Arar v. Ashcroft

United States Court of Appeals, Second Circuit (en banc), 2009
--- F.3d ----, 2009 WL 3522887

DENNIS JACOBS, Chief Judge: Maher Arar appeals from a judgment of the United States District Court for the Eastern District of New York (Trager, J.) dismissing his complaint against the Attorney General of the United States, the Secretary of Homeland Security, the Director of the Federal Bureau of Investigation, and others, including senior immigration officials. Arar alleges that he was detained while changing planes at Kennedy Airport in New York (based on a warning from Canadian authorities that he was a member of Al Qaeda), mistreated for twelve days while in United States custody, and then removed to Syria via Jordan pursuant to an inter-governmental understanding that he would be detained and interrogated under torture by Syrian officials. The complaint alleges a violation of the Torture Victim Protection Act ("TVPA") and of his Fifth Amendment substantive due process rights arising from the conditions of his detention in the United States, the denial of his access to counsel and to the courts while in the United States, and his detention and torture in Syria.

The district court dismissed the complaint (with leave to re-plead only as to the conditions of detention in the United States and his access to counsel and the courts during that period) and Arar timely appealed (without undertaking to amend). *Arar v. Ashcroft,* 414 F. Supp.2d 250 (E.D.N.Y. 2006). A three-judge panel of this Court unanimously held that: (1) the District Court had personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar failed to state a claim under the TVPA; and (3) Arar failed to establish subject matter jurisdiction over his request for a declaratory judgment. *Arar v. Ashcroft,* 532 F.3d 157 (2d Cir. 2008). A majority of the panel also dismissed Arar's *Bivens* claims, with one member of the panel dissenting. *Id.* The Court voted to rehear the appeal *in banc.* We now affirm.

We have no trouble affirming the district court's conclusions that Arar sufficiently alleged personal jurisdiction over the defendants who challenged it, and that Arar lacks standing to seek declaratory relief. We do not reach issues of qualified immunity or the state secrets privilege. As to the TVPA, we agree with the unanimous position of the panel that Arar insufficiently pleaded that the alleged conduct of United States officials was done under color of foreign law. We agree with the district court that Arar insufficiently pleaded his claim regarding detention in the United States, a ruling that has been reinforced by the subsequent authority of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Our attention is therefore focused on whether Arar's claims for detention and torture in Syria can be asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) ("*Bivens*").

To decide the *Bivens* issue, we must determine whether Arar's claims invoke *Bivens* in a new context; and, if so, whether an alternative remedial scheme was available to Arar, or whether (in the absence of affirmative action by Congress) "'special factors counsel[ ] hesitation.'" *See Wilkie v. Robbins,* 551 U.S. 537, 550 (2007) (quoting *Bush v. Lucas,* 462 U.S. 367, 378 (1983)). This opinion holds that "extraordinary rendition" is a context new to *Bivens* claims, but avoids any categorical ruling on alternative remedies – because the dominant holding of this opinion is that, in the context of extraordinary rendition, hesitation is warranted by special factors. We therefore affirm. . . .

Our ruling does not preclude judicial review and oversight in this context. But if a civil remedy in damages is to be created for harms suffered in the context of extraordinary rendition, it must be created by Congress, which alone has the institutional competence to set parameters, delineate safe harbors, and specify relief. If Congress chooses to legislate on this subject, then judicial review of such legislation would be available.

Applying our understanding of Supreme Court precedent, we decline to create, on our own, a new cause of action against officers and employees of the federal government. Rather, we conclude that, when a case presents the intractable "special factors" apparent here, it is for the Executive in the first instance to

decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us as judges – to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation. Administrations past and present have reserved the right to employ rendition, *see* David Johnston, *U.S. Says Rendition to Continue, but with More Oversight,* N.Y. Times, Aug. 24, 2009, and not withstanding prolonged public debate, Congress has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence.

I

Arar's complaint sets forth the following factual allegations.

Arar is a dual citizen of Syria, where he was born and raised, and of Canada, to which his family immigrated when he was 17.

While on vacation in Tunisia in September 2002, Arar was called back to work in Montreal. His itinerary called for stops in Zurich and New York.

Arar landed at Kennedy Airport around noon on September 26. Between planes, Arar presented his Canadian passport to an immigration official who, after checking Arar's credentials, asked Arar to wait nearby. About two hours later, Arar was fingerprinted and his bags searched. Between 4 p.m. and 9 p.m., Arar was interviewed by an agent from the Federal Bureau of Investigation ("FBI"), who asked (*inter alia*) about his relationships with certain individuals who were suspected of terrorist ties. Arar admitted knowing at least one of them, but denied being a member of a terrorist group. Following the FBI interview, Arar was questioned by an official from the Immigration and Nationalization Service ("INS") for three more hours; he continued to deny terrorist affiliations.

Arar spent the night alone in a room at the airport. The next morning (September 27) he was questioned by FBI agents from approximately 9 a.m. until 2 p.m.; the agents asked him about Osama Bin Laden, Iraq, Palestine, and other things. That evening, Arar was given an opportunity to return voluntarily to Syria. He refused, citing a fear of torture, and asked instead to go to Canada or Switzerland. Later that evening, he was transferred to the Metropolitan Detention Center ("MDC") in Brooklyn, where he remained until October 8.

On October 1, the INS initiated removal proceedings, and served Arar with a document stating that he was inadmissible because he belonged to a terrorist organization. Later that day, he called his mother-in-law in Ottawa – his prior requests to place calls and speak to a lawyer having been denied or ignored. His family retained a lawyer to represent him and contacted the Canadian Consulate in New York.

A Canadian consular official visited Arar on October 3. The next day, immigration officers asked Arar to designate in writing the country to which he would want to be removed. He designated Canada. On the evening of October 5, Arar met with his attorney. The following evening, a Sunday, Arar was again questioned by INS officials. The INS District Director in New York left a voicemail message on the office phone of Arar's attorney that the interview would take place, but the attorney did not receive the message in time to attend. Arar was told that she chose not to attend. In days following, the attorney was given false information about Arar's whereabouts.

