

Arar v. Ashcroft

UNITED STATE COURT OF APPEALS, SECOND CIRCUIT
532 Federal Reporter 3d 157 (2008)

Author's Note: This was a 2-1 split decision. The two-judge majority viewed the case context as one which suggested that it be decided as if it were an immigration case. The question as framed thus involved a foreign citizen merely being removed from the U.S. The plaintiff detainee was therefore not entitled to the constitutional (and treaty-based) rights that would otherwise accrue if he were overstaying a visa period, or seeking asylum. So he was not technically “in” the U.S. He was waiting for his connecting flight at a U.S. airport, while en route from his departure country (Tunisia) to his destination country (Canada).

The dissenting judge bitterly complained that this case could hardly be decided in an “immigration” context. The plaintiff detainee never intended to “enter” the U.S. It was merely a brief and intermediate layover, during his trip from Tunisia to his Canadian home in Montreal.

The author’s footnotes are alphabetized. The court’s footnotes are numbered. Most case citations have been deleted, to facilitate ease of reading. They can be obtained by referring to the original case as cited above.

Court’s (majority) Opinion: JOSÉ A. CABRANES, Circuit Judge:

On September 26, 2002, plaintiff-appellant Maher Arar, a dual citizen of Syria and Canada, and the subject of a U.S. government “lookout,” was detained by U.S. authorities at John F. Kennedy International airport in New York City (“JFK Airport”) while en route from Tunisia to Montreal. On October 7, 2002, J. Scott Blackman, then the U.S. Immigration and Naturalization Service (“INS”) Regional Director for the Eastern Region, determined, based on a review of classified and unclassified information, that Arar was a member of Al Qaeda and therefore inadmissible to the United States. Pursuant to this determination, Blackman signed an order authorizing Arar to be removed to Syria “without further inquiry before an immigration judge....”

In February 2004, the Canadian Government convened an official commission (“the Commission”) to look into “the actions of Canadian officials in relation to” Arar’s detention in the United States, his eventual removal to Syria, and his subsequent detention by Syrian authorities. ... The Commission determined that Canadian officials had “requested” that American authorities create lookouts for Arar and his wife, had described Arar to American authorities as an “Islamic Extremist individual suspected of being linked to the Al Qaeda terrorist movement,” and had provided American authorities with information derived from their investigations of Arar. The Commission further determined that “[i]t [wa]s very likely that, in making the decisions to detain and remove Mr. Arar, American authorities relied on information about Mr. Arar provided by the [Royal Canadian Mounted Police].” Accordingly, the Commission recommended that Canadian authorities consider granting Arar’s request for compensation from the Canadian government. In January 2007, the Canadian government entered into a settlement agreement with Arar, whereby he received compensation of 11.5 million Canadian dollars (approximately \$9.75 million, at the time) in exchange for withdrawing a lawsuit against the Canadian government. *See* Ian Austen, *Canada Will Pay \$9.75*

Million to Man Sent to Syria and Tortured, N.Y. Times, Jan. 27, 2007, at A5.

On January 22, 2004, shortly before the initiation of the Canadian inquiry, Arar filed this civil action ... Arar alleges that these individuals mistreated him while he was in the United States and then removed him to Syria with the knowledge or intention that he would be detained and tortured there.

...

In a memorandum and order dated February 16, 2006, the United States District Court for the Eastern District of New York ... dismissed ... Arar's suit for failure to state a claim upon which relief can be granted. ... Upon receiving notice that Arar had elected not to amend his complaint to [attempt to] cure the jurisdictional defects found by the District Court, the Clerk of Court entered judgment dismissing the action with prejudice on August 17, 2006. Arar now brings this appeal.

Arar's suit implicates several questions of first impression for our Court. One threshold question presented on this appeal is whether, as defendants contend, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, deprived the District Court of subject matter jurisdiction over the claims raised in ... Arar's complaint. The adjudication of this question is, for the reasons set forth below, particularly difficult in light of the record before us. However, because *we are compelled to dismiss* these claims on the basis of other threshold—that is, non-merits—grounds, we need not determine whether the INA did, in fact, strip the District Court of subject matter jurisdiction to hear Arar's removal-related claims [*italics added*].

