 131-32.

Accordingly, the district court properly recognized that adjudication of these claims would necessarily implicate matters of foreign affairs and national security interests. SA 67-77. The Canadian commission report cited by Arar, *see* Arar Br. 13-14, and Canada's recent settlement with him do not eliminate the concerns cited by the district court that litigating these claims may create tensions between the United States and Canada. As explained in our Response to Arar's Motion for Judicial Notice, the United States did not give evidence or otherwise participate in the

Canadian commission proceedings, and recent public statements by the two governments demonstrate that the United States and Canada have divergent views with respect to this matter.[21] The potential that this litigation could cause conflict with Canada thus remains very real. Apart from the foreign affairs concerns relating to Canada, the United States requires the cooperation of many nations in order to protect the American people from terrorism as well as to achieve myriad other foreign-policy and international as well as national-security objectives, and it will be difficult to obtain the vital assistance of other countries in fighting international terrorism if they know that the nature and extent of their communications with our country will be subject to later judicial scrutiny. *Cf. Halkin v. Helms*, 690 F.2d 977, 993 (D.C. Cir. 1982) (revealing diplomatic communications could harm foreign relations by embarrassing governments that may wish their cooperation to remain secret). Recognizing *Bivens* claims that raise such serious separation-of-powers concerns would be inappropriate.[22]

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[21] *See* Spencer Hsu, *Canadian Will Remain On U.S. Watch List*, Washington Post, A14 (Jan. 23, 2007) ("Canadian Maher Arar remains on a U.S. border-control watch list"); Doug Struck*, Tortured Man Gets Apology From Canada*, Washington Post, A14 (Jan. 27, 2007) ("[Prime Minister] Harper and Arar both criticized the United States for its refusal to accept the exhaustive Canadian inquiry * * *. Public resentment in Canada has swelled this week over U.S. officials' insistence that Arar should remain on its 'watch list' of potential suspects.").

[22] Creating *Bivens* claims here also would be at odds with the policies of the (continued...)

Arar argues (Br. 38-39 & nn.15-18) that national-security and foreign-affairs concerns do not counsel against recognizing a *Bivens* claim because courts sometimes adjudicate cases touching on foreign affairs, and even cases arising out of a war context. We agree that not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). It is true, however, that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). The special factors issue presented here is not whether Arar's claims are non-justiciable under *Baker*. Rather, the question is whether a court should create a cause of action for damages in a context fraught with foreign-affairs and national-security implications. *See supra* p. 45 n.20. As the district court held, it should not: "the task of balancing individual rights against national-security concerns is one that courts

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[22](...continued)
long-established "rule of non-inquiry" most frequently applied in the analogous context of extradition. *See Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990). That rule, which "is shaped by concerns about institutional competence and by notions of separation of powers," bars courts from inquiring into "the fairness of a requesting nation's justice system" and "the procedures or treatment which await a surrendered fugitive in the requesting country." *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) (internal quotation marks omitted). *A fortiori*, if courts cannot, in the context of extradition, inquire into transfers of *U.S. citizens* to another country for criminal prosecution, courts should not create a non-statutory damages action in order to inquire into communications with a foreign government regarding the removal of an alien determined by U.S. officials to be a member of a foreign terrorist organization.

should not undertake without the guidance or the authority of the coordinate branches * * *." SA 75-76. None of the cases cited by Arar is to the contrary, because none involves the question whether to create a non-statutory damages action against federal officials.

IV. ARAR FAILED TO STATE A CLAIM FOR VIOLATION OF THE TVPA.

As the district court recognized, there is no waiver of sovereign immunity permitting TVPA claims against the United States. SA 20 n.5. The district court thus treated the TVPA claim as limited to the individual-capacity defendants, and Arar does not challenge that decision. The United States, however, addresses the applicability of the TVPA in this context as *amicus curiae*.