On October 8, 2002, Arar learned that the INS had: (1) ordered his removal to Syria, (2) made a (required) finding that such removal would be consistent with Article 3 of the Convention Against Torture ("CAT"), and (3) barred him from re-entering the United States for five years. He was found inadmissible to the United States on the basis of 8 U.S.C. §1182(a)(3)(B)(i)(V), which provides that any alien who "is a member of a terrorist organization" is inadmissible to the United States. The finding was based on Arar's association with a suspected terrorist and other (classified) information. Thereafter, Defendant J. Scott Blackman, an INS Regional Director, made a determination that Arar was clearly and unequivocally a

member of Al Qaeda and inadmissible to the United States. A "Final Notice of Inadmissibility," dated October 8, and signed by Defendant Deputy Attorney General Larry Thompson, stated that Arar's removal to Syria would be consistent with the CAT, notwithstanding Arar's articulated fear of torture.

Later that day, Arar was taken to New Jersey, whence he flew in a small jet to Washington, D.C., and then to Amman, Jordan. When he arrived in Amman on October 9, he was handed over to Jordanian authorities who treated him roughly and then delivered him to the custody of Syrian officials, who detained him at a Syrian Military Intelligence facility. Arar was in Syria for a year, the first ten months in an underground cell six feet by three, and seven feet high. He was interrogated for twelve days on his arrival in Syria, and in that period was beaten on his palms, hips, and lower back with a two-inch-thick electric cable and with bare hands. Arar alleges that United States officials conspired to send him to Syria for the purpose of interrogation under torture, and directed the interrogations from abroad by providing Syria with Arar's dossier, dictating questions for the Syrians to ask him, and receiving intelligence learned from the interviews.

On October 20, 2002, Canadian Embassy officials inquired of Syria as to Arar's whereabouts. The next day, Syria confirmed to Canada that Arar was in its custody; that same day, interrogation ceased. Arar remained in Syria, however, receiving visits from Canadian consular officials. On August 14, 2003, Arar defied his captors by telling the Canadians that he had been tortured and was confined to a small underground cell. Five days later, after signing a confession that he had trained as a terrorist in Afghanistan, Arar was moved to various locations. On October 5, 2003, Arar was released to the custody of a Canadian embassy official in Damascus, and was flown to Ottawa the next day.

II

On January 22, 2004, Arar filed a four-count complaint in the Eastern District of New York seeking damages from federal officials for harms suffered as a result of his detention and confinement in the United States and his detention and interrogation in Syria. Count One of Arar's complaint seeks relief under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 note (a)(1) (the "TVPA claim"). Counts Two and Three seek relief under the Fifth Amendment for Arar's alleged torture in Syria (Count Two) and his detention there (Count Three). Count Four seeks relief under the Fifth Amendment for Arar's detention in the United States prior to his removal to Syria. Arar also seeks a declaratory judgment that defendants' conduct violated his "constitutional, civil, and human rights." . . .

III . . .

At the outset, we conclude (as the panel concluded unanimously) that Arar: (1) sufficiently alleged personal jurisdiction over the defendants, and (2) has no standing to seek declaratory relief; in addition, because we dismiss the action for the reasons set forth below, we need not (and do not) reach the issues of qualified immunity or the state secrets privilege. . . .

IV

The TVPA creates a cause of action for damages against any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." 28 U.S.C. §1350 note (a)(1). Count One of Arar's complaint alleges that the defendants conspired with Jordanian and Syrian officials to have Arar tortured in direct violation of the TVPA.

Any allegation arising under the TVPA requires a demonstration that the defendants acted under color of foreign law, or under its authority. *Kadic v. Karadzic,* 70 F.3d 232, 245 (2d Cir. 1995). "In construing

the term[ ] . . . 'color of law,' courts are instructed to look . . . to jurisprudence under 42 U.S.C. §1983. . . ." *Id.* (citing H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991) *reprinted in* 1992 U.S.C.C.A.N. 84, 87). Under section 1983, "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins,* 487 U.S. 42, 49 (1988) (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)). The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be fairly attributed to the state. . . .

Accordingly, to state a claim under the TVPA, Arar must adequately allege that the defendants possessed power under Syrian law, and that the offending actions (*i.e.,* Arar's removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power. The complaint contains no such allegation. Arar has argued that his allegation of conspiracy cures any deficiency under the TVPA. But the conspiracy allegation is that United States officials encouraged and facilitated the exercise of power by Syrians in Syria, not that the United States officials had or exercised power or authority under Syrian law. The defendants are alleged to have acted under color of federal, not Syrian, law, and to have acted in accordance with alleged federal policies and in pursuit of the aims of the federal government in the international context. At most, it is alleged that the defendants encouraged or solicited certain conduct by foreign officials. Such conduct is insufficient to establish that the defendants were in some way clothed with the authority of Syrian law or that their conduct may otherwise be fairly attributable to Syria. *See, e.g., Harbury v. Hayden,* 444 F. Supp. 2d 19, 42-43 (D.D.C. 2006), *aff'd on other grounds,* 522 F.3d 413 (D.C. Cir. 2008). We therefore agree with the unanimous holding of the panel and affirm the District Court's dismissal of the TVPA claim.

V

Count Four of the complaint alleges that the conditions of confinement in the United States (prior to Arar's removal to Syria), and the denial of access to courts during that detention, violated Arar's substantive due process rights under the Fifth Amendment. The District Court dismissed this claim-without prejudice-as insufficiently pleaded, and invited Arar to re-plead the claim in order to "articulate more precisely the judicial relief he was denied" and to "name those defendants that were personally involved in the alleged unconstitutional treatment." *Arar,* 414 F. Supp. 2d at 286, 287. Arar elected (in his counsel's words) to "stand on the allegations of his original complaint."

On a motion to dismiss, courts require "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570; *see also Ashcroft v. Iqbal,* --- U.S. ----, 129 S. Ct. 1937, 1949-50 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level. . . ." *Twombly,* 550 U.S. at 555. Broad allegations of conspiracy are insufficient; the plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord,* 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation marks omitted) (addressing conspiracy claims under 42 U.S.C. §1985). Furthermore, a plaintiff in a *Bivens* action is required to allege facts indicating that the defendants were personally involved in the claimed constitutional violation. *See Ellis v. Blum,* 643 F.2d 68, 85 (2d Cir. 1981).