We must therefore determine ... whether Arar's allegation that U.S. officials conspired with Syrian authorities to torture him states a claim against the U.S. officials under the TVPA;^a ... [and] whether to create a judicial damages remedy, pursuant to *Bivens*,^b for Arar's claims that U.S. officials (a) removed him to Syria with the knowledge or intention that he would be detained and tortured there and (b) mistreated him while he was detained in the United States; and finally, (4) whether Arar may seek a declaratory judgment that defendants' actions violated his constitutional rights.

...

I. BACKGROUND

A. Facts Alleged

Arar's complaint ... sets forth the following relevant factual allegations. On September 26, 2002, U.S. immigration officials detained Arar at JFK Airport while he was transferring flights on his way from Tunisia to Montreal. He remained in U.S. custody for twelve days. For most of this time, he was held at the Metropolitan Detention Center ("MDC") in Brooklyn, NY. Arar claims that on the evening of September 26, he was "placed in solitary confinement" in a room with no bed and with lights that were left on all night.

^a Torture Victim Protection Act, Note to 28 U.S. Code § 1350. The Note to this code section authorizes a remedy in favor of those tortured by foreign authorities. Section 1350, standing alone, authorizes a remedy in U.S. courts, between *foreign* citizens. The amendment provides a remedy to U.S. citizens as well.

^b *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (plaintiff able to sue and obtain damages, directly under U.S. Constitution's 4th Amendment prohibition against unreasonable search and seizure).

On October 1, Arar was presented with a document stating that the INS had determined that he was a member of Al Qaeda and was therefore inadmissible to the United States; he was then permitted to make a telephone call to his family, who retained on all night. On the morning of September 27, he was allegedly questioned by FBI agents who ignored his requests to see a lawyer or make a telephone call. Arar alleges that his requests to see a lawyer or make a telephone call were also ignored between September 27 and October 1.

The complaint further alleges that Arar met his lawyer at the MDC on the evening of October 5; that, after this meeting, on the evening of Sunday, October 6, defendant McElroy left a message notifying Arar's lawyer that the INS wished to question Arar further; that INS officials then immediately proceeded to question Arar, having falsely told him that his lawyer had chosen not to be present; that, on the following day, INS officials falsely informed Arar's lawyer that Arar had been transferred from the MDC to an unidentified detention facility in New Jersey when, in fact, Arar was still being held at the MDC; and that on October 8, defendant Thompson signed an order authorizing Arar's removal.

The complaint further alleges that, although Arar had designated Canada as the country to which he wished to be removed, on October 8, 2002, U.S. officials caused him to be transported from the MDC to New Jersey, where he was flown to Washington D.C.; and from Washington D.C. to Amman, Jordan, where Jordanian authorities turned him over to Syrian military officials. Syrian authorities allegedly kept Arar in custody for approximately twelve months; initially subjected him to "physical and psychological torture"—including regular beatings and threats of severe physical harm; and confined him throughout this time in an underground cell six feet long, seven feet high, and three feet wide.

Arar alleges ... that he was removed to Syria pursuant to the U.S. government's "extraordinary rendition" policy, with the knowledge or intention that Syrian officials would extract information from him through torture. He further alleges ... that defendants provided Syrian authorities with information about him, suggested subjects for Syrian authorities to interrogate him about, and received "all information coerced from [him] during [these] interrogations." Thompson, "as Acting Attorney General," is alleged ... to have signed the order authorizing Arar's removal to Syria.

B. Procedural History

On January 24, 2005, the United States formally asserted the state-secrets privilege over information relating to Counts one through three of Arar's complaint. Specifically, the United States explained:

Litigating [Arar's claims] would necessitate disclosure of classified information, including: (1) the basis for the decision to exclude [Arar] from [the United States] based on the finding that [he] was a member of ... al Qaeda...; (2) the basis for the rejection of [Arar's] designation of Canada as the country to which [he] wished to be removed ...; and (3) the considerations involved in the decision to remove [Arar] to Syria.

