UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAHER ARAR,

Plaintiff,

- against -

JOHN ASHCROFT, Attorney General of the United States; LARRY D. THOMPSON, formerly Acting Deputy Attorney General; TOM RIDGE, Secretary of State for Homeland Security; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the 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 District Director 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.

04-CV-0249-DGT-VVP

PLAINTIFF MAHER ARAR'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Barbara Olshansky
Jules Lobel
David Cole
Maria LaHood

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tele: (212) 614-6439

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE STATUTES

FEDERAL RULES

FEDERAL REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Why would United States officials intercept a Canadian citizen on his way home to Canada, detain him at JFK, intentionally obstruct his access to a lawyer, order him removed, and then place him not on a connecting flight to his home in Canada, but on a federally chartered jet to Syria where he would be detained without charges, interrogated and tortured for nearly one year? That is the fundamental question underlying this case.

Plaintiff Maher Arar alleges that Defendants forcibly diverted him from Canada to Syria because they knew that Canada would not detain him without charges and torture him, while Syria would. Mr. Arar spent ten months in incommunicado solitary detention without charges or trial in Syria, where he was subject to brutal acts of torture, while being questioned pursuant to the direction of U.S. officials and based on a dossier provided by those officials to the Syrians. Mr. Arar claims that Defendants' treatment of him in the United States, their decision to forcibly redirect him to Syria, and their complicity in his arbitrary detention and torture in Syria "shock the conscience," and violates both his substantive due process rights and the Torture Victims Protection Act.

Defendants argue that even if all the above is taken as true, as it must on a motion to dismiss, Mr. Arar has no right to *any* form of relief. They assert a variety of objections, but at bottom their claim is that even though it would unquestionably violate due process to conspire to subject a U.S. citizen or a foreign national residing here to such treatment, this conduct violates no constitutional rights whatsoever because Mr. Arar is a foreign national who had not formally entered the United States, and therefore is entitled to no legal protections. No case supports such an extreme proposition. On the contrary, the core elements of substantive due process—such as the prohibition on torture, arbitrary detention, and the right of access to the courts—always limit

U.S. officials' treatment of "persons," whether they are citizens or not, and whether injured here or elsewhere.

Defendants' jurisdictional objections mirror their arguments on the merits. If accepted, they would offer complete immunity to government officials who, as alleged, intentionally conspire to subject a human being to arbitrary detention and brutal torture. Defendants argue that because they employed immigration powers at JFK to achieve their unlawful ends, Mr. Arar is now barred from holding them responsible for their actions, even if those actions were blatantly unconstitutional. Nothing in the immigration laws requires such a result. Mr. Arar could not have pursued these claims via any other legal route, and accordingly, this Court has jurisdiction to entertain them now absent the clearest of indications from Congress that it intended to foreclose all review of constitutional claims in this situation. There is no such evidence, and jurisdiction is appropriate.

For similar reasons, a damages remedy under *Bivens* is appropriate. There is no evidence that Congress sought through its immigration laws to insulate government officials complicit in torture, arbitrary detention, and denial of access to courts from being held accountable in damages for their wrongs. Moreover, because he faces a five-year bar to reentry to the United States, and would like to return, Mr. Arar has standing to seek, and is entitled to, injunctive and declaratory relief.

As allegedly, Defendants' treatment of Mr. Arar violated clearly established rights under the Due Process Clause and the Torture Victim Protection Act ("TVPA"). It is well established that torture, arbitrary detention without charge or trial, and interference with access to the courts violates substantive due process. And it is equally clear that Mr. Arar is entitled to substantive due process protection, despite the fact that he is a Canadian citizen.

To support their argument regarding the TVPA, Defendants cite a securities fraud case, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), in which the Supreme Court held that there is no aiding and abetting cause of action in private civil suits brought under the federal securities law. However, *Central Bank* does not hold that a statute must explicitly allow for secondary liability in order for a court to hold aiders and abetters or co-conspirators liable. Rather, these decisions support the proposition that the scope of liability under a statute must be determined through a reading of the text of the specific statute.

FACTUAL BACKGROUND

The Extraordinary Rendition of Maher Arar

Maher Arar is a thirty-three-year-old Canadian citizen. (Compl. ¶ 11.) He was born in Syria and immigrated to Canada with his family when he was a teenager. (*Id.)* Mr. Arar was educated in Canada as a software engineer and has since worked in that capacity in both Canada and the United States. (*Id.*) He currently lives in Canada with his wife and their two young children. (*Id.*)

In September 2002, Mr. Arar was vacationing with his family in Tunisia, when his employer at the time, MathWorks, requested that he return to Ottawa to consult with a prospective client. (Compl. ¶ 25.) Accordingly, Mr. Arar purchased a return ticket to Montreal, Canada, with stops in Zurich, Switzerland and New York, New York. (*Id.*) Mr. Arar left Tunisia on September 25, 2002 and headed home, his family remaining behind. After stopping overnight in Zurich, he boarded a flight to John F. Kennedy Airport in New York ("JFK"). (*Id.*)

Day One of U.S. Detention

Mr. Arar's flight landed in New York at approximately 12:00 p.m. on September 26, 2002. (Compl. ¶ 26.) To catch his connecting flight to Canada, Mr. Arar was required to pass through immigration. (*Id.*) At immigration, Mr. Arar presented a valid Canadian passport to the immigration inspector on duty. (*Id.*) After reviewing Mr. Arar's passport, the inspector instructed Mr. Arar to wait nearby. (*Id.*)

Approximately two hours later, an immigration officer fingerprinted and photographed Mr. Arar. (Compl. ¶ 27.) Shortly thereafter, two uniformed men searched Mr. Arar's wallet, carry-on bags and luggage, all without his consent. (*Id.*) Concerned that he would miss his connecting flight, Mr. Arar repeatedly asked to make a telephone call. The officers, however, ignored his requests. (*Id.*)

At approximately 4:00 p.m., three or four men approached Mr. Arar. (Compl. ¶ 28.) One of the officers told Mr. Arar that he wanted to ask him some questions. (*Id.*) The officer assured Mr. Arar that he would be permitted to make his connecting flight after answering the questions. (*Id*.) When Mr. Arar requested a lawyer, the officers told him that only U.S. citizens were entitled to lawyers. (*Id.*)

The interrogation lasted approximately five hours, and Mr. Arar missed his connecting flight. (Compl. ¶ 29.) During the interrogation, a Federal Bureau of Investigation ("FBI") agent constantly swore at Mr. Arar, calling him, among other things, a "fucking smart guy" with a "fucking selective memory." (*Id.*) The agent became even more agitated when Mr. Arar did not supply him with prompt responses to his rapid-fire questions. (*Id.*) During the questioning, it became apparent to Mr. Arar that the agent was referring to a particular report, but that report was never disclosed to Mr. Arar. (Compl. ¶ 30.) Among the FBI agent's questions, were inquiries regarding Mr. Arar's work and travel in the United States, as well as his relationships

with certain individuals such as Abdullah Almalki. (*Id*.) Mr. Arar explained to the agent that Mr. Almalki was no more than a casual acquaintance of his from Ottawa. (*Id*.)

Immediately following the FBI agent's five-hour interrogation, an immigration officer questioned Mr. Arar for an additional three hours regarding his membership in, or affiliation with, various terrorist groups. (Compl. ¶ 31.) Mr. Arar denied any such membership or affiliation. (*Id.*) The immigration officer ended his questioning at midnight. (*Id.*)

Mr. Arar was then shackled, put into a vehicle, and driven to another building at JFK, which Mr. Arar could not identify. (Compl. ¶ 32.) There, he was placed in solitary confinement in a cell without a bed and with lights that remained on twenty-four hours a day. (*Id*.)

Day Two of U.S. Detention

On September 27, 2002 at 9:00 a.m., two FBI agents interrogated Mr. Arar for approximately five hours. Among other things, they asked him about Osama Bin Laden, Iraq, and Palestine. (Compl. ¶ 33.) Both agents constantly screamed explicatives at Mr. Arar. (*Id*.) During the entirety of the interrogation Mr. Arar denied any connection to terrorists or involvement in terrorist activity. (*Id*.) He repeatedly requested legal assistance and an opportunity to make a phone call, but those requests were denied. (*Id*.)

At about 2:00 p.m., the agents brought Mr. Arar back to his cell in chains and shackles. (Compl. ¶ 34). They gave him a cold McDonalds meal, which was his first food in almost two days. (*Id*.) Early that evening, an immigration officer visited Mr. Arar and asked that Mr. Arar "volunteer" to go to Syria. (Compl. ¶ 35.) Mr. Arar refused, insisting that he be sent either to Canada, where he was a citizen, or back to Switzerland where his flight to JFK had originated. (*Id*.) Angered by Mr. Arar's response, the officer stated that the United States government had a "special interest" in Mr. Arar. The officer then instructed Mr. Arar to sign a form, but did not

allow him to read the form. Fearing adverse consequences if he did not sign, Mr. Arar complied. (*Id*.)

Later that evening, Mr. Arar was taken, in chains, and shackles from his cell and put in a vehicle, and driven from JFK to the Metropolitan Detention Center ("MDC") in Brooklyn, New York. (Compl. ¶ 36.) There, he was strip-searched, given an orange jumpsuit to wear, and placed in solitary confinement in a small cell. (*Id*.)

Days 3 Through 8 of U.S. Detention

Over the next three days, until October 1, 2002, Mr. Arar repeatedly requested to see a lawyer and to make a telephone call, to no avail. (Compl. ¶ 37.)

On October 1, 2002, an MDC official gave Mr. Arar an INS-issued document stating that Mr. Arar had been determined to be inadmissible into the United States because he belonged to an organization designated by Secretary of State Colin Powell as a "Foreign Terrorist Organization," namely, Al Qaeda. (Compl. ¶ 38.) Mr. Arar was never given a meaningful opportunity to contest this determination. (*Id*.) That same day, five days after his detention had begun, Mr. Arar was allowed to make one telephone call. (Compl. ¶ 39.) Mr. Arar chose to call his mother-in-law in Ottawa, Canada.

All the while, Mr. Arar's family had been frantically searching for him. (Compl ¶ 39.) Upon learning that he was detained at the MDC, Mr. Arar's wife contacted the Office for Canadian Consular Affairs ("Canadian Consulate"), which had not been informed of Mr. Arar's detention. (*Id*.) At that time, his wife also retained Ms. Amal Oummih, an immigration attorney practicing in New York, to represent Mr. Arar. (*Id*.)

On October 3, 2002, Maureen Girvan of the Canadian Consulate visited Mr. Arar at the MDC. (Compl. ¶ 40.) Ms. Girvan reviewed the INS document denying Mr. Arar admission into the United States. (*Id.*) Mr. Arar expressed fear that he might be removed to Syria, and Ms.

Girvan assured Mr. Arar that removal to Syria was not an option, as he was a Canadian citizen. (*Id*.)

On October 4, 2002, two immigration officers visited Mr. Arar's cell and asked him to designate in writing the country to which he wished to be removed. (Compl. ¶ 41.) Mr. Arar designated Canada. (*Id*.)

Days 9 through 12 of U.S. Detention

On the evening of October 5, 2002, a Saturday, Ms. Oummih visited Mr. Arar for the first—and only—time. (Compl. ¶ 42).

The following Sunday, October 6, 2002, several INS officers removed Mr. Arar from his cell, and brought him, in chains and shackles to a room where approximately eight INS officials interrogated him regarding his opposition to removal to Syria. (Compl. ¶ 43). The INS did not give Ms. Oummih, Mr. Arar's lawyer, advance notice of the interrogation, and instead left a message on her *office* voicemail that evening—Sunday—while the interrogation was already in process. (*Id*.)

Initially, Mr. Arar refused to answer questions without his lawyer present. (Compl. ¶ 43.) Upon his refusal, INS officials told Mr. Arar that Ms. Oummih had chosen not to attend. In fact, however, Ms. Oummih only learned of the interrogation when she arrived at work the following morning—Monday, October 7, 2002—several hours after the interrogation had ended. (*Id*.) Throughout the interrogation, Mr. Arar expressed his grave concern that he would be tortured if he were sent to Syria, and fully substantiated his claims in this regard. (Compl. ¶ 44.)

The officials carried the six-hour interrogation well into the early-morning hours of Monday, October 7, 2002. (Compl. ¶ 45.) During the interrogation, Mr. Arar was able to discern that the officers were discussing his status with "Washington D.C." (*Id*.) At the

conclusion of the interrogation, the officers attempted to coerce Mr. Arar into signing what appeared to him to be a transcript. (*Id*.) When he refused, the officers returned him to his cell.

That morning, while Mr. Arar was in his cell at the MDC, an INS official telephoned Ms. Oummih to inform her that INS had brought Mr. Arar to its Varick Street offices in Manhattan "for processing." (Compl. ¶ 46.) Following the "processing," according to the official, Mr. Arar was then to proceed to a detention facility in New Jersey. (*Id*.) Several hours later the same INS official telephoned Ms. Oummih a second time to notify her that Mr. Arar had arrived at the New Jersey detention facility. (*Id*.) The agent instructed Ms. Oummih to call back the next day for the exact location. (*Id*.) In fact, Mr. Arar had remained confined at the MDC. (*Id*.)

At approximately 4:00 a.m. on October 8, 2002, INS agents took Mr. Arar in chains and shackles to a room where two INS officials announced that, based on classified information, INS Regional Director Defendant J. Scott Blackman had ordered that Mr. Arar be sent to Syria, and had determined that his removal to Syria was consistent with Article 3 of the United Nations Convention Against Torture. (Compl. ¶ 47.)

When Mr. Arar pleaded for reconsideration, the INS officials told him that the INS was not governed by the Geneva Conventions, and that he was barred from re-entering the United States for five years. (*Id.)* Mr. Arar was not informed of his right to appeal this determination (Compl. ¶ 38.) Deputy Attorney General Defendant Larry Thompson, in his capacity as Acting Attorney General, signed the order on October 8, 2002. (Compl. ¶ 48.)

The INS transported Mr. Arar in shackles and chains from the MDC to a New Jersey airfield. There, Mr. Arar boarded a small private jet that flew to Washington, D.C. (Compl. ¶49.) From Washington, D.C., Mr. Arar was flown to Amman, Jordan. (*Id.)* Mr. Arar arrived in Amman on October 9, 2002, where federal officials turned him over to Jordanian authorities for delivery to the Syrians. (*Id.)*

Syria's Record of Torture

Syria's "legacy of torture, oppression, misery and ruin," as President Bush described it recently (Compl. Ex. B at 4), is well known to the United States government, as Syria "for years has been near the top of U.S. lists of human rights violators and sponsors of terrorism" (Compl. Ex. C at 11). In its 2002 "Country Report on Human Rights Practices" in Syria, the U.S. Department of State reported the following conditions in Syrian prisons:

> Despite the existence of constitutional provisions and several Penal Code penalties for abusers, there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners, detainees, and the London-based Syrian Human Rights Organization reported that torture methods including administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyper-extending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine. * * * Although it occurs in prisons, torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, *especially while the authorities were attempting to extract a confession or information.*

(Compl. Ex. A at 2) (emphasis added). In addition, Syrian prison conditions have been found to be "poor," and the "[f]acilities for political or national security prisoners generally were worse than those for common criminals." (*Id.*)

U.S. Rendition Practices and Syrian Cooperation

Mr. Arar's forcible transfer to Syria was made pursuant to Defendants' non-public policy of "extraordinary rendition," in which the United States delivers suspects to foreign intelligence

services "known for using brutal means" to extract information from the suspect on behalf of the U.S. (Compl. Ex. C at 8; Ex. E at 2). According to a senior U.S. intelligence official, "[t]here have been 'a lot of rendition activities' since the Sept. 11, 2001 terrorist attacks in the United States." (Compl. Ex. C at 17). The United States engages in rendition because "'[s]omeone might be able to get information [the U.S.] can't get from detainees." (*Id.*) One official "who has been directly involved in rendering captives into foreign hands" explained: "'We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.'" (*Id.* at 8.)

Syria is one of the foreign intelligence services used by the United States for its renditions. As reported by intelligence experts, the Syrian government "maintains a secret but growing intelligence relationship with the CIA," and, according to the former director of counterterrorism at the CIA, has "provided some very useful assistance on al Qaeda in the past." (*Id*. at 17.)

Syrian Detention and Torture

After being delivered to Syria, Mr. Arar spent the next ten months in a "grave" cell, measuring only six-feet long, seven-feet high, and three-feet wide (Compl. ¶ 58), and located at the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch") (Compl. ¶ 50.) The cell was damp and cold, particularly during the winter months. (Compl. ¶ 58.) His only source of light was a small aperture in the cell's ceiling. (*Id.*) Rats entered his cell through the aperture, and cats often urinated on Mr. Arar. (*Id*.) Sanitary facilities were nonexistent. (Compl. ¶ 59.) The officials allotted Mr. Arar one opportunity to bathe in cold water each week. (*Id.*) The officials banned exercise and fed Mr. Arar food that was barely edible. (*Id.*) By the end of his stay, Mr. Arar had lost forty pounds. (*Id.*)

Mr. Arar's detention was under the direction of the Syrian security forces, a governmental organization that operates independently and "outside the legal system." (Compl. Ex. A at 2.) According to the U.S. Department of State, the Syrian security forces are known to have "committed serious human rights abuses." (*Id.*)

For the first twelve days, Syrian officials interrogated Mr. Arar for approximately eighteen hours each day. (Compl. ¶ 51.) During the interrogations, the Syrian officials physically and psychologically tortured Mr. Arar. (*Id.*) Among other things, Syrian security officers regularly beat Mr. Arar on his palms, hips, and lower back with a two-inch thick electric cable. (*Id.*) The Syrian officers also beat Mr. Arar in his stomach, face, and the back of his neck with their fists. (*Id.*) In addition, the officers threatened to place Mr. Arar in a spine-breaking "chair," hang him upside down in a "tire" for beatings, and administer electric shocks. (*Id.*) On October 17, 2002, the Syrian security officers put Mr. Arar in a room where he could hear the screams of other detainees being tortured. (Compl. ¶ 52.)

The interrogation was closely coordinated with U.S. officials, who supplied information and questions, and received reports from the Syrians on Mr. Arar's responses. During the interrogations, Mr. Arar discerned that the Syrians' questions were not their own. Instead, they were the same questions asked of him by the U.S. officials. (Compl. ¶ 54.) Like the FBI officials, Syrian security officers asked questions focusing on Mr. Arar relationship with certain individuals, including Abdullah Almalki. (*Id.*) In fact, United States officials sent their Syrian counterparts a dossier on Mr. Arar, compiled in part from the interrogations at JFK. (Compl. ¶ 55.) United States officials also directed Syrian officials on which matters to cover during Mr. Arar's interrogations. (*Id.*) Syrian security officers then supplied the U.S. officials with all information extracted from Mr. Arar when the Syrian officials tortured him. (Compl. ¶ 56.)

Canada Intervenes

After the Canadian Embassy contacted the Syrian Government regarding Mr. Arar's detention on October 20, 2002, Syrian security officers ended the long interrogations and severe physical beatings. (Compl. ¶ 60.) One day later, Syrian officials confirmed to Canadian Embassy officials that they were detaining Mr. Arar at the Palestine Branch. (*Id.*)

United States officials had previously refused even to acknowledge to Ms. Oummih, Mr. Arar's immigration attorney, or to Ms. Girvan, the Canadian Consulate staff person who visited Mr. Arar at MDC, that Mr. Arar had been removed to Syria. (Compl. ¶ 60.)

On October 23, 2002, Canadian officials visited Mr. Arar at the Palestine Branch. (Compl. ¶ 61.) Before the visit, Syrian security officers threatened to torture Mr. Arar if he complained to the Canadian Consulate about his mistreatment. (*Id.*) The Canadian Consulate visited Mr. Arar five more times over the next ten months, and each time he was threatened with torture if he complained of mistreatment. (*Id.*) On August 14, 2003, the Consulate's last visit, however, Mr. Arar was unable to bear the pressure any longer, and yelled out to the Canadian Consular official that he was being tortured and kept in a grave. (*Id.*)

Five days later, Syrian security officials brought Mr. Arar to the Syrian Military Intelligence's Investigations Branch. (Compl. ¶ 62.) The officials forced Mr. Arar to sign a false confession stating that he had participated in terrorist training in Afghanistan. (*Id.*) In fact, Mr. Arar has never been to Afghanistan or involved in any terrorist activity. (Compl ¶53.) The Syrians then transferred Mr. Arar to Sednaya Prison, a suffocating, overcrowded Syrian prison facility. (Compl. ¶62.) Mr. Arar remained there for six weeks. (*Id.*)

On September 28, 2003, Syrian officials transferred Mr. Arar back to the Palestine Branch and placed him in solitary confinement for one week. (Compl. ¶ 63.) During his

confinement, Mr. Arar heard detainees screaming in pain and begging day and night for their torture to stop. (*Id.*)

Syria Releases Mr. Arar Without Filing a Single Charge Against Him

On October 5, 2003, exactly one year after he had flown into JFK Airport, Syria released Mr. Arar without filing any charges. (Compl. ¶ 64.) As Syria's highest-ranking diplomat in Washington, D.C., Imad Moustapha explained: "We did our investigations. We traced links. We traced relations. We tried to find anything. We couldn't." (Compl. Ex. E at 2.) Immediately prior to his release, Syrian officials took Mr. Arar to the Syrian Supreme State Security Court where a prosecutor told him that he would be released that day without criminal charges. (Compl. ¶ 64.) The Syrian security officials released Mr. Arar into the custody of Canadian Embassy officials in Damascus, Syria. (*Id.*) The next day the Canadian Consulate flew Mr. Arar to Ottawa where he was reunited with his family that he had not seen in more than a year.

