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.	§	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

I. INTRODUCTION

Plaintiff makes clear in his opposition that he does not challenge the order removing him from the United States based on his membership in al Qaeda. He challenges only the conditions of his U.S. detention and the selection of Syria as his country of removal. The removal order bars Plaintiff from reentering the United States. The only "continuing" injury he claims is this reentry bar, but that is simply a direct legal consequence of the removal order that applies regardless of what country of removal is selected. The only relief that could conceivably redress the reentry bar would be vacatur of the removal order, but Plaintiff expressly concedes he is not challenging that order. That concession is fatal to his standing to seek declaratory relief from the United States because Plaintiff cannot identify any prospective injury that is traceable to the conduct he challenges or redressable by the relief he seeks.

Even if Plaintiff had standing to seek declaratory relief, his claims against the United States would fail as a matter of law. First, Plaintiff may not collaterally challenge the immigration authorities' decision to remove him to Syria in a suit such as this. The only jurisdiction to review such an immigration decision is that provided by the Immigration and Nationality Act (INA) or available on a petition for habeas corpus. Second, the law is clear that the U.S. Constitution does not protect aliens outside the United States, and Plaintiff cites no authority extending constitutional protections to aliens detained and allegedly tortured on foreign soil by foreign officials. Third, the United States is not subject to suit under the Torture Victim Protection Act (TVPA) because that statute contains no waiver of sovereign immunity and, in any event, only covers actions taken under color of foreign law, not conduct of U.S. officials discharging federal governmental functions. Finally, Plaintiff's challenge to the conditions of his immigration detention in the United States fails because he has not alleged that those conditions constituted "gross physical abuse."

II. ARGUMENT

A. As there is no likelihood that Plaintiff will again be subject to the actions he challenges, and the reentry bar is neither traceable to those actions nor redressable by the relief he seeks, Plaintiff lacks standing to seek declaratory relief from the United States.

Plaintiff asks this Court to render a judgment against the United States declaring that past actions allegedly taken by federal officials violated the TVPA and the Due Process Clause. He implies that the judgment he seeks would modify future governmental conduct and minimize his risk of being subjected again to the past actions he challenges. As explained in our opening brief, U.S. MEM. at 5-13, Plaintiff lacks Article III standing to seek prospective relief from the United States. He has not shown the requisite personal stake in securing a judicial declaration as to the legality of the alleged past actions because they are not ongoing and he faces no realistic and immediate threat of being subjected to them in the future. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Plaintiff addresses this threshold standing hurdle in three-and-a-half pages at the end of his 97-page brief, and his clarification of the conduct he challenges and the relief he seeks serves only to confirm that he lacks standing.

It is important to emphasize what is not at issue in this case. As we observed in our opening brief, the complaint was unclear as to the specific actions Plaintiff was challenging through his claim for declaratory relief. He appeared to challenge the finding that he was inadmissible due to his al Qaeda membership and the removal order that followed. He now makes clear that he is not seeking a declaratory judgment as to the legality of those actions.[1] Plaintiff seeks only a judgment declaring as

---

[1] See PL. MEM. at 13 (Plaintiff "does not complain about the decision to classify him as inadmissible into the United States"); id., at 15, 19 (Plaintiff "does not challenge his removal order," his claims are "collateral" to the order and to its "validity," the Defendants' conduct was unlawful "without regard as to how [he] got to Syria, and without regard to whether the removal order was valid," and his

illegal his domestic detention and his removal to Jordan and Syria allegedly pursuant to a "conspiracy" to bring about his torture, see PL. MEM. at 93, but he makes no attempt to show, as to these actions, that he is currently being subjected to them or likely will be again in the future.[2] This much, then, is undisputed: the past actions that Plaintiff asks this Court to declare as unlawful--his domestic detention and removal to Syria--are not now recurring as to Plaintiff and are not likely to recur imminently.

Plaintiff claims that, even if he faces no recurrence of the challenged actions, he has standing to seek a declaratory judgment addressing their legality because he is currently barred from reentering the United States. This reentry bar, Plaintiff claims, is "an ongoing legally cognizable injury" that entitles him to seek prospective relief. PL. MEM. at 95. In short, Plaintiff urges that, regardless of whether a particular action is likely to recur, a party has standing to seek a declaratory judgment as to its legality if he shows he suffers a "continuing, present adverse effect[]" of it. Id. at 95 (quoting Lyons, 461 U.S. at 102; O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)). While continuing adverse effects from past conduct may sometimes support standing, that rationale has no applicability here, where the alleged "adverse effect" does not flow directly and inevitably from the challenged conduct and would not be redressed by the relief sought.

"Standing does not automatically attach once an ongoing injury is identified." Perry v. Sheahan, 222 F.3d 309, 314 (7th Cir. 2000). To confer standing, the ongoing effect must satisfy Article III: it

---

claims "stand[] wholly apart from the validity of the removal order").