Arar alleges that "Defendants" – undifferentiated – "denied Mr. Arar effective access to consular assistance, the courts, his lawyers, and family members" in order to effectuate his removal to Syria. But he fails to specify any culpable action taken by any single defendant, and does not allege the "meeting of the minds" that a plausible conspiracy claim requires. He alleges (in passive voice) that his requests to make phone calls "were ignored," and that "he was told" that he was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed. Given this omission, and in view of Arar's rejection of

an opportunity to re-plead, we agree with the District Court and the panel majority that this Count of the complaint must be dismissed.

We express no view as to the sufficiency of the pleading otherwise, that is, whether the conduct alleged (if plausibly attributable to defendants) would violate a constitutionally protected interest. To the extent that this claim may be deemed to be a *Bivens*-type action, it may raise some of the special factors considered later in this opinion.

VI

Arar's remaining claims seek relief on the basis of torture and detention in Syria, and are cast as violations of substantive due process. At the outset, Defendants argue that the jurisdictional bar of the INA deprived the District Court of subject-matter jurisdiction over these counts because Arar's removal was conducted pursuant to a decision that was "at the discretion" of the Attorney General. . . .

. . . [W]e need not decide the . . . question of whether the INA bar defeats jurisdiction of Arar's substantive due process claims, because we conclude below that the case must be dismissed at the threshold for other reasons.

VII

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 66, (2001). The plaintiff in *Bivens* had been subjected to an unlawful, warrantless search which resulted in his arrest. The Supreme Court allowed him to state a cause of action for money damages directly under the Fourth Amendment, thereby giving rise to a judicially-created remedy stemming directly from the Constitution itself.

The purpose of the *Bivens* remedy "is to deter individual federal officers from committing constitutional violations." *Malesko,* 534 U.S. at 70. So a *Bivens* action is brought against individuals, and any damages are payable by the offending officers. *Carlson v. Green,* 446 U.S. 14, 21(1980). Notwithstanding the potential breadth of claims that would serve that objective, the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in "new contexts." *See Malesko,* 534 U.S. at 69 (internal quotation marks omitted). In the 38 years since *Bivens,* the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman,* 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson,* 446 U.S. 14. Since *Carlson* in 1980, the Supreme Court has declined to extend the *Bivens* remedy in any new direction at all. Among the rejected contexts are: violations of federal employees' First Amendment rights by their employers, *Bush v. Lucas,* 462 U.S. 367 (1983); harms suffered incident to military service, *United States v. Stanley,* 483 U.S. 669 (1987); denials of Social Security benefits, *Schweiker,* 487 U.S. at 412; claims against federal agencies, *FDIC v. Meyer,* 510 U.S. 471 (1994); claims against private corporations operating under federal contracts, *Malesko,* 534 U.S. 61 (2001); and claims of retaliation by federal officials against private landowners, *Wilkie,* 551 U.S. at 562.

This case requires us to examine whether allowing this *Bivens* action to proceed would extend *Bivens* to a new "context," and if so, whether such an extension is advisable.

"Context" is not defined in the case law. At a sufficiently high level of generality, any claim can be analogized to some other claim for which a *Bivens* action is afforded, just as at a sufficiently high level of particularity, every case has points of distinction. We construe the word "context" as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components.

The context of this case is international rendition, specifically, "extraordinary rendition." Extraordinary rendition is treated as a distinct phenomenon in international law. Indeed, law review articles that affirmatively advocate the creation of a remedy in cases like Arar's recognize "extraordinary rendition" as the context. *See, e.g.,* Peter Johnston, Note, *Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States,* 16 J.L. & Pol'y 357, 363 (2007). More particularly, the context of extraordinary rendition in Arar's case is the complicity or cooperation of United States government officials in the delivery of a non-citizen to a foreign country for torture (or with the expectation that torture will take place). This is a "new context": no court has previously afforded a *Bivens* remedy for extraordinary rendition.

Once we have identified the context as "new," we must decide whether to recognize a *Bivens* remedy in that environment of fact and law. The Supreme Court tells us that this is a two-part inquiry. In order to determine whether to recognize a *Bivens* remedy in a new context, we must consider: whether there is an alternative remedial scheme available to the plaintiff; and whether "'special factors counsel[ ] hesitation'" in creating a *Bivens* remedy. *Wilkie,* 551 U.S. at 550 (quoting *Bush,* 462 U.S. at 378).

VIII . . .

. . . [W]e need not decide whether an alternative remedial scheme was available because, "even in the absence of an alternative [remedial scheme], a *Bivens* remedy is a subject of judgment . . . [in which] courts must . . . pay particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie,* 551 U.S. at 550. Such special factors are clearly present in the new context of this case, and they sternly counsel hesitation.

IX

When the *Bivens* cause of action was created in 1971, the Supreme Court explained that such a remedy could be afforded because that "case involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens,* 403 U.S. at 396. This prudential limitation was expressly weighed by the Court in *Davis,* 442 U.S. at 245-46, and *Carlson,* 446 U.S. at 18-19, and such hesitation has defeated numerous *Bivens* initiatives, *see, e.g., Stanley,* 483 U.S. at 683-84; [*Chappell v. Wallace*, 462 U.S. 296 (1983)] at 304; *Wilkie,* 551 U.S. at 554-55; [*Dotson v. Griesa*, 398 F.3d 156 (2d Cir. 2005)] at 166-67. Among the "special factors" that have "counsel[ed] hesitation" and thereby foreclosed a *Bivens* remedy are: military concerns, *Stanley,* 483 U.S. at 683-84; *Chappell,* 462 U.S. at 304; separation of powers, *United States v. City of Philadelphia,* 644 F.2d 187, 200 (3d Cir. 1980); the comprehensiveness of available statutory schemes, *Dotson,* 398 F.3d at 166; national security concerns, *Beattie v. Boeing Co.,* 43 F.3d 559, 563 (10th Cir. 1994); and foreign policy considerations, *United States v. Verdugo-Urquidez,* 494 U.S. 259, 274 (1990).