The Current Litigation

On January 22, 2004, Plaintiff filed the complaint in this action (the "Complaint"). In that Complaint, Plaintiff seeks redress for his unconstitutional detention and rendition at the hands of Defendants. He does not complain about the decision to classify him as inadmissible into the United States.

In response to the Complaint each Defendant served a pre-motion letter articulating the bases upon which each intended to move to dismiss the Complaint. Plaintiff responded, through

his counsel's letters, dated July 9 and 10, 2004. The Defendants subsequently filed motions to dismiss the Complaint.[1]

LEGAL ARGUMENT

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court "must accept the factual allegations in the complaint[] as true, and draw all reasonable inferences in favor of the plaintiff[]." *Small v. City of N.Y.*, 274 F. Supp. 2d 271, 275 (E.D.N.Y. 2003); *see Bolt Electric, Inc. v. City of N.Y.*, 53 F.3d 465, 469 (2d Cir. 1995). "The district court should grant such a motion only if, after viewing plaintiff's allegations in this favorable light, 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Walker v. City of N.Y.*, 974 F.2d 293, 298 (2d Cir. 1992) (quoting *Ricciuti v. New York City Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991)).

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS

This Court has subject matter jurisdiction to entertain Plaintiff's claims under 28 U.S.C. § 1331 both because they arise under the Constitution and the Torture Victim Protection Act ("TVPA"), a federal statute. Defendants contend, however, that various provisions of the Immigration and Nationality Act ("INA") bar the Court's jurisdiction over Plaintiff's claims that his detention and treatment in the U.S. and his transfer and subsequent detention and treatment in

[1] The Defendants submitted the following briefs in support of their motions to dismiss: Memorandum in Support of Motion to [sic] dismissing the claims Against Attorney General John Ashcroft in his individual capacity ("Ashcroft Br."); Memorandum of Law in Support of Defendant Larry D. Thompson's Motion to Dismiss ("Thompson Br."); Memorandum of Law in Support of the Motion to Dismiss Plaintiff's Claims Against the United States of America ("Govt. Br."); Memorandum of Law in Support of Defendant Blackman's Motion to Dismiss, or Alternatively, for Summary Judgment ("Blackman Br."); Memorandum of Law in Support of Motion to Dismiss Plaintiff's Claims Against Defendant Robert S. Mueller III in his Personal Capacity ("Mueller Br."); Memorandum of Law in Support of the Motion to Dismiss Plaintiff's Claims Against Defendant McElroy in his Individual Capacity ("McElroy Br."); and Memorandum of Points and Authorities In Support of Motion of Defendant James Ziglar to Dismiss Complaint ("Ziglar Br.").

Syria violated his constitutional and statutory rights. Defendants argue (1) that the decision to send Mr. Arar to Syria was an exercise of discretion not subject to any judicial review whatsoever; and, (2) that because Mr. Arar's claims arise from a removal proceeding the exclusive avenue for judicial review was a petition for review of his removal order filed in the court of appeals. *See* Govt. Br. 13-18; Blackman Br. 7-12; Mueller Br. 23-24; Thompson Br. 14-17; Ziglar Br. 7-10.

The INA provisions Defendants cite do not preclude judicial review here. Mr. Arar does not seek review of any exercise of discretion; he challenges *ultra vires* actions that were wholly beyond Defendants' discretionary authority. Neither the Attorney General nor any other government official has discretion to violate the Constitution or to subject an individual to torture. "[D]ecisions that violate the Constitution cannot be 'discretionary,' so claims of constitutional violations are not barred by § 1252(a)(2)(B)." *Wong v. United States*, 373 F.3d 952, 962 (9th Cir. 2004); *see also Torres-Aguilar v. I.N.S.*, 246 F.3d 1267, 1270 (9th Cir. 2001) (finding it retained jurisdiction to review colorable claims of due process violations); *Sanchez-Cruz v. I.N.S.*, 255 F.3d 775, 779 (9th Cir. 2001) (finding due process claims are reviewable); *Wong v. Warden, FCI Raybrook*, 171 F.3d 148 (2d Cir. 1999) (holding "judicial review exists over allegations of constitutional violations even when the agency decisions underlying the allegations are discretionary.").

Defendants' argument that Plaintiff could have filed a petition for review in the court of appeals is equally unavailing. His claims that Defendants violated his substantive due process rights by their complicity in his mistreatment in Syria and while in detention in the United States *are* collateral to his removal order, and therefore could not have been raised or redressed in a petition for review. And to the extent that Mr. Arar's claims do challenge his removal order (on

the ground that it violated substantive due process to remove him for the purpose of having him arbitrarily detained and tortured), Defendants affirmatively obstructed any opportunity Mr. Arar might have had to file a petition, and therefore cannot invoke this bar.

Defendants' sweeping jurisdictional arguments maintain that no matter how ill-fitting the regulatory cover, no matter how abusive the treatment of a non-citizen in immigration custody, and no matter how egregious the consequences of a decision to send that person to a third country for detention without charge and interrogation under torture, government officials are implicitly and absolutely immunized from any suit to establish liability and seek money damages. These arguments run directly counter to the principle that jurisdictional statutes should not be read to preclude review of constitutional claims absent the most explicit of directives from Congress.

A. Neither 8 U.S.C. § 1252(a)(2)(B)(ii) nor 8 U.S.C. § 1226(e) Bars Jurisdiction Over Plaintiff's Challenges to Defendants' Unconstitutional Policies and Practices

Defendants maintain that two provisions of the INA, 8 U.S.C. § 1252(a)(2)(B)(ii) and 1226(e), bar all judicial review of Plaintiff's challenge to Defendants' complicity in his torture and arbitrary detention. Defendants claim that to the extent that their complicity arises out of the decision to remove Mr. Arar under 8 U.S.C. § 1225(c), and to send him to Syria rather than to Canada, those decisions were discretionary, and therefore judicial review is barred by 8 U.S.C. §1252(a)(2)(B)(ii). And they maintain that to the extent their complicity arose out of their decision to detain Mr. Arar at JFK, that decision was also discretionary, and judicial review is barred by 8 U.S.C. § 1226(e). Although these provisions do bar review of certain exercises of discretion, they do not apply here because Plaintiff's claim is that Defendants were acting *ultra vires*, by violating the Constitution. Because the Attorney General has no discretion to violate the Constitution, these provisions by their terms do not bar jurisdiction over constitutional

challenges. *See, e.g*, *Wong*, 373 F.3d at 962; *Beslic v. I.N.S.*, 265 F.3d 568, 571 (7th Cir. 2001) (finding that an INA provision providing "there shall be no appeal of any discretionary decision [under 8 U.S.C. § 1255(a)]," did not apply where petitioners raised "substantial constitutional claims").

The Supreme Court reached precisely this result in ruling that §1226(e) poses no jurisdictional bar to a constitutional challenge to the detention of "criminal aliens." In *Demore v. Kim*, the Court explained that "'where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" 538 U.S. at 510, (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). The Court found that habeas jurisdiction was appropriate, even though Kim sought to "set aside . . . [a] decision by the Attorney General under this section regarding the detention or release of any alien." 538 U.S. at 516 (quoting § 1226(e)); *see also Webster,* 486 U.S. at 603 (holding provision precluding judicial review of CIA employment decisions by committing them to "agency discretion" did not bar judicial review of *constitutional* claims); *see also McBrearty v. Perryman*, 212 F.3d 985, 987 (7th Cir. 2000) ("door-closing statutes . . . are often interpreted as being inapplicable to constitutional challenges."); *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996) (statutes must be construed in light of "the presumption . . . against slamming the courthouse door in the face of holders of constitutional claims").

The Supreme Court has consistently required a clear and unequivocal statement of legislative intent before concluding that Congress stripped the federal courts of jurisdiction to hear legal and constitutional challenges to federal activity. *See Demore v. Kim*, 538 U.S. at 534 ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *INS v. St. Cyr*, 533 U.S.

289, 299 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'. . . we are obligated to construe the statute to avoid such problems.") (internal citations omitted); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) ("clear and convincing evidence of congressional intent" required before a "statute will be construed to restrict access to judicial review."). ; *see also St. Cyr*, 533 U.S. 289, 308-09. In *Kim*, the Court held that Congress had not removed habeas jurisdiction despite statutory language which provided that "[n]o court may set aside any action or decision by the Attorney General" to detain criminal aliens while removal proceedings are ongoing. *Kim*, 538 U.S. at 516. Similarly, in *St. Cyr*, the Court preserved habeas jurisdiction in the face of four statutory provisions that could have been read as excluding it, including one entitled "Elimination of Custody Review by Habeas Corpus." 533 U.S. at 308-311, 314.

Mr. Arar claims that the government's decision to transfer him to Syria, its complicity in his detention without charges and interrogation under torture in Syria, and its mistreatment of him while in detention in New York, were all beyond the government's legal and constitutional authority. Accordingly, Plaintiff does not seek review of any constitutionally exercised "discretionary judgment," and neither §1226(e) nor §1252(a)(2)(B)(ii) bars Plaintiff's challenges here.

B. 8 U.S.C. §§1252(b)(9) and (g) Do Not Bar Jurisdiction of Plaintiff's Challenges to Defendants' Unconstitutional Policies and Practices

Defendants' alternative contention is that to the extent any judicial review was ever available to Mr. Arar, his exclusive avenue was a petition for review from his removal order. *See* Thompson Br. at 6-13; Ashcroft Br. at 19-29; Blackman Br. at 7-13; Ziglar Br. at 7-10. This argument is wrong for at least two reasons: (1) Plaintiff's lawsuit challenges conduct collateral to

the removal order; and (2) Defendants' interference with Mr. Arar's access to counsel made it impossible for Mr. Arar to file a petition for review, and Defendants cannot now benefit from their own wrongdoing.

First, Plaintiff's suit does not challenge his removal order. Plaintiff challenges Defendants' complicity in his detention without charges and torture in Syria, as well as his mistreatment while in detention in New York, matters collateral to the validity of the removal order. Defendants' complicity in Mr. Arar's treatment abroad violates due process and the TVPA, without regard as to how Mr. Arar got to Syria, and without regard to whether the removal order was valid. Similarly, Mr. Arar alleges that Defendants violated his due process rights in this country, by subjecting him to arbitrary detention, outrageous and excessive conditions of confinement, coercive and involuntary custodial interrogation, and measures designed to interfere with his access to lawyers and the courts. Again, the validity of this claim stands wholly apart from the validity of the removal order.

A petition for review of a removal order in the court of appeals, even if it could have been filed, would not have provided a forum for adjudicating these claims Challenges to unconstitutional detention practices and torture, here or abroad, cannot be remedied by the court of appeals on a petition for review of a removal order. Moreover, the petition process provides no occasion for damages actions against individual defendants. Indeed, individual officers are not even proper parties on a petition for review. Accordingly, jurisdiction is proper here under 28 U.S.C. § 1331. *See Wong v. U.S.*, 373 F.3d 952, 962-66 (9th Cir. 2004) (holding that INA jurisdictional provisions do not preclude *Bivens* actions for certain immigration decisions).

This result is supported by *St. Cyr*, 533 U.S. at 313, which held that § 1252(b)(9) "does not bar habeas jurisdiction over removal orders *not* subject to judicial review under §

1252(a)(1)." In upholding habeas jurisdiction to hear the challenge of a "criminal alien" to his removal, the Court reasoned that the "purpose [of § 1252(b)(9)] is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only 'with respect to review of an order of removal under subsection (a)(1).'" *Id.* As a "criminal alien" St. Cyr could not obtain review of his removal order in a petition for review under § 1252(a)(1), and therefore the Court held that § 1252(b)(9) did not apply. *Id.* Here, too, Plaintiff could not have obtained review of his detention and torture claims on a petition for review, and therefore § 1252(b)(9) is equally inapplicable.[2]

Second, even if any of Mr. Arar's claims could have been pursued via a petition for review, Defendants themselves affirmatively prevented him from pursuing them through their unconstitutional interference with his access to counsel and the courts. As described above, Defendants obstructed Mr. Arar's access to counsel while detained in New York, including by lying to both him and his attorney, and then transporting him to Syria where he was detained incommunicado for ten months. There is no way that he could have filed a petition for review,

---

[2] Defendants' reliance on § 1252(g) is similarly misplaced. See, e.g. Govt. Br. 15-16; Ashcroft Br. 19-29; Blackman Br. 7-13. That provision simply underscores the exclusive nature of the (b)(9) review process for specific claims. The Supreme Court has rejected any broad reading of § 1252(g) and interprets it narrowly to apply "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'"—all essentially "challenges to the Attorney General's exercise of prosecutorial discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 n.9 (1999) (quoting § 1252(g)). Plaintiff does not challenge any of these discrete actions. *See Medina v. U.S.*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000) (finding that 8 U.S.C. § 1252(g) does not bar a "claim for monetary damages for intentional torts and violations of constitutional rights where the immigration proceedings have terminated").

Defendants rely on several cases from outside this circuit, such as *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999), *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001), and *Humphries v. Various Fed. U.S. I.N.S. Employees*, 164 F.3d 936 (5th Cir. 1999). These cases neither not binding here, nor is their reasoning persuasive. *Humphries* relies on an overbroad interpretation of § 1252(g) that the Supreme Court subsequently rejected in *Reno v. American-Arab Anti-Discrimination Commission. See Foster*, 243 F.3d at 213 n.2 ("*Humphries* does not control the outcome of this case because its interpretation of the IIRIRA preceded the Supreme Court's narrow construction of the statute in [*American-Arab*]."). And *Van Dinh* was an individual habeas case to which Plaintiff sought to add a duplicative *Bivens* cause of action for injunctive relief. 197 F.3d at 435.

or that his attorney, without even being able to consult him, could have filed one on his behalf. There is absolutely no evidence that Congress intended Subsection (b)(9) to preclude all judicial review of constitutional claims where federal officials affirmatively obstruct the filing of a petition for review.

Accepting the allegations of the complaint as true, as this Court must, Defendants intentionally conspired to deny Mr. Arar access to the courts, and sent him to Syria in order to have him arbitrarily detained without charges and interrogated under torture. Nothing in the INA suggests that Congress intended to preclude judicial review of such serious constitutional claims simply because the government facilitated and carried out these abuses in part through the immigration process.

II. CONGRESS HAS NOT EXPRESSLY PRECLUDED A *BIVENS* CAUSE OF ACTION FOR DAMAGES, NOR DO ANY "SPECIAL FACTORS" BAR SUCH A CAUSE OF ACTION

Defendants argue that even if none of the jurisdiction-limiting provisions of the INA bar a *Bivens* action, Plaintiff cannot bring such an action because "special factors" counsel against it. *See*, *e.g.*, Ashcroft Br. 18, 30-32; Ziglar Br. at 18-19; Blackman Br. at 13-17; Mueller Br. 24-28. Defendants' argument is wrong because Congress has neither provided an alternative remedial scheme for the redress sought here, nor is there any evidence that Congress sought to preclude damages actions against government officials who deliberately violated the constitutional and statutory rights of a foreign national by detaining him for the purpose of transporting him abroad for detention and interrogation under torture. A *Bivens* action is available for constitutional violations unless "defendants show that Congress has provided an alternative remedy which is *explicitly declared* to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or there are "special factors counseling hesitation in the absence of

affirmative action by Congress." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Defendants have made neither showing here.

A. No Satisfactory Alternative Remedy Exists

Defendants first maintain that because the INA creates a "comprehensive [regulatory] scheme," it should be read to implicitly preclude a *Bivens* remedy for the constitutional violations alleged here. However, *Bivens* has been found to be precluded only where Congress has created a *satisfactory* alternative remedy for the violations alleged. Thus, in *Schweiker v. Chilicky,* 487 U.S. 412 (1988), *Bivens* relief was denied Social Security Disability recipients who claimed Fifth Amendment due process violations, due to the existence and availability of "elaborate administrative remedies." *Id.* at 412. The *Schweiker* Court explained, "[w]hen 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, we have not created additional *Bivens* remedies." *Id*. at 423 (emphasis added). Likewise, in *Bush v. Lucas*, 462 U.S. 367 (1983), *Bivens* relief was denied to a federal employee claiming violation of his First Amendment rights, because of "comprehensive . . . provisions *giving meaningful remedies . . ..*" *Id. at* 367 (emphasis added).[3] The statutes in *Schweiker* and *Bush* both provided a compensatory scheme. Here, by contrast, as illustrated in Point I above, the INA provides *no* compensatory remedies whatsoever for the violations Plaintiff alleges, much less the sort of meaningful relief that could substitute for a *Bivens* action.

[3] The cases cited by Defendants do not suggest a different rule. *Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994), denied *Bivens* relief because the administrative scheme at issue "provides meaningful remedies in a multitiered and carefully crafted administrative process." *Van Dinh v. Reno*, 197 F.3d 427, 435 (10th Cir. 1999), relied on the preclusive effect of two specific jurisdictional provisions. Both *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983), involve unique concerns related to military service.

B. There Are No "Special Factors" Present Here

Moreover, neither "national security" nor "foreign policy concerns" warrant barring a *Bivens* action altogether. *See* Ziglar Br. at 19; Blackman Br. at 15; Mueller Br. at 27. As the Supreme Court's decisions in the enemy combatant cases made clear, "national security" is not a talisman that excuses government officials of any need to justify their conduct. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004). Defendants are free to argue on the merits that national security interests justified their incursions on Plaintiffs' constitutional rights. But there is absolutely no support for the proposition that once Defendants invoke "national security," that *ends* the case at the *Bivens* threshold without any consideration of what Plaintiff's rights are and whether they were violated.[4]

"Special factors" apply in arenas where courts are reluctant to interfere; but courts have frequently permitted individual damages actions against Government officials for wrongful, tortious or unconstitutional conduct, even during wartime, and even when the act was a military decision executed as part of an authorized military operation. *See Koohi v. U.S.*, 976 F.2d 1328, 1331 (9th Cir. 1992); *see also Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Mitchell v. Harmony*, 54 U.S. (12 How.) 115 (1851); *Ford v. Surget*, 97 U.S. 594 (1878). *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388, 392 (1971) (citing *Bell v. Hood*, 327 U.S. at 684).

[4] The only cases Defendants cite, *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), and *Reinbold v. Evers*, 187 F.3d 348 (4th Cir. 1999), involved disputes over security clearances, which depend upon "an affirmative act of discretion on the part of the granting official." *Beattie*, 43 F.3d at 565 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 528 (1988)). These cases do not suggest a general doctrine that the presence of any "national security" concerns precludes *Bivens* claims, and they have no relation to the wrongful detention and conditions-of-confinement claims asserted by Plaintiffs.

The Supreme Court has consistently followed that principle, emphasizing that "even the war power does not remove constitutional limitations safeguarding essential liberties."[5] Individual liberties remain fully protected in wartime because "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[6] Accordingly, the war power, like all other constitutional powers, cannot be exercised in derogation of other constitutional provisions, and "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit."[7] Where, as here, the government has *not* invoked the war power, and has *not* sought to detain Mr. Arar as an enemy combatant, but merely asserts a broad "foreign affairs" and "national security" claim, there is even less warrant for judicial deference.

III. THE COMPLAINT STATES A CLAIM FOR DUE PROCESS VIOLATIONS UNDER THE FIFTH AMENDMENT

Plaintiff alleges that while he was en route from Switzerland back to his home country of Canada, Defendants stopped him, placed him in removal proceedings, lied to him and his lawyer to obstruct his access to counsel and the courts, ordered him removed on the basis of secret

---

[5] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *see also Ex parte Milligan*, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.").

[6] *United States v. Robel*, 389 U.S. 258, 264 (1967).

[7] *Id.* at 263. Throughout our nation's history the Executive has argued, as the government again argues here, that the exercise of war powers is subject to little or no judicial scrutiny, and the Court has consistently rejected those arguments. The Supreme Court has thus held that principles of separation of powers do not give the executive unreviewable authority to punish desertion by soldiers on the field of battle, *Trop v. Dulles*, 356 U.S. 86 (1958); to maintain steel production during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); to punish acts of sabotage by alien enemies, *Ex parte Quirin*, 317 U.S. 1 (1942); to seize enemy property, *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); to annex territory seized by military conquest, *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850); to impose internments on resident aliens and U.S. citizens, *Korematsu v. United States*, 323 U.S. 214 (1944); to exercise court martial authority over former servicemen, *Toth v. Quarles*, 350 U.S. 11 (1955); and to impose punishment on military dependants abroad, *Reid v. Covert*, 354 U.S 1 (1957); to declare martial law and try civilians, *Ex parte Milligan,* 71 U.S. 2 (1866).

evidence that he had no opportunity to rebut, and then removed him, not to Canada, his home country and his country of designation, but to Syria. It is difficult to imagine any reason to send Mr. Arar—or indeed any Canadian citizen—to Syria rather than to Canada, except that Syria, unlike Canada, engages in such practices as prolonged detention without charge, coercive interrogation, and torture. (Compl. Ex. A.) Mr. Arar alleges that Defendants sent him to Syria not only knowing of these practices, but *because of* these practices, pursuant to a policy of "rendering" suspects in the war on terror to third countries where they will be tortured for information. (Compl. Ex. C., E.) He further alleges that Defendants directed his interrogation in Syria, gave the Syrians a dossier on him, and received reports from the Syrians on his responses to the interrogation. (Compl. ¶55.)

Defendants' treatment of Mr. Arar violates substantive due process because taken as a whole it "shocks the conscience."