[2] Plaintiff comes close to conceding that, insofar as he complains about past harms or injuries resulting from the challenged actions, he cannot establish standing to seek declaratory relief, as only damages can remedy them. See PL. MEM. at 95 (conceding the Lyons and O'Shea analysis "might be applicable" were he "only complaining about the physical injuries caused by his detention and torture"); id. at 94 (conceding that "many of his injuries can be remedied only by damages").

must be an injury in fact; the injury must have been caused by, or be fairly traceable to, the challenged conduct; and it must be likely (not speculative) that the requested relief will redress the injury. See U.S. MEM. at 5; Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. _, 124 S. Ct. 2301, 2308-09 (2004); McConnell v. Federal Election Comm'n, 540 U.S. 93, 225-26 (2003); Allen v. Wright, 468 U.S. 737, 751 (1984). Here, the reentry bar--the only "continuing" injury Plaintiff asserts--plainly fails to satisfy either traceability or redressability.[3]

1. Traceability. By operation of law, the reentry bar was imposed as a consequence of the removal order issued as a result of the determination that Plaintiff was inadmissible due to his al Qaeda membership.[4] Article III requires "a causal connection between the injury and the conduct complained

---

[3] It is also doubtful that the reentry bar qualifies as an injury-in fact for Article III purposes as it does not "inva[de] . . . [any] concrete and particularized legally protected interest" that Plaintiff possesses in entry or seeking entry. McConnell, 540 U.S. at 227. Like all "unadmitted and nonresident alien[s]," he has no "right of entry to this country." Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); accord Burrafato v. United States Dep't of State, 523 F.2d 554, 555-56 & n.2 (2d Cir. 1975); Noel v. Chapman, 508 F.2d 1023, 1027 (2d Cir. 1975). Such aliens "have no standing to challenge denial of entry into the United States." Al Makaaseb General Trading Co., Inc. v. Christopher, 1995 WL 110117, *4 (S.D.N.Y. Mar. 13, 1995); accord Adams v. Baker, 909 F.2d 643, 647 n.3 (1st Cir. 1990)(unadmitted alien lacked "standing to seek either administrative or judicial review of the consular officer's decision to deny him a visa"). Even assuming a protected interest in entry, Plaintiff has not shown an actual or imminent injury to it. He alleges only that he "wishes to return to the United States for work and to visit relatives and friends," COMPL., ¶ 12 (emphasis added), a speculative "'some-day' intention[]" insufficient to support standing. U.S. MEM. at 8 (citation omitted); see also McConnell, 540 U.S. at 226 (where Senator claimed injury resulting from campaign-finance law, but injury could not possibly occur until reelection bid in 2008, the alleged injury was "too remote temporally to satisfy Article III standing"); Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (threatened injury must be "certainly impending" to be an injury in fact.")(citation omitted).

[4] See 8 U.S.C. §§ 1182(a)(9)(A)(i)-(iii), 1326; see also U.S. MEM. at 2-3, 15-16, 26-30; COMPL., ¶ 12 (claiming his "immigration order prohibit[s] his return"); id., Ex. D, Final Notice of Inadmissibility (ordering Plaintiff removed under INA Section 235(c), and stating, "[i]f you enter or attempt to enter the United States for any purpose, without the prior written authorization of the Attorney General, you will be subject to arrest, removal, and possible criminal prosecution").

of--the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" Lujan v. Defenders of Wildlife, 504 U .S. 555, 560-61 (1992)(citation omitted). The bar, however, is not traceable to any of the actions Plaintiff challenges. It did not result from his domestic detention or the conditions of it. Nor could it have resulted from the alleged mistreatment he claims he suffered abroad. Indeed, the reentry bar was in effect as soon as he was ordered removed and thus could not have been caused by anything that occurred afterward. Finally, while Plaintiff complains about being sent to Syria, the bar did not result from his removal to that particular country. It is a consequence of the unchallenged order directing Plaintiff's removal from the United States, not of the separate decision as to where he would be sent. Had Plaintiff been removed to Canada, as he wished, or to another country, his unchallenged removal from the United States would still have resulted in the identical reentry bar. Because the only asserted continuing injury is not "'fairly' traceable to the challenged action," Plaintiff lacks standing to seek prospective relief. Allen, 468 U.S. at 751.

2. Redressability. To establish Article III standing, Plaintiff also must show that it is likely--not speculative--that the injury he asserts, the reentry bar, will be redressed by the relief he requests. Here, however, the requested judicial declaration would have no impact whatsoever on the reentry bar.[5] All Plaintiff seeks is a judgment declaring the conditions of his domestic detention and his removal to Syria unlawful. Such a judgment, if rendered, would still leave Plaintiff ineligible to enter this country.

---

[5] Because Plaintiff does not challenge the removal order in his case, he is distinguishable from the alien in Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004), who challenged the validity of his removal order through a habeas petition. The Second Circuit in Swaby found the bar to be an ongoing collateral consequence of the removal order, and so it reasoned that the alien's removal did not moot his challenge to that order.

Accordingly, as Plaintiff has not established redressability with respect to the reentry bar, the bar cannot give him standing to seek a declaratory judgment against the United States.[6]

B. The Immigration and Nationality Act precludes Plaintiff from litigating Counts I, II, and III in this forum at this time.

A number of federal statutory provisions control review of the operative immigration decisions in this case. U.S. MEM. at 13-18. Plaintiff fails to discuss the actual statutory language or the case law in any detail; instead, he asserts broad-brush propositions that, he claims, permit jurisdiction under the general federal question statute over the United States' decision to remove him to his native country of Syria. Nothing Plaintiff proffers warrants departure from the specific and limited jurisdictional avenues available under the INA to review the challenged actions.

With respect to the INA's exclusivity provision, 8 U.S.C. § 1252(b)(9), Plaintiff contends that "jurisdictional statutes should not be read to preclude review of constitutional claims absent the most explicit of directives from Congress." PL. MEM. at 16.[7] But this provision does not distinguish between constitutional and other sorts of challenges. Indeed, in limiting "[j]udicial review of all questions of law and fact," Congress explicitly included "interpretation and application of constitutional . . . provisions . . ." 8 U.S.C. § 1252(b)(9). More importantly, that this jurisdictional provision precludes Counts I, II,

---

[6] See McConnell, 540 U.S. at 229 (no redressability where asserted injury "would remain unchanged" even if requested relief, the invalidation of campaign-contribution limits, were granted); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 107 (1998)("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); see also Perry, 222 F.3d at 314-15 (dismissing declaratory-relief claim as to validity of sheriff's seizure policy under which plaintiff's weapons were confiscated, because plaintiff did not face future threat from policy, and because "the relief sought" was "unrelated to," and would not have redressed, the "ongoing injury" claimed as a "continuing, present adverse effect").

