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# Damages against Federal Officers - The Second Circuit Contributes to Executive Interference in National Security Litigation through Improper Bivens Analysis

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# DAMAGES AGAINST FEDERAL OFFICERS—THE SECOND CIRCUIT CONTRIBUTES TO EXECUTIVE INTERFERENCE IN NATIONAL SECURITY LITIGATION THROUGH IMPROPER *BIVENS* ANALYSIS

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IN *Arar v. Ashcroft*,[1] a divided Second Circuit held that violations of substantive due process under the Fifth Amendment are not actionable pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*.[2] The court erroneously considered the state-secrets privilege, a common-law evidentiary rule that allows the government to withhold information from discovery in the interest of national security,[3] as a "special factor" under *Bivens* and consequentially denied the judicial creation of a damages remedy.[4] This decision has serious negative implications for national security litigation: it unduly expands executive intrusion in the judicial sphere and departs from recent U.S. Supreme Court pronouncements on the separation of powers.

On September 26, 2002, Maher Arar, a dual Canadian-Syrian national, arrived from Switzerland at John F. Kennedy Airport while in transit from Tunisia to Montréal, Canada.[5] In New York, federal agents for what was then the U.S. Immigration and Naturalization Service ("INS") identified Arar as a member of al Qaeda, a known terrorist organization, and therefore inadmissible to the United States.[6] Pursuant to this determination, the INS Regional Director designated him to be removed to Syria "without further inquiry before an immigration judge."[7] Prior to his removal, federal agents allegedly subjected Arar to harsh interrogation and

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1. 532 F.3d 157 (2d Cir. 2008).
2. *Id.* at 164 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)).
3. *See* Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991).
4. *Arar*, 532 F.3d at 183.
5. Arar v. Ashcroft, 414 F. Supp. 2d 250, 252-53 (E.D.N.Y. 2006).
6. *Id.*
7. *Id.* at 254.

detention for thirteen days.[8] These agents purportedly gave him an opportunity to return voluntarily to Syria, but he refused.[9] Arar believed he would be tortured if he went back to Syria and asked his interrogators to send him to Canada or return him to Switzerland instead.[10] On October 8, 2002, however, federal agents flew Arar to Amman, Jordan, where Jordanian authorities turned him over to Syrian military officials.[11] These officials allegedly tortured and detained Arar for nearly one year without filing any formal charges against him.[12] On October 5, 2003, at the request of the Canadian government, Syrian authorities released Arar into the custody of Canadian diplomats in Damascus, and he later returned to his family in Ottawa.[13]

On January 22, 2004, Arar brought suit in federal court on statutory and constitutional grounds seeking declaratory and monetary relief.[14] Count one claimed that U.S. officials conspired with Syrian and Jordanian authorities in violation of the Torture Victim Prevention Act ("TVPA").[15] Arar alleged that federal agents provided Syrian authorities with information about him and suggested subjects for interrogation as part of a plan to extract counter-terrorism information.[16] Counts two and three alleged that U.S. officials violated Arar's Fifth Amendment rights by knowingly and intentionally subjecting him to torture and interrogation in Syria, and that as a result of these actions, Syrian officials arbitrarily detained him.[17] Arar alleged these federal officers removed him to Syria pursuant to the U.S. government's "extraordinary rendition" program, whereby suspected terrorists are sent to foreign countries for interrogation and detention otherwise not permitted in the United States.[18] Count four alleged several additional due process deprivations that occurred while Arar was in U.S. custody.[19] Arar also sought *Bivens* damages from the federal officers he claimed were responsible for violating his Fifth Amendment rights.[20] The government moved to dismiss the action by asserting the state-secrets privilege over information relating to the first three counts and lack of personal jurisdiction over the fourth.[21]

On February 16, 2006, the district court dismissed counts one through three for failure to state a claim upon which relief could be granted and thus did not reach the issues raised by the government's assertion of the