Defendants concede that inadmissible aliens are entitled to substantive due process while in the United States. *See* Govt. Br. 22-23; Ashcroft Br. 38-39. Defendants do not directly dispute that conspiring to have an individual be tortured and detained without charges violates substantive due process. Nor do they dispute that intentionally interfering with access to the courts violates substantive due process. Instead, Defendants argue that because they used the immigration power to inflict this treatment on Mr. Arar, their conduct is cloaked in the plenary power doctrine, and the court must defer to Defendants' decisions as to how to treat him. *See* Ashcroft Br. 39-43; Govt. Br. at 26-30. But whatever else may be said about the immigration power, it has never been held to insulate conduct that intentionally facilitates torture, arbitrary detention, and interference with access to courts from constitutional review.

Mr. Arar also claims that he was injured in Syria, where he was also arbitrarily detained and was actually tortured, and that the United States is liable for these injuries because they were the result of Defendants' policies and intentional actions. With respect to these injuries, the United States argues that Mr. Arar has no constitutional rights whatsoever, because he was in Syria. *See* Govt. Br. 24-26. Under this theory, due process would not even have been violated had the federal government sent federal agents to Syria to torture Mr. Arar themselves or had they simply sent Mr. Arar to Syria for summary execution. That is not the law. Where, as here, Defendants used Mr. Arar's transiting through the United States to forcibly redirect him to a country for arbitrary detention, coercive interrogation and torture, and continued their involvement by directing the interrogation that took place abroad, the Constitution does extend beyond our borders.

A. Defendants' Alleged Complicity in Mr. Arar's Torture and Prolonged Arbitrary Detention Without Charge Violates Clearly Established Substantive Due Process Rights

There can be little serious dispute that conspiring to lock up a human being for ten months without charges, to have him tortured, and to deny him access to the courts to ensure that he is unable to forestall such treatment violates substantive due process. Whether the Court considers each of these actions standing alone, or as a course of conduct, they plainly violate substantive due process, because they "shock the conscience."

1. Torture

For more than fifty years, it has been established that official conduct that "shocks the conscience" violates substantive due process. *Rochin v. California*, 342 U.S. 165, 209 (1952). Torture is the paradigmatic example of conduct that "shocks the conscience." In *Rochin*, the Court held that taking a suspect who had apparently swallowed contraband to a hospital to have his stomach pumped in a clinical setting violated substantive due process because "[t]his conduct

shocks the conscience." *Id.* In so holding, the Court expressly analogized Mr. Rochin's treatment to torture, declaring these "methods too close to the rack and the screw to permit of constitutional differentiation." *Id.*

Thus, the Court in *Rochin* found stomach-pumping in a hospital setting to violate substantive due process precisely because it was akin to torture.[8] Here, Mr. Arar was subject—not to treatment akin to torture—but to torture itself. Accordingly, there can be no dispute that his treatment in Syria, if carried out pursuant to a governmental policy or aided and abetted by government officials, would violate substantive due process.[9]

That conclusion is only confirmed by developments in the law over the past fifty years, which have seen the virtually unanimous adoption of an absolute international law prohibition on torture and cruel, inhuman and degrading treatment in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), which the United States has signed, ratified, and implemented. CAT, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/Res/39/708 (1984), reprinted in 23 ILM 1027 (1984). Indeed, the prohibition on torture has risen to the level of a norm of customary international law that is "specific, universal, and obligatory," reserved for a small number of practices that are *never* permissible,

---

[8] Courts have found conduct similar to, and less egregious than, that suffered by Mr. Arar to "shock the conscience" and therefore violate substantive due process. *See, e.g., Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 252 (2d Cir. 2001) (gym teachers physical assault of student is "conscience-shocking"); *Hayes v. Faulkner County*, 388 F.3d 699 (8th Cir. 2004) (38-day detention without charges violated substantive due process).

[9] While Mr. Arar's detention and torture in Syria were directly carried out by Syrian officials, federal officials may be held liable for the complained-of deprivation of Mr. Arar's substantive constitutional rights under the "state created danger" doctrine, despite the fact that they did not torture him with their own hands, so long as their conduct placed Mr. Arar in the situation where he was ultimately tortured, and their actions in doing so shocked the conscience. *See, e.g., Dwares v. City of N. Y.*, 985 F.2d 94 (2d Cir. 1993) (police found liable for injuries suffered by individual who burned a flag when the police told skinheads they would not intervene if they beat him); *Hemphill v. Schott*, 141 F.3d 412 (2d Cir. 1998) (police officers found liable for providing gun to private citizen they knew had a grudge against ultimate victim and brought them together).

including genocide, slavery, summary execution, and torture. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 (2004) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (recognizing ATCA claims for torture).

This international law consensus properly informs substantive due process, because the content of substantive due process turns on what offends widely shared "canons of decency." As the Supreme Court has explained:

> Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'

Rochin, 342 U.S. at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 416-417 (1945)). The *Rochin* Court continued, "[D]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id*. (*quoting Snyder v. Com. Of Mass.*, 291 U.S. 97, 105 (1934)). Few rights are more fundamental, under our Constitution and international law, than the right not to be subjected to torture.

2. Prolonged Arbitrary Detention

It is also well established that arbitrarily detaining an individual incommunicado and without charges for ten months violates substantive due process. The Supreme Court has recognized two types of detention—punitive and preventive. Punitive detention may be imposed only pursuant to a conviction under the criminal law. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (invalidating statute permitting civil commitment based on finding of dangerousness alone, reasoning that "[a]s Foucha was not convicted, he may not be punished"); *see also Wong Wing v. I.N.S.*, 163 U.S. 228 (1896) (invalidating statute that imposed imprisonment at hard labor

on deportable noncitizens because it imposed punishment without a criminal conviction). The Court has recently reiterated that "government detention violates the [Due Process] Clause" unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or "in certain special and 'narrow' non-punitive circumstances.'" *Zadvydas v. Davis*, 533 U.S. 678, 690, (2001).

Had Mr. Arar been detained in the United States under the conditions imposed in Syria, the detention would unquestionably be considered punitive, and would be invalid for the absence of a criminal conviction. But even if it were viewed as preventive, the detention would violate substantive due process, because it falls within none of the "special and 'narrow' non-punitive circumstances" that have been recognized as legitimate. *Zadvydas*, 533 U.S. at 690. Mr. Arar was not detained pursuant to criminal or immigration charges, upon a showing of dangerousness or flight risk. Nor was he civilly committed based upon a finding of dangerousness and a mental disability. Mr. Arar was detained under conditions that themselves "shock the conscience," namely incommunicado detention, much of it in a prison cell the size of a grave.

Civil preventive detention is permissible only where: (i) the detention serves a legitimate nonpunitive interest in protecting the community; and (ii) is not excessive in light of that interest. *United States v. Salerno*, 481 U.S. 739-52 (1987). In *Salerno*, the Court held that the Bail Reform Act's imposition of civil nonpunitive detention satisfied substantive due process only because it served a "legitimate and compelling" interest, *id.* at 749, applied only to a "specific category of extremely serious offenses," *id.* at 750, and required both a showing of probable cause for arrest and clear and convincing evidence, established in a "full-blown adversary hearing," that "no conditions of release can reasonably assure the safety of the community or any person." *Id.* In addition, the Court held that the Act's "extensive safeguards" satisfied

procedural due process, emphasizing that these included the right to counsel, to testify, to proffer evidence, and to cross-examine witnesses; that the government must prove its case by clear and convincing evidence; and that an independent judge guided by "statutorily enumerated factors" must issue a written decision subject to "immediate appellate review." *Id.* at 751-52.

Here, by contrast, Mr. Arar was detained without any hearing, without any charges, without any showing that he was a danger to the community or risk of flight, and without any access to courts, counsel, or even his family. Thus, there can be no doubt that if Defendants had detained Mr. Arar in the U.S. under these conditions, they would have violated substantive due process. There can also be no doubt that had Defendants conspired with a private party to inflict this treatment, they would be liable. As shown below, the fact that Defendants outsourced this arbitrary detention to Syria does not relieve them of constitutional liability.

3. Interference With Access to Courts

Defendants' interference with Mr. Arar's access to a lawyer and to the courts while detained in the United States also violated clearly established principles of substantive due process. The fact that this interference was for the purpose of ensuring Mr. Arar's rendition to Syria to be detained without charges and tortured only underscores the extent to which this conduct "shocks the conscience." But even without that illegitimate purpose, Defendants' interference with Mr. Arar's access to the courts would violate clearly established due process principles.

Defendants denied Mr. Arar access to the courts through a concerted series of actions. First, they denied his repeated requests to consult with an attorney and to make phone calls while in custody. Then, after his family learned of his plight and retained an attorney for him, Defendants lied to the attorney about Mr. Arar's status and to Mr. Arar about his attorney's desire to assist him in order to keep the two apart. Third, Defendants lied to Mr. Arar's attorney

and secretly transported Mr. Arar to Syria, ensuring that his attorney could not file a suit on his behalf. And finally, Mr. Arar was detained incommunicado in Syria, and therefore unable to seek access to the courts until his release without charges ten months later.

The right of access to the courts is "well-established." *Lewis v. Casey*, 518 U.S. 343, 350 (1996). Indeed, it is "the right conservative of all other rights, [which] lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) At its core, it forbids government from "actively interfering" with a person's "presentation of claims to the courts." *Lewis*, 518 U.S. at 349-50. The Supreme Court has stated that the right of access to the courts is the "very essence of civil liberty," *Marbury*, 5 U.S. at 163, which serves as a fundamental check on "the awesome authority of the State." *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). Indeed, it is access to the courts that ensures that our government remains "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). And it is precisely that access that Defendants denied Mr. Arar.

The constitutional right of access to the courts protects against governmental action "actively interfering" with a person's ability to press a legal claim. *Lewis v. Casey*, 518 U.S. at 349-50. The Supreme Court has enforced this right in several situations involving interference far less egregious than that presented here. It has, for example, invalidated restrictions on prisoners' ability to obtain assistance in preparing and filing claims, *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (invalidating regulation prohibiting the use of law students to interview prisoners), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989), and struck down prohibitions on referrals to attorneys that impaired an individual's access to the courts,

Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1 (1964) (invalidating injunction prohibiting referrals to specific lawyers).[10]

Defendants' actions here were more egregious than those found unconstitutional in the above cases. Defendants affirmatively, repeatedly, and intentionally blocked Mr. Arar's efforts to secure counsel in order to file a petition for habeas corpus or to otherwise challenge his detention. *See Bell*, 746 F.2d at 1261 ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claim for redress."); *Ryland*, 708 F.2d at 973-75 (holding litigant's right is prejudiced by state officers' conduct delaying case); *Barrett v. U.S.*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.").

In sum, the treatment Mr. Arar suffered directly at the hands of federal government officials, and at the hands of Syrian officials acting in conspiracy with federal officials, clearly violates well-established principles of due process. Defendants do not seriously contend otherwise. Rather, they claim that they were free to engage in this otherwise unconstitutional

[10] Courts of appeals have held that the government violates the right of access to the courts by concealing facts that, if known, would have provided the individual with grounds to seek legal redress, (*see Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claim for redress."), by engaging in conduct that delays the prosecution of an action, *see Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983) (holding litigant's right is prejudiced by state officers' conduct delaying case), by acting to undermine an existing claim, *see Barrett v. U.S.*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.")), and by engaging in actions that conceal or obscure important facts or evidence. *See Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) ("[T]he Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers-up evidence."); *International Ass'n of Firefighters, Local 2069 v. City of Sylacauga*, 436 F. Supp. 482, 491 (N.D. Ala. 1977) (applying doctrine where a municipal defendant amended a regulation and thereby prevented public access to documents that could prove the municipality's liability).

conduct because Mr. Arar was a foreign national who had not been admitted to the United States. Accordingly, Defendants argue, Mr. Arar's constitutional rights while he was present in the United States are severely limited, and his rights while in Syria were nonexistent. On this theory, nothing in the Constitution barred Defendants from blocking his access to courts while here, from forcibly redirecting him to Syria for the purpose of subjecting him to arbitrary detention, coercive interrogation, and torture, and to be complicit with the Syrians in Mr. Arar's mistreatment in Syria.

B. Mr. Arar is Protected by Substantive Due Process Despites His Status as An Unadmitted Alien

Defendants offer two different arguments against Mr. Arar's due process claims, each turning on the location where his injuries were suffered. With respect to injuries sustained in the United States, they concede that Mr. Arar was protected by substantive due process, but contend that their treatment of him did not violate any substantive due process rights. With respect to his treatment in Syria, Defendants argue that Mr. Arar had no constitutional rights, even if the Syrians were acting at Defendants' behest in subjecting Mr. Arar to torture and arbitrary detention. On this view, there is no constitutional bar on outsourcing torture. Both arguments are wrong.

1. Mr. Arar's treatment in the United States violated due process.

Defendants concede that at least while he was present in U.S. custody at JFK Airport, Mr. Arar was entitled to some substantive due process protection. *See* Govt. Br. 22-23; Ashcroft Br. 38-39. Despite this, they argue that the entry fiction doctrine somehow precludes this Court from finding that Mr. Arar's due process rights were violated. The entry fiction doctrine provides no such thing.

As the Second Circuit has acknowledged, unadmitted aliens enjoy "constitutional due process protection" that includes a right not to be subjected to "gross physical abuse." *Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). Other courts have reached the same conclusion, reasoning that "[if] excludable aliens were not protected by even the substantive component of constitutional due process . . . we do not see why the United States government could not torture or summarily execute them." *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003).

Thus, it is well established that even if excludable aliens are not entitled to procedural due process with respect to the discretionary entry decision itself, as persons they retain substantive due process rights regarding their physical liberty. *See, e.g., Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (holding that excludable aliens have a due process right to object to intentionally abusive detention conditions); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981) (holding that as detention of excludable alien becomes indefinite, it would be viewed as "impermissible punishment rather than detention pending deportation."); *Kwai Fun Wong v. U.S.*, 373 F.3d 952 (9th Cir. 2004) (holding that the entry fiction doctrine does not negate Due Process rights, but may restrict the procedural rights of an alien in connection with seeking admission into the U.S.); *Xi v. I.N.S.*, 298 F.3d 832 (9th Cir. 2002) (extending the limits on post-removal detention and definite detentions to aliens deemed inadmissible); *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982) (holding that Congress has not granted the Attorney General the power to detain an excluded alien arbitrarily and reading in the requirements of a security risk determination).

It is true that the Supreme Court has twice held that aliens seeking entry to the United States do not have any due process rights with respect to the *procedures used to determine their*

admissibility. U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953). But Mr. Arar is not asserting a procedural due process claim, and in any event those cases are fully explained by routine due process principles, equally applicable to U.S. citizens and foreign nationals.

In *Knauff* and *Mezei*, the Court held that aliens seeking entry to the United States at the border could not object on procedural due process grounds to the process used to determine their admissibility. The Court reasoned that foreign nationals have no right to entry, and therefore have no constitutional right to any particular set of procedures in connection with the entry process. That conclusion is consistent with the Court's general procedural due process doctrine, equally applicable to citizens and foreign nationals, which holds that due process attaches only when the government seeks to take away a protected liberty, property, or life interest. Where a wholly discretionary benefit is at issue—whether it be an incarcerated citizen's request for parole or a foreign national's request to enter—a procedural due process claim fails at the threshold because there is no liberty interest at stake.[11] Thus, the conclusion that procedural due process is not triggered at the entry determination turns on the fact that there is no liberty interest in entry itself, and not on the status of the individual rights claimant as a foreign national. *See generally*

[11] *See, e.g.*, *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Olim v. Wakinekona*, 461 U.S. 238, 248-49 (1983) (holding that state prison regulations did not create a liberty interest implicated by a transfer to another state); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (ruling that neither a state statute empowering the Board of Pardons to commute sentences nor the Board's practice of commuting three-fourths of life sentences created a liberty interest requiring due process in review of applications for commutation); *Meachum v. Fano*, 427 U.S. 215 (1976) (finding that prison inmates had no liberty interest implicated in being transferred to another prison); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972) (holding that an untenured professor had no property interest in being rehired and therefore no due process objection to the procedures used to reach that decision); *Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) (finding that various actions taken by the INS to encourage aliens to apply for suspension of deportation did not create a liberty interest protected by due process).

DAVID COLE, IN AID OF REMOVAL: DUE PROCESS LIMITS ON IMMIGRATION DETENTION, 51 EMORY L.J. 1003, 1031-37 (2002) (and cases cited therein).

Mr. Arar does not claim a violation of procedural due process with respect to a discretionary interest in entry. Instead, he asserts that his *substantive due process* rights were violated by Defendants' interference with his access to the courts, and by Defendants' decision to redirect him to Syria so that he could be subject to arbitrary detention and torture there. These actions, taken when Mr. Arar was in the United States, violated clearly established substantive due process principles, as identified above.

Defendants contend that because these actions were carried out through the immigration power, they are cloaked in "plenary power," and the Court must defer to the government's actions, whatever those actions consisted of and whatever their purpose. But the plenary power doctrine does not offer such a blank check; on the contrary, this power is "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. And nothing could be more important than the limitation on access to courts, arbitrary detention, and torture.

2. Mr. Arar's treatment in Syria, because of U.S. complicity, violated due process.

Defendants also deny that any due process rights attach to Mr. Arar's treatment in Syria. On their theory, the Constitution simply does not apply extraterritorially, and Mr. Arar would not even have a cause of action had Defendants personally flown to Syria to torture him themselves. That view of the Constitution is plainly wrong. Where U.S. officials are complicit in torture and arbitrary detention, they violate the due process limitations on their power, wherever they act. The Constitution follows the assertion of U.S. authority, and cannot be escaped simply by engaging in torture abroad.

There was a time when the Constitution was thought to be limited to the territory of the United States. But the Supreme Court laid that notion to rest nearly fifty years ago in *Reid v. Covert*, 354 U.S. 1 (1957) (holding that constitutional rights extend to U.S. citizens tried by a U.S. military court in Great Britain). *See generally* GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 108-117 (1996) (constitutional limits are not limited to the territory of the United States nor to citizens, but apply where federal officials apply the force of federal law to foreign nationals).

The Supreme Court's decision this summer in the Guantanamo cases confirms that foreign nationals outside U.S. sovereign territory nonetheless have constitutional rights. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). While the focus of the Court's decision was on whether federal courts have jurisdiction to entertain habeas petitions from foreign nationals held as "enemy combatants" at Guantanamo Bay, Cuba, the Court expressly addressed the merits, stating that

> 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). *Cf. U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein. 124 S. Ct. at 2698 n.15.

The reference to Justice Kennedy's opinion in *Verdugo-Urquidez* is to portion of Justice Kennedy's opinion which stating that whether due process rights apply to aliens abroad requires a contextual analysis that asks whether application of the right abroad would be "impracticable and anomalous." 494 U.S. at 278. The Fourth Amendment's warrant requirement specifically at issue in *Verdugo-Urquidez*, Justice Kennedy reasoned, would be anomalous as applied abroad because no judge would even have jurisdiction to issue warrants abroad. *Id.* at 278. But there is nothing anomalous whatsoever about applying the prohibition on torture, arbitrary detention, and interference with access to courts on U.S. officials when treating foreign nationals, whether here,

at the border, or abroad. These prohibitions stem from basic concepts of decency and respect for human dignity, and apply to all "persons," without regard to nationality.

The fact that foreign nationals outside the United States have due process rights when U.S. officials seek to exercise authority over them is made clear by the well-established doctrine that foreign defendants have a due process right not to be subject to suit in the United States if they have not had sufficient contacts with the forum. The Supreme Court has long held that aliens outside the United States are entitled to due process when they are sued as civil defendants in United States courts. *See Asahi Metal Indus. Co. v. Superior Court of Ca.*, 480 U.S. 102 (1987). And the Court has emphasized that this right "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of judicial liberty." *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).[12]

The only cases Defendants cite for the proposition that constitutional rights do not limit U.S. officials acting with respect to foreign nationals abroad do not support their broad proposition. In *Verdugo-Urquidez*, the Court held only that the Fourth Amendment, for reasons peculiar to that right, did not have extraterritorial application to the search of a foreign national's foreign home. And in *Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) the Court explicitly warned against conflating the treatment of "enemy aliens." *i.e.*, nationals of the country with which we are at war, with the treatment of foreign nationals generally:

[12] These cases also undermine any suggestion in the plurality in *Verdugo-Urquidez* that aliens require "significant voluntary connection with the United States" to gain constitutional rights. 494 U.S. at 271. That view was expressly rejected by Justice Kennedy, the fifth vote necessary to a *majority,* 494 U.S. at 275-278 (Kennedy, J., concurring), and it is Kennedy's *Verdugo-Urquidez* decision that the Supreme Court relied upon in *Rasul,* not the plurality opinion. Moreover, under the minimum contacts doctrine of personal jurisdiction, it is precisely the *absence* of significant voluntary connection that forms the basis of the due process violation. Prior "voluntary connection" to the United States cannot be justified as a necessary prerequisite for fundamental due process protections.

> [D]isabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage. Judge Cardozo commented concerning this distinction: "Much of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects.

339 U.S. at 772. Disregarding the Court's warning, Defendants here seek to conflate the rights of an "enemy alien" with those of Mr. Arar, a citizen of Canada and Syria, both countries with which we are at peace.

Accordingly, Mr. Arar was protected by substantive due process both with respect to Defendants' treatment of him in the United States, and with respect to the treatment he suffered in Syria with which the Defendants were complicit. The Constitution does not sanction U.S. complicity in torture, wherever it occurs and by whatever hand it is directly inflicted. Where, as here, federal government officials use the coercive arm of the law on foreign nationals to the end of detaining them arbitrarily, torturing them, and denying them access to the courts, they have violated substantive due process.