[7] This contention would not apply to Count I, which is not a constitutional claim.

and III of this suit in this forum at this time does not mean that review of constitutional claims is wholly precluded, nor has the United States ever suggested as much. It simply means that review is permitted only as the INA prescribes, or, as the United States explained, pursuant to habeas corpus, which is the exception to the general exclusivity of the review specified in the INA. U.S. MEM. at 14.[8]

Against that backdrop, Plaintiff's citation to such cases as Demore v. Kim, 538 U.S. 510 (2003), and I.N.S. v. St. Cyr, 533 U.S. 289 (2001), to support his claim that general federal-question jurisdiction exists here is unpersuasive.[9] Both were habeas cases, and, as we explained, in declining to construe the INA's judicial review provisions to wholly preclude habeas review of constitutional claims, the Supreme Court relied on the unique nature of habeas relief, distinguishing it from far-reaching judicial review of the sort Plaintiff seeks here. See U.S. MEM. at 14 n.11. The only court of appeals case cited by Plaintiff that contemplates review of alleged constitutional claims in a manner other than provided for in the INA or available via habeas is Wong v. United States, 373 F.3d 952 (9th Cir. 2004). But as we noted in our opening brief, the Wong court failed to consider the crucial distinction between habeas and non-habeas review. U.S. MEM. at 14 n.11. The same is true of the only other

---

[8] Plaintiff is simply incorrect in suggesting, without citation, that the United States' position is that his exclusive avenue of review was a petition for review of his removal order, as opposed to habeas. PL. MEM. at 18. His contention that jurisdiction must lie here because a petition for review does not include a damages remedy is specious. See, e.g., Schweiker v. Chilicky, 487 U.S. 412, 422-29 (1988)(refusing to imply a damages remedy against federal officials for alleged constitutional violations where the comprehensive statutory scheme provided by Congress did not provide one).

[9] Plaintiff's reliance on non-immigration cases, discussing different statutes with different language, is similarly misplaced. Even assuming those cases stood for the proposition that Congress may not wholly preclude judicial review of constitutional claims in immigration cases (something the Supreme Court has never held), that circumstance is not presented here. See PL. MEM. at 17-18 (citing Webster v. Doe, 486 U.S. 592 (1988); Johnson v. Robison, 415 U.S. 361 (1974); Czerkies v. United States Dep't of Labor, 73 F.3d 1435 (7th Cir. 1996)).

authority Plaintiff cites, a district court decision that has never been cited. See PL. MEM. at 20 n.2 (citing Medina v. United States, 92 F.Supp.2d 545 (E.D. Va. 2000)).[10]

Plaintiff's related claim--that 8 U.S.C. § 1252(a)(2)(B)(ii), limiting review of matters "in the discretion of the Attorney General," does not apply because the alleged acts were unconstitutional or "ultra vires" and so could not have involved the exercise of discretion--is similarly unpersuasive. PL. MEM. at 15. In the immigration context, the Second Circuit has held that habeas review is available to aliens found inadmissible on security grounds pursuant to INA Section 235(c) and to aliens opposing removal to a particular country based on a claimed fear of torture.[11] To the extent Plaintiff's constitutional arguments are even colorable, habeas was the forum in which to raise them.

Plaintiff's claim that the United States "affirmatively obstructed any opportunity [he] might have had" to file a habeas petition while in U.S. custody in no way creates jurisdiction where Congress has precluded it. PL. MEM. at 16. Plaintiff states in conclusory fashion that he "could not have pursued

---

[10] Two Ninth Circuit cases cited by Plaintiff and relied upon by the Wong court for the notion that there is a kind of universal federal jurisdiction to raise constitutional challenges to immigration decisions are inapposite. See PL. MEM. at 15 & Wong, 373 F.3d at 963 (citing Torres-Aguilar v. I.N.S., 246 F.3d 1267 (9th Cir. 2001); Sanchez-Cruz v. I.N.S., 255 F.3d 775 (9th Cir. 2001)). In each, in contrast to this case, the alien filed a petition to review a final decision of the Board of Immigration Appeals, the avenue of review explicitly contemplated by the INA. Moreover, in Torres-Aguilar, the Ninth Circuit cautioned that, even with respect to review contemplated under the INA, "a petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb. To hold otherwise would allow immigrants . . . to circumvent clear congressional intent to eliminate judicial review over discretionary decisions through the facile device of re-characterizing an alleged abuse of discretion as a 'due process' violation." Torres-Aguilar, 246 F.3d at 1271.