Two principles emerge from this review of case law:

- "Special factors" is an embracing category, not easily defined; but it is limited in terms to factors that provoke "hesitation." While special factors should be substantial enough to justify the absence of a damages remedy for a wrong, no account is taken of countervailing factors that might counsel alacrity or activism, and none has ever been cited by the Supreme Court as a reason for affording a *Bivens* remedy where it would not otherwise exist.
- The only relevant threshold – that a factor "counsels hesitation" – is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or

an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.

With these principles in mind, we adduce, one by one, special factors that bear upon the recognition of a *Bivens* remedy for rendition.

X

Although this action is cast in terms of a claim for money damages against the defendants in their individual capacities, it operates as a constitutional challenge to policies promulgated by the executive. Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them. A *Bivens* action is sometimes analogized to an action pursuant to 42 U.S.C. §1983, but it does not reach so far as to create the federal counterpart to an action under *Monell v. Department of Social Services,* 436 U.S. 658 (1978). Here, we need not decide categorically whether a *Bivens* action can lie against policymakers because in the context of extraordinary rendition, such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation. Our holding need be no broader.

A. Security and Foreign Policy

The Executive has practiced rendition since at least 1995. *See* Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 15 (2007) (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, CIA). Arar gives "the mid-1990s" as the date for the inception of the policy under which he was sent to Syria for torture. A suit seeking a damages remedy against senior officials who implement such a policy is in critical respects a suit against the government as to which the government has not waived sovereign immunity. Such a suit unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers, and thereby elicits government funds for settlement. (Canada has already paid Arar $10 million.)

It is a substantial understatement to say that one must hesitate before extending *Bivens* into such a context. A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns. It is clear from the face of the complaint that Arar explicitly targets the "policy" of extraordinary rendition; he cites the policy twice in his complaint, and submits documents and media reports concerning the practice. His claim cannot proceed without inquiry into the perceived need for the policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries.

The Supreme Court has expressly counseled that matters touching upon foreign policy and national security fall within "an area of executive action 'in which courts have long been *hesitant* to intrude'" absent congressional authorization. *Lincoln v. Vigil,* 508 U.S. 182, 192 (1993) (emphasis added) (*quoting Franklin v. Massachusetts,* 505 U.S. 788, 819 (1992) (Stevens, J., concurring in part and concurring in the judgment)). It "has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive. . . . Thus, unless Congress specifically has provided otherwise, courts

traditionally have been *reluctant* to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan,* 484 U.S. 518, 529-30 (1988) (emphasis added) (*quoting Haig v. Agee,* 453 U.S. 280, 293-94 (1981)). This "hesita[tion]" and "reluctan[ce]" is counseled by:

- the constitutional separation of powers among the branches of government, *see United States v. Curtiss-Wright Exp. Co.,* 299 U.S. 304, 320-22 (1936) . . .
- the limited institutional competence of the judiciary, *see Boumediene v. Bush,* --- U.S. ----, 128 S. Ct. 2229, 2276-77 (2008) ("Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."). . . .

B. Classified Information

The extraordinary rendition context involves exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues. The sensitivities of such classified material are "too obvious to call for enlarged discussion." *Dep't of Navy,* 484 U.S. at 529 (internal quotation marks omitted). Even the probing of these matters entails the risk that other countries will become less willing to cooperate with the United States in sharing intelligence resources to counter terrorism. "At its core," as the panel opinion observed, "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." *Arar,* 532 F.3d at 181. To determine the basis for Arar's alleged designation as an Al Qaeda member and his subsequent removal to Syria, the district court would have to consider what was done by the national security apparatus of at least three foreign countries, as well as that of the United States. Indeed, the Canadian government-which appears to have provided the intelligence that United States officials were acting upon when they detained Arar-paid Arar compensation for its role in the events surrounding this lawsuit, but has *also* asserted the need for Canada itself to maintain the confidentiality of certain classified materials related to Arar's claims.

C. Open Courts

Allegations of conspiracy among government agencies that must often work in secret inevitably implicate a lot of classified material that cannot be introduced into the public record. Allowing Arar's claims to proceed would very likely mean that some documents or information sought by Arar would be redacted, reviewed *in camera,* and otherwise concealed from the public. Concealment does not bespeak wrongdoing: in such matters, it is just as important to conceal what has *not* been done. Nevertheless, these measures would excite suspicion and speculation as to the true nature and depth of the supposed conspiracy, and as to the scope and depth of judicial oversight. Indeed, after an inquiry at oral argument as to whether classified materials relating to Arar's claims could be made available for review *in camera,* Arar objected to the supplementation of the record with material he could not see. *See* Letter from David Cole, Counsel for Maher Arar (Dec. 23, 2008). After pointing out that such materials are unnecessary to the adjudication of a motion on the pleadings (where the allegations of the complaint must be accepted as true), Arar protested that any materials submitted *ex parte* and *in camera* would not be subject to adversarial testing and that consideration of such documents would be "presumptively unconstitutional" since they would result in a decision "on the basis of secret information available to only one side of the dispute."

The court's reliance on information that cannot be introduced into the public record is likely to be a

common feature of any *Bivens* actions arising in the context of alleged extraordinary rendition. This should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings, a value incorporated into modern First and Sixth Amendment law. . . .

XI

A government report states that this case involves assurances received from other governments in connection with the determination that Arar's removal to Syria would be consistent with Article 3 of the CAT. Office of Inspector General, Dep't of Homeland Sec., (Unclassified) *The Removal of a Canadian Citizen to Syria* 5, 22, 26-27 (2008). This case is not unique in that respect. Cases in the context of extraordinary rendition are very likely to present serious questions relating to private diplomatic assurances from foreign countries received by federal officials, and this feature of such claims opens the door to graymail.