IV. DEFENDANTS VIOLATED THE TVPA BY CONSPIRING WITH AND AIDING AND ABETTING SYRIAN OFFICIALS TO TORTURE MR. ARAR UNDER COLOR OF SYRIAN LAW

Despite clear allegations that they actively planned and conspired to render Mr. Arar to Syria for purposes of unlawful detention without charge or trial, interrogation, and torture, Defendants argue that they cannot be held responsible for their actions under the TVPA, 28 U.S.C. § 1350, Pub. L. No. 102-256, 106 Stat. 73 (1992). Essentially, they argue that only the persons who directly tortured Mr. Arar can be held liable under the Act and that—even if the Act imposes accessorial or conspiratorial liability—Mr. Arar has failed to plead sufficient facts to support Defendants' liability. Defendants' contentions stem from a fundamental misunderstanding of the specific nature of Mr. Arar's TVPA claims, the scope of liability imposed by the Act and the pleading requirements for secondary liability.

A. The Text and Legislative History of the TVPA Support Secondary Liability

Defendants contend that only "primary violators," and not individuals who either aid and abet or conspire to commit acts of torture, may be held liable under the TVPA. *See* Mueller Br. at 11-14; Blackman Br. at 27; Ziglar Br. at 11-12. Under this theory, Mr. Arar would only have a cause of action against the Syrian officials who personally tortured him. Such a limited interpretation is inconsistent with the intent and purpose of the TVPA. Indeed, the language of the TVPA and its legislative history indicate that the Act includes secondary liability. *See* S. Rep. No. 102-249, at 8-9 & n.16, 102d Cong., 1st Sess., 1991 WL 258662 (Nov. 26, 1991) (stating that the statute is intended to apply to those who "ordered, abetted, or assisted" in torture and noting that Congress modeled the TVPA on international agreements condemning torture, many of which provide for aider and abettor liability).[13]

1. All the courts that have considered the question have found secondary liability under the TVPA.

In *Wiwa*, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002), the Southern District specifically rejected the argument that the TVPA does not include secondary liability. The *Wiwa* court noted that neither *Central Bank* nor *Dinsmore,* the cases cited by Defendant, "holds that a statute must explicitly allow for secondary liability in order for a court to hold aiders and abettors and co-conspirators liable." *Id*. at *16. It distinguished the language of the TVPA, which provides liability for an individual who "subjects" another to torture, 28 U.S.C. §

[13] Defendant Mueller argues that the shorter House Report does not contain this language. *See* Mueller Br. at 13. However, the relevant language in the Senate Bill that authorized secondary liability (that an individual who "subjects" an individual to torture shall be liable), was identical to the House Bill and was included in the legislation as adopted. *See* S. Rep. No. 102-249, *supra,* at 1. Moreover, the House Report makes clear that "the TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under . . . section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)." H.R. Rep. 102-367, 102 Cong., (2d Sess. 30) U.S. Code Cong. & Ad. News 84, 86.

1350, note, §§ 2(a) & (b), from Section 10(b), finding that the word "subjects" "expands rather than narrows the reach of the statute" and includes "individuals who 'cause someone to undergo' torture . . . as well as those who actually carry out the deed." No. 96 Civ. 8386, 2002 WL 319887 * 15. The *Wiwa* court also noted that the legislative history of the Act supports this reading. *Id*. All other courts to consider the issue have concurred that the TVPA includes secondary liability. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996) (rejecting argument that jury instruction should have limited liability to acts directly committed by the defendant); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d. 1325, 1332 (S.D. Fla. 2002) (noting that the "Senate Report on the TVPA makes clear that the statute is intended to apply to those who 'ordered, abetted, or assisted in the violation'"); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002) (holding that the defendant was responsible for his own acts and acts he "directed, ordered, aided, abetted or participated in"). This Court should follow these cases and reject Defendants' strained argument of general analysis under *Central Bank. Cf. Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 321 (S.D.N.Y. 2003) (holding that courts should follow the line of cases specifically allowing aiding and abetting liability under the Alien Tort Claims Act and not "the more general analysis" argued under *Central Bank "*under the maxim of *lex specialis derogat lex generalis*").

2. The statutory language in Central Bank is distinguishable.

Despite clear case law establishing that the TVPA includes secondary liability, Defendants cite a securities fraud case to argue that the TVPA does not support aiding and abetting liability. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Supreme Court examined the language of § 10(b) of the Securities Exchange Act of 1934, which prohibits the use of any "manipulative or deceptive device or contrivance" in connection with a securities transaction. The Supreme Court held that § 10(b)

did not support aiding and abetting liability for private civil suits because aiders and abettors do not use such devices or contrivances themselves. 511 U.S. at 175. *See also Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 844 (2d Cir. 1998) (applying reasoning of *Central Bank* to preclude conspiracy liability under § 10(b), noting that the "statutory text . . . was the determinative issue in *Central Bank* and it controls here as well").

Contrary to Defendants' assertions, neither *Central Bank* nor *Dinsmore* require that the words "aiding and abetting" or "conspiracy" explicitly appear in a statute in order for secondary liability to be found. In *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), the Seventh Circuit rejected that assertion, and found that the particular statutory structure of § 10(b) distinguished it from other statutes, noting that the Supreme Court "carefully crafted *Central Bank's* holding to clarify that aiding and abetting liability would be appropriate in certain cases, albeit not under 10(b)." 291 F.3d at 1019. The *Boim* court distinguished the statute at issue in that case, 18 U.S.C. § 2333, from § 10(b) for reasons that apply equally to the TVPA.[14] It noted that "*Central Bank* addressed extending aiding and abetting liability to an implied right of action,

[14] The cases cited by Defendants, are similarly distinguishable because, unlike the TVPA, the language of the statutes in question clearly limit liability to the primary actor or because they do not involve the issue of aiding and abetting liability at all. *See* Thompson Br. at 24; Blackman Br. at 31; Mueller Br. at 12 (citing *Pennsylvania Ass'n. of Edwards Heirs v. Rightenour*, 235 F.3d 839, 843 (3d Cir. 2000) (adhering to its reasoning in an earlier case that "[l]ike § 10b, the text of [RICO] § 1962 itself contain no indication that Congress intended to impose private civil aiding and abetting liability under RICO."); *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 431 (S.D.N.Y. 2003) (looking to the text of the Truth in Lending Act which provides for liability for "any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such a person."); *MCI Telecomm. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 129 (D. N.J. 1995) (declining to find liability for aiding and abetting under the Sherman Act which states that every person who "shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize." and suggesting that even if a statute fails to provide for aiding and abetting liability it can be presumed if there is "sufficient evidence of congressional intent to the contrary"); *Sparshott v. Feld Entm't, Inc.* 89 F.Supp.2d 1, 3-4 (D.D.C. 2000) (holding that the Federal Wiretap Act does not create a private cause of action and not addressing the issue of aiding and abetting liability).)

not an express right of action"[15] and that the inclusion of aiding and abetting liability under § 2333 was consistent with Congress' intent. *Id.* at 1020-21. Defendants' overly broad interpretation of *Central Bank* has been similarly rejected by courts interpreting other statutes, including the Alien Tort Claims Act, 28 U.S.C. § 1350. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) ("*Central Bank* [does not] hold that aiding and abetting is generally precluded from federal civil causes of action," but requires that courts examine the language of the individual statute).

B. Plaintiff Has Adequately Alleged The Existence of a Conspiracy to Commit Torture and That Defendants Aided and Abetted Torture

1. Requirements for pleading a conspiracy to violate rights.

Defendants also argue that the Complaint insufficiently alleges their involvement in a conspiracy and/or their aiding and abetting the torture of Mr. Arar. The allegations in the Complaint sufficiently meet the notice pleading requirements of Fed. R. Civ. P. 8(a). In the recent case, *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002), the Second Circuit reviewed the pleading requirements under Fed. R. Civ. P. 8(a):

> As the Supreme Court has recently had occasion to remind us, a complaint adequately states a claim when it contains 'a short and plain statement of the claim showing that the pleader is entitled to relief.' . . . Thus, a complaint is sufficient if it gives 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'

Id. at 186. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (rejecting judicially created heightened pleading requirements); *Leatherman v. Tarrant County Narcotics Intelligence and*

[15] The Seventh Circuit explained:

> the courts were already inferring an intent by Congress to create a private civil cause of action with section 10(b), and they would have been stacking another inference on top of that one in extending liability to aiders and abettors in rule 10b-5 actions. The Court was understandably reluctant to pile inference upon inference in determining Congressional intent. But no such stacking is required in section 2333, which expressly creates a private right of action for plaintiffs.

Id.

Coordination Unit, 507 U.S. 163, 168 (1993) (same).[16] Further, the Supreme Court has noted that the "[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 176, (1970) (Black, J., concurring). *See Swierkiewicz*, 534 U.S. at 512 (emphasizing that notice pleading under Rule 8(a)(2) "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

The Second Circuit has held that in order to establish a §1983 conspiracy claim, a plaintiff must show "(1) an agreement between a state actor and [a non-state actor]; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2nd Cir. 2002). Following the Supreme Court's recent rejection of a heightened pleading standard in *Swierkiewicz*, some courts have suggested that a plaintiff need only give notice of (1) the parties to the conspiracy, (2) the general purpose, and (3) the approximate date in lieu of pleading all the elements of a conspiracy. *See, e.g., Bullard v. New York*, 240 F. Supp.2d 292, 301-302 (S.D.N.Y. 2003); *see also Toussie v. Powell*, 323 F.3d 178, 185 n.3 (2d Cir. 2003) (noting that requiring more than conclusory allegations of conspiracy may not be valid in light of *Leatherman* and

[16] As support for their position that Plaintiff's aiding and abetting claim does not plead sufficient facts to survive a 12(b)(6) motion, Defendants Mueller, McElroy, and Ziglar cite *Lesavoy v. Lane*, 304 F. Supp. 2d 520 (S.D.N.Y. 2004). However, *Lesavoy* was a fiduciary duty case in which a broker was alleged to have *defrauded* the plaintiff and a corporation was alleged to have aided and abetted the breach of a fiduciary duty (as a consequence of the fraud). *Id.* at 525. While the complaint was couched as aiding and abetting a breach of fiduciary duty, the underlying claim was one of fraud, which is one of the Rule 9(b) exceptions to the liberal pleading rules and must be pled with particularity. The court in *Lesavoy* found that the fraud itself was not pled with requisite particularity, *id.* at 529-32, and this ultimately influenced the court's ruling that the aiding and abetting of the 'breach of fiduciary duty' could similarly not stand. *See Armstrong v. McAlpin,* 699 F.2d 79 (2d Cir. 1983) (applying Rule 9(b) standard to a claim of aiding and abetting a fraudulent scheme).

Swierkiewicz, but not reaching the issue).[17] As discussed below, the Complaint satisfies both the standard suggested in *Bullard* and the traditional requirements set forth in *Ciambriello.*

2. The Complaint adequately alleges secondary liability.

The Second Circuit has unequivocally held that since conspiracies are by their very nature secretive operations, they may be proven by circumstantial rather than direct evidence. *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999). *See also Rousenville v. Zahl*, 13 F.3d 625, 632 (2d Cir. 1994) ("[c]onspiracies are by their very nature secretive operations that can hardly ever be proven by direct evidence."); *Hernandez v. Goord*, 312 F. Supp. 2d 537, 546 (S.D.N.Y. 2004). Given Mr. Arar's lack of access to information and the extreme secrecy under which the United States has operated, Mr. Arar has alleged more than sufficient facts to establish a conspiracy to violate his rights under the TVPA.[18]

a) The Complaint properly alleges a conspiracy.

The Complaint satisfies both the *Bullard* and *Ciambriello* pleading standards. Specifically, in satisfaction of *Bullard*, the Complaint alleges that the Defendants and unnamed

[17] The Seventh Circuit has stated that *Swierkiewicz* appears to overrule prior precedent, including in the Second Circuit, suggesting that "conclusory allegations" of a conspiracy are insufficient and has held that it is sufficient to plead "the parties, general purpose, and approximate date, so that the defendant has notice what he is charged with." *Walker v. Thompson*, 288 F.3d 1005, 1007, 1008 (7th Cir. 2002) (Posner, J.).

[18] *See generally United States v. Pitre*, 960 F.2d 1112, 1121 2d Cir. 1992 ("existence of and participation in a conspiracy may be established through circumstantial evidence."); and *United States v. Soto*, 716 F.2d 989, 991 (2d Cir. 1983) ("the 'existence of and participation in a conspiracy . . . may be established . . . through circumstantial evidence.'") The cases cited by Defendants are distinguishable in that they are instances where the plaintiffs did no more than include the word conspiracy without further elaboration of the basis for their assertion, and at least one of their cases was decided on summary judgment motion, and not a motion to dismiss. Further, to the extent that they can be construed to require more than notice pleading, their authority has been called into question by *Leatherman* and *Swierkiweicz. See Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993) (conspiracy allegations were "unsupported by any specifics and many were flatly contradicted by proffered evidence")(decided on summary judgment motion); *Spear v. Town of W. Hartford*, 954 F.2d 63, 68 (2d Cir. 1992) (failure to allege any facts demonstrating joint action); *Hall v. Dworkin*, 829 F. Supp. 1403, 1413 (N.D.N.Y. 1993) (must state "the purpose of or any overt acts perpetrated by defendants which reasonably relate to the claimed conspiracy"). A fourth case failed to allege the elements of a RICO conspiracy claim. *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 (2d Cir. 1990) (RICO conspiracy claim requires plaintiff to plead an agreement to commit two predicate acts).

Jordanian and Syrian officials are the parties to the conspiracy (Compl. ¶ 74), the purpose of the conspiracy was to subject Mr. Arar to arbitration detention, coercive interrogation and torture (Compl. ¶ 77), and the time was September 26, 2002 through October 2003. (Compl. ¶¶ 26-66.)

The Complaint also alleges all the elements of a conspiracy. The Defendants agreed "amongst themselves and with unnamed Syrian officials to deport Plaintiff to Syria for the purpose [of] coercive interrogation and torture in that country." (Compl. ¶ 77.) At the time they transported Mr. Arar to Syria, Defendants were fully aware that Syria systematically practiced torture and that they planned to interrogate Mr. Arar under torture. (Compl. ¶ 78.) It also alleges that the Defendants "detained Plaintiff, denied him access to counsel, the courts and his consulate, and used governmental resources to transfer Plaintiff to Syrian custody." (Compl. ¶ 77.) Despite the fact that Mr. Arar is a Canadian citizen who had designated Canada as his country of removal, the Defendants overrode that decision and instead made special arrangements to send him to Syria. (Compl. ¶ 49.) These allegations satisfy the requirements of (1) an agreement between foreign and non-foreign state actors, (2) to act in concert and (3) an overt act in furtherance.

Further, the Complaint pleads specific facts providing strong direct and circumstantial evidence of a conspiracy and Defendants' involvement. Specifically, U.S. officials viewed Mr. Arar as a terrorism suspect and were eager to interrogate him for information. (Compl. ¶¶ 30, 31, 33, 35, 38.) Defendants had sufficient information to know that there was a specific risk of torture in Mr. Arar's case given Mr. Arar's specific, detailed warnings about his personal circumstances and because, in Syria, torture is most likely to occur when authorities attempt to "extract a confession or information." (Compl. ¶¶ 23, 40, 44, 45, 47, Exhs. A at 2-3 & B at 4.) Defendant McElroy was aware of the interrogations during which Mr. Arar expressed his fear of

torture and detailed the basis of his concerns. (Compl. ¶¶ 43, 44.) Further, Mr. Arar's interrogators indicated that the issue was discussed with "Washington D.C.," which in a supposed "national security" case of "special interest," presumably would include Defendants Ashcroft, Thompson, Ridge, Ziglar, and Mueller. (Compl. ¶¶ 31, 33, 35, 44-45.)

Further, Defendants Blackman, Thompson, and Ashcroft had to have been involved in the decision to remove Mr. Arar to Syria, and the circumstances of the removal suggest that they were not only aware of the danger or torture, but that they intended that he be tortured for purposes of gathering intelligence. *See* Thompson Br. at 24; Blackman Br. at 31; Mueller Br. at 12; *see also* Complaint Ex. C at 8 ("We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] of them."). In addition to Defendant Blackman's written decision regarding Mr. Arar's removal, Defendant Thompson signed an order sending Mr. Arar to Syria. (Compl. ¶ 48.) According to the INA and its implementing regulations, *only* the Attorney General (Ashcroft and Thompson) and the Regional Director (Blackman) have authority to order Mr. Arar's removal without further inquiry by an immigration judge. 8 U.S.C. § 1125(c)(2); 8 C.F.R. § 235.8(b). The INA also provides that *only* the Attorney General has authority to override Mr. Arar's designation of Canada as his country of removal. 8 U.S.C. § 1231(b)(2)(C). INS regulations require that Defendants should have considered the risk of torture in deciding to remove Mr. Arar to Syria. 8 C.F.R. § 235.8(b)(4); 8 C.F.R. § 208.20.

The complaint alleges that Defendants provided Syrian officials with a dossier on Mr. Arar and suggested specific matters to be covered by Syrian officials during his interrogation and torture. (Compl. ¶ 55.) And the Syrian government has acknowledged that the U.S. asked it to take Mr. Arar. Once in Syrian custody, the questions asked of Mr. Arar "bore a striking similarity to those asked Mr. Arar by FBI agents at JFK in September 2002," and the Complaint

alleges, Syrian security officers turned over to Defendants all information coerced from Mr. Arar during his interrogations under torture. (Compl. ¶¶ 54, 56.) Torture of Mr. Arar under such circumstances was consistent with U.S. extraordinary rendition policies. (Compl. ¶ 57.) The facts alleged in the Complaint establishing a policy, knowledge, motive, actions in furtherance of the plan, and that Defendants' benefited from the wrongful acts, all support a conspiracy between Defendants and Syrian officials to remove Mr. Arar to Syria for the purpose of extracting information under torture.[19] *See In re Sunset Bay Associates*, 944 F.2d 1503, 1517 (9th Cir. 1991) (conspiracy can be "inferred from the nature of acts done, the relations of the parties, the interests of the alleged conspirators and other circumstances.") (quoting *Greenwood v. Mooradian*, 137 Cal.App.2d 532, 538, 290 P.2d 955, 959 (Cal. 1955)). Further, U.S. officials attempted to obstruct Mr. Arar's communication with his counsel and conceal from the Canadian consulate the fact that Mr. Arar had been removed to Syria. (Compl. ¶¶ 46, 60.) These attempts to cover-up the unlawful transport to Syria also support Mr. Arar's allegations of a conspiracy. *See Pangburn*, 200 F.3d at 72 (allegations that defendants attempted to cover-up their unlawful acts supported claim of conspiracy).

b) The complaint alleges aiding and abetting liability.

The elements of aiding and abetting based liability are similar to those of a conspiracy claim:

[19] Defendant Thompson cites *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) and *Ginsburg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268 (2d Cir. 1999) for the proposition that merely inducing a public party to act does not constitute joint action. Thompson Br. at 20. Both cases, which were dismissed on summary judgment, are distinguishable because they failed to provide any evidence, circumstantial or otherwise, of a joint plan or action. Similarly, Defendant Blackman cites a number of cases that establish that supervisors cannot be held liable <u>solely</u> based on a respondeat superior theory and defendants' failure to adopt disciplinary procedures or investigate. Blackman Br. at 27-29. *See e.g. Rizzo v. Goode*, 423 U.S. 362, 371 (1976), *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). These cases are inapposite here, where plaintiff has alleged that defendants have actually conspired to and aided and abetted torture.

> (1) the party [whom] the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time [that] he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.

Halberstam v. Welch, 705 F.2d 472, 477 (D.C.Cir. 1983). As the D.C. Circuit noted in *Welch*, there is little difference between conspiracy and aiding and abetting liability: "[t]he prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity [while] aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct . . .." *Id*. at 478.

The Complaint properly alleges a claim for aiding and abetting torture. Specifically, the Complaint states that (1) Syrian officials subjected Mr. Arar to coercive interrogation and torture causing him severe physical and mental injuries (Compl.¶¶ 51-53, 75); (2) Defendants not only were aware of their role, but actively agreed and conspired to cause the torture and coercive interrogation (Compl. ¶¶ 77, 78); and (3) Defendants knowingly and substantially participated in the violation by, among other things, detaining Mr. Arar, denying him access to counsel, the courts and his consulate, overriding Canada as the designated country of removal, deciding to remove Mr. Arar to Syria and making special arrangements to send him there, providing the Syrians with a dossier on Mr. Arar and proposing questions to be asked. (Compl. ¶ 49, 77.) Defendants' awareness of their role and individual involvement is also supported by the alleged facts discussed *infra*.

C. Through Joint Action With Syrian Officials, Defendants Have Acted Under Color of Foreign Law for Purposes of the TVPA

Defendants argue that their status as U.S. officials prevents them from being deemed to have acted "under color of Syrian law" for purposes of the TVPA. A thorough analysis of the relevant case law under § 1983 shows that Defendants are mistaken.

The TVPA imposes liability on any individual that "under actual or apparent authority or color of law, of any foreign nation . . . subjects an individual to torture." 28 U.S.C. § 1350. The Second Circuit has held "in construing the terms 'actual or apparent authority' and 'color of law,' [for purposes of the TVPA] courts are to look to principles of agency law and jurisprudence under 42 U.S.C. § 1983." *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (noting that the TVPA's legislative history looks to Section 1983 to construe "color of law.") (citing H.R. Rep. No. 367, 102d Cong., 1st Sess., pt.1(1991); S.Rep. No 249, 102d Cong., 1st Sess. (1991)). Section 1983 jurisprudence clearly establishes that a U.S. government official can be deemed to act under color of law of a government other than the United States. A consistent interpretation of "color of law" under the TVPA suggests that U.S. government officials can also act under color of foreign law.