[11] Wang v. Ashcroft, 320 F.3d 130, 142 (2d Cir. 2003)(habeas is appropriate vehicle to review Convention Against Torture challenge to removal); Azzouka v. Sava, 777 F.2d 68, 72 (2d Cir. 1985)("Exclusion under section 235(c) is subject to review--albeit a limited one--on habeas corpus.").

these claims via any other legal route," id., at 2, but this assertion cannot withstand scrutiny. Plaintiff contacted his family on October 1, 2002, and they retained an attorney for him. COMPL., ¶ 39. Plaintiff then met with his attorney on October 5, 2002. Id., ¶ 42. He had been served a Notice of Temporary Admissibility based on his al Qaeda membership four days earlier. Id., ¶ 38 (Plaintiff received notice of inadmissibility on October 1, 2002). Plaintiff was also already aware that the United States was considering removing him to Syria, and in fact had been for a week. Id., ¶ 35 (alleging that, on September 27, 2002, an immigration officer asked Plaintiff to agree to be removed to Syria). Plaintiff says that when he met with Maureen Girvan of the Canadian Consulate on October 3, 2002, he expressed concern that he might be removed to Syria. Id., ¶ 40. Plaintiff's attorney thus could have filed a habeas petition immediately upon learning of the notice of temporary inadmissibility on October 5, before Plaintiff's removal on October 8. His claims were not reviewed either as provided in the INA or via habeas because he did not avail himself of that real, albeit narrow, opportunity. Nor is it surprising that he had a limited opportunity to seek judicial review given that he was ordered removed on security-related grounds under a statute providing for the "expedited removal of inadmissible arriving aliens." 8 U.S.C. § 1225 (quoting statutory heading; emphasis added).

Plaintiff urges further that the United States' alleged "complicity in his mistreatment in Syria," and the conditions of his domestic detention, are "collateral" to his removal order and therefore "could not have been raised." PL. MEM. at 15. As for Plaintiff's challenge to the conditions of his domestic detention, the United States has never maintained that the INA precludes jurisdiction over Count IV, and, in fact, specifically stated that it does not. U.S. MEM. at 15 n.12. Plaintiff's allegations of torture in Syria, however, are not "collateral" to the order removing him to that country.

To be sure, if the United States had no alleged involvement in the claimed mistreatment in Syria, the INA's jurisdictional limits would not preclude suit under the TVPA or the Constitution against the Syrian officials who allegedly tortured Plaintiff (assuming a claim were otherwise stated). That, of course, is not what Plaintiff maintains here. Rather, he alleges, the opposite is true--the very reason the United States chose Syria as the country of removal was purportedly to bring about torture, and he maintains further that the United States could have ordered him released from Syrian custody. PL. MEM. at 61. The selection of Syria as the removal country thus is inextricably linked to Plaintiff's claim of torture and is not collateral to or severable from it. Where an alien fears torture in the proposed removal country, that claim is cognizable both on habeas and on a petition for review of the removal order.[12] Plaintiff ignores that the Foreign Affairs Reform and Restructuring Act of 1988 (FARRA) limits collateral review of claims that removal will result in an alien's torture in violation of the CAT. U.S. MEM. at 16-17. Accordingly, this tort suit is not a proper forum for Plaintiff's torture claims.

C. Plaintiff has abandoned his TVPA claim against the United States, which in any event is barred by sovereign immunity and fails to state a claim.

As the United States explained in its opening brief, suits against federal officers in their official capacity are in fact suits against the United States. Id., at 18. Plaintiff therefore must show that the United States has waived sovereign immunity for his official-capacity claims. The TVPA, which applies only to "individual[s]," contains no such waiver, id. at 18-19, and nowhere in his 15-page TVPA discussion does Plaintiff respond to this threshold and dispositive issue. Accordingly, Count I of the

---

[12] See, e.g., Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004)(CAT claim on petition for review); Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003)(CAT claim on habeas).

Complaint must be dismissed with respect to all official-capacity claims.

With the exception of qualified immunity, any argument dispositive as to the individual-capacity Defendants on Count I applies with equal force to the United States. Because it is clear and undisputed that sovereign immunity compels dismissal of the United States, we do not discuss herein all the alternative bases for dismissal. However, we will address in detail one additional basis for dismissal concerning a matter of particular federal significance, namely, Plaintiff's claim that the alleged acts of the U.S. officials occurred under "color of law, of any foreign nation." 28 U.S.C. § 1350 note, § 2(a). Plaintiff alleges that the Defendants removed him to Syria so that Syrian authorities could interrogate him under torture. COMPL., ¶ 3. He argues that, because the Defendants allegedly "directed, ordered, confirmed, acquiesced or conspired and/or aided and abetted" the claimed torture, id., ¶ 71, it occurred "under color of foreign law."

In support of this theory, Plaintiff maintains that, like private parties sued under 42 U.S.C. § 1983, for acts taken under "color of state law," federal officials act "under color of foreign law" whenever they "participat[e] in a joint activity with a [foreign government] or its agents." PL. MEM. at 50. The cited cases, however, do not stand for this sweeping proposition. Despite Plaintiff's protestations, Schneider v. Kissinger is on all fours with the allegations in this matter, and the court's conclusion there that Secretary Kissinger acted under color of federal law applies equally here. 310 F. Supp. 2d 251, 267 (D.D.C. 2004), appeal docketed, 04-5199 (D.C. Cir. May 28, 2004); see generally Strickland v. Shalala, 123 F.3d 863, 866 (6th Cir. 1997)("Because federal officials typically act under color of federal law, they are rarely subject to liability under § 1983.").

With one exception, all the cases cited by Plaintiff either involve private parties or statements in

dicta where the courts ultimately found the allegations insufficient to support a claim that federal officers acted under color of state law.[13] In Billings v. United States, PL. MEM. at 52 n.20, the Ninth Circuit assumed without deciding that "federal employees, like private individuals, can act under color of state law if they conspire or act in concert with state officials to deprive a person of her civil rights." 57 F.3d 797, 801 (9th Cir. 1995). The court went on to dismiss the claim because the state officials were "clearly acting at the behest and under the direction of the federal agents," not the other way around. Id. The court thus held that, "[i]f the Secret Service Agents and the Sheriff's officers acted jointly, it was under the color of federal law." Id. Similarly, in Case v. Milewski, PL. MEM. at 52 n.20, the court of appeals found that the Naval police officers' "actions were taken under color of federal law" despite plaintiff-arrestee's claim that they were cloaked with state authority because the arrest was exclusively on state criminal charges, the citations were on state forms and prosecutable in a state venue, and the plaintiff was not on federal property when he was arrested. 327 F.3d 564, 567-68 (7th Cir. 2003).