A. Assurances

The regulations promulgated pursuant to the [Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), 8 U.S.C. §1231 note] explicitly authorize the removal of an alien to a foreign country following receipt from that country of sufficiently reliable assurances that the alien will not be tortured. *See* 8 C.F.R. §208.18(c). Should we decide to extend *Bivens* into the extraordinary rendition context, resolution of these actions will require us to determine whether any such assurances were received from the country of rendition and whether the relevant defendants relied upon them in good faith in removing the alien at issue.

Any analysis of these questions would necessarily involve us in an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships. An investigation into the existence and content of such assurances would potentially embarrass our government through inadvertent or deliberate disclosure of information harmful to our own and other states. Given the general allocation of authority over foreign relations to the political branches and the decidedly limited experience and knowledge of the federal judiciary regarding such matters, such an investigation would also implicate grave concerns about the separation of powers and our institutional competence. These considerations strongly counsel hesitation in acknowledging a *Bivens* remedy in this context.

B. Graymail

. . . [T]here is further reason to hesitate where, as in this case, the challenged government policies are the subject of classified communications: a possibility that such suits will make the government "vulnerable to 'graymail,' *i.e.,* individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations," or otherwise compromise foreign policy efforts. *Tenet v. Doe,* 544 U.S. 1, 11 (2005). We cast no aspersions on Arar, or his lawyers; this dynamic inheres in any case where there is a risk that a defendant might "disclose classified information in the course of a trial." *United States v. Pappas,* 94 F.3d 795, 799 (2d Cir. 1996). This is an endemic risk in cases (however few) which involve a claim like Arar's.

The risk of graymail is itself a special factor which counsels hesitation in creating a *Bivens* remedy. There would be hesitation enough in an ordinary graymail case, *i.e.,* where the tactic is employed against the *government,* which can trade settlement cash (or the dismissal of criminal charges) for secrecy. *See Tenet,* 544 U.S. at 11; *Pappas,* 94 F.3d at 799. But the graymail risk in a *Bivens* rendition case is uniquely

troublesome. The interest in protecting military, diplomatic, and intelligence secrets is located (as always) in the *government;* yet a *Bivens* claim, by definition, is never pleaded against the government. *See, e.g., Malesko,* 534 U.S. at 70. So in a *Bivens* case, there is a dissociation between the holder of the non-disclosure interest (the government, which cannot be sued directly under *Bivens*) and the person with the incentive to disclose (the defendant, who cannot waive, but will be liable for any damages assessed). In a rendition case, the *Bivens* plaintiff could in effect pressure the individual defendants until the *government* cries uncle. Thus any *Bivens* action involving extraordinary rendition would inevitably suck the government into the case to protect its considerable interests, and – if disclosure is ordered – to appeal, or to suffer the disclosure, or to pay. . . .

In the end, a *Bivens* action based on rendition is – in all but name – a claim against the government. It is not for nothing that Canada (the government, not an individual officer of it) paid Arar $10 million dollars.

XII

In the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. The guard who beat a prisoner should not have beaten him; the agent who searched without a warrant should have gotten one; and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes. This distinction may or may not amount to a special factor counseling hesitation in the implication of a *Bivens* remedy. But it is surely remarkable that the context of extraordinary rendition is so different, involving as it does a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached.

Consider: should the officers here have let Arar go on his way and board his flight to Montreal? Canada was evidently unwilling to receive him; it was, after all, Canadian authorities who identified Arar as a terrorist (or did something that led their government to apologize publicly to Arar and pay him $10 million).

Should a person identified as a terrorist by his own country be allowed to board his plane and go on to his destination? Surely, that would raise questions as to what duty is owed to the other passengers and the crew.

Or should a suspected terrorist en route to Canada have been released on the Canadian border – over which he could re-enter the United States virtually at will? Or should he have been sent back whence his plane came, or to some third country? Should those governments be told that Canada thinks he is a terrorist? If so, what country would take him?

Or should the suspected terrorist have been sent to Guantanamo Bay or – if no other country would take him – kept in the United States with the prospect of release into the general population? *See Zadvydas v. Davis,* 533 U.S. 678, 699-700 (2001).

None of this is to say that extraordinary rendition is or should be a favored policy choice. At the same time, the officials required to decide these vexed issues are "subject to the pull of competing obligations." *Lombardi v. Whitman,* 485 F.3d 73, 83 (2d Cir. 2007). Many viable actions they might consider "clash with other equally important governmental responsibilities." *Pena v. DePrisco,* 432 F.3d 98, 114 (2d Cir. 2005) (internal quotation marks omitted). Given the ample reasons for pause already discussed, we need not and do not rely on this consideration in concluding that it is inappropriate to extend *Bivens* to this context. Still, Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions-which are directly related to the security of the population and the foreign affairs of the country-should be subjected to the influence of litigation brought by aliens.

XIII

All of these special factors notwithstanding, we cannot ignore that, as the panel dissent put it, "there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security." *Arar,* 532 F.3d at 213 (Sack, J., concurring in part and dissenting in part). Where does that leave us? We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition. By the same token, we can easily locate that competence, expertise, and responsibility elsewhere: in Congress. Congress may be content for the Executive Branch to exercise these powers without judicial check. But if Congress wishes to create a remedy for individuals like Arar, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded. Once Congress has performed this task, *then* the courts in a proper case will be able to review the statute and provide judicial oversight to the "Executive and Legislative decisions [which have been made with regard] to the conduct of foreign relations and national security." *Id.* . . .

SACK, Circuit Judge, joined by Judges CALABRESI, POOLER, and PARKER, concurring in part and dissenting in part. . . . We disagree . . . with the majority's continued insistence that Arar cannot employ a *Bivens* remedy to seek compensation for his injuries at the hands of government agents. The majority reaches that conclusion by artificially dividing the complaint into a domestic claim that does not involve torture – viz., "[Arar's] claim regarding detention in the United States," – and a foreign claim that does – viz., "[Arar's] claims for detention and torture in Syria." The majority then dismisses the domestic claim as inadequately pleaded and the foreign claim as one that cannot "be asserted under *Bivens* " in light of the opinion's "dominant holding" that "in the context of involuntary rendition, hesitation is warranted by special factors.". . .