1. Defendants need not be foreign officials to act under color of foreign law.

Section 1983 provides liability where a plaintiff is deprived of a Constitutional or statutory right of the United States "'under color of any statute, ordinance, regulation, custom, or usage, of *any State or Territory*.'" *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 213 (1970) (emphasis added). Section 1983 jurisprudence makes clear that non-state actors can act under color of state law by participating in a joint activity with a state or its agents. The Supreme Court has held that "'[p]rivate persons, jointly engaged with state officials in the prohibited actions, are acting 'under color' of law for purposes [§ 1983]. To 'act under color' of law does

not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state or its agents.'" *Id.* at 152. *See also Ciambrello v. County of Nassau*, 292 F. 3d 307, 324 (2nd Cir. 2002) (finding that a *non-state actor* can act under "color of state law" for purposes of §1983 when s/he "'is a willful participant in joint activity with the State or its agents.'") (citing *Adickes*); *United States v. Price,* 383 U.S. 787, 794 (1966) ("To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.") (interpreting 18 U.S.C. § 242, the criminal counterpart to 42 U.S.C. § 1983); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) ("to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents"). Similarly, Defendants need not be foreign officials to act under color of foreign law so long as they willfully participated in joint activity with foreign officials to violate Mr. Arar's right to be free from torture under the TVPA.

2. Defendants' status as U.S. officials does not prevent them from acting under color of foreign law for purposes of the TVPA.

Defendants rely on a single decision of a district court in Washington, D.C. to argue that Defendants' status as U.S. officials prevents them from acting under color of foreign law. *See Schneider v. Kissinger*, 310 F.Supp.2d 251 (D.D.C. 2004). The district court's reasoning is inconsistent with multiple § 1983 cases holding that federal officials can act under color of law of another governmental entity. Indeed, as the Second Circuit held, there is:

> no reason why a joint conspiracy between federal and state officials should [not] carry [the] same consequences under § 1983 as does joint action by state officials and private persons. It was the evident purpose of § 1983 to provide a remedy when federal rights have been violated through the use or misuse of a power derived from a State.

Kletschka v. Driver, 411 F.2d 436, 449 (2d Cir. 1969); *see Jackson v. Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1973) (finding that § 1983 claims apply to actions of the federal government when "there is a conspiracy between state and federal officials"). According to the Second Circuit, "[w]hen the violation is a joint product of the exercise of a State power and a non-State power," the only test to determine whether the conspirators have acted under state law is whether the "state or its officials played a 'significant' role in the result." *Kletschka*, 411 F.2d at 449. In *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754, the Seventh Circuit held that federal law enforcement officers acting in concert with state officials could be deemed to act under color of state law at the same time as they were acting in the course of their federal employment.[20]

Applying *Kletschka's* analysis to the TVPA's color of foreign law requirement, U.S. government officials can be held liable under the TVPA if they conspire with officials of a foreign country to torture an individual and the foreign officials play a significant role in the conspiracy. Mr. Arar has sufficiently alleged joint action and it is clear that Syrian officials played a significant role in the conspiracy by torturing him for the purposes of interrogation. Defendants' argument that they are shielded from liability because they are U.S. officials is unavailing.[21]

---

[20] *Case v. Milewski*, 327 F.3d 564, 567 (7th Cir. 2003) (finding that "it is assumed that a § 1983 action can lie against federal employees—as it can against private individuals—if they conspire or act in concert with state officials to deprive a person of her civil rights under color of state law."); *Billings v. U.S.*, 57 F.3d 797, 801 (9th Cir. 1995) (assuming 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").

[21] In any event, any dispute as to whether the acts alleged in the Complaint are actionable under theories of third-party liability or "color of law of a foreign nation" is a material factual dispute improper for resolution at this preliminary stage. *See Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) (declining to determine a color of law issue with respect to TVPA jurisdiction because of a factual dispute).

3. Schneider failed to consider relevant authority establishing that federal officials can act under color of law of another government.

The sole case Defendants rely upon in arguing that federal government officials cannot act under color of foreign law, *Schneider v. Kissinger*, 310 F.Supp.2d 251 (D.D.C. 2004), devotes two sentences to the issue and fails to consider § 1983 color-of-law jurisprudence as the Second Circuit and the TVPA's legislative history directs courts to do. In fact, *Schneider* does not even mention the TVPA's legislative history or provide an analysis of what constitutes "color of foreign law" in light of established § 1983 jurisprudence. *Id* at 267. Instead, *Schneider* simply contains a conclusory statement that in "carrying out the direct orders of the President of the United States, Kissinger was most assuredly acting pursuant to U.S. law." *Id.* (citation omitted). *Schneider* fails to address the holdings of the Second, Seventh, and Ninth Circuit Courts of Appeals that federal officials can act under color of law of another governmental entity if they conspire with other governmental officials to deprive an individual of his or her rights. *Kletschka* 411 F.2d at 449; *Jackson*, 496 F.2d at 635; *Hampton*, 600 F.2d at 623; *Case*, 327 F.3d at 567; *Billings*, 57 F.3d at 801.

Further, the facts of this case are readily distinguishable from those addressed in *Schneider.* *Schneider* involved a suit against former National Security Advisor Dr. Henry Kissinger, for an attempted coup attempt in Chile allegedly undertaken at the direction of the President. *Id*. at 253, 258. In reaching its holding, the *Schneider* court appeared to be heavily influenced by the political ramifications of the case, holding that Dr. Kissinger was carrying out foreign policy based on direct orders of the President.[22] *Id*. at 261, 267.

[22] The *Schneider* court held that the entire case should be dismissed based on the political question doctrine and that Dr. Kissinger was entitled to qualified immunity because the TVPA was passed *almost twenty-two years* after the events in question. *Id*. at 258-64, 267. The political question doctrine does not apply here.

In sum, this court should not follow *Schneider*'s assumption that U.S. officials cannot be deemed to act under color of foreign law for purposes of the TVPA when carrying out direct orders of the President. The *Schneider* court failed to consider § 1983 as instructed by the TVPA's legislative history and the Second Circuit in *Kadic*. As Mr. Arar has alleged that Defendants acted in concert with Syrian officials to torture him for purposes of interrogation and that the Syrian officials played a significant role in the conspiracy, he has satisfied the TVPA's "color of foreign law" requirement. Moreover, there is no allegation here that Defendants acted pursuant to direct orders of the President. Accordingly, Defendants' Motions to Dismiss Plaintiff's TVPA claims on this basis should be denied.

V. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

A. Defendants Are Not Entitled to Qualified Immunity on Plaintiff's Due Process Claims

Defendants are entitled to qualified immunity only if "their [official] conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this standard, the Court must apply a two-step analysis. It must first decide, "as a threshold matter," whether the facts alleged, liberally construed, show a violation of a constitutional right. If so, the Court then decides whether that right was "clearly established" at the time of the violation. *Poe v. Leonard*, 282 F.3d 123, 132 (2d Cir. 2002). As Defendants acknowledge, these two questions must be addressed "in the proper sequence." *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see also Brousseau v. Haugen*, 125 S. Ct. 596, 598 n. 3 (2004).

A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). Mr. Arar need not

demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established"). Nor need he identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Mr. Arar need only show that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional. *Id.* at 740. Government officials may have such fair warning "even in novel factual circumstances." *Id.* at 741. Prior decisions may "clearly foreshadow" a ruling that the challenged conduct is unconstitutional, *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 362 (2d Cir. 2002) (internal citation and quotation omitted), or a previously announced "general constitutional rule" may apply "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997). "Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar conduct." *Hope*, 536 U.S. at 753.

As shown above, the rights not to be tortured, arbitrarily detained, or denied access to the courts are among the most fundamental in any civilized society. It could not have been more clear than that Defendants were barred from conspiring to have Mr. Arar arbitrarily detained and tortured, or from interfering with his access to the courts by lying to him and his lawyer and secretly transporting him out of the country. Accordingly, Defendants are not entitled to qualified immunity.

B. Qualified Immunity is Not Available Under the TVPA

The affirmative defense of qualified immunity developed in the context of litigation brought under 42 U.S.C. §1983. Despite the fact that the language of Section 1983 does not grant any immunities, the Supreme Court has construed the statute so as to immunize certain conduct from claims for damages under it. In the TVPA context, where Congress has expressly defined the norms that apply and has *not* seen fit to import the affirmative defense of qualified immunity, there is simply no basis to import this judicially-created defense.

Moreover, the Supreme Court has granted "qualified immunity" to government officials, protecting them from personal monetary liability, only "insofar as their [official] conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In deciding whether Defendants are entitled to qualified immunity, this Court "as a threshold matter" must ask whether the facts alleged by Plaintiff, liberally construed, show violations of his constitutional and statutory rights and "[i]f so," inquire whether the rights in question were "clearly established at the time the violation[s] occurred." *Poe v. Leonard*, 282 F.3d 123, 132 (2d Cir. 2002).

Because torture is both defined in the TVPA, *see* 28 U.S.C. § 1350 note, and recognized as a violation of customary international human rights law, there can be no doubt that the right not to be tortured is a clearly established right. The Second Circuit confirmed this fact twenty-five years ago in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1979):

> In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world *(in principle if not in practice)*, we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

Id. at 880 (emphasis added). Violations of "the law of nations" cannot be valid governmental practice. Defendants' acts alleged here sufficiently establish violations of clear standards of constitutional, statutory, and international law.

Nevertheless, Defendants argue that Plaintiff cannot survive this motion to dismiss because the law under the TVPA was not clearly established such that they, as U.S. officials, should have known that they could not subject Mr. Arar to torture by delivering him to Syria for that purpose. This is because: 1) they did not engage in torture themselves, *see* Thompson Br. at 36; Mueller Br. at 21; 2) they weren't acting "under color of foreign law," Thompson Br. at 36; Ashcroft Br. at 37;[23] McElroy Br. at 36; Mueller Br. at 21-22; 3) Mr. Arar was not in their "custody or physical control," Thompson Br. at 36-37; 4) they were performing their duties authorized under the INA and its regulations, McElroy Br. at 37; Ziglar Br. at 14; Blackman Br. at 22-23; and 5) they reasonably believed their conduct was lawful. *See* McElroy Br. at 37.[24]

However, Defendants are mistaken with regard to the level of factual specificity required to demonstrate that a right is clearly established. Concomitant with its discussion of the requirement of fact specificity in *Anderson*, in *United States v. Lanier*, 520 U.S. 259 (1997), the Supreme Court made clear that the central issue is fair notice or warning.

Simply put, no matter how finely they seek to segment their plan to send Mr. Arar to Syria for detention and interrogation under torture, Defendants can put forth no convincing

[23] Contrary to Defendant Ashcroft's claim, Ashcroft Br. at 37, Mr. Arar alleged that the acts described in the Complaint constitute a violation of the right not to be tortured under color of foreign law, and that Defendants conspired in and/or aided and abetted with foreign officials to torture Mr. Arar under color of Syrian law. Compl. ¶¶ 73, 74.

[24] Defendant McElroy's subjective belief is irrelevant; his actions must have been "objectively reasonable." *See, e.g., Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 103 (2d Cir. 2003).

argument that they were each of them unaware that their effort to interrogate Mr. Arar by subjecting him to torture clearly violated his due process and TVPA rights.

The law is clear that a plaintiff need not demonstrate that "the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. *See also Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established"). Nor does it even suggest that the plaintiff must identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Rather, to establish that a right is "clearly established," the plaintiff need only show that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional. *Id.* at 740. Government officials may have such fair warning "even in novel factual circumstances." *Id.* at 741. For example, prior decisions may "clearly foreshadow" a ruling that the challenged conduct is unconstitutional. *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 362 (2d Cir. 2002) (internal citation and quotation omitted). Some conduct is, of course, *so obviously* unconstitutional that no reasonably competent official could deny fair warning, despite the absence of any precedent on all fours. *Hope*, 536 U.S. at 739.

Because torture is defined in the TVPA, *see* 28 U.S.C. § 1350 note, and recognized as a violation of both federal constitutional law and customary international human rights law, there can be no doubt that the right not to be tortured is a clearly established right. There is no doubt whatsoever that all three branches of our federal government have independently recognized that

torture is absolutely prohibited as being inconsistent with "the values of this country." Remarks by Pres. Bush, June 22, 2004.[25]

Congress's rejection of torture is evident from both domestic legislation and from the international treaties to which the United States is a party. With respect to domestic legislation, the War Crimes Act provides that it is a war crime for any member of the U.S. Armed Forces or a U.S. national to commit an act "inside or outside the United States" that, among other things, is "defined as a grave breach in any of the [Geneva Conventions] or any protocol to such convention to which the United Sates is a party." 18 U.S.C. § 2441(a), (c)(1). Congress' emphatic rejection of torture also appears in the treaties to which the United States is a party, which, along with the Constitution and federal laws, are "the supreme Law of the Land." U.S. Const., art. VI, cl. 2; *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

The most sweeping repudiation of torture in an international treaty appears in the Convention Against Torture. The Senate ratified CAT (which President Reagan submitted to the Senate and President George H.W. Bush supported) in 1990, and the United States became a party to the treaty with the enactment of 18 U.S.C. § 2340A in 1994. Article 2 of CAT requires each state party to take all necessary actions "to prevent acts of torture in any territory under its jurisdiction." *Id*., art. 2(1). It also provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal or political instability or any other public

[25] Available at http://www.whitehouse.gov/news/releases/2004/06/20040622-4.html.

emergency, may be invoked as a justification of torture." *Id*., art. 2(2). Article 16 expands the scope of CAT to reach "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id*., art. 16(1).

In ratifying the CAT, the Senate stated that:

> [I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:
>
> (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (3) the threat of imminent death; or
>
> (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Reg. S17486-01 (1990). With respect to the United States' obligations under Article 16, the Senate specified that the United States considers the term "cruel, inhuman or degrading treatment or punishment" to mean "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." *Id*.

Finally, secondary liability under the TVPA also militates against a strict construction of the "custody or physical control" requirement. Moreover, courts have held that the "custody or

control" requirement of the TVPA should be read broadly in plaintiff's favor in light of the Congressional intent to provide plaintiffs with effective redress for acts of torture.

> While it may be argued that [plaintiff] was never in [defendant's] personal custody or physical control, the legislative history of the TVPA indicates that this circumstance does not preclude his liability for her ordeal. As the Senate Committee Report accompanying the statute explains, "a higher official need not have personally performed or ordered the abuses in order to be held liable [under the TVPA]." S. Rep. No. 249, 102d Cong., 1st Sess. 9 (1991). I find that [plaintiff] was in the defendant's "custody" for purposes of TVPA liability, given that the defendant had authority and discretion to order that [plaintiff] be released.

Xuncax v. Gramajo, 886 F. Supp. 162, 178, n15 (D. Mass. 1995). *See also, Hilao*, 103 F.3d at 778-779 (plaintiff stated claim for "torture" under TVPA though he was never in the "custody or control" of defendant himself (the President of the Philippines), but rather, under the custody and control of individuals under his command).

Courts have also "very liberally construed the 'in custody' requirement for purposes of federal habeas." *Maleng v. Cook*, 490 U.S. 488, 492 (1989); *accord Peyton v. Rowe*, 391 U.S. 54, 64 (1968). In *Abu Ali v. Ashcroft*, 2004 U.S. Dist. LEXIS 25239 (D.D.C. 2004), the court held that an individual is "in custody" for habeas purposes when he is allegedly arrested and held by a foreign agent at the behest or direction of the United States. *Id.* at *49, *62. The Government's position, on the other hand, would allow the United States to "deliver American citizens to foreign governments to obtain information through the use of torture." *Id.* at *32.

Mr. Arar was in the custody or physical control of Defendants because they delivered Mr. Arar to Syria to be held, interrogated, and tortured, and they could have ordered his release.

Given the depth and breadth of the three branches' commitment to the eradication of torture, Defendants cannot here claim that they received no "fair warning."

VI. PLAINTIFF HAS SUFFICIENTLY ALLEGED PERSONAL PARTICIPATION BY THE VARIOUS DEFENDANTS

The individual Defendants' arguments that they were not personally involved in depriving Plaintiffs of their constitutional rights suffers four general flaws: (1) they disregard the applicable decisional authority regarding personal involvement; (2) they ignore the pleading rules delineated in the Federal Rules of Civil Procedure; (3) they confuse the standards for a motion to dismiss with the standards for summary judgment; and most tellingly, (4) they simply ignore the inclusive allegations of the Complaint.

First, as this Court has already noted, personal involvement of a supervisory official may be established by evidence that:

> the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).[26] In addition, "anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Wong v. Beebe*, 2002 WL

[26] *Wong*, 373 F.3d at 966; *see also Johnson,* 588 F.2d 740, 742 (9th Cir. 1978); *Stevenson*, 877 F.2d 1435, 1439 (9th Cir. 1989); *Gini*, 40 F.3d 1041, 1044 (9th Cir. 1994) In addition, "anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Wong v. Beebe*, 2002 WL 31548486, at *14 (D. Or. Apr. 5, 2002) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Johnson*, 588 F.2d at 743-44 ("The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury."); s*ee also Saye v. St. Vrain Valley Sch. Dist.*, 785 F.2d 862, 867-68 (10th Cir. 1986) (holding that liability for a retaliatory discharge is not cut off when a school board decides to dismiss a teacher based on the recommendation of principal who had retaliatory intent); *Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984) (holding Board of Trustees liable on the basis of its decision affirming college president's retaliatory termination of professor);

31548486, at *14 (D. Or. Apr. 5, 2002) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson*, 588 F.2d at 743-44. S*ee also Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984) (holding college president liable for retaliatory termination of professor, although final action taken by trustees).

This is not a case in which Plaintiff seeks to hold high-level officials responsible for aberrant and isolated activities of remote local officials. The policies and practices complained of here were part and parcel of the federal government's policies on treatment of alleged terrorists. (Compl. Ex. C, E.) It strains credulity to suggest that the Attorney General, the Secretary of State for Homeland Security, Director of the FBI, and the Commissioner for the INS were somehow unaware of the extraordinary renditions program, a program well-publicized and acknowledged by public officials. *Id.* .Even at public Congressional hearing in September 2004, CIA Counterterrorist Center head Cofer Black alluded to this "new form[] of 'operational flexibility' in dealing with suspected terrorists,'" saying "'[t]his is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11,'" and "[a]fter 9/11 the gloves come off.'"

Second, Defendants ignore the liberal pleading rules articulated in the Federal Rules of Civil Procedure. Rule 8(a) requires only that the defendants be put on fair notice of plaintiff's claim and relies on "liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

Third, the Second Circuit has recently remarked on the difficulty of prevailing on a motion to dismiss (as distinct from a motion for summary judgment) based on qualified immunity for lack of personal involvement. In *McKenna v. Wright*, 386 F.3d 432 (2d. Cir. 2004), the court held that a supervisory official presenting a qualified immunity defense "on a Rule12(b)(6) motion instead of a motion for summary judgment must accept the more stringent standard applicable to this procedural route . . . Thus, the plaintiff [at the time of the Rule 12(b)(6) motion] is entitled to all reasonable inferences from the facts alleged." *Id.* at 436.

Finally, Defendants' claims that insufficient allegations of personal involvement have been made simply ignore the allegations in the Complaint specifying that all Defendants played significant supervisory and/or operational roles in the challenged policies. (Compl. ¶¶ 24, 45-48, 68-95.) Defendants Ashcroft, Thompson, Blackman, McElroy, Mueller, and others, unlawfully detained Mr. Arar and subjected him to coercive and involuntary interrogation for thirteen days. (Compl. ¶ 4.) They denied Mr. Arar access to counsel, the courts, and his consulate, and agreed amongst themselves, other Defendants, and Syrian officials to deliver him to Syria to be interrogated by torture. (Compl. ¶ 77.) Each of these Defendants was fully aware of the policy of state-sponsored torture in Syria, and knowingly gave that government substantial assistance to torture Mr. Arar. (Compl. ¶ 78.) These Defendants provided their Syrian counterparts with a dossier on Mr. Arar, and suggested matters to be covered during his interrogation. (Compl. ¶ 55.) They then received from the Syrian security officers all information coerced from Mr. Arar while he was interrogated and tortured. (Compl. ¶ 56.)

To dismiss the claims against these officials for lack of personal involvement, this Court would have to find that these officials had no involvement with the extraordinary rendition policy administered by the Department of Justice, Homeland Security, INS, the FBI and the CIA.

Further, this Court would have to find that it was not the defendants who negotiated Mr. Arar's removal to Syria with the Syrian government, but instead the Syrian government negotiated Mr. Arar's removal with low-level government employees. It is insulting that the Defendants ask us to believe that low-level governmental employees orchestrate extraordinary renditions to not only Syria, but also Jordan, Egypt and Morocco, all without the blessing or assistance of individuals in the defendants' positions. In addition, the Complaint alleges specific involvement in the decision to remove Mr. Arar from the U.S. As detailed below, there are ample specific allegations to support liability against each Defendant.[27]

(1) John Ashcroft. Attorney General Ashcroft asserts that he is being sued only for the alleged actions of his subordinates. *See* Ashcroft Br. at 8-10. Contrary to Ashcroft's assertion that "Arar does not alleged that the Attorney General ordered Arar's removal or made any decision relating to Arar personally," Ashcroft Br. at 5, the Complaint states that "Defendant Ashcroft was responsible for making the decision to remove Mr. Arar to Jordan and Syria," and that Ashcroft "[c]onspir[ed] with and/or aid[ed] and abett[ed] Defendants Thompson, Blackman, McElroy, Mueller, and others, as well as Syrian government officials" so that Mr. Arar would be removed to Syria and be interrogated by Syrian authorities with the knowledge that he would be in danger of being tortured. (Compl. ¶ 14.)