Shortly thereafter, all defendants moved to dismiss Arar's claims against them.

They contended ... that Arar’s complaint should be dismissed because the assertion of the state-secrets privilege by the United States prevented them from introducing evidence required to present a meaningful defense. ...

In a memorandum and order filed on February 16, 2006, the District Court, without reaching the issues raised by the assertion of the state-secrets privilege by the United States, dismissed ... Arar’s complaint.

...

Therefore, with the agreement of the parties, we evaluate the claims presented under applicable law before considering whether the assertion of the state-secrets privilege by the United States requires dismissal of this action.

II. DISCUSSION

...

C. The Torture Victim Protection Act (Count One)

The TVPA ... creates a cause of action for damages against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture.” The District Court determined that the factual allegations set forth in Arar’s complaint did not state a claim that defendants acted “under color of *foreign law*” (italics added). We agree.^c

...

D. Money damages under the Fifth Amendment (Counts Two, Three, and Four)

Counts two and three of Arar’s complaint allege that defendants violated Arar’s rights under the substantive due process component of the Fifth Amendment by removing him to Syria with the knowledge or intention that he would be detained and tortured there. Count four of Arar’s complaint alleges that defendants violated Arar’s rights to substantive and procedural due process under the Fifth Amendment by mistreating him while he was detained in the United States. Arar contends that both of these alleged violations are actionable pursuant to *Bivens*.^d

On the theory that, “in appropriate circumstances[,] a federal ... court may provide relief in damages for the violation of constitutional rights if there are ‘no special factors counseling hesitation [and] in the absence of affirmative action by Congress,’ ” ... the Supreme Court has created such remedies on only two other occasions: the first for employment discrimination in violation of the equal protection component of the Fifth Amendment’s Due Process Clause, and the second for violations of the Eighth Amendment by federal prison officials. ...

Indeed, the Supreme Court has “responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.” ...

By asking us to devise a new *Bivens* damages action for alleged violations of the substantive due process component of the Fifth Amendment, Arar effectively invites us

^c Both the original statute in 28 U.S. Code § 1350, and its amendment containing the Torture Victims Protection Act, are addressed in textbook § 10.5 on National Human Rights Perspectives.

^d See author’s footnote b.

to disregard the clear instructions of the Supreme Court by extending *Bivens* not only to a new context, but to a new context requiring the courts to intrude deeply into the national security policies and foreign relations of the United States.

...
(2)

To the best of our understanding, Arar seeks a *Bivens* remedy for at least two analytically distinct categories of claims. The first set of claims, described in Counts two and three of Arar’s complaint, arises from Arar’s allegation that defendants removed him to Syria with the knowledge or intention that he would be detained and tortured there. The second set of claims, described in Count four of the complaint, arises from Arar’s allegations about the way in which defendants treated him while he was detained in the United States. We consider each of these claims in turn.

(a)

Arar’s removal-related [rendition] claims arise from the alleged violation of his substantive due process interest in not being involuntarily removed to a country where he would be detained and subjected to torture. Step one of the *Bivens* inquiry reveals that Congress has created alternative processes for protecting this interest. The Foreign Affairs Reform and Restructuring Act of 1988, codified at 8 U.S.C. § 1231 note (“FARRA”), states that the United States “shall ... not ... effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture;” and provides for an alien to raise claims based on this section “as part of the review of a final order of removal pursuant to ... the Immigration and Nationality Act.” Thus, as a general matter, *Bivens* relief would not be available for removal-related claims such as the one that Arar raises here because the INA’s “alternative, existing” mechanism of review would normally provide “a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages,” under step one of our *Bivens* analysis.

...

Step two of our *Bivens* analysis requires us to determine whether Arar’s suit implicates what the Supreme Court has described as “special factors” that would counsel against creation of a *Bivens* remedy. ... Pursuant to the framework set forth by the Supreme Court, we are compelled to defer to the determination of Congress as to the availability of a damages remedy in circumstances where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country’s relations with foreign powers.