As we will explain, . . . the complaint's allegations cannot properly be divided into claims for mistreatment in the United States and "claims for detention and torture in Syria." Arar's complaint of mistreatment sweeps more broadly than that, encompassing a chain of events that began with his interception and detention at New York's John F. Kennedy Airport ("JFK") and continued with his being sent abroad in shackles by government agents with the knowledge that he would likely be tortured as a result. Viewed in this light, we conclude that Arar's allegations do not present a "new context" for a *Bivens* action.

And even were it a new context, we disagree with what appears to be the *en banc* majority's test for whether a new *Bivens* action should be made available: the existence *vel non* of "special factors counselling hesitation." First, we think heeding "special factors" relating to secrecy and security is a form of double counting inasmuch as those interests are fully protected by the state-secrets privilege. Second, in our view the applicable test is not whether "special factors" exist, but whether after "paying particular heed to" them, a *Bivens* remedy should be recognized with respect to at least some allegations in the complaint. Applying that test, we think a *Bivens* remedy is available. . . .

Our overriding concern, however, is with the majority's apparent determination to go to whatever length necessary to reach what it calls its "dominant holding": that a *Bivens* remedy is unavailable. Such a holding is unnecessary inasmuch as the government assures us that this case could likely be resolved quickly and expeditiously in the district court by application of the state-secrets privilege. . . .

II. The Dismissal of the Fourth Claim for Relief . . .

A. Specification of Defendants' Acts and Conspiracy Allegations . . .

Arar should not have been required to "name those defendants [who] were personally involved in the alleged unconstitutional treatment." *Arar,* 414 F. Supp. 2d at 287. In actions pursuant to 42 U.S.C. §1983, which are "analog [s]" of the less-common *Bivens* action, *Ashcroft v. Iqbal,*--- U.S. ----, ----, 129 S. Ct. 1937, 1948 (2009) (citation omitted), we allow plaintiffs to "maintain[ ] supervisory personnel as defendants . . . until [they have] been afforded an opportunity through at least brief discovery to identify the subordinate officials who have personal liability." *Davis v. Kelly,* 160 F.3d 917, 921 (2d Cir. 1998) (citing Second Circuit authority).

> Similarly, courts have rejected the dismissal of suits against unnamed defendants described by roles . . . until the plaintiff has had some opportunity for discovery to learn the identities of responsible officials. Once the supervisory officer has inquired within the institution and identified the actual decision-makers of the challenged action, those officials may then submit affidavits based on their personal knowledge of the circumstances.

Id. (citations omitted). . . .

To be sure, the Supreme Court has recently set a strict pleading standard for supervisory liability claims under Bivens against a former Attorney General of the United States and the Director of the FBI." *See Iqbal, supra.* We do not think, however, that the Court has thereby permitted governmental actors who are unnamed in a complaint automatically to escape personal civil rights liability. A plaintiff must, after all, have some way to identify a defendant who anonymously violates his civil rights. We doubt that *Iqbal* requires a plaintiff to obtain his abusers' business cards in order to state a civil rights claim. Put conversely, we do not think that *Iqbal* implies that federal government miscreants may avoid *Bivens* liability altogether through the simple expedient of wearing hoods while inflicting injury. Some manner of proceeding must be made available for the reasons we recognized in *Davis.*

Whether or not there is a mechanism available to identify the "Doe" defendants, moreover, Arar's complaint *does* sufficiently name some individual defendants who personally took part in the alleged violation of his civil rights. The role of defendant J. Scott Blackman, formerly Director of the Regional Office of INS, for example, is, as reflected in the district court's explication of the facts, *see Arar,* 414 F. Supp. 2d at 252-54, set forth in reasonable detail in the complaint. So are at least some of the acts of the defendant Edward J. McElroy, District Director of the INS. . . .

***C. Sufficient Pleading under* Iqbal**

More generally, we think the district court's extended recitation of the allegations in the complaint makes clear that the facts of Arar's mistreatment while within the United States-including the alleged denial of his access to courts and counsel and his alleged mistreatment while in federal detention in the United States-were pleaded meticulously and in copious detail. The assertion of relevant places, times, and events - and names when known - is lengthy and specific. Even measured in light of Supreme Court case law post-dating the district court's dismissal of the fourth claim, which instituted a more stringent standard of review for pleadings, the complaint here passes muster. It does not "offer[ ] 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal,* 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). Nor does it "tender[ ] 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly,* 550 U.S. at 557). Its allegations of a constitutional

violation are "'plausible on [their] face.'" *Id.* (quoting *Twombly,* 550 U.S. at 555). And, as we have explained, Arar has pled "factual content that allows the court to draw the reasonable inference that the defendant[s][are] liable for the misconduct alleged." *Id.* (quoting *Twombly,* 550 U.S. at 556). We would therefore vacate the district court's dismissal of the Fourth Claim for Relief.

III. The Majority's Interpretation of the Second and Third Claims for Relief . . .

Although Arar pled in his Fourth Claim for Relief what he denominated as a separate "Claim" on the subject of "Domestic Detention," including allegations about unconstitutional conditions of confinement and denial of access to courts and counsel, the complaint as a whole makes broader allegations of mistreatment while within the borders of the United States. . . .

It may not have been best for Arar to file a complaint that structures his claims for relief so as to charge knowing or reckless subjection to torture, coercive interrogation, and arbitrary detention in Syria (the second and third claims) separately from charges of cruel and inhuman conditions of confinement and "interfere[nce] with access to lawyers and the courts" while in the United States (the fourth claim). But such division of theories is of no legal consequence. "'Factual allegations alone are what matter [ ].'" *Northrop,* 134 F.3d at 46 (quoting *Albert,* 851 F.2d at 571 n.3). The assessment of Arar's complaint must, then, take into account the entire arc of factual allegations that it contains – his interception and arrest; his interrogation, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C. and forced transfer to Syrian authorities for further detention and questioning under torture. Such attention to the complaint's factual allegations, rather than its legal theories, makes perfectly clear that the remaining claims upon which Arar seeks relief are not limited to his "detention or torture in Syria," but include allegations of violations of his due process rights in the United States. The scope of those claims is relevant in analyzing whether a *Bivens* remedy is available.