The only case cited by Plaintiff in which the court concluded that there were sufficient allegations to state a claim that federal officials acted under color of state law is Kletchka v. Driver, 411 F.2d 436 (2d Cir. 1969), and Kletchka supports the government's position herein. There, the plaintiff claimed that state and federal defendants conspired under color of state law to deprive him of due process with respect to certain employment decisions made by the Syracuse Veterans Administration

---

[13] See PL. MEM. at 51-52 (citing Ciambriello v. County of Nassau, 292 F.3d 307, 324 (2d Cir. 2002)(rejecting claim that private party could be held liable under § 1983, and observing that plaintiff's "conclusory allegations of conspiracy ring especially hollow in light of the adversarial relationship" between the state and private actors); Jackson v. Statler Found., 496 F.2d 623, 635 (2d Cir. 1974)("no colorable claim" of conspiracy was made as between federal and state actors)).

(VA) hospital, a federal institution. In concluding that summary judgment for the Syracuse VA defendants was not appropriate, the Second Circuit began by observing that the state defendants exerted influence over the federal defendants, influence they "possessed by virtue of the power and authority vested in them under state law." Id. at 447. The court went on to describe "[t]he most striking evidence concerning the close relationship" between the federal VA defendants and "the state medical school" with which they were affiliated. Id. The indicia of state influence included the institutions' physical proximity, the fact that both were "completely integrated in all departments" and customarily shared staff who were "considered as equal members . . . in all respects," and the fact that the Dean's Committee of the state school had "a general supervisory aegis over the quality of patient care and training" in the VA hospital and nominated persons for appointment to the VA professional staff (although the final decision was still the VA's). Id. at 447-48 (citation and internal quotation marks omitted). In toto, the court found that, if proven, these factors made it clear that "the chief administrators of the [state] medical school are in a position to exert a powerful influence over the personnel policies" of the VA hospital. Id. at 448. Conversely, the court dismissed plaintiff's claims against federal employees in the VA's office in Washington, D.C. With respect to those defendants, the Second Circuit concluded, "[t]here is no indication" that their involvement "was under the control or influence of the State defendants." Id. at 449; accord Williams v. United States, 396 F.3d 412, 415 (D.C. Cir. 2005)(holding that federal employee did not act under color of D.C. law for purposes of § 1983, and that D.C. had "no authority" over him and "thus did not exercise . . . coercive power through

him")(citation and internal quotation marks omitted).[14]

In this case, Plaintiff has not alleged a single indicium of influence or control by Syria over the United States that might arguably support the conclusion that Syria "exercise[d] . . . coercive power through" U.S. officials. Id. To the contrary, Plaintiff's theory is that the Syrians were doing the United States' bidding. Plaintiff alleges, for example, that the United States "could have ordered his release" from Syrian custody. PL. MEM. at 61. At most then, the complaint makes a claim that Syrian officials operated under color of federal law. Because there is no basis to conclude that Defendants were acting under color of anything other than federal law, Plaintiff's TVPA claim should be dismissed.

D. Plaintiff can show no substantive due-process violation based on his removal to Syria, any harm he suffered abroad, or the conditions of his domestic detention.

1. Selection of removal country. The Executive's decision to disregard Plaintiff's designation of Canada and redesignate Syria as his removal country was well within its plenary immigration power. U.S. MEM. at 20-21, 26-30. Because he "gained no foothold in the United States" under the entry-fiction doctrine, Plaintiff acquired no substantive due-process rights that could have been violated by this decision. Id., at 22 (quoting Kaplan v. Tod, 267 U.S. 228, 230 (1925)). In opposition, Plaintiff argues first that the entry fiction does not deprive aliens of substantive due-process protections but, rather, only precludes them from asserting procedural due-process claims in connection with the

---

[14] See also Johnson v. Orr, 780 F.2d 386, 390 (3d Cir. 1986)(in determining whether National Guardsman acted under color of state law, "[a] crucial inquiry is whether day-to-day operations are supervised by the Federal [or state] government")(citation and internal quotation marks omitted); Strickland, 123 F.3d at 866 (in evaluating "whether particular conduct constitutes action taken under the color of state [or by analogy foreign] law[]," courts "must focus on the actual nature and character of that action")(citation and internal quotation marks omitted).

admission process (claims that Plaintiff is not asserting here). PL. MEM. at 34 (citing, inter alia, Wong v. United States, 373 F.3d 952 (9th Cir. 2004)). Plaintiff thus contends he enjoyed the full panoply of substantive due-process rights. Id., at 33-36. Whatever may be the law in the Ninth Circuit, this is clearly not the law in the Second Circuit. The Second Circuit has declared that unadmitted aliens "appear[] to have little or no constitutional due process protection" "[o]ther than protection against gross physical abuse." Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). It has also held that their "[i]ndefinite detention . . . does not violate due process." Guzman v. Tippy, 130 F.3d 64, 66 (2d Cir. 1997)(per curiam).[15] Plaintiff's narrow view of the entry-fiction doctrine, and his broad view of the substantive due-process rights of unadmitted aliens, are simply inconsistent with these Second Circuit authorities.