Further demonstrating Ashcroft's direct involvement are the statutory provisions relating to the individuals authorized to override judicial authority and remove an individual to a third country. The INA states that the only individuals with the authority to sign off on a removal order without further judicial inquiry are the Attorney General, the Acting Attorney General and

[27] This Court may consider documents attached as exhibits to the Complaint. FED. R. OF CIV. PROC. Rule 10(c). *See also*, *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995).

the Regional Director. 8 U.S.C. § 1125(c)(2); 8 C.F.R. § 235.8(b). Furthermore, it is only the Attorney General and Acting Attorney General that have the authority to override Mr. Arar's designation of Canada as his country of removal. 8 U.S.C. § 1231(b)(2)(C). Without these approvals, which clearly indicate Ashcroft's involvement, Mr. Arar would have never been removed to Syria. Moreover, Defendants' own briefs advance the position, albeit in the hope of avoiding jurisdiction under the INA, that the complained of events were the result of the exercise of Ashcroft's—or his designee's—discretion. *See* Govt. Br. 13-18; Blackman Br. 7-12.

(2) Larry D. Thompson. Former Acting Deputy Attorney General Thompson likewise denies any personal involvement in Mr. Arar's "extraordinary rendition" to Syria. Thompson Br. at 1-2. Because Thompson was acting Attorney General when the unlawful actions took place, he conspired with the other defendants and Syrian officials to torture Arar, or with knowledge he would be tortured. (Compl. ¶ 15.) And again, the Acting Attorney General is one of only three individuals author with the authorization to remove Mr. Arar to Syria. And, in this case it was Thompson who signed that order. (Compl. ¶ 15.) Without Thompson's signature on Mr. Arar's removal order, Mr. Arar would have been neither rendered to Syria nor tortured.

(3) James Ziglar. Then-INS Commissioner Ziglar also argues that conclusory, vague, or general allegations do not suffice. Ziglar Br. at 1. Mr. Arar has alleged he was ultimately responsible for the implementation and enforcement of immigration regulations, and, like all defendants, he conspired with the other defendants and Syrian officials to torture Arar, or with knowledge he would be tortured. (Compl. ¶ 17.)

(4) J. Scott Blackman. Former Regional Director of the Eastern Regional Office of the INS claims that his role in Mr. Arar's removal was limited to his order that Mr. Arar be

removed from the U.S., and that had no part in the decision to remove him to Syria. Blackman Br. at 5. However, the Complaint plainly alleges that his responsibilities in Mr. Arar's case were substantially more extensive. The Complaint alleges that Mr. Blackman failed to giving proper consideration to Article 3 of CAT in addition to "[c]onspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, McElroy, Mueller and others, as well as Syrian governmental officials" to remove Mr. Arar to Syria, where he knew that "Mr. Arar would be in danger of being subjected to torture." (Compl. ¶ 18.) Furthermore, Blackman was one of only three individuals authorized to determine Mr. Arar's fate.

(5) Edward J. McElroy. Former District Director of the INS for the New York District, and now District Director of Immigration and Customs Enforcement McElroy states that the Complaint offers "no factual basis" to infer McElroy's involvement. McElroy Br. at 9. However, the Complaint alleges that as the responsibly party for the "enforcement of customs and immigration laws in the New York City area," McElroy made the decision to remove Mr. Arar to Syria by "[c]onspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, McElroy, Mueller and others, as well as Syrian governmental officials." (Compl. ¶ 20.) In addition, the Complaint alleges that INS officials were extensively involved in, among other things, interrogating Mr. Arar and lying to Mr. Arar's attorney regarding his whereabouts, all of which was done under the supervision of McElroy. (Compl. ¶¶ 27, 28, 31, 35, 41-47.)

(6) Robert Mueller. FBI Director Mueller attempts to absolve himself of personal involvement in Mr. Arar's "extraordinary rendition" by asserting that the only allegations against him are based solely on his status as Director of the FBI. Mueller Br. at 4. However, the Complaint alleges that Mueller's involvement not only extended to Mr. Arar's detention in the United States, but also to coordination with Syrian officials regarding the content of Mr. Arar's

interrogations while in Syria. (Compl. ¶¶ 4, 21.) Furthermore, the Complaint alleges involvement of FBI officers in Mr. Arar's initial interrogations, which directly implicates Mueller in his supervisory role over these officers. (Compl. ¶¶ 29, 30, 33.)

On a Motion to Dismiss "[h]owever unlikely it may appear to a court from a plaintiff's complaint that he will ultimately be able to prove an alleged fact such as mental state, the court may not go beyond Federal Rule of Civil Procedure 8(a)(2) to require the plaintiff to supplement his pleadings with additional facts that support his allegation of knowledge either directly or by inference. Whether the plaintiff can produce evidence to create a genuine issue with regard to his allegation is to be resolved through a motion for summary judgment." *Phelps* at 186-87.

In light of the above, the liberal pleading standards set forth in *Swierkiweicz*[28] and accepting as true all the allegations in the Complaint, Mr. Arar here has adequately pled personal involvement of each of the named defendants in his "extraordinary rendition" to Syria. The Complaint alleges the pivotal role played by each of the Defendants in his ultimate torture in Syria. Absent each of the Defendants' personal involvement Mr. Arar could not have been subject to "extraordinary rendition."

VII. THIS CASE DOES NOT PRESENT A POLITICAL QUESTION

Defendants Thompson and Ashcroft argue that this case should be dismissed as a non-justiciable political question, and other defendants similarly argue that this case requires judges to make "broad policy determinations" that they are ill-equipped to make. *See* Thompson Br. at 13-17; Ashcroft Br. at p. 42. The argument is premised on a broad proposition that is neither supported by legal authority nor applicable to the concrete issues involved in this case.

[28] *See also Brown v. W. Conn. State Univ.*, 204 F. Supp. 2d 355, 364 (D. Conn., 2002) ("While plaintiff may not yet know the details of the alleged conspiracy, that is precisely the purpose of discovery under the liberal pleading rules.").

Defendant Thompson makes the sweeping statement that "Plaintiff asks this Court to scrutinize policy decisions constitutionally committed to the Executive branch – namely, the conduct of the country's foreign affairs and implementation of immigration policies." *See* Thompson Br. at 13. But Defendants' decision to torture Mr. Arar by means of a conspiracy is not a policy committed to the discretion of the Executive branch, nor could it be.

Equally unpersuasive is Defendant Thompson's contention that the adjudication of Mr. Arar's claims would unlawfully limit the government's ability to "gather[] information and intelligence in the conduct of the war on terrorism." *See* Thompson Br. at 14. While intelligence gathering may be within the purview of the Executive branch, it is not immune from constitutional constraints, there certainly is no cloak of political immunity provided to government officials who use torture to effectuate their ends.

Plaintiff is not asking the Court to review any broad foreign policy decisions made by Government. Rather, "the complaint is narrowly focused on the lawfulness of the defendants' conduct in a single incident," namely defendants' decision to torture Plaintiff Arar. *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992). Damage claims for violations of universally recognized international and constitutional norms such as torture are generally not appropriate for dismissal on political question or similar grounds, for as this Circuit has stated, "judges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in [the] context of human rights." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

A. Mr. Arar's Claims Seek Vindication of His Personal Rights—Not Review of U.S. Foreign Policy

Claims such as Plaintiff's seeking the vindication of his individual and personal legal rights rarely trigger the political question doctrine. Such claims are not subject to dismissal as presenting non-justiciable political questions simply because they may have foreign policy

implications. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988) (Supreme Court has repeatedly found that claims based on such rights are justiciable, even if they implicate foreign policy decisions), *Pangilinan v. I.N.S.*, 796 F.2d 1091, 1096 (9th Cir. 1986); (political question doctrine does not bar court from hearing cases involving an individual rights to equal protection and due process); *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984), ("[a]n area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action"); *Eain v. Wilkes*, 641 F.2d 504, 516 (7th Cir. 1981) (political question doctrine does not preclude court from determining whether there is an adequate protection of rights for a person who is requested to be extradited); *Sharon v. Time Inc.*, 599 F. Supp. 538, 552 (S.D.N.Y. 1984) ("[j]udicial abstention on political grounds has similarly been found inappropriate when individual rights in domestic affairs are at stake, even where the litigation touches upon sensitive foreign affairs concerns, or deals with a subject allocated in the main by the Constitution to another branch").

Recently, a district court refused to invoke the political question doctrine or similar separation of powers concerns to dismiss a claim that United States officials unlawfully conspired with the government of Saudi Arabia to detain an American citizen abroad. *Ali v. Ashcroft*, F. Supp. 2d, No. Civ A. 04-1258 JDB, 2004 WL 2913175 (D.C.C. Dec. 16, 2004). The *Ali* Court held that the United States may not "avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen." *Id.* At *11. So too, American officials may not avoid this Court's jurisdiction by enlisting a foreign nation as an intermediary to torture someone the United States takes into its custody. As this Circuit has held, constitutional requirements may attach "where [the] cooperation between [the] United States and

foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials." *United States v. Maturo*, 982 F.2d 57, 61 (2nd Cir. 1992). *See also Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506-09 (D.C. Cir. 1984) (rejecting the political question doctrine's application, and noting that "teaming up with foreign agents cannot exculpate officials of the United States from liability").

Indeed, United States courts have a long history of deciding damage claims for wrongful conduct committed by Executive officials even during wartime. For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Chief Justice Marshall spoke for a unanimous court in holding a captain in the U.S. Navy liable for damages to a ship owner for the illegal seizure of his vessel during wartime. The Court held that the President's orders authorizing seizure of the ship did not immunize the captain from a lawsuit for civil damages where the President's instructions *went beyond his statutory authority*, and rejected the argument that the owner's claim should be resolved by "negotiation" with the government and not through a damage action. *Id*. at 179.

The Supreme Court has repeatedly permitted damage actions to be brought against individual soldiers and officers for wrongful or otherwise tortious conduct taken in the course of warfare. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (U.S. soldier sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (soldier was not exempt from civil liability for trespass and destruction of cattle if his act not done in accordance with the usages of civilized warfare); *Freeland v. Williams*, 131 U.S. 405, 417 (1889); *The Paquete Habana*, 175 U.S. 677 (1900) (court imposed damages for seizure of fishing vessels). *See also* 54 Am. Jur. 2d *Military and Civil Defense* § 293 (1971); W. Winthrop, *Military Law & Precedents* 780 n. 31, 887-89 (2d ed.

1920). More recently, various Courts of Appeals have rejected the political question defense in actions suing individuals or government officials for wrongful, illegal conduct during wartime. Indeed, the Court of Appeals for the Ninth Circuit in *Koohi v. United States*, 976 F.2d 1328, 1331-32 (9th Cir. 1992) expressly held that federal courts are well equipped to review military decisions:

> Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.

976 F.2d at 1331.

Judicial refusal to reject claims as political questions is particularly evident in *damage actions* alleging violations of individual rights. *See Koohi*, 976 F.2d at 1332 ("[d]amage actions are particularly judicially manageable" and "are particularly nonintrusive.") Indeed, the Supreme Court has adjudicated claims in a variety of foreign policy contexts, including a challenge to an Executive agreement settling individual claims with a foreign nation. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) (determining the constitutionality of the Executive agreement settling claims arising out of the crisis with Iran). *See also Regan v. Wald*, 468 U.S. 222 (1984) (adjudicated challenge to ban on travel to Cuba).

B. Plaintiff's Claims Do Not Present A Political Question Under the *Baker v. Carr* Factors

The Supreme Court has often cautioned that lawsuits relating to foreign relations must not be automatically dismissed as non-justiciable political questions, but rather must be subjected to a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker v. Carr*, 369 U.S. 186, 211-12 (1962); *see also Japan Whaling Ass'n v. Am. Cetacean*

Soc'y, 478 U.S. 221, 230 (1986) (court "cannot shirk this responsibility [of judicial review] merely because our decision may have significant political overtones").

Despite the Supreme Court's admonition in *Baker*, Defendant Thompson improperly inflates Plaintiff's claim to make it appear that the Court would be thrust into an Executive branch debate about which side to support in a war or coup attempt. *See* Thompson Br. at 15. For example, Defendant Thompson cites *Schneider v. Kissinger* where the court dismissed as a political question claims that "ask this Court to assess the reasonableness of the Executive Branch's decision to seek—perhaps through violent means—a change in the makeup of a foreign sovereign." *Reichenberg v. Nelson* 310 F. Supp. 248, 259 (D. Neb.. 1970). Here, by contrast, Mr. Arar does not ask this Court to review the Executive Branch's policy toward Syria, Iraq or any other foreign sovereign, but rather whether the government may decide to torture an alien held in its custody in the United States. Resolution of that issue, as opposed to the sweeping and fanciful questions presented in Defendant's brief, does not involve a non-justiciable political question.

Application of the six factors delineated in *Baker v. Carr*, 369 U.S. 186 (1962) makes clear that Plaintiff's claims do not present a political question. First, there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." The power to torture individuals is not textually committed to the Executive branches, indeed U.S. and international law unequivocally denies that authority to Executive officials.

Second, this case is judicially manageable. Defendant Thompson has made no argument to the contrary, and indeed, could not do so. Arar's complaint simply asks this Court to decide the narrow issue of whether Defendants decided to torture Arar while he was in their custody. "Universally recognized norms" of both international and constitutional law "provide judicially

discoverable and manageable standards" for adjudicating a claim that Executive officials illegally decided to torture an individual. *See Kadic* 70 F.3d at 249.

Third, Plaintiff's claims are not "impossible to decide without an initial official policy determination of a kind clearly for non-judicial discretion," nor do they require the court to "express a lack of respect" due co-ordinate branches of government. Here, the Executive branch has officially and repeatedly stated that the United States does not condone torture. Statutory, constitutional and international law all emphatically and categorically condemn the use of torture. Plaintiff seeks only to hold accountable Defendants who flouted those laws. The potential for improper judicial interference is minimized where, as here, Plaintiff sues for damages caused by violation of a norm that has been long recognized and upheld by the United States government. For this reason, this Court's ruling will not result in "multifarious pronouncements" or undermine a "political decision already made." As Attorney General designate Gonzalez recently affirmed, it is not the official policy of the U.S. government to condone or support torture.

In sum, the six *Baker* factors and the well-established decisional law relating to the political question doctrine clearly compel denial of Defendants' motion to dismiss.

VIII. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS ASHCROFT, THOMPSON, AND MUELLER IN THEIR INDIVIDUAL CAPACITIES.

Defendants Ashcroft, Thompson, and Mueller have challenged this Court's personal jurisdiction over them in their individual capacities.[29] Mr. Arar "need make only [a] *prima facie* showing that jurisdiction exists" when the issue is decided without a full evidentiary hearing. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *see also In Re:*

[29] Defendant Ziglar has not contested this Court's personal jurisdiction over him, and has therefore waived any such argument. *See* Fed. R. Civ. P. 12(h)(1).

Magnetic Audiotape Antitrust Litig., 334 F.3d 204 (2d Cir. 2003) ("Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction.").[30]

This Court has personal jurisdiction over Defendants Ashcroft and Mueller in their individual capacities because it has jurisdiction over them in their official capacities. This Court also has personal jurisdiction over Defendants in their individual capacities under the New York long-arm statute, as well as over Defendant Thompson under New York's general jurisdiction statute, N.Y. C.P.L.R. § 301. Furthermore, Defendants' contacts with New York are sufficient to satisfy Constitutional due process requirements.[31]

A. Because This Court Has Personal Jurisdiction Over Defendants Ashcroft and Mueller in Their Official Capacities, It Also Has Jurisdiction Over Them in Their Individual Capacities

This Court has personal jurisdiction over Defendants Ashcroft and Mueller in their individual capacities because it has jurisdiction over them in their official capacities, which has not been, and could not be, challenged by Defendants. *See, e.g., Mojica v. Reno,* 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, and question certified by, Yesil v. Reno*,

[30] Defendants Mueller and Thompson assert that Mr. Arar's claims against them in their individual capacities should be dismissed because the Complaint does not plead facts to establish personal jurisdiction. *See* Mueller Br. at 28; Thompson Br. at 38. However, a "complaint need not include allegations of personal jurisdiction or venue." 1-6 Federal Litigation Guide: New York and Connecticut, § 6.03, Matthew Bender & Co., 2004. Fed. R. Civ. P. 8(a) requires that the complaint contain only "a short and plain statement of the grounds upon which the court's jurisdiction depends," which refers to subject matter rather than personal jurisdiction. *See Stirling Homex Corp. v. Homasote Co*., 437 F.2d 87, 88 (2d Cir. 1971).

[31] Although Defendants do not contend that this Court's personal jurisdiction over them would violate their due process rights, and should now be precluded from doing so, Defendants have "minimum contacts" with New York such that the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (citations omitted). At minimum, Defendants conduct satisfies the "effects test", in which there are minimum contacts even when the defendant's only contact with the forum was calculated to cause and did cause injury in the forum state. *See Calder v. Jones*, 465 U.S. 783, 789 (1984); *see also, World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted) ("defendant 'purposefully directed' his activities at residents of the forum"). In this case, Defendants certainly directed their activities at Mr. Arar in New York, where a substantial part of the events giving rise to his claims occurred, and where injury to Mr. Arar occurred. (Compl. ¶ 9.)

#97-2629, 1998 U.S. App. LEXIS 23528 (September 18, 1998); *Arias-Agramonte v. Commissioner of INS* No. 00 Civ. 2412, 2000 WL 1617999*9 (S.D.N.Y. Oct. 30, 2000); *Pottinger v. Reno*, 51 F. Supp. 2d 349, 356 (E.D.N.Y. 1999), *aff'd*, 242 F.3d 367 (2d Cir. 2000). Service of a summons "is effective to establish jurisdiction over the *person of a defendant*" who could be subjected to the jurisdiction of a New York court or when authorized by a statute of the United States. Fed. R. Civ. P. 4(k)(1) (emphasis added).

The cases cited by Defendants do not undermine this fundamental legal principle. In the majority of Defendants' cases, claims against defendants in their official capacities had either not been made at all or had been dismissed for other reasons, requiring the courts to ascertain whether they had personal jurisdiction over defendants in their individual capacities. *See Grove Press, Inc. v. Angleton,* 649 F.2d 121 (2d Cir. 1981)(defendants no longer working for the CIA when action was commenced); (see *Grove Press, Inc. v. CIA,* 608 F.2d 926, 927 (2d Cir. 1979) (for facts of case)); *Barbera v. Smith,* 654 F. Supp. 386, 392 (S.D.N.Y. 1987), *reversed on other grounds,* 836 F.2d 96 (2d Cir. 1987)(court first decided there was no claim against the Attorney General in his official capacity); *see also Wahad v. F.B.I.*, 132 F.R.D. 17, 19, 23 (S.D.N.Y. 1990); *Lee v. Carlson*, 645 F. Supp. 1430, 1433 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 712 (1987); *Nwanze v. Philip Morris Inc*., 100 F. Supp. 2d 215 (S.D.N.Y. 2000); *Davis v. United States*, No. 01 Civ. 6356, 2002 U.S. Dist. LEXIS 18088 (S.D.N.Y. 2002).[32]

[32] In *Adelona v. Webster*, 654 F. Supp. 968 (S.D.N.Y. 1987), the court granted the former director of the FBI's motion to dismiss because it lacked personal jurisdiction over him under the New York long arm statute without even addressing whether he was sued in his official and/or individual capacity, or noting what the claims against him were. Moreover, the court found that it lacked jurisdiction not only because the FBI director was not present at the apartment search that was the subject of the complaint, but because he "submitted [an] affidavit disassociating himself from the decision-making process" in the case, and he "presented evidence showing that the FBI rules set out the required constitutional standards for searches." *Id.* at 973. The plaintiffs in that case presented no evidence to support their allegation that the former FBI Director's policies contributed to the occurrence. *Id.*

Defendants cite only one case in which a court declined to exercise personal jurisdiction over a defendant in his individual capacity when it had jurisdiction over him in his official capacity. *See Green v. McCall,* 710 F.2d 29 (2d Cir. 1983). In *Green*, the court decided that the hearing examiners who unlawfully delayed the plaintiffs' paroles did not represent the federal parole commissioners in their individual capacities merely because by statute, the parole commissioners delegated their investigative powers to the examiners. *Green,* 710 F.2d at 33-34. The Court of Appeals vacated the district court's opinion under Conn. Gen. Stat. § 52-59b(a)(2), which was "virtually identical" to N.Y. C.P.L.R. § 302(a)(2), and remanded for consideration of other possible bases of jurisdiction.[33] *Id.* at 32-34. The court did not consider that it had jurisdiction over defendants in their individual capacities *because* it already had jurisdiction over them in their official capacities.