The Supreme Court has observed on numerous occasions that determinations relating to national security fall within “an area of executive action in which courts have long been hesitant to intrude.” ... At its core, this suit arises from the Executive Branch’s alleged determination that (a) Arar was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests. There can be no doubt that for Arar’s claims to proceed, he must probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States, in order to determine the basis for his alleged designation as an Al Qaeda affiliate and his removal to Syria via Jordan despite his request to be removed to Canada. Indeed, the Canadian government, which

has provided Arar with compensation for its role in the events giving rise to this litigation, has asserted the need for Canada itself to maintain the confidentiality of material that goes to the heart of Arar's claims. ... For its part, the United States, as noted above, has invoked the state-secrets privilege in response to Arar's allegations.

Assuming that a sufficient record can even be developed in light of the confidential nature of the relevant evidence and the involvement of at least three foreign governments-Syria, Jordan, and Canada-in the salient events alleged in the complaint, the District Court would then be called upon to rule on whether Arar's removal was proper in light of the record. In so doing, the effective functioning of U.S. foreign policy would be affected, if not undermined. For, to the extent that the fair and impartial adjudication of Arar's suit requires the federal courts to consider and evaluate the implementation of the foreign and national security policies of the United States and at least three foreign powers, the ability of the federal government to speak with one voice to its overseas counterparts is diminished, and the coherence and vitality of U.S. foreign policy is called into question.

On this point, the observations of the Court of Appeals for the District of Columbia Circuit are particularly relevant:

[T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored—their ability to produce what the Supreme Court has called in another context “embarrassment of our government abroad” through “multifarious pronouncements by various departments on one question.” Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens’ using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

Similarly, we need not determine whether the motivation behind this lawsuit arises from geopolitical or personal considerations in order to recognize that litigation of this sort threatens to disrupt the implementation of our country's foreign and national security policies. The litigation of Arar's claims would necessarily require an exploration of the intelligence relied upon by the officials charged with implementing our foreign and national security policies, the confidential communications between the United States and foreign powers, and other classified or confidential aspects of those policies, including, perhaps, whether or not such policies even exist.¹⁷ There can be no doubt that litigation of

¹⁷ That adjudication of Arar's claims would require inquiry into national-security intelligence and diplomatic communications cannot be doubted in light of federal regulations providing that, in determining whether removal to a particular country would be consistent with the obligations imposed by FARRA,

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under

this sort would interfere with the management of our country's relations with foreign powers and affect our government's ability to ensure national security.

...

For the reasons stated above, we are not required, at this juncture in the proceedings, to consider the possible consequences of the assertion of the state-secrets privilege by the United States. The assertion of the state-secrets privilege is, however, a matter of record, and a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers. ... In that sense, the government's assertion of the state-secrets privilege in this litigation constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication employed by the federal courts.^e

That this action involves the intersection of [immigration] removal decisions and national security ... and it is well established that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political-Departments of the Government."

...

In sum, we hold that—barring further guidance from the Supreme Court—a *Bivens* remedy is unavailable for claims "arising from *any action* taken or proceeding brought to remove an alien from the United States under" the authority conferred upon the Attorney General and his delegates by the INA (italics added).

(b)

The vitality of Arar's request for *Bivens* relief for claims arising from Count four of his complaint ("domestic detention") turns, not on the existence of any "special factors," but on the more commonplace fact that Arar's factual allegations fail to state a claim under the Due Process Clause of the Fifth Amendment. Arar apparently seeks to bring two distinct types of claims based on events alleged to have occurred in the United States. The first is a "due process" claim based on defendants' alleged obstruction of Arar's access to counsel and to the courts. The second is a substantive due process challenge to the conditions of Arar's U.S. detention. We consider each of these in turn.

(i)

The complaint alleges that, while Arar was incarcerated at the MDC, defendants ignored his initial requests to see a lawyer, misled him about the availability of his lawyer so that they could question him outside her presence, and misled his lawyer about his whereabouts so that they could prevent her from challenging his removal to Syria. These

this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture....