Second, Plaintiff argues that, because there was an illicit purpose behind the decision to remove him to Syria, the decision violated due process on a "shocks the conscience" theory and cannot be "cloaked" in "the plenary power doctrine." PL. MEM. at 25, 36. Plaintiff cites no authority for the proposition that the selection of an inadmissible alien's removal country, or any other type of immigration decision, may be appropriately reviewed under a "shocks the conscience" standard, and that proposition cannot be reconciled with the courts' rejection of due-process rights for unadmitted

---

[15] Guzman's holding that inadmissible aliens may be indefinitely detained consistently with the Constitution was not disturbed by Clark v. Martinez, 543 U.S. __, 125 S. Ct. 716 (2005), where the Supreme Court held that the detention of unadmitted aliens under 8 U.S.C. § 1231(a)(6) is subject to the same limitations that were imposed on the detention of admitted aliens under that statute in Zadvydas v. Davis, 533 U.S. 678 (2001). The Court in Martinez rested its decision entirely on statutory grounds, see Martinez, 125 S. Ct. at 722-23, and it declined to hold that the indefinite detention of inadmissible aliens raised constitutional concerns. Id. at 723-24.

aliens in immigration proceedings.

Even if such a standard applied, it would require Plaintiff to do far more than ascribe a bad motive to the selection of Syria as his removal country. Under the Fourth Amendment, "[s]ubjective intentions play no role," and an officer need only act with objective reasonableness. Whren v. United States, 517 U.S. 806, 813 (1996). In substantive due-process cases, motive may at times be relevant. See County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)(stating "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level"). But this does not mean that Plaintiff can take conduct that is objectively reasonable and authorized by statute and state a due-process violation merely by claiming bad motive, as "objective considerations" remain "the controlling principle." Lewis, 523 U.S. at 858 (Kennedy, J., concurring). Indeed, as the Third Circuit has held, Lewis "superceded prior decisions" that required substantive due-process plaintiffs to show only that government officials "acted with an 'improper motive.'" United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 394 (3d Cir. 2003); cf. Olivier v. Robert L. Yeager Mental Health Ctr., 398 F.3d 183, 189-90 (2d Cir. 2005) (questioning relevance of "improper motive or intent," in light of Whren, in due-process challenge to involuntary commitment, but declining to resolve issue given lack of bad-motive evidence). Because the "shocks the conscience" standard is "an even higher burden for plaintiffs than the objective reasonableness test," McDonald v. Haskins, 966 F.2d 292, 294S (7th Cir. 1992), Plaintiff must at least show the objective unreasonableness of the Defendants' conduct in order to meet the more demanding "shocks the conscience" standard that he claims controls here. See Scott v. Clay County, 205 F.3d 867, 876 (6th Cir. 2000)(stating the "Fourth Amendment's comparatively relaxed 'objective

unreasonableness' standard of proof" is more "favorable to the plaintiff" when "juxtaposed against the more exacting 'shocks the conscience'" standard).

Plaintiff cannot satisfy this "objective unreasonableness" standard. He does not dispute that the redesignation of Syria was authorized by statute, and, indeed, once Plaintiff's designation of Canada was disregarded, the statutory scheme favored Syria. See U.S. MEM. at 16, 29 n.28; 8 U.S.C. § 1231(b)(2)(C), (D), & (E)(iv). Nor does he address the Second Circuit precedent strongly suggesting that the selection of a removal country does not even implicate due process. See U.S. MEM. at 16 n.13, 25, 28-30 & nn.27, 30; Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986); Linnas v. I.N.S., 790 F.2d 1024 (2d Cir. 1986). The facially permissible decision to remove Plaintiff to Syria, then, cannot qualify as the kind of "most egregious official conduct" that is necessary to support a "shocks the conscience" due-process claim. Lewis, 523 U.S. at 846. Plaintiff cannot invalidate a statutorily authorized, objectively justifiable immigration decision simply by alleging an improper motive.

2. The detention and alleged torture abroad. Plaintiff's due-process claims based on the detention and alleged torture in Syria are precluded as a matter of law by Supreme Court and other authorities holding that the U.S. Constitution confers no rights on non-resident aliens outside the sovereign territory of the United States. See U.S. MEM. at 24-26 (citing, inter alia, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763 (1950)). Notwithstanding this precedent, Plaintiff asks the Court to hold that "the Constitution does extend beyond our borders," PL. MEM. at 26 (emphasis added), and gives him substantive rights while in the custody of a foreign government that he can enforce against the United States and its officials. This Court should decline Plaintiff's request to globalize the U.S. Constitution in this fashion. Plaintiff cites

no authority supporting such a radical step and fails to distinguish the authorities that preclude it. Contrary to Plaintiff's claim regarding Eisentrager, see PL. MEM. at 38-39, it was not solely the status of the aliens in that case as "enemy aliens" that led the Court to deny them protections under the Due Process Clause. That Eisentrager was speaking more broadly was made clear in Verdugo, where the Court referred to Eisentrager's "emphatic" rejection of the Fifth Amendment's extraterritorial application and relied on Eisentrager to reject the constitutional claim of a Mexican alien, who clearly was not an "enemy alien." See Verdugo, 494 U.S. at 269.[16]

Plaintiff relies most prominently on Rasul v. Bush, 542 U.S. __, 124 S.Ct. 2686 (2004), claiming it "confirms that foreign nationals outside U.S. sovereign territory . . . have constitutional rights." PL. MEM. at 37. Plaintiff misreads Rasul. As we explained, see U.S. MEM. at 24-25 n.21, Rasul avoided the complex problems raised by extraterritorial application of the Constitution and dealt instead with the "narrow" question of whether federal courts "lack[ed] jurisdiction" under the habeas statute to entertain the petitions of foreign nationals held at the Guantanamo Bay Naval Base. Rasul, 124 S.Ct. at 2690, 2693, 2698-99. This interpretation of Rasul was recently adopted by the District