8. *Id.* at 253-54.
9. *Id.* at 253.
10. *Id.*
11. *Id.*
12. *Id.* at 254-55.
13. *Id.* at 255.
14. *Id.* at 257.
15. *Id.*
16. *Id.* at 256-57.
17. *Id.* at 257-58.
18. *Id.* at 256.
19. *Id.* at 258.
20. *Id.* at 267.
21. *Id.* at 286-87.

state-secrets privilege.[22] The court dismissed count four for lack of personal jurisdiction over the individual defendants.[23] The district court also held that no cause of action under *Bivens* could be extended in light of special factors counseling hesitation.[24] The court went on to name national security and foreign policy considerations as the special factors.[25] After the Clerk of the Court entered judgment dismissing the action with prejudice, Arar appealed.[26]

In a split opinion, the Second Circuit affirmed the district court's judgment and its refusal to award *Bivens* damages.[27] Judge Sack filed an opinion concurring in part and dissenting in part.[28] He agreed with the majority's determination that Arar made a *prima facie* showing of personal jurisdiction over the defendants, his complaint did not state a claim under the TVPA, and he had not established federal subject matter jurisdiction over his declaratory judgment request.[29] Judge Sack, however, disagreed with the majority's refusal to provide *Bivens* relief and would have allowed Arar's claims for money damages to move forward.[30]

The Supreme Court in *Bivens* created a non-statutory damages remedy for violations of the Fourth Amendment by agents of the Federal Bureau of Narcotics.[31] Although the U.S. Constitution vests Congress with legislative power,[32] *Bivens* held that, in appropriate circumstances, the Constitution itself provides an implied cause of action for its own violation by federal officers.[33] Courts conduct a fact-sensitive, two-step inquiry to determine whether an extension of *Bivens* relief is proper.[34] First, a court will examine whether an alternative damages remedy exists or there is an explicit congressional prohibition against one.[35] Either would bar the judicial recognition of an implied cause of action. Second, a court must consider "special factors" that would "counsel hesitation" and foreclose the availability of a remedy.[36] These considerations "d[o] not concern the merits of the particular remedy [being] sought," but rather involve "the question of who [Congress or the courts] should decide whether such

22. *Id.* at 287.

23. *Id.*

24. *Id.* at 281.

25. *Id.*

26. Arar v. Ashcroft, 532 F.3d 157, 163 (2d Cir. 2008). Arar did not amend his complaint to cure the jurisdictional defects and instead appealed from the judgment of the district court. *Id.*

27. *Id.* at 164.

28. *Id.* at 193 (Sack, J., concurring in part and dissenting in part).

29. *Id.* at 201.

30. *Id.*

31. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396-97 (1971); *see also* 42 U.S.C. § 1983 (2006) (providing the basis for civil action for deprivation of rights).

32. U.S. CONST. art. I, § 1.

33. *Bivens*, 403 U.S. at 401-03 (Harlan, J., concurring).

34. *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2598 (2007).

35. *Id.*

36. *Id.*

a remedy should be provided."[37]

The *Arar* majority approached the *Bivens* inquiry by separating the damages sought into two sets of claims.[38] The first set, and the subject of this Casenote, encompassed counts two and three of Arar's complaint which arose from the allegation that federal officers "removed him to Syria with the knowledge or intention" that he would be unlawfully detained and tortured there.[39] Step one of the *Bivens* analysis revealed that Congress provided a remedial scheme in the Foreign Affairs Reform and Restructuring Act of 1988 ("FARRA") for claims arising from an alien's involuntary return to a country where he believed he would be tortured.[40] Step two showed that special factors, including national security interests, foreign policy concerns, and the state-secrets privilege, weighed against the judicial recognition of an implied cause of action.[41] The gravamen of the special-factors examination was a fear that the court's creation of a damages remedy would interfere with the political branches' conduct of foreign policy.[42] But regrettably the court also considered that "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."[43]