^e Could one thus assume that mere assertion of the privilege—which the court never resolved on the its merits—tips the scale against the detainee plaintiff in such cases?

allegations, if taken as true, may be sufficient to establish that one or more federal officials intentionally obstructed Arar’s access to counsel and to the courts. They are not, however, sufficient to establish the appropriateness of *Bivens* relief. Rather, for a *Bivens* remedy to be available, Arar must establish that (1) an individual in his position possessed a constitutional right of access to counsel and the courts, and (2) that defendants’ actions violated this constitutional right.

a. Right to Counsel

...
As an unadmitted alien, Arar as a matter of law lacked a physical presence in the United States. ...

In this case, the applicable statutory provisions specifically authorized the Attorney General to remove Arar “without further inquiry or hearing by an immigration judge” if the Attorney General, after reviewing the evidence establishing his inadmissibility, determined that a hearing “would be prejudicial to the public interest, safety, or security.”²⁷

...
In sum, Arar is unable to point to any legal authority suggesting that, as an unadmitted alien who was excluded pursuant to the procedures set forth in 8 U.S.C. § 1225(c), he possessed any form of entitlement to the assistance of counsel—let alone a constitutional entitlement, the violation of which could constitute a predicate for the *Bivens* relief he seeks. Accordingly, we conclude that Arar’s allegations about the various ways in which defendants obstructed his access to counsel fail to state a claim under the Due Process Clause of the Fifth Amendment.

b. Right of Access to the Courts

As the Supreme Court has noted, the ultimate purpose of an access to the courts claim is to obtain “effective vindication for a separate and distinct right to seek judicial relief for some wrong.” ... For this reason, the complaint setting forth the claim in question must include an adequate description of a “ ‘nonfrivolous,’ ‘arguable’ underlying claim” that the plaintiff has lost as a result of the complained-of official actions.

Arar’s complaint fails this test insofar as *his complaint fails to set forth adequately “the underlying cause of action,” that defendants’ conduct compromised* (italics added). ... Although Arar now claims [in this ensuing civil suit for damages] that defendants compromised his right to seek a court order “enjoin[ing] his removal to a country that would torture him, as a violation of FARRA and [the Convention Against Torture (‘CAT’)^f],” his complaint makes no mention of FARRA, the CAT, or the

²⁷ Arar was removed pursuant to 8 U.S.C. § 1182(a)(3) (removability on security and related grounds) under the procedures set forth in 8 U.S.C. § 1225(c); subsection 1225(c)(2)(B) provides that:

If the Attorney General (i) is satisfied on the basis of confidential information that the alien is inadmissible ... and (ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

^f The CAT is covered in textbook §10.2 on the U.N.-promoted human rights regime.

possibility of injunctive relief. ... Accordingly, we conclude that Arar has failed to state a due process claim based on defendants' obstruction of his access to the courts.

(ii)

The framework for evaluating a conditions-of-confinement challenge brought by an unadmitted alien constitutes a question of first impression for our Court. ...

Arar alleges that, while in the United States, he was subjected to "coercive and involuntary custodial interrogations ... conducted for excessively long periods of time and at odd hours of the day and night" on three occasions over twelve days; deprived of sleep and food on his first day of detention; and, thereafter, was "held in solitary confinement, chained and shackled, [and] subjected to [an] invasive strip-search." These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse. ... For this reason, we conclude that Arar has not adequately alleged that the conditions of his confinement violated his Fifth Amendment substantive due process rights under the "*gross physical abuse*" approach of the Fifth Circuit and Eleventh Circuit (*italics added*).

... Arar nowhere alleges that the conditions of his confinement were inflicted with punitive intent or were otherwise unrelated to a legitimate government purpose. Rather, his complaint repeatedly emphasizes that defendants kept him in custody in order to interrogate him, and sought to interrogate him in an effort to obtain information "about his membership in or affiliation with various terrorist groups." Nor do the other incidental conditions of his detention—specifically, the shackling, strip search, and delay in providing him with adequate food and sleeping facilities—rise to the level of a constitutional violation.

...

The judgment of the District Court is **AFFIRMED**.

SACK, Circuit Judge, concurring in part and dissenting in part.