---

[16] Plaintiff seeks to impugn the precedential value of Verdugo, suggesting that Justice Kennedy did not join in all aspects of the majority opinion. PL. MEM. at 37-38 & n.12. Plaintiff is simply mistaken. See Verdugo, 494 U.S. at 275 ("Although some explanation of my views is appropriate given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the Court, which I join.")(Kennedy, J., concurring)(emphasis added); see also United States v. Esparza-Mendoza, 265 F.Supp.2d 1254, 1261 (D. Utah 2003)("This court is not at liberty to second-guess Justice Kennedy's direct statement that he was joining the Court's opinion."), aff'd, 386 F.3d 953 (10th Cir. 2004). Verdugo also forecloses Plaintiff's suggestion that Reid v. Covert, 354 U.S. 1 (1957), supports the application of the Constitution to non-resident aliens, PL. MEM. at 37, as it recognized that Reid dealt only with the rights of U.S. citizens abroad and does not support affording due-process protections to non-resident aliens. See Verdugo, 494 U.S. at 269-70.

Court in Khalid v. Bush, __ F.Supp.2d __, 2005 WL 100924 (D.D.C. Jan. 19, 2005)(Leon, J.), appeal docketed, Nos. 05-5062 & 05-5063 (D.C. Cir. Mar. 2, 2005). As that court recognized, "non-resident aliens captured and detained outside the United States have no cognizable constitutional rights," id., at *6 (quoting subheading), and "[n]othing in Rasul alters the holding articulated in Eisentrager and its progeny" that "aliens outside sovereign United States territory with no connection to the United States . . . possess no cognizable constitutional rights." Id., at *6-7. See id., *8 (rejecting as "misplaced and unpersuasive" the petitioners' "expansive reliance upon Rasul's 'footnote 15' for the proposition that the Rasul majority intended to overrule, sub silentio, Eisentrager and its progeny").[17]

Finally, Plaintiff asks the Court to fashion a "state created danger" exception to the rule from Eisentrager and Verdugo barring extraterritorial application of the Constitution. PL. MEM. at 27 n.9. Under his theory, substantive due process would apply extraterritorially, and the conduct of U.S. officials would "shock the conscience," so long as those officials placed Plaintiff in the situation where he was ultimately harmed by foreign actors on foreign soil. Plaintiff cites "danger creation" cases that involve actions occurring in this country as to citizens and thus are clearly inapplicable here. In any

---

[17] There is contrary authority from another District Judge. See In re Guantanamo Detainee Cases, __ F.Supp.2d __, 2005 WL 195356 (D.D.C. Jan. 31, 2005)(Green, J.), pet. for interlocutory appeal granted, No. 05-8003 (D.C. Cir. Mar. 11, 2005). Contrary to Khalid, Judge Green read Rasul, "in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights." 2005 WL 195356, at *8. Key to Judge Green's ruling, however, was her determination that Guantanamo Bay "must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." Id., at *18. Thus, even if her analysis were accepted as correct, it would not supply a basis for extending constitutional rights to non-resident aliens held in Syria, a sovereign foreign nation that can hardly be viewed as "equivalent" to U.S. territory.

event, the authorities we previously cited, including Supreme Court and Second Circuit decisions,[18] foreclose Plaintiff's theory.[19]

3. Conditions of domestic confinement. Again, in the Second Circuit, the only substantive due-process right arguably possessed by an inadmissible alien temporarily detained on U.S. soil while his admissibility is determined is a "limited right to be free, while in this country, from 'gross physical abuse' by federal officials." U.S. MEM. at 31 (quoting Correa, 901 F.2d at 1171 n.5).[20] The alleged

---

[18] See U.S. MEM. at 25-26 & nn. 22-24; id., at 30 n.30; see also Verdugo, 494 U.S. at 262 (nonresident alien had no Fourth Amendment claim with respect to search of Mexican property even though search was performed at request of U.S. official in California); Doherty, 808 F.2d at 943-44 (Second Circuit sanctioned removal of terrorist alien to United Kingdom even though he faced life sentence there and would face lesser sentence if removed to Ireland as he requested); Linnas, 790 F.2d at 1030-31 (Second Circuit sanctioned removal of former Nazi official to former Soviet Union even though, upon his return there, he was likely to face death sentence imposed during sham trial); Harbury v. Deutch, 233 F.3d 596, 602-04 (D.C. Cir. 2000)(holding that Verdugo barred Fifth Amendment due-process claim arising from alleged torture of non-resident alien in Guatemala, notwithstanding allegations that federal officials in the United States conspired to have alien tortured), rev'd on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403 (2002).

[19] Plaintiff also claims that extraterritorial application of the Constitution is established by "personal jurisdiction" cases affording non-resident aliens the due-process right not to be sued in a forum with which they lack "minimum contacts." See PL. MEM. at 38. Contrary to Plaintiff's claims, those cases simply recognize that, before a court may exercise jurisdiction over a party to a case before it, the court must first afford that party certain minimal rights. Plaintiff's reliance on Wong Wing v. United States, 163 U.S. 228 (1896), see PL. MEM. at 28-29, similarly fails, because Wong Wing held only that the usual limits on the government's prosecutorial power apply when the government chooses to prosecute inadmissible aliens physically present in the United States. See Borrero v. Aljets, 325 F.3d 1003, 1008 (8th Cir. 2003)(stating Wing "may support extending certain constitutional protections to inadmissible aliens accused of crimes" but "do[es] not call into question the power of the government to detain an alien who is stopped at the border" pursuant to its immigration authority) (emphasis added). The United States' exercise of its immigration power to remove, rather than prosecute, an alien is not similarly limited.