A. Arar does not allege that any of the defendants directly violated the TVPA by subjecting him to torture. Rather, Arar claims that the defendants aided and abetted or conspired with the Syrian officials who allegedly subjected him to torture. The defendants' alleged acts, however, were taken under color of U.S. law and not, as the TVPA requires, "under actual or apparent authority, or color of law, of any foreign nation." TVPA, § 2(a). *See Harbury v. Hayden*, 444 F. Supp. 2d 19, 42 (D.D.C. 2006) ("all relevant decisions point to the conclusion that such liability pursuant to the TVPA cannot attach to U.S. agents"). That Arar asserts that the defendant federal officials knew that Arar would be subjected to torture by Syrian

officials does not transform the defendants into Syrian officials or cloak the defendants with any authority under Syrian law. The defendants were U.S. officials located in the United States and administering U.S. law. As already explained, the decisions at issue – the denial of admission to Arar as a member of al Qaeda, the disregard of his designation of Canada as the country of removal, the selection of Syria as the country of removal, and the determination that removal to Syria was consistent with U.S. obligations under the CAT – were all governed by and made pursuant to the INA, the FARR Act, and the implementing regulations. The defendants had authority to make these decisions by virtue of their positions in the U.S. government. The defendants did not possess any authority under Syrian law or purport to exercise any authority under Syrian law. *See Schneider v. Kissinger*, 310 F.Supp.2d 251, 267 (D.D.C.2004) ("Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign coconspirators may have been acting under color of Chilean law"), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005).

1. Arar cites cases brought under 42 U.S.C. § 1983 in an effort to hold U.S. officials liable under the TVPA. While Congress and this Court recognized that it was appropriate to look to § 1983 in regard to the actions of foreign officials and *private parties* to determine if the latter were acting under color of foreign law, *see*

Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) (citing H.R. Rep. No. 367 at 5 (1991)), there is no indication that Congress contemplated extending liability to U.S. officials exercising authority under U.S. law. Applying the TVPA to hold such officials liable "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. There is utterly no indication that Congress intended such a result, and no court has ever reached such a result.

Moreover, it is one thing within our nation's state-federal governmental structure to say that a federal official working side-by-side with a state official in a law-enforcement investigation might be acting under color of state law in some limited circumstances, or vice-versa. The federal government and state governments frequently act jointly or cooperatively, and federal and state law frequently provide overlapping authority. But it is quite another thing to suggest that U.S. officials, when acting within the scope of their federal offices, should be viewed as acting under the color of law of another sovereign nation. As the district court observed, the foreign affairs "arena is animated by different interests and issues." SA 35.

Similarly, it is one thing to hold that a private party can act under color of foreign law when acting in concert with foreign officials. A private party possesses no authority under U.S. law. Thus, if he or she acts in concert with foreign officials, the question is simply whether their relationship is close enough to warrant the conclusion that the private party is functioning as a governmental actor rather than as a private party. If so, the only government at issue is the foreign sovereign, and there is no anomaly in holding that the private party is acting under color of foreign law. But a U.S. official performing his or her job responsibilities -- by definition -- acts under color of U.S. law, and so the question is not whether he or she acts closely enough with a foreign sovereign to be deemed a governmental actor rather than a private one. Rather, the question is whether there is any basis in law or logic to deem the U.S. official to be stripped of his or her U.S. governmental authority and transformed into a foreign governmental actor. Where, as here, the U.S. officials exercised authority under U.S. law, there is no basis to deem their actions to have been taken under color of foreign law.

2. In any event, even under § 1983, where an action is taken by federal officials under federal law, it is not generally deemed an act taken under color of state law. *See District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973) (because § 1983 only deals with acts accomplished under color of state law, it "does not reach

purely private conduct and * * * actions of the Federal Government"). Arar cites *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969), but there the plaintiff's basis for suing federal officials under § 1983 was "that in depriving plaintiff of a federal right they acted 'under color of state law' by virtue of their conspiracy with the state defendants *and* by virtue of the fact that their actions were partially the product of the influence of the state defendants." *Id.* at 448 (emphasis added). Indeed, this Court distinguished between two groups of federal officials, holding that one group may have been sufficiently influenced by state officials to be deemed to have acted under color of state law, *id*. at 447-48, but that another group of federal officials could not be deemed state actors because their conduct was not "under the control or influence of the State defendants," *id*. at 449.

The district court correctly held that *Kletschka* does not help Arar, because his theory is that the defendant U.S. officials influenced the Syrian officials who allegedly subjected him to torture, not that Syria directed or influenced U.S. officials to act. *See* SA36; *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995) (where state officers acted "at the behest and under the direction of the federal agents," federal agents did not act under color of state law; rather, "[i]f the Secret Service Agents and the Sheriff's officers acted jointly, it was under the color of federal law").