By contrast, Mr. Arar is not contending that personal jurisdiction is authorized here by virtue of any delegation of Defendants' statutory powers to others acting in New York. Rather, Defendants Ashcroft and Mueller are alleged to have been intimately involved in the decision to detain Mr. Arar and send him to be tortured in Syria, as well as in the decision to adopt the extraordinary renditions policy. (Compl. ¶¶ 4, 57.) In other words, the Defendants' own individual *ultra vires* acts within the State provide this Court with personal jurisdiction over

[33] After *Green v. McCall* and *Grove Press* were decided, the New York Court of Appeals found that jurisdiction over a corporate employee cannot be defeated under the long-arm statute because his dealings were in a corporate capacity, and pointed out "that prior New York state cases had 'provided no basis for development of the jurisdictional doctrine the Second Circuit attributed to it.'" *Kinetic Instruments, Inc. v. Lares*, 802 F. Sup. 976, 981 (S.D.N.Y. 1992), *citing Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 468, 472 (1988). Moreover, "[w]here an individual defendant acts through corporate entities within his control, the acts of those corporations can form the basis for jurisdiction over the individual." *Savage Universal Corp. v. Grazier Const., Inc.*, 2004 U.S. Dist. LEXIS 16088 at *28 (S.D.N.Y. 2004), *citing Kreutter v. McFadden Oil Corp,*, 71 N.Y.2d 460, 467, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988); *see also, Retail Software Services, Inc. v. Lashlee*, 854 F.2d 18, 22 (2d Cir. 1988) (a corporation can act as an agent for an individual for purposes of § 302(a)(1)). There is no logical or legal justification for why a court should not have personal jurisdiction over a government official where it would have jurisdiction over a corporate officer through the corporation's acts.

them. This Court therefore has personal jurisdiction over Defendants Ashcroft and Mueller in their individual capacities, as well as their official capacities, within due process constraints.[34]

B. This Court Has Personal Jurisdiction Over Defendant Thompson Under N.Y. C.P.L.R. 301 Because He Works in New York State.

Defendant Thompson, who was Deputy Attorney General and Acting Attorney General when he removed Mr. Arar to Syria, is being sued in his individual capacity only. (Compl. ¶ 15.) He argues that this Court does not have personal jurisdiction over him under the long-arm statute. *See* Thompson Br. at 39-44.

"Decisional law . . . under the [New York] CPLR . . . is the basis for determining whether a court may exercise jurisdiction over defendants who do not consent." *Merritt v. Shuttle, Inc.,* 13 F. Supp. 2d 371, 376 (E.D.N.Y. 1998) (citations omitted).

> An individual permanently employed in New York City, who regularly commutes on a daily basis to conduct business here, can be deemed present in New York as contemplated by CPLR 301. Such a person voluntarily avails herself of the protection and benefits of New York, including its laws, on a regular, continuous and systematic basis and must be deemed continuously present here for purposes of jurisdiction. Such a defendant should reasonably expect to be subject to New York State's jurisdiction, even if the cause of action is not New York related.

[34] Personal jurisdiction is also authorized over Defendants Ashcroft and Mueller in their individual capacities under the doctrine of pendent personal jurisdiction, "where a federal statute authorizes nationwide service of process, and the federal and state claims 'derive from a common nucleus of operative fact'". *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) (citations omitted). Nationwide service is authorized against Defendants in their official capacities under 28 U.S.C. § 1391(e) and under Fed. R. Civ. P. 4(i). *See Blackburn v. Goodwin*, 608 F.2d 919, 925, n.12 (2d Cir. 1979) (although declining to decide whether 1391(e) provides a source of nationwide personal jurisdiction, the court was inclined to agree with the two circuits that had addressed the issue and decided that it did); *but see Green v. McCall*, *supra,* 710 F.2d 29 at 31, n.4 (without analysis, court stated that argument on appeal that §1391(e) provides pendent jurisdiction over individual capacity was meritless); s*ee also Perez v. Reno*, No. 97 Civ. 6712, 2000 WL 686369#3 (S.D.N.Y. May 25, 2000) (court noted that petitioner had not argued that Fed. R. Civ. P. Rule 4(i) "authorizes service of process without recourse to New York law"). There is no justification for applying the doctrine to pendent state claims, but not pendent federal claims, and all of Mr. Arar's claims derive from a common nucleus of operative fact. (Compl. ¶ 57.)

FCNB Spiegel Inc. v. Dimmick, 163 Misc. 2d 152, 155, 619 N.Y.S.2d 935, 937 (N.Y. Civ. Ct. 1994).

This Court does, however, have personal jurisdiction over Defendant Thompson under New York's general jurisdiction statute because he is physically present in New York – he works in works here N.Y. C.P.L.R. § 301. Defendant Thompson is currently Senior Vice President of Government Affairs, General Counsel and Secretary at PepsiCo,[35] and is based in Purchase, New York.[36]

Defendant Thompson's work in New York also satisfies federal due process standards. *Id.* at 156, 619 N.Y.S. 2d at 938; *see also, ABKCO Indus., Inc. v. Lennon,* 377 N.Y.S.2d 362, 366-67 (1975), *aff'd in part, modified in part*, 384 N.Y.S. 2d 781 (1st Dep't 1976) (finding personal jurisdiction over an individual doing business in New York where the cause of action did not arise out of that business).

---

[35] *See* http://www.pepsico.com/company/officers-directors.shtml; s*ee also* http://www.brookings.edu/scholars/lthompson.htm ("In August 2004, Larry Thompson became senior vice president and general counsel of PepsiCo."); *Larry D. Thompson: senior vice president and general counsel, Pepsico*, Ebony Magazine, December 2004, available at http://www.findarticles.com/p/articles/mi_m1077/ is_2_60/ai_n7577916.

[36] PepsiCo Press Release dated August 23, 2004, available at http://phx.corporate-ir.net/phoenix.zhtml?c=78265&p=IROL-NewsText&t=Regular&id=606066&. *See also, Larry Thompson's Job With Pepsico*, November, 2004 issue of Corporate Counsel, available at http://talkleft.com/new_archives/008701.html. "Larry D. Thompson, Ashcroft's former deputy, said he was 'fully engaged and committed' to a senior executive position he took last summer with PepsiCo in Purchase, N.Y., according to a statement issued by the soft drink and snack foods company," *Speculation Swirls Around Top Justice Job; John Ashcroft's former deputy shows no interest in taking the position if the attorney general resigns*, Richard B. Schmitt, Los Angeles Times; Nov 5, 2004; pg. A.12, available at http://www.truthout.org/docs_04/110604J.shtml.

Should the Court determine that Defendant Thompson must be served while working in New York, Plaintiff stands ready to accomplish service. This Court, therefore, has personal jurisdiction over Defendant Thompson under N.Y. C.P.L.R. § 301.[37]

C. This Court Has Personal Jurisdiction Over Defendants Ashcroft, Thompson and Mueller under the New York Long Arm Statute.

Defendants Ashcroft, Thompson and Mueller are also subject to this Court's personal jurisdiction under the New York Long Arm Statute. *See* N.Y. C.P.L.R. § 302. By causing Mr. Arar to be unlawfully detained and interrogated for thirteen days in New York before sending him off to be detained and interrogated through torture, (Compl. ¶¶ 4, 26, 27, 47), Defendants have "engaged in some purposeful activity in this State in connection with the matter in suit." *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.,* 15 N.Y.2d 443, 457, 261 N.Y.S. 2d 8, 18 (1965); *see also, Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 16, 308 N.Y.S. 2d 337, 339 (1970).

"[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful

---

[37] This Court may also have general personal jurisdiction over Defendants Ashcroft and Mueller (and Thompson at the time of service) under N.Y. C.P.L.R. § 301 because they transact or transacted business in New York on a regular basis.

> In addition, service reaches a non-domiciliary who regularly transacts business in New York, even where there is no nexus between the claim and the state, pursuant to C.P.L.R. § 301. As the Henderson [v. INS, 157 F.3d 106 (2d Cir. 1998)] Court noted, "because the Attorney General transacts business in New York on a regular basis, she is unquestionably subject to long-arm jurisdiction under New York law." *157 F.3d at 124 n.19.* See *Mojica, 970 F. Supp. at 167; Nwankwo, 828 F. Supp. at 175* (citing Commentary, *N.Y. C.P.L.R. § 301* (McKinney 1990)). Thus, because New York's long-arm jurisdiction reaches the Attorney General, she is subject to the personal jurisdiction of this Court."

Arias-Agramonte v. Commissioner of INS, No. 00 Civ. 2412, 2000 WL 161799*9-10 at *33-34 (S.D.N.Y. Oct. 30, 2000). The distinction between individual and official capacities does not apply to N.Y. C.P.L.R. § 301, *see, infra,* discussion regarding § 302(a)(1).

and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp*., 71 N.Y.2d 460, 467, 527 N.Y.S. 2d 195, 198-99 (1988) (citations omitted).

Moreover, "[n]o single event or contact connecting defendant to the forum state need be demonstrated; rather, the totality of all defendant's contacts with the forum state must indicate that the exercise of jurisdiction would be proper." *Cutco Indus., Inc. v. Naughton,* 806 F.2d 361, 365 (2d Cir. 1986) (citations omitted). "In determining whether an agency exists under § 302, courts have focused on the realities of the relationship in question rather than the formalities of agency law." *Id.* at 366.

1. Defendants Ashcroft, Thompson and Mueller Committed Tortious Acts Within New York Under N.Y. C.P.L.R. § 302(a)(2).

This Court has jurisdiction over a defendant who in-person or through an agent commits a tortious act within New York, from which the cause of action arises. N.Y. C.P.L.R. § 302(a)(2). Defendants Ashcroft, Thompson, and Mueller—either themselves or through their agents and co-conspirators—unlawfully detained and interrogated Mr. Arar for thirteen days in New York, and then sent him to Syria to be tortured. (Compl. ¶¶ 4, 26, 27, 47, 57.) These tortious acts provide the Court with jurisdiction over Defendants. It is well established that acts "committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under CPLR 302(a)(2)." *Best Cellars Inc. v. Grape Finds at Dupont, Inc*., 90 F. Supp. 2d 431, 445 (S.D.N.Y. 2000) (citations omitted); *see also, Solv-Ex Corp. v. Quillen*, No. 96 civ. 6057, 1997 WL 452023 (S.D.N.Y. Aug. 7, 1997) (plaintiff met "modest burden" of prima facie showing by alleging that defendant was part of the conspiracy to drive down plaintiff's stock price through acts of co-conspirators in New York).

In *Grove Press, Inc. v. Angleton,* 649 F.2d 121 (2d Cir. 1981), relied on by Defendants (Thompson Br. at 38, 42-23; Mueller Br. at 29-31),[38] the court of appeals found that the evidence to connect appellants with a conspiracy that they acquiesced to several internal-security projects conducted by the CIA was extremely weak.[39] *Press, Inc. v. Angleton,* 649 F.2d at 123. No part of the common action occurred in New York, and there was no showing that any of the CIA employees in New York were parties to the common agreement.[40] *Id.* at 123.

In this case, the agents in New York were under the control of their superiors in Washington D.C., who directed how and when Mr. Arar would be detained and questioned here, and then transported for detention and interrogation under torture in Syria. While being interrogated by U.S. officials, the local agents were discussing the issue with "Washington D.C."

---

[38] The reasoning in *Grove Press* concerning the requirement that an agent represent defendant in his individual capacity is questionable in that it relied significantly on *Marsh v. Kitchen*, 480 F.2d 1270 (2d Cir. 1973), which was overturned to the extent it required a traditional agency relationship. *Galgay v. Bulletin*, 504 F.2d 1062, 1065 (2d Cir. 1974) (citations omitted); *see also, Lehigh Valley Industries, Inc. v. Birenbaum,* 527 F.2d 87, 90, n3 (2d Cir. 1975); *Dixon v. Mack*, 507 F. Supp. 345, 352, n.7 (S.D.N.Y. 1980). In *Marsh,* the court rejected plaintiff's argument that Secret Service agents who arrested and processed him in New York were the "agents" of Missouri Secret Service agents who had obtained the warrant for his arrest. *Id.* at 1270-1272. The New York agents were under the control of "their own superiors in New York, who directed how and when the arrest should be made." *Id.* at 1273.

[39] Plaintiff brought suit against a former CIA director and employees challenging their investigation methods. *Grove Press, Inc. v. Angleton,* 649 F.2d at 122. The complaint alleged that from 1955 to 1976 defendants "conspired to, participated in, authorized or failed to supervise certain activities", including opening a file on the company, infiltrating its activities, surveilling its employees, opening its mail, wiretapping, etc. *Grove Press, Inc. v. CIA,* 608 F.2d 926, 927 (2d Cir. 1979). The allegations of conspiracy here are not merely the approval of internal investigation and surveillance projects over a twenty-one year period. Mr. Arar alleges that these particular government officials conspired with each other and with Syrian officials to have him interrogated with the use of torture. (Compl. ¶ 69.) Each Defendant actually participated in and had an integral role in causing Mr. Arar to be tortured.

[40] Here, it is undisputed that a substantial part of the "common action" occurred in New York. Mr. Arar was detained and interrogated in New York for nearly two weeks before he was delivered to Syria. (Compl. ¶ 4.) Mr. Arar has also alleged that Defendants were each parties to the "common agreement." (Compl. ¶ 69.) Defendants' co-conspirators and agents in New York were acting at their direction and under their control, whether specifically with regard to Mr. Arar, or in carrying out the "extraordinary renditions" policy.

(Compl. ¶¶ 43-45.) Defendants also implemented the unlawful "extraordinary renditions" policy through which Mr. Arar was sent to Syria to be tortured. (Compl. ¶ 57.)

This Court also has personal jurisdiction over Defendants for ratifying acts committed in New York with the purpose of accomplishing the conspiracy's shared goal. *See Dixon v. Mack,* 507 F. Supp. 345 (S.D.N.Y. 1980) (finding personal jurisdiction under § 302(a)(2) over co-conspirator who performed no acts in New York, and who did not join the conspiracy until after co-conspirators' acts in New York were completed, because plaintiff alleged that the out-of-state co-conspirator knew that an overt act had occurred in New York). At the very least, Defendants ratified the acts of their co-conspirators in New York. (Compl. ¶ 24.)

Defendants' ratification also satisfies any requirement that the co-conspirators in New York acted under the control of, or on behalf of, Defendants.[41] *Id.* at 351. The requisite benefit accrues to the out-of-state conspirator when the acts of the New York conspirators realize the conspiracy's goals. *See Dixon* 507 F. Supp. at 351; *see also Clark v. U.S.*, 481 F. Supp. 1086 (S.D.N.Y. 1979).[42] The conspiracy to have Mr. Arar subjected to torture in Syria was realized, and therefore all Defendants benefited. (Compl. ¶¶ 68-69.) Even if one of the Defendants did not

[41] It is questionable whether out-of-state Defendants are even required to have directed and controlled co-conspirators in New York. The court in *Dixon* saw no reason for this requirement that could be construed from *Grove Press*, because it would unnecessarily require that co-conspirators have "masterminded" the acts. *Dixon, supra*, 507 F. Supp. at 352, n7. Moreover, the "suggestion in Grove Press that jurisdiction over an out-of-state conspirator depends in part on his having 'directed and controlled the New York activities,' 483 F. Supp. at 138," arises in that part of the opinion in which the court's effort to distinguish *Marsh v. Kitchen*, 480 F.2d 1270 (2d Cir. 1973), which was overruled by *Galgay* to the extent it required a traditional agency relationship. *Dixon, supra*, 507 F. Supp. at 352, n7.

[42] The court's statement in *Barbera v. Smith*, 654 F. Supp. 386, 394 (S.D.N.Y., 1987) that *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979) is no longer good law in light of *Grove Press*, with all due respect, is inaccurate, as explained in *Dixon,* 507 F. Supp. at 352, n7.

know Mr. Arar had been detained, interrogated, and mistreated until the plan was underway, he would nevertheless be liable for ratifying the acts.[43] *See Dixon*, 50 F. Supp. at 351.

Defendants' agents in New York were not simply agents of the U.S. Government. It was for Defendants' *personal* benefit that Mr. Arar's rendition had to be done covertly by their agents.

> If defendants acted to avoid *personal* liability and publicity, then they thereby became subject to personal jurisdiction in New York because such actions would have been taken for their personal benefit. Jurisdiction may be asserted even if defendants acted from mixed motives, that is, if they acted in what they perceived to be the government's best interest but at the same time were acting for their personal benefit as well.

Barrett v. USA, 646 F. Supp. 1345, 1352 (S.D.N.Y. 1986) (emphasis in original).[44] Defendants Ashcroft, Thompson and Mueller *covertly* implemented the extraordinary rendition policy to deliver Mr. Arar to Syria to be tortured. (Compl. ¶ 24.) Their agents executed Mr. Arar's rendition from New York in secret at least in part to avoid personal liability and negative publicity for the men who held the highest offices at the Department of Justice and the FBI.

Defendants' agents acted covertly throughout Mr. Arar's ordeal. They did not inform the Office for Canadian Consular Affairs of Mr. Arar's detention. (Compl. ¶ 24.) When Mr. Arar

---

[43] Defendant Thompson's argument that the complaint does not allege that he knew that the federal agents had detained, interrogated, and mistreated Mr. Arar prior to the signing of the October 8, 2002 removal order is therefore inapposite. *See* Thompson Br. at 42.

[44] In *Barrett,* the Plaintiff had died as a result of drug injections he was given at the New York State Psychiatric Institute (NYSPI), which were later discovered to have been supplied by the United States Army as part of chemical warfare experiments. *Barrett,* 646 F. Supp. at 1347. Plaintiff asserted a "conspiracy to conceal the Army's involvement in the drug testing program." *Id.* at 1351. After discovery was complete, the court found that there was an issue of fact regarding whether the conspiracy to cover up the role of the Army and their personal role was motivated by concerns about personal liability, adverse publicity, and their professional reputations.

was able to have an immigration attorney retained for him, she did not receive sufficient notice to permit her to be present at Mr. Arar's interrogation regarding his opposition to "removal" to Syria. (Compl. ¶ 43.) The day before Mr. Arar was whisked out of the country, his attorney was lied to at least twice by Defendants' agents regarding his whereabouts. (Compl. ¶ 46.) In addition to furthering Defendants' conspiracy, these and other efforts by Defendants' New York agents to conceal what they were doing were intended to protect Defendants' professional reputations, and avoid adverse publicity and personal liability for Defendants. (*See, e.g.,* Compl. Exs. C & E.) For this reason, this Court also has personal jurisdiction under § 302(a)(2) over Defendants Ashcroft, Thompson, and Mueller. (Compl. ¶¶ 4, 26, 27, 47, 57.)

2. Plaintiff Arar's Causes of Action Arise from the Transaction of Business in New York by Defendants Under N.Y. C.P.L.R. § 302(a)(1).

Mr. Arar's causes of action arise from the transaction of business in New York by Defendants Ashcroft, Thompson and Mueller and their agents under N.Y. C.P.L.R. § 302(a)(1). A "single transaction in New York, out of which the cause of action has arisen, may satisfy the requirement of the transaction of business provision." *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.,* 15 N.Y.2d 443, 456, 261 N.Y.S. 2d 8, 18 (1965) .

For example, in *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 19, 308 N.Y.S. 2d 337, 341-42 (1970), the New York Court of Appeals found personal jurisdiction under § 302(a)(1) over a California buyer who placed bids over the telephone at an auction in New York through an employee of the plaintiff art gallery. The court exercised jurisdiction over the Defendant for his *own* act, and also noted that his use of plaintiff's employee to make his transaction constituted transacting business in New York through an agent. *Id.* "[P]articularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without ever actually setting foot in the State." *Id.* at 17 (citations omitted); s*ee also CT*

Chem. (USA), Inc. v. Horizons Intl., Inc., 106 F.R.D. 518, 520 (S.D.N.Y. 1985) (contracts negotiated telephonically and perhaps at a lunch meeting are sufficient under § 302(a)(1)).

Mr. Arar's detention at JFK airport was the first phase of the plan that resulted in his torture in Syria. Accordingly, that detention is sufficient to trigger jurisdiction over the Defendants in New York. *See Arias-Agramonte, supra,* 2000 U.S. Dist. LEXIS 15716) at *33 (the "act of the Attorney General's agents in transferring [petitioner] from detention at John F. Kennedy airport to an INS facility in York, Pennsylvania satisfy § 302(a)(1)"); *see also Mojica,* 970 F. Supp. 130.

The court in *Arias-Agramonte* applied the *Grove Press* test and found that the agent acted in the state "for the benefit of, and with the knowledge and consent of" the Attorney General.[45] *Arias-Agramonte, No. 00 Civ. 2412, 2000 WL 161799,* at *9-10. It is irrelevant that the court's finding in *Arias-Agramonte* under § 302(a)(1) was in the context of habeas corpus petition against the Attorney General in her official capacity. Defendants do not cite to any case establishing that in the Second Circuit or under New York law there is a distinction between official and individual capacities under any subsection other than § 302(a)(2). "Under New York law it is established that this *subsection* does not provide jurisdiction over a defendant in his individual capacity based on an agent's tortious act within the state unless the agent was representing the defendant in his individual capacity." *Green v. McCall,* 710 F.2d 29, 33 (2d Cir.

[45] The acts of a non-domiciliary's agent confer jurisdiction over his principal under C.P.L.R. § 302(a)(1) if the agent acted in the state "for the benefit of, and with the knowledge and consent of" the non-resident principal. *Grove Press, Inc. v. Angleton,* 649 F.2d 121, 122 (2d Cir. 1981); *see also Galgay v. Bulletin Co.,* 504 F.2d 1062, 1065 (2d Cir. 1974) (stating that an agent must act "at the request and for the business purposes of" the principal). Here, the act of the Attorney General's agents in transferring Arias from detention at John F. Kennedy airport to an INS facility in York, Pennsylvania satisfy § 302(a)(1). *See Mojica,* 970 F. Supp. at 166-67*; Yesil v. Reno*, 958 F. Supp. 828, 835 (S.D.N.Y. 1997)*; Nuankuo v. Reno*, 828 F. Supp. 171, 174 (E.D.N.Y. 1993).

1983) (citing *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122-23 (2d Cir. 1981) (other citations omitted) (emphasis added). [46]

Mr. Arar has alleged that Defendants *themselves* adopted the extraordinary renditions policy, and delivered Mr. Arar to Syria pursuant to that policy so that he would be interrogated under torture. (Compl. ¶¶ 24, 57.) He has not sued Defendants Ashcroft, Thompson, and Mueller in their individual capacities because they head the responsible agencies. Instead, he alleges that the decision to institute and carry out Mr. Arar's "extraordinary rendition" took place at the highest levels; each Defendant's participation was necessary to implement the policy and send Mr. Arar to his torture in Syria.