[20] The United States did not, as Plaintiff suggests, "concede that inadmissible aliens are entitled to substantive due process while in the United States." PL. MEM. at 25.

conditions of Plaintiff's detention here do not constitute "gross physical abuse," and Plaintiff does not suggest otherwise. The precise conditions complained of remain unclear.[21] The only condition of his domestic detention that Plaintiff discusses in any substance is Defendants' alleged "interference with access to courts." PL. MEM. at 30-33. No case law regarding other alleged "conditions" is mentioned, and, in any event, none rises to the level of gross physical abuse. The United States therefore does not discuss them further herein.

Plaintiff does not cite a single case in the immigration context, or indeed a single case in any context involving an alien, that discusses the notion of constitutional "access to courts." Even with respect to citizens, the concept is fuzzy. The few cases Plaintiff cites offer a grab bag of constitutional sources, most of which are not pled in his complaint, including the First Amendment's right to petition courts, Fourteenth Amendment equal protection, and otherwise non-specific due process. See PL. MEM. at 32. The due-process cases largely involve access to courts by inmates, and, in that context, the law only requires that they be provided sufficient tools "to attack their sentences, directly or collaterally, and . . . to challenge the conditions of their confinement," not that they receive any "permanent provision of counsel." Lewis v. Casey, 518 U.S. 343, 354-55 (1996). Plaintiff's claim that unadmitted aliens may assert those nebulous rights in this context is wholly unsupported.[22]

---

[21] See, e.g., PL. MEM. at 5 (contending that Plaintiff was interrogated for hours, expletives were screamed at him, he was shackled, and he was given a cold McDonald's meal (purportedly his first in two days)).

[22] Even putting aside these concerns, Plaintiff still states no claim, as we previously explained. See supra pp. 8-9. He saw his counsel after he was served a temporary notice of inadmissibility and made aware of the prospect of removal to Syria. Consistent with the expedited proceedings mandated by Congress as a consequence of his al Qaeda membership, he had a narrow window in which to file a habeas petition. He thus cannot show a violation of any ill-defined "right" to access the courts.

III. CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, we respectfully request that the Court dismiss with prejudice all of Plaintiff's claims against the United States.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
Civil Division

JEFFREY S. BUCHOLTZ
Deputy Assistant Attorney General
Civil Division

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division

ROSLYNN MAUSKOPF
United States Attorney
Eastern District of New York

SCOTT DUNN
Assistant United States Attorney
One Pierrepont Plaza
Brooklyn, NY 11201
Tel. (718) 254-6029
Fax (718) 254-6081
E-mail: scott.dunn@usdoj.gov

MARY HAMPTON MASON (MM 9148)
Senior Trial Attorney, Torts Branch, Civil Division
Tel. (202) 616-4123; Fax (202) 616-4314; E-mail: mary.mason@usdoj.gov

JEREMY S. BRUMBELOW (JB 6615)
Trial Attorney, Torts Branch, Civil Division
Tel. (202) 616-4330; Fax (202) 616-4314; E-mail: jeremy.brumbelow@usdoj.gov

UNITED STATES DEPARTMENT OF JUSTICE
P.O. Box 7146, Ben Franklin Station, Washington, D.C. 20044

ATTORNEYS FOR THE UNITED STATES OF AMERICA AND ALL OFFICIAL-CAPACITY DEFENDANTS[23]

DATED: MARCH 14, 2005

[23] In separate papers, the United States will seek to substitute, pursuant to Fed. R. Civ. P. 25(d), Attorney General Alberto R. Gonzales and Secretary of Homeland Security Michael Chertoff as defendants on the official-capacity claims against Defendants Ashcroft and Ridge, respectively.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2005, true copies of the foregoing were served by first class mail, postage pre-paid, or by Federal Express, upon the following:

Counsel for the plaintiff:
Barbara J. Olshansky, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012; and

Robert F. Fink, Esq.
DLA Piper Rudnick Gray Cary US LLP
1251 Avenue Of The Americas
New York, NY 10020-1104

Counsel for defendant John Ashcroft:
Larry Gregg, Esq.
Assistant U.S. Attorney
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314

Counsel for defendant Larry D. Thompson:
John J. Cassidy, Esq.
Stephen L. Braga, Esq.
Baker Botts, L.L.P
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Counsel for defendant J. Scott Blackman:
Thomas G. Roth, Esq.
Law Offices
395 Pleasant Valley Way, Suite 201
West Orange, NJ 07052

Counsel for defendant Robert Mueller:
Ira H. Raphaelson, Esq.
O'Melveny & Myers, L.L.P.
1625 Eye Street NW
10th Floor
Washington DC 20006-4001

Jim Walden, Esq.
O'Melveny & Myers, L.L.P.
Times Square Tower
7 Times Square
New York, NY 10036

Counsel for defendant James Ziglar:
William Alden McDaniel, Jr., Esq.
Law Offices of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, MD 21201-3606

Counsel for defendant Edward J. McElroy:
Debra L. Roth, Esq.
Thomas M. Sullivan, Esq.
Shaw, Bransford, Veilleux & Roth, PC
1100 Connecticut Avenue, N.W., Ste. 900
Washington, DC 20036-4101

Jeremy S. Brumbelow

JEREMY S. BRUMBELOW