B. Arar's allegation of aiding and abetting or conspiracy by U.S. officials does not state a claim under the TVPA. Arar, in essence, urges a standard of culpability under the TVPA that would permit liability where a particular individual did not himself act under color of foreign law but aided someone else who did. Likewise, Arar's aiding-and-abetting theory would impose liability on individuals who did not have "custody or physical control" of the alleged victim as required by the TVPA, § 3(b)(1), but who aided someone who did. Arar's theory thus cannot be reconciled with the statute's terms.

In addition, it would be inappropriate to extend the TVPA to encompass aiding-and-abetting or conspiracy liability without far clearer legislative direction. Whether to impose civil aiding-and-abetting or conspiracy liability is a legislative choice. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998). In *Central Bank*, the Court explained that, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, *there is no general presumption that the plaintiff may also sue aiders and abettors*." 511 U.S. at 182 (emphasis added). In the criminal-law context, "aiding and abetting is an ancient * * * doctrine," but its extension to permit civil redress is not well established and has been "at best

uncertain in application." *Id*. at 181. While in the criminal context the government's prosecutorial judgment serves as a substantial check on the imposition of aiding-and-abetting liability, there is no similar check on civil aiding-and-abetting liability claims.

Significantly, *Central Bank* noted that "Congress has not enacted a general civil aiding and abetting statute – either for suits by the Government * * * or for suits by private parties." 511 U.S. at 182. Thus, under *Central Bank*, a court must not presume that there is any right to assert an aiding-and-abetting claim under the TVPA. That same rationale is equally applicable to conspiracy claims. *See Dinsmore*, 135 F.3d at 840-44.[23] Accordingly, absent clear direction from Congress, a federal court should not recognize such claims under the TVPA.

In recognizing aiding-and-abetting liability under the TVPA, the district court (SA 24) cited a Senate Report stating that "[t]he legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. 102-249 at 8-9 (1991). When it enacted the TVPA, however, Congress adopted the House bill, and the accompanying House Report, over the Senate bill. *See* H.R. Rep. 102-367,

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[23] The presumption against implying aiding-and-abetting liability can be overcome. For example, the United States successfully argued in favor of aiding-and-abetting liability under a statute providing a cause of action to those injured by an act of international terrorism, 18 U.S.C. § 2337. *See Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002). That argument was based, however, on that statute's particular context, language, and purposes.

102nd Cong., 2d Sess. 30 (1992). Thus, in determining legislative intent, a court should look to the House, not the Senate, Report. Notably, the reference to "abetting" torture was not present in the House Report.

Moreover, in context, it is evident that even the Senate Report did not intend "abetting" liability to obliterate the requirement that the defendant have acted under "actual or apparent authority, or color of law" of a foreign nation, or the TVPA's mandate that liability be limited to acts "directed against an individual in the offender's custody or physical control." TVPA, § 3(b)(1). Rather, all the examples cited in the Senate Report in which the authors believed liability would attach involved foreign commanders who ordered or otherwise authorized a subordinate to commit torture. S. Rep. 102-249 at 8-9. Aiding-and-abetting liability would not be so limited. As the Court recognized in *Central Bank*, the adoption of aiding-and-abetting liability effects "a vast expansion" of the scope of a civil cause of action beyond those principally responsible for the acts. 511 U.S. at 183. Indeed, under the Restatement (2d) of Torts, aiding-and-abetting liability can extend to those who know of the conduct and took any substantial act to assist or encourage the conduct. Under this broad theory of liability, aliens have attempted to seek redress under the TVPA against federal officials who allegedly supported giving aid to countries with poor human rights records. *See, e.g., Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C.

Cir. 2006), *cert. denied,* 2007 WL 506059 (Feb. 20, 2007). Before such an expansive approach to civil liability under a statute is adopted, however, legislative action is generally required. *Central Bank*, 511 U.S. at 183. This Court should not undertake such an expansion of the TVPA without clear guidance from Congress.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(c) and Second Circuit Rule 32(a)(2), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,895 words (which does not exceed the applicable 14,000 word limit).

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CERTIFICATE OF SERVICE

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