IV. The "Context" in Which a *Bivens* Remedy Is Sought

The majority's artificial interpretation of the complaint permits it to characterize the "context" of Arar's *Bivens* action as entirely one of "international rendition, specifically, 'extraordinary rendition.'" This permits the majority to focus on the part of the complaint that presents a "new context" for *Bivens* purposes. But when the complaint is considered in light of all of Arar's allegations, his due process claim for relief from his apprehension, detention, interrogation, and denial of access to counsel and courts in the United States, as well as his expulsion to Syria for further interrogation likely under torture, is not at all "new.". . .

C. The New Context Test . . .

If the alleged facts of Arar's complaint were limited to his claim of "extraordinary rendition" to, and torture in, Syria – that is, limited to his allegations that he was transported by the United States government to Syria via Jordan pursuant to a conspiracy or other arrangement among the countries or their agents and mistreated in Syria as a result – as the majority would have it, then we might well agree that we are dealing with a "new context." But. . . the complaint is not so limited. Incarceration in the United States without cause, mistreatment while so incarcerated, denial of access to counsel and the courts while so incarcerated, and the facilitation of torture by others, considered as possible violations of a plaintiff's procedural and substantive due process rights, are hardly novel claims, nor do they present us with a "new context" in any legally significant sense.

We have recognized implied *Bivens* rights of action pursuant to the Due Process Clause, so Arar's claims for relief are not new actions under *Bivens* in that sense. . . . In *Iqbal*, for example, we considered a *Bivens* action brought on, *inter alia,* a Fifth Amendment substantive due process theory. The plaintiff alleged physical mistreatment and humiliation, as a Muslim prisoner, by federal prison officials, while he was detained at the MDC. After concluding, on interlocutory appeal, that the defendants were not entitled to qualified immunity, we returned the matter to the district court for further proceedings. We did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of the *Bivens* doctrine. *Iqbal,* 490 F.3d at 177-78. . . .

Indeed, even the most "international" of Arar's domestic allegations - that the defendants, acting within the United States, sent Arar to Syria with the intent that he be tortured - present no new context for *Bivens* purposes. Principles of substantive due process apply to a narrow band of extreme misbehavior by government agents acting under color of law: mistreatment that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi v. Whitman,* 485 F.3d 73, 79 (2d Cir.2007) (internal quotation marks omitted). Sending Arar from the United States with the intent or understanding that he will be tortured in Syria easily exceeds the level of outrageousness needed to make out a substantive due process claim. . . .

To be sure, Arar alleges not that the defendants themselves tortured him; he says that they "outsourced" it. But we do not think that the question whether the defendants violated Arar's substantive due process rights turns on whom they selected to do the torturing, or that such "outsourcing" somehow changes the essential character of the acts within the United States to which Arar seeks to hold the defendants accountable. . . .

V. Devising a New *Bivens* Damages Action . . .

B. The Special Factors Identified by the Majority . . .

. . . After *Iqbal,* it would be difficult to argue that Arar's complaint can survive as against defendants who are alleged to have been supervisors with, at most, "knowledge" of Arar's mistreatment. *See Iqbal,* 129 S. Ct. at 1949; *see also id.* at 1955 (Souter, J., dissenting). And to the extent that the United States remains a defendant, perhaps it should be dismissed for want of possible liability under *Bivens* too. But that does not dispose of the case against the lower-level defendants, such as Blackman, McElroy, and the Doe defendants, who are alleged to have personally undertaken purposeful unconstitutional actions against Arar.

It also may be that to the extent actions against "policymakers" can be equated with lawsuits against policies, they may not survive *Iqbal* either. But while those championing Arar's case may in fact wish to challenge extraordinary rendition policy writ large, the relief Arar himself seeks is principally compensation for an unconstitutional implementation of that policy. That is what *Bivens* actions are for. . . .

. . . The other "special factors" cited by the majority focus our attention on the ability of the executive to conduct the business of diplomacy and government in secret as necessary and to protect public and private security. It is beyond dispute that the judiciary must protect that concern. *See, e.g., Doe v. CIA,* 576 F.3d 95 (2d Cir. 2009). But inasmuch as there are established procedures for doing just that, we think treating that need as giving rise to "special factors counseling hesitation" is an unfortunate form of double counting. The problem can be, should be, and customarily is, dealt with case by case by employing the established procedures of the state-secrets doctrine, rather than by barring all such plaintiffs at the courtroom door without further inquiry.

C. Factors Weighing in Favor of a Bivens *Action*

At least some factors weigh in favor of permitting a *Bivens* action in this case. We assume, as we are required to, that Arar suffered a grievous infringement of his constitutional rights by one or more of the defendants, from his interception and detention while changing planes at an international airport to the time two weeks later when he was sent off in the expectation – perhaps the intent and expectation – that he would be tortured, all in order to obtain information from him. Breach of a constitutional or legal duty would appear to counsel in favor of some sort of opportunity for the victim to obtain a remedy for it. . . .

VI. The State-Secrets Privilege

[The dissenters argue that the state-secrets privilege is well suited to provide for a ruling on the merits of Arar's claims.] . . .

BARRINGTON D. PARKER, Circuit Judge, joined by Judges CALABRESI, POOLER, and SACK, dissenting: . . . My point of departure from the majority is the text of the Convention Against Torture, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 2, cl. 2, December 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 ("Convention Against Torture"). Because the majority has neglected this basic commitment and a good deal more, I respectfully dissent.

Maher Arar credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest. He also credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress. *See* 8 U.S.C. §1252(a)(2)(D) (providing for judicial review of constitutional claims or questions of law raised by an order of removal).

While I broadly concur with my colleagues who dissent, I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts. The majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security. Its approach distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in these arenas. To my mind, the most depressing aspect of the majority's opinion is its sincerity. . . .