Not only are contacts by Defendants with New York regarding Mr. Arar's removal to Syria relevant in determining personal jurisdiction, but any such contacts in which the extraordinary renditions policy was formulated, discussed, or implemented, or which "were aimed at laying the groundwork for" this policy are also relevant. In *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the court found that defendant's "contacts with New York [were] sufficient to establish a prima facie showing of personal jurisdiction over [defendant] inasmuch as [his] activities in New York were aimed at laying the groundwork for the LSD testing

[46] Although the court in *Barbera v. Smith*, 654 F. Supp. 386 (S.D.N.Y. 1987), reversed on other grounds, 836 F.2d 96 (2d Cir. 1987), granted a former Attorney General's motion to dismiss for lack of personal jurisdiction based on an agency theory under subsections §§ 302(a)(1), (a)(2), and (a)(3), the court did not specifically consider whether the agency analysis set forth in *Grove Press* applied to subsections of the long-arm statute other than § 302(a)(2). The plaintiff in *Barbera* alleged that the former U.S. Attorney General "negligently and recklessly failed to [adequately] train and supervise [his subordinates]," Assistant United States Attorneys (AUSAs), which caused her daughter's death. *Barbera*, at 393. One of the AUSAs told the killer's attorney that Barbera was a cooperating witness, and then had refused to give her police protection after another person thought to be an informant disappeared. The court found, as it did in *Grove Press* that plaintiff must allege more than that the agents "'were simply United States employees acting as agents for the United States government'" in order to show that they were the Attorney General's personal agents representing him in his individual capacity. 654 F. Supp. At 393, citing *Grove Press, Inc. v. Angleton*, 649 F.2d at 123. Unlike the present case, the Attorney General in *Barbera* was not alleged to have implemented or overseen a governmental policy or program responsible for the complained-of acts or to have been personally involved.

program of which [plaintiff] claims to have been one of the unwitting victims."[47] *Kronisch,* at 131; *see also Clark v. United States*, 481 F. Supp. 1086, 1097 (S.D.N.Y. 1979) (court found personal jurisdiction over the FBI Director under § 302(a)(2) and (3)(i) because it was alleged that he "developed and authorized the program of illegal surveillance against plaintiffs in New York").

The Government has a covert extraordinary renditions policy of removing non-U.S. citizens who are suspected of links to terrorist groups to countries where interrogations under state-sanctioned torture are routine. (Compl. ¶ 24.) Any contacts Defendants had with New York in formulating or implementing the "extraordinary rendition" policy should also be considered for personal jurisdiction purposes, and jurisdictional discovery should be granted to further discern Defendants' contacts with New York.

3. Defendants Ashcroft, Thompson and Mueller Committed Tortious Acts From Outside of the State Which Injured Mr. Arar In New York Under N.Y. C.P.L.R. § 302(a)(3), and They Regularly Engaged In Persistent Courses of Conduct In New York.

Defendants also committed tortious acts outside of the state, causing injury in New York, and engaged in a persistent course of conduct in New York. N.Y. C.P.L.R. § 302(a)(3)(i). Defendants Ashcroft, Thompson, and Mueller caused Mr. Arar to be unlawfully detained and interrogated in New York for thirteen days, and conspired with and aided and abetted other officials to deliver Mr. Arar to Syria to be tortured. (Compl. ¶¶ 4, 14, 15, 26, 27, 47.)

[47] The plaintiff in *Kronisch* sued two CIA officials, claiming that an "agent of the United States government placed LSD in his drink in a Paris cafe in October 1952" as part of the CIA's program to test the effects of mind-altering drugs on unwitting subjects. *Id.* at 116. The court found jurisdiction under § 302(a)(1) over the head of the CIA's drug experimentation program in the 1950s (*Id.* at 124), who plaintiff also claimed might have been the agent to drug him. *Id.* at 116. Defendant had made approximately six trips to New York in 1952, allegedly concerning the LSD testing program. *Id.* at 130. The Court made clear that a jury might be skeptical that plaintiff was drugged by defendant. *Id.* at 126.

Defendant Thompson, Acting Attorney General, signed the order removing Mr. Arar to Syria so that authorities there would use torture to interrogate him. (Compl. ¶ 15.) Defendant Ashcroft was responsible for making the decision to remove Mr. Arar from New York to Jordan and Syria, a decision that was made while Mr. Arar was in New York. (Compl. ¶¶ 14, 46-48.) Along with the other Defendants, Defendant Mueller, who is responsible for counter-terrorism operations, sent Mr. Arar from New York to Syria so that he would be interrogated by torture. (Compl. ¶ 21.)

The adoption, ratification, and implementation of the extraordinary renditions policy to remove people to countries in order to be interrogated under torture should be deemed sufficient as a tortious act which caused injury to Mr. Arar in New York.[48] *See Kronisch,* 150 F.3d at 131 (New York contacts aimed at laying the groundwork for a program of which plaintiff was a victim sufficient for personal jurisdiction); *see also Clark*, 481 F. Supp. at 1097.

Even if adopting and implementing the extraordinary renditions policy is deemed in itself an insufficient act, Mr. Arar has made sufficient allegations that Defendants Ashcroft, Thompson, and Mueller, were (or because of their positions *must* have been)[49] *personally*

---

[48] Defendant Mueller argues that because Mr. Arar had not been admitted to the United States, he was therefore not "within" New York within the meaning of §302(a)(3). *See* Mueller Br. at 30, n.8. He cites only to *Shaughnessy v. United States*, 345 U.S. 206 (1953), presumably for the "entry fiction" that an unadmitted alien has not entered the United States for immigration purposes. Defendant, however, cites no authority to expand that proposition to the New York long-arm statute for personal jurisdiction purposes.

[49] The President of the United States has issued an order directing that a specific person in the United States be detained in military custody when he was merely "closely associated with Al Qaeda". *See Rumsfeld v. Padilla*, __ U.S.__ 124 S. Ct. 2711, 2716, n.2 (2004). It is difficult, if not impossible to believe that someone who was determined to be a *member* of Al Qaeda (albeit incorrectly) flew into J.F.K. airport just over one year after September 11, 2001, and was detained and interrogated in New York for nearly two weeks, and the nation's top two law enforcement officers (the Attorney General and the Deputy Attorney General), and the Director of the FBI (who is responsible for counter-terrorism operations), were not personally involved in determining his fate. A presumption that they were *not* involved cannot be made without the benefit of discovery.

involved in removing him to Syria to be tortured. (Compl. ¶¶ 14, 15, 21, 46-48.) Moreover, while Mr. Arar was interrogated by government officials, he was informed that his interrogators were discussing the issue with "Washington D.C." (Compl. ¶¶ 43-45.) Mr. Arar does not merely allege that these Defendants are culpable because of the chain of command, or their supervisory rolls, but rather that they were each individually involved in sending him to his torture. *Id.*

Defendants have regularly engaged in persistent courses of conduct in New York, as explained in the discussion, *supra*, regarding Defendants' transaction of business in New York under N.Y. C.P.L.R. § 302(a)(1).[50]

D. PLAINTIFF ARAR IS ENTITLED TO DISCOVERY.

If this Court determines that there are insufficient grounds on the existing record to support personal jurisdiction, Mr. Arar respectfully requests that a decision on personal jurisdiction be deferred until the completion of discovery since the personal jurisdiction issues are so intertwined with the issues of Defendants' personal participation in Mr. Arar's extraordinary rendition. In *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976 (S.D.N.Y. 1992), the court deferred determination of personal jurisdiction until after all discovery was completed because the "inquiries into jurisdiction and liability can become entwined, and it is clear that jurisdictional discovery will substantially overlap with general discovery. . .." *Id.* at 988; s*ee also Barrett, supra,* 646 F. Supp. at 1350 (S.D.N.Y. 1986) (even after discovery was complete, the court found that "[s]ince the question of jurisdiction and the merits of this action are so intertwined, plaintiff should not be required to establish jurisdiction by [a preponderance of the

[50] Again, the only case cited by Defendants regarding the application of the official/individual agency distinction under § 302(a)(3) was *Barbera,* 654 F. Supp. 386, *reversed on other grounds,* (2d Cir. 1987), which did not consider whether the decisions in *Grove Press, supra,* and *Green v. McCall, supra,* should be extended beyond § 302(a)(2). Moreover, *Barbera* is questioned by its reliance on *Marsh, supra,* since it was overruled by *Galgay* to the extent it required a traditional agency relationship. *Dixon, supra*, 507 F. Supp. at 352, n.7.

evidence] before trial."), *citing United States v. Montreal Trust Co*., 358 F.2d 239, 242 (2d Cir. 1966); 12 Moore's Federal Practice, 12.07[2.-2].

Here, Defendants' personal involvement in detaining, interrogating, and sending Mr. Arar to his torture for purposes of *Bivens* liability greatly if not completely overlaps with the personal jurisdiction inquiry of their contacts with New York, where Mr. Arar was intercepted, detained and interrogated for nearly two weeks, and removed from. Any facts related to Defendants' direct involvement in Mr. Arar's ordeal in New York, whether or not through agents, will be the same facts relevant to this Court's jurisdiction over them. Because these issues are inextricably linked, a decision on personal jurisdiction should be deferred until the completion of all discovery.[51]

At a bare minimum, Mr. Arar respectfully requests that he be allowed to conduct jurisdictional discovery to determine what contacts Defendants Ashcroft, Mueller, and Thompson have had with the forum, through their agents or otherwise. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13, (1978) ("discovery is available to ascertain the facts bearing on [jurisdictional] issues"); *see also In Re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 205 (2d Cir. 2003) (remanded to district court because "plaintiffs should have been afforded an opportunity to engage in jurisdictional discovery with regard to [defendant] prior to the court ordering dismissal"); *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990) ("generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue").

[51] *First City, N.A. v. Rafidain Bank,* 150 F.3d 172 (2d Cir. 1998), cited by Defendant Thompson, also supports Plaintiff Arar's request for discovery. Thompson Br. at p. 44. In *First City, N.A.,* the appeals court vacated and remanded the district court's dismissal of plaintiff's complaint for lack of subject matter jurisdiction under the FSIA *after* it had already permitted limited discovery on plaintiff's alter ego theory. 150 F.3d at 174. Plaintiff had argued that the court had jurisdiction over the Iraqi Central Bank because it was the alter ego of a commercial bank wholly owned by Iraq. *Id.* The appeals court ordered the district court to permit full discovery against the commercial bank, and then to determine whether further jurisdictional discovery against the Central Bank was warranted. *Id.* at 177.

Under the New York state law standard for jurisdictional discovery, plaintiff "need only demonstrate that facts 'may exist' whereby to defeat the motion." *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 466, 254 N.Y.S. 2d 905, 907-08 (1974); *see also, Dept. of Economic Dev. v. Arthur Andersen & Co.*, 747 F. Supp. 922, 930 (S.D.N.Y. 1990) (district court applied New York state law standard, denying personal jurisdiction discovery because "[n]o attempt has been made by [third-party plaintiff] to articulate jurisdictional facts that 'may exist' which further discovery would substantiate.")

This practice under N.Y. C.P.L.R. § 3211, which the Court of Appeals deemed analogous to Fed. R. Civ. P. 12 and 56(f), "protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party." *Id.* The facts regarding the participation by Defendants Ashcroft, Mueller, and Thompson beyond what Mr. Arar has alleged are in their "exclusive control", and should be disclosed by them through discovery. "A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum." *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996).

"A prima facie showing of jurisdiction . . . may impose undue obstacles for a plaintiff, particularly one seeking to confer jurisdiction under the 'long arm' statute. (CPLR 302.)" *Peterson, supra,* at 467. The court in *Peterson* found that "plaintiffs have made a sufficient start, and shown their position not to be frivolous", *id.* (citation omitted), and decided that plaintiffs "should have further opportunity to prove other contacts and activities of the defendant in New York as might confer jurisdiction under the long-arm statute, thus enabling them to oppose the motion to dismiss." *Id.*

Mr. Arar has alleged that Defendants Ashcroft, Thompson and Mueller were responsible for his detention and interrogation in New York, and for sending him from New York to Syria to be tortured. (Compl. ¶¶ 4, 14, 15, 21.) At one of Mr. Arar's interrogation sessions in New York, he was told that his interrogators were discussing the issue with "Washington D.C." (Compl. ¶¶ 43-45.) The only way to ascertain the breadth of Defendant' contacts with this forum is through discovery. Defendants Ashcroft, Thompson, and Mueller may have been communicating directly with their agents in New York via telephone, email, or otherwise. They may have personally directed that Mr. Arar be held, interrogated, and sent to Syria. Defendants may have at some point had discussions in New York or with people in New York which "were aimed at laying the groundwork for" the extraordinary renditions policy, non-refoulement policy, or "counter-terrorism" policies regarding non-citizen visitors more generally. *See Kronisch, supra*, 150 F.3d at 131. Defendants may have even been present in New York during Mr. Arar's ordeal.

IX. PLAINTIFF IS ENTITLED TO DECLARATORY RELIEF

Plaintiff seeks a judgment declaring that Defendants' conduct of detaining him for the purpose of transporting him to Syria for arbitrary detention and torture violated his rights under the TVPA and the Due Process Clause of the U.S. Constitution. (Compl. ¶ 24.)

The Declaratory Judgment Act states specifically that "any court in the United States, upon the filing of the appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Declaratory Judgment Act, 28 U.S.C. § 2201. The Supreme Court has made clear that where there is a "substantial controversy, between parties of adverse legal interests, of sufficient immediacy and reality," a declaratory judgment could then be properly issued. *See Maryland Casualty Co. v. Pacific Coal & Oil Co., et al*, 312 U.S. 270, 273 (1941).

To invoke the relief available under the Declaratory Judgment Act, as Defendants correctly note, Mr. Arar must still be able to establish the constitutional minima for Article III standing. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court held that the plaintiff must show: 1) that he has suffered a particularized injury to a legally protected interest that affects him "in a personal and individual way;" 2) that the injury is traceable to the challenged actions of the defendant; and 3) that it is "likely" that a favorable decision by the court will relieve the injury. 504 U.S. at 560-61.

Plaintiff's injuries unequivocally meet the standard of "sufficient immediacy and reality" for declaratory relief. *Maryland* Casualty *Co.,* 312 U.S. at 273. Defendants detained him for purposes of removing him detention to Syria for arbitrary detention and interrogation under torture. While many of his injuries can be remedied only by damages, Mr. Arar is currently suffering a specific ongoing legal disability as a direct result of Defendants' unlawful actions—he is subject to a five-year bar preventing him even from applying for entry to or transit through the United States. The bar directly affects Mr. Arar because he has worked for sustained periods for American companies here in the past, and has stated that he would like to return in the future for that purpose, as well as to visit relatives and friends. (Compl. ¶12.) In fact, at the time of his interdiction by Defendants at JFK Airport, Mr. Arar still retained a valid business visa for work in the United States. As a direct result of Defendants' unconstitutional actions, Mr. Arar's status changed from the holder of a valid business visa to that of a person barred even from consideration for entry for five years. That is plainly a cognizable legal injury, and that injury was directly caused by Defendants' challenged actions.

The Government relies heavily on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), arguing that unless Plaintiff can show that the alleged

illegal action will recur to him in the future, he has no standing to seek declaratory or injunctive relief. But *Lyons* and *O'Shea* involved injuries that had been fully complete at the time of the lawsuit, and therefore prospective declaratory or injunctive relief could redress plaintiffs' injuries only if they could show that they were likely to be injured in the same way by Defendants in the future. As the Court stated in *Lyons*, "[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . *if unaccompanied by any continuing, present adverse effects*." 461 U.S. at 102 (quoting *O'Shea*, 414 U.S. at 495-96). If Plaintiff were only complaining about the physical injuries caused by his detention and torture, that analysis might be applicable.

Here, by contrast, Plaintiff's injury is "accompanied by continuing present adverse effects," and therefore the *Lyons-O'Shea* analysis is inapposite. Plaintiff is suffering an *ongoing* legally cognizable injury—namely, the five-year bar on reentry—that is redressable *now*. Accordingly, his claim does not rest only on "past exposure to illegal conduct," and he need not show that his injury is likely to recur in the future. *Ward v. Utah*, 321 F.3d 1263, 1269 (10th Cir., 2003) (finding standing where plaintiff suffered "'continuing, present adverse effects' in the form of the chilling of his First Amendment rights"); *Canatella v. California*, 304 F.3d 843, 853 (9th Cir., 2002) (finding standing based on "continuing, present adverse effects" in form of chilling of First Amendment rights); *Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000) (identifying "continuing, present adverse effects" as "the exception recognized in *O'Shea* and *Lyons").*

This conclusion is compelled by *Swaby v. Ashcroft*, 357 F.3d 156, 159-61 (2d Cir. 2004). In that case, the Second Circuit held that the very injury Mr. Arar suffers here—a five-year bar to reentry—was sufficient to constitute an injury in fact, caused by defendants, and redressable by a

judicial decision in the foreign national's favor. As the Court wrote, in language directly applicable here:

> In order to satisfy the case-or-controversy requirement, petitioner "'must have suffered, or be threatened with, an actual injury traceable to the [respondent] and likely to be redressed by a favorable judicial decision.'" Petitioner asserts an actual injury-a bar to reentering the United States-that has a sufficient likelihood of being redressed by the relief petitioner seeks from this Court.

357 F.3d at 159-60. (quoting *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477 (1990)). Here, too, Mr. Arar "asserts an actual injury—a bar to reentering the United States—that has a sufficient likelihood of being redressed by the relief [he] seeks from this Court." No more is required to establish standing to sue.

The United States seeks to distinguish *Swaby* on the ground that the Court was addressing mootness, not standing, and notes that these are distinct doctrines. *See* Govt. Br. at 10 n.7. But while the doctrines are distinct for some purposes, they are hardly unrelated. Indeed, the very case the *Swaby* Court quotes in the passage noted above, *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, is a mootness decision that expressly quotes and relies upon standing cases to define the requirements of the continuing case or controversy. *See Lewis*, 494 U.S. at 477 (quoting *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) and *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-473 (1982)). Both mootness and standing are driven at bottom by the Article III requirement of a concrete case or controversy. If the existence of a bar to reentry keeps a case or controversy alive for Article III purposes, it would also be sufficient as a basis to establish standing in the first place.

CONCLUSION

For the reasons articulated above, Plaintiff respectfully requests that the Court deny the Defendants' motions to dismiss the Complaint.

Dated: January 14, 2005
New York, New York

Respectfully submitted,

THE CENTER FOR CONSTITUTIONAL RIGHTS

By: Barbara J. Olshansky
Barbara J. Olshansky (BO 3635)
Jules Lobel
David Cole
Maria LaHood

666 Broadway, Seventh Floor
New York, New York 10012
Tel. (212) 614-6439
Fax (212) 614-6499

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of Plaintiff Maher Arar's Memorandum of Law In Opposition to Defendants' Motions to Dismiss to be sent by first class mail, postage pre-paid, and sent via electronic mail, on this 14th day of January, 2005, in *Arar v. Ashcroft, et al.*, 04-cv-0249 (DGT)(VVP), to:

For Def. Ashcroft (individual capacity):
Larry Gregg, Esq.
Brian D. Miller, Esq.
Assistant U.S. Attorney
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314-5794

larry.gregg@usdoj.gov
brian.miller@usdoj.gov

For Def. Mueller (individual capacity):
Ira H. Raphaelson, Esq.
O'melveny & Myers LLP
1625 Eye Street NW, 10th Floor
Washington, D.C. 20006-4001

iraphaelson@omm.com

Jim Walden
United States Attorneys Office
Criminal Division
One Pierrepont Plaza
Brooklyn, NY 11201

JWalden@OMM.com

For Def. Ziglar (individual capacity):
William A. McDaniel, Jr., Esq.
McDaniel & Griffin
118 West Mulberry St.
Baltimore, MD 21201-3606

wam@mcdgr.com

For Def. McElroy (individual capacity):
Debra L. Roth, Esq.
Thomas M. Sullivan, Esq.
Shaw, Bransford, Veilleux & Roth, PC
1100 Connecticut Ave., NW, Ste. 900
Washington, D.C. 20036-4101

droth@shawbransford.com
tsulliva@shawbransford.com

For Def. Blackman (individual capacity):
Thomas G. Roth, Esq.
Law Offices
395 Pleasant Valley Way, Suite 201
West Orange, NJ 07052

tgroth395@aol.com

For Def. Thompson (individual capacity):

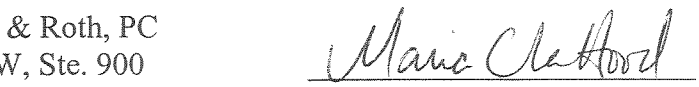
John J. Cassidy, Esq.
Stephen L. Braga, Esq.
Baker Botts, L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400

john.cassidy@bakerbotts.com
stephen.braga@bakerbotts.com

For all Defendants in their official capacities:
Timothy P. Garren, Esq.
Mary Hampton Mason, Esq.
Jeremy S. Brumbelow, Esq.
U.S. Department of Justice
Civil Division, Torts Branch
Ben Franklin Station, P.O. Box 7146
Washington, D.C. 20044

mary.mason@usdoj.gov
Jeremy.Brumbelow@usdoj.gov

Scott Dunn (original and 2 copies)
Assistant United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th floor
Brooklyn NY 11201-2776



Maria C. LaHood
Center For Constitutional Rights
666 Broadway, 7th Fl., New York, NY 10012
212-614-6430
Attorneys for Plaintiff