I. OVERVIEW

...

The majority fails ... by mischaracterizing this as an immigration case, when it is in fact about forbidden tactics allegedly employed by United States law enforcement officers in a terrorism inquiry. Although I concur in some parts of the judgment, I respectfully dissent from its ultimate conclusion. I would vacate the judgment of the district court granting the defendants' motion to dismiss.

...

II. THE FACTS AS ALLEGED IN ARAR'S COMPLAINT

The majority provides a strikingly spar[s]e description of the allegations of fact on the basis of which Arar mounts this appeal. The district court's opinion, *see Arar v. Ashcroft*, 414 F.Supp.2d 250, 252-57 (E.D.N.Y.2006), by contrast, rehearses the facts in considerable detail. According to the district court, the complaint alleges the following facts, repeated here nearly verbatim. They "are assumed to be true for purposes of the pending appeal, as ... [is] required [when] ... reviewing a ruling on a motion to dismiss" [because this dismissal is not one that will proceed to the merits].

A. Arar’s Apprehension, Detention, and Forcible Transportation to Syria

...

Arar was given an opportunity to voluntarily return to Syria, but refused, citing a fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a “special interest” in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center (“MDC”) in Brooklyn, New York, where he was strip-searched and placed in solitary confinement. During his initial three days at MDC, Arar’s continued requests to meet with a lawyer and make telephone calls were refused.

...

B. Arar’s Detention in Syria

...

During his ten-month period of detention in Syria, Arar alleges, he was placed in a “grave” cell measuring six feet long, seven feet high, and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence (“Palestine Branch”). The cell was damp and cold, contained very little light, and was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria.

During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips, and lower back with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, his face, and the back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking “chair,” hung upside down in a “tire” for beatings, and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity.

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As evidence of this, Arar notes that the interrogations in the United States and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, the Syrian officials supplied U.S. officials with all information extracted from Arar; plaintiff cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the United States that it extracted from Arar. *See* Complaint Ex. E (January 21, 2004 transcript of CBS’s *Sixty Minutes II*: “His Year In Hell”).

C. Arar’s Contact with the Canadian Government While Detained in Syria

The Canadian Embassy contacted the Syrian government about Arar on October 20, 2002, and the following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar.

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave.

...

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist, and is having trouble finding employment due to his reputation and inability to travel in the United States.

D. The U.S. Policy Related to Interrogation of Detainees by Foreign Governments

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of “extraordinary rendition,” according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The “extraordinary rendition” policy involves the removal of “non-U.S. citizens detained in this country and elsewhere and suspected—reasonably or unreasonably—of terrorist activity to countries, including Syria, where interrogations under torture are routine.” ...

This “extraordinary rendition” program is not part of any official or declared U.S. public policy; nevertheless, it has received extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Arar details a number of articles in the mainstream press recounting both the incidents of this particular case and the “extraordinary rendition” program more broadly.

Arar alleges that the defendants directed the interrogations by providing information about Arar to Syrian officials and receiving reports on Arar’s responses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating, and torturing Arar. Arar argues in the alternative that, at a minimum, the defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria.

...

F. The Canadian Government Inquiry

On September 18, 2006, a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (“Arar Commission”), established by the government of Canada to investigate the Arar affair, issued a three-volume report. *See Arar Comm’n, Report of the Events Relating to Maher Arar* (2006). ...

On January 26, 2007, the Office of the Prime Minister of Canada issued the following announcement:

Prime Minister Stephen Harper today released the letter of apology he has sent to Maher Arar and his family for any role Canadian officials may have played in what happened to Mr. Arar, Monia Mazigh and their family

in 2002 and 2003.

“Although the events leading up to this terrible ordeal happened under the previous government, our Government will do everything in its power to ensure that the issues raised by Commissioner O’Connor are addressed,” said the Prime Minister. “I sincerely hope that these actions will help Mr. Arar and his family begin a new and hopeful chapter in their lives.”