Notably, the majority opinion does not appear to dispute the notion that Arar has stated an injury under the Fifth Amendment of the Constitution. That is heartening, because, by any measure, the notion that federal officials conspired to send a man to Syria to be tortured "shocks the conscience." *Rochin v. California,* 342 U.S. 165, 172 (1952). What is profoundly disturbing, however, is the Court's pronouncement that it can offer Arar no opportunity to prove his case and no possibility of relief. This conclusion is at odds with the Court's responsibility to enforce the Constitution's protections and cannot, in my view, be reconciled with *Bivens*. The majority is at odds, too, with our own State Department, which has repeatedly taken the position before the world community that this exact remedy is available to torture victims like Arar.If the Constitution ever implied a damages remedy, this is such a case - where executive officials allegedly blocked access to the remedies chosen by Congress in order to deliver a man to known torturers.

The Court's hesitation today immunizes official conduct directly at odds with the express will of

Congress and the most basic guarantees of liberty contained in the Constitution. By doing so, the majority risks a government that can interpret the law to suits its own ends, without scrutiny. . . .

I . . .

When presented with an appropriate case or controversy, courts are entitled – indeed obliged – to act, even in instances where government officials seek to shield their conduct behind invocations of "national security" and "foreign policy." *See, e.g., Hamdan v. Rumsfeld,* 548 U.S. 557 723 (2006); *Reid v. Covert,* 354 U.S. 1, 23-30 (1957); *Youngstown* [*Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)]. *Compare Ex parte Quirin,* 317 U.S. 1, 19 (1942) (observing the "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty"), *with* Maj. Op. at 42 (suggesting that Arar's allegations do not trigger the Court's "unflagging duty to exercise [its] jurisdiction"). This authority derives directly from the Constitution and goes hand in hand with the responsibility of the courts to adjudicate all manner of cases put before them. . . .

II . . .

. . . [C]ontrary to the majority's suggestion, the courts require no invitation from Congress before considering claims that touch upon foreign policy or national security. In fact, the Supreme Court has demonstrated its willingness to enter this arena against the express wishes of Congress. In *Boumediene v. Bush,* --- U.S. ----, 128 S. Ct. 2229 (2008), the Supreme Court rebuffed legislative efforts to strip the courts of jurisdiction over detainees held at Guantanamo Bay. It held that the writ of habeas corpus extended to the naval base, and that neither Congress nor the executive branch could displace the courts without formally suspending the writ. Importantly, it did so despite the fact that this exercise of judicial power plainly affected the executive's detention of hundreds of enemy combatants and a centerpiece of the war on terror. The Court recognized that habeas proceedings "may divert the attention of military personnel from other pressing tasks" but refused to find these concerns "dispositive." *Id.* at 2261. . . .

POOLER, Circuit Judge, joined by Judges CALABRESI, SACK, and PARKER, dissenting. . . .

II. TVPA . . .

. . . In the Section 1983 context, the Supreme Court has held that private individuals may be liable for joint activities with state actors even where those private individuals had no official power under state law. *Dennis v. Sparks,* 449 U.S. 24, 27-28 (1980). In *Sparks,* the private individuals conspired with a state judge to enjoin the plaintiff's mining operation. The Court held:

> [T]o act 'under color of' state law for §1983 purposes doesnot 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. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of §1983 actions.

Id.; see also Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 315 (2d Cir. 2007) (Korman, J., concurring in part). Arar alleges that U.S. officials, recognizing that Syrian law was more permissive of torture that U.S. law, contacted an agent in Syria to arrange to have Arar tortured under the authority of Syrian law. Specifically, Arar alleges that U.S. officials sent the Syrians a dossier containing questions, identical to those questions he was asked while detained in the U.S., including one about his relationship

with a particular individual wanted for terrorism. He also alleges the Syrian officials supplied U.S. officials with information they extracted from him, citing a public statement by a Syrian official. Assuming the truth of these allegations, defendants' wrongdoing was only possible due to the latitude permitted under Syrian law and their joint action with Syrian authorities. The torture may fairly be attributed to Syria. . . .

Under Section 1983, non-state actors who willfully participate in joint action with state officials, acting under state law, themselves act under color of state law. By analogy, under the TVPA, non-Syrian actors who willfully participate in joint action with Syrian officials, acting under Syrian law, themselves act under color of Syrian law. In *Aldana v. Del Monte Fresh Produce,* 416 F.3d 1242, 1249, 1265 (11th Cir. 2005), the Eleventh Circuit sustained a TVPA claim where plaintiffs alleged that a U.S. corporation "hir[ed] and direct[ed] its employees and/or agents," including a Guatemalan mayor, "to torture the Plaintiffs and threaten them with death." 416 F.3d at 1265. The allegation that the corporation participated in joint action with the Guatemalan official was sufficient.I see no principled reason to apply different rules to the TVPA context than the Section 1983 context, to federal agent defendants than corporate defendants, or to actors in the United States than actors on foreign soil. Arar alleges that defendants, acting in concert with Syrian officials, interrogated him through torture under color of Syrian law, which they could not have accomplished under color of U.S. law alone. . . .

CALABRESI, Circuit Judge, joined by Judges POOLER, SACK, and PARKER, dissenting. . . . In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the TVPA and of §1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person – whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law – is effectively left without a U.S. remedy. . . .

All this, as the other dissenters have powerfully demonstrated, is surely bad enough. I write to discuss one last failing, an unsoundness that, although it may not be the most significant to Arar himself, is of signal importance to us as federal judges: the majority's unwavering willfulness. It has engaged in what properly can be described as extraordinary judicial activism. It has violated long-standing canons of restraint that properly must guide courts when they face complex and searing questions that involve potentially fundamental constitutional rights. It has reached out to decide an issue that should not have been resolved at this stage of Arar's case. Moreover, in doing this, the court has justified its holding with side comments (as to other fields of law such as torts) that are both sweeping and wrong. That the majority – made up of colleagues I greatly respect – has done all this with the best of intentions, and in the belief that its holding is necessary in a time of crisis, I do not doubt. But this does not alter my conviction that in calmer times, wise people will ask themselves: how could such able and worthy judges have done that? . . .