The Government has sent letters to both the Syrian and the U.S. governments formally objecting to the treatment of Mr. Arar. Ministers Day and MacKay have also expressed Canada’s concerns on this important issue to their American counterparts. Finally, Canada has removed Mr. Arar from Canadian lookout lists, and requested that the United States amend its own records accordingly.

The Prime Minister also announced that Canada’s New Government has successfully completed the mediation process with Mr. Arar, fulfilling another one of Commissioner O’Connor’s recommendations. This settlement, mutually agreed upon by all parties, ensures that Mr. Arar and his family will obtain fair compensation, in the amount of \$10.5 million, plus legal costs, for the ordeal they have suffered.

IV. ANALYSIS

This is not an immigration case. Contrary to the majority’s analysis, Arar’s allegations do not describe an action arising under or to be decided according to the immigration laws of the United States. Arar did not attempt to enter the United States in any but the most trivial sense; he sought only to transfer through JFK Airport to travel from one foreign country to another. He was initially interrogated by FBI agents, not INS officials; they sought to learn not about the bona fides of his attempt to “enter” the United States, but about his alleged links to al Qaeda. The INS was not engaged in order to make a determination as to Arar’s immigration status. The agency’s principal involvement came after the FBI failed to obtain desired information from him, in order to facilitate his transfer to Syria so that he might be further held and questioned under torture.

This lawsuit is thus about the propriety and constitutionality of the manner in which United States law enforcement agents sought to obtain from Arar information about terrorism or terrorists which they thought—wrongly as it turned out—that he possessed. The majority goes astray when it accepts the defendants’ attempt to cast it as an immigration matter.

...

A. The Gravamen of the Complaint

...

Not until deep in its opinion, though, does the majority come to address this, the heart of the matter: Arar’s treatment by defendants while he was present in the United States. ... Having thus limited its consideration to only a portion of the acts Arar complains of, the majority blandly concludes: “These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse” necessary to support a conclusion that his due process

rights had been infringed.

... Arar was, in effect, abducted while attempting to transit at JFK Airport. And when he failed to give defendants the information they were looking for, and he refused to be sent “voluntarily” to Syria, they forcibly sent him there to be detained and questioned under torture.

B. Arar’s Pleading of a Substantive Due Process Violation

Principles of substantive due process apply only to a narrow band of extreme misbehavior by government agents acting under color of law: mistreatment of a person that is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” ... Indeed, although the “shocks the conscience” test is undeniably vague, “[n]o one doubts that under Supreme Court precedent, interrogation by torture” meets that test. ... The defendants did not themselves torture Arar; they “outsourced” it.¹⁹ But I do not think that whether the defendants violated Arar’s Fifth Amendment rights turns on whom they selected to do the torturing: themselves, a Syrian Intelligence officer, a warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles.

...

The majority reaches the wrong conclusion in large measure, I think, by treating Arar’s claims as though he were an unadmitted alien seeking entry into the United States. The majority asserts that “[a]s an unadmitted alien, Arar as a matter of law lacked a physical presence in the United States.” And it concludes from this that “the full protections of the due process clause” do not apply to Arar because they “apply only to ‘persons within the United States.’ ”

But the notion that, while in New York City, Arar was not “physically present” in the United States, is a legal fiction peculiar to immigration law. It is relevant only to the determination of an alien’s immigration status and related matters. It is indeed a fiction that works largely to the benefit of aliens, permitting them to remain here while immigration officials determine whether they are legally admissible.

...

The majority acknowledges that even an unadmitted alien, treated under the immigration laws as though he was not physically present within the United States, has constitutional rights. The majority sees the scope of those rights as not extending “beyond” freedom from “gross physical abuse.” I think that unduly narrow. It seems to me that Arar was entitled to the bare-minimum protection that substantive due process affords.

Arar adequately alleges a violation of his substantive due process rights. His allegations, properly construed, describe decisions made and actions taken by defendants within the United States, while Arar was in the United States, designed to obtain abroad information from him, even if doing so ultimately required his detention and torture.

¹⁹ “[R]endition—the market approach—outsources our crimes, which puts us at the mercy of anyone who can expose us, makes us dependent on some of the world’s most unsavory actors, and abandons accountability. It is an approach we associate with crime families, not with great nations.” Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 388 (2008). “[O]ne could get the worst of both worlds: national responsibility for acts as to which the agents we have empowered are unaccountable.”

Once the defendants, having despaired of acquiring the information from Arar here, physically caused him to be placed in the hands of someone, somewhere—anyone, anywhere—for the purpose of having him tortured, it seems to me that they were subjecting him to the most appalling kind of “gross physical abuse.”

...

C. Availability of a *Bivens* Action

In *Bivens*, the Supreme Court “recognized for the first time an implied private right of action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” The *Bivens* Court permitted “a victim of a Fourth Amendment [search and seizure] violation by federal officers [to] bring suit for money damages against the officers in federal court.”

...

In any event, I see no reason why *Bivens* should not be available to vindicate Fifth Amendment substantive due process rights.

...

A federal inmate serving a prison sentence can employ *Bivens* to seek damages resulting from mistreatment by prison officials. It would be odd if a federal detainee not charged with or convicted of any offense could not bring an analogous claim.

...

It seems to me that the state-secrets privilege itself adequately protects the interests the majority thinks counsel against providing Arar a *Bivens* remedy. The state-secrets privilege is a narrow device that must be specifically invoked by the United States and established by it on a case-by-case basis. ... “The privilege may be invoked only by the government and may be asserted even when the government is not a party to the case.” That seems far preferable to the majority’s blunderbuss solution—to withhold categorically the availability of a *Bivens* cause of action in all such cases—and the concomitant additional license it gives federal officials to violate constitutional rights with virtual impunity. Rather than counseling against applying *Bivens*, the availability to the defendants of the state-secrets privilege counsels permitting a *Bivens* action to go forward by ensuring that such proceedings will not endanger the kinds of interests that properly concern the majority.

The majority reaches its conclusion, moreover, on the basis of the proposition that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative ... Departments of the Government.” But there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security. ... (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); (“[D]espite our recognition of the importance of [the Attorney General’s activities in the name of national security] to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary.”); (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”). ... “[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” [*S*]ee also Brief of Retired Federal Judges as *Amici Curiae* (“The Supreme Court has made clear that the Executive’s power to protect national security or

conduct foreign affairs does not deprive the judiciary of its authority to act as a check against abuses of those powers that violate individual rights.”).

The alleged intentional acts which resulted in Arar’s eventual torture and inhumane captivity were taken by federal officials while the officials and Arar were within United States borders, and while Arar was in the custody of those federal officials.³³ He therefore presents this Court with a classic, or at the very least viable, *Bivens* claim—a request for damages incurred as a result of violations of his Fifth Amendment substantive due process rights by federal officials while they detained him.

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...

V. CONCLUDING OBSERVATION

I have no reason whatever to doubt the seriousness of the challenge that terrorism poses to our safety and well-being. *See generally, e.g.,* Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (2008). During another time of national challenge, however, Justice Jackson, joined by Justice Frankfurter [both ranking among the most prominent members of the federal judiciary], dissented from the Supreme Court’s decision that the due process rights of an unadmitted alien were not violated when he was kept indefinitely on Ellis Island without a hearing. The alien’s entry had been determined by the Attorney General to “be prejudicial to the public interest for security reasons,” and he had therefore been excluded from the United States. Although *Mezei*⁸ was an immigration case with little bearing on the matter before us today, Justice Jackson’s observations then, at a time of when we thought ourselves in imminent and mortal danger from international Communism, are worth repeating now:

The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.³⁴

... [W]ith respect to the government’s treatment of Mr. Mezei, he [Justice Jackson] concluded: “It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.” I think Justice Jackson’s observations warrant careful consideration at the present time and under present circumstances.

³³ Irrespective of what ultimately happened to Arar abroad, the actions that he challenges were perpetrated by U.S. agents entirely within the United States. ...

⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, (1953).

³⁴ The Supreme Court very recently observed: Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint....

Boumediene v. Bush, 128 S.Ct. 2229, 2277 (2008) (principle case in textbook §10.7 on U.S. application of the Laws of War post-9–11).