The Second Circuit looked to *Bivens* precedent involving the coordinate branches of government for guidance on what might be considered a special factor. In *Bush v. Lucas*, the Supreme Court determined that it was preferable for Congress to evaluate the impact of damages suits for alleged violations of a federal employee's First Amendment rights.[44] In *Chappell v. Wallace*, the Court refused to extend *Bivens* relief to victims of alleged violations of constitutional rights by military officers because Congress enjoys "plenary control" over military discipline.[45] And in *Sanchez-Espinosa v. Reagan*, then-Judge Scalia sitting on the D.C. Circuit concluded that Congress must determine whether a damages remedy should exist "against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."[46] While the *Arar* majority provided some indication that an interference with foreign relations might counsel against the judicial creation of a

37. *See* Arar v. Ashcroft, 532 F.3d 157, 181 (2d Cir. 2008) (quoting Bush v. Lucas, 462 U.S. 376, 380 (1983)).

38. *Id.* at 178.

39. *Id.* The second set of claims in count four of the complaint arose from Arar's allegations regarding his treatment while detained in the United States. *Id.* The Second Circuit determined that these allegations did not state a claim under the Due Process Clause of the Fifth Amendment and dismissed the complaint, thereby foreclosing a *Bivens* remedy. *Id.* at 190.

40. *Id.* at 179.

41. *Id.* at 181-84.

42. *Id.* at 181-82.

43. *Id.* at 183 (emphasis added).

44. *Id.* at 178 (citing Bush v. Lucas, 462 U.S. 367, 389 (1983)).

45. *Id.* (citing Chappell v. Wallace, 462 U.S. 296, 301 (1983)).

46. *Id.* at 182 (quoting Sanchez-Espinosa v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985)).

damages remedy, it failed to offer any precedent that the state-secrets privilege itself should be considered a special factor. The court merely relied on a footnote from *Sosa v. Alvarez-Machain* for the proposition that "federal courts should give *serious weight* to the Executive Branch's view of the case's impact on foreign policy" when evaluating whether monetary relief under *Bivens* is appropriate.[47]

Judge Sack in dissent provided a more convincing *Bivens* analysis. Step one of his inquiry showed that an alternative damages remedy did not exist because Arar was not seeking the type of relief the FARRA was designed to address.[48] In step two, Judge Sack found no special factors counseling hesitation and criticized the majority's consideration of the state-secrets privilege.[49] He noted that the proper invocation of the privilege would protect the legitimate national security interests that concerned the majority and that, at a minimum, Arar presented a viable *Bivens* claim.[50]

The majority's consideration of the state-secrets privilege as a special factor is troubling for at least two reasons. First, it is an undue expansion of executive intrusion in the judicial sphere. In *United States v. Reynolds*, the Supreme Court formally recognized the state-secrets privilege as a narrowly construed common-law evidentiary rule and held that when "the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone."[51] Since *Reynolds*, courts have broadened this rule to include military and state secrets, diplomatic relations, and intelligence sources.[52] Although the use of the state-secrets privilege necessarily implicates national security, it is distinguishable from nebulous foreign relations concerns that occupy *both* political branches of government, such as those in *Sanchez-Espinosa v. Reagan*, which might counsel against a *Bivens* remedy. The privilege, indeed, is wholly within the province of the executive branch: the department that controls the matter of the case has unconditional authority over its assertion, there is no congressional oversight over its invocation,[53] and

47. *Id.* at 182-83 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)) (emphasis added).

48. *Id.* at 211 (Sack, J., concurring in part and dissenting in part). Arar challenged the constitutionality of his treatment by federal officers, but not his immigration removal order. *Id.* at 211-12.

49. *Id.* at 212.

50. *Id.* at 213-14.

51. United States v. Reynolds, 345 U.S. 1, 10 (1953).

52. *See* Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 106 (2007) (collecting cases).

53. Several scholars and the American Bar Association have urged Congress to clarify or codify the state-secrets privilege. *See* Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 220-21 (2008); Victor Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C. J. INT'L L. & COM. REG. 629, 641, 653 app. (2008). To date, however, Congress has not enacted such legislation. *Cf.* State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009); State Secret Protection Act of 2009, S. 417, 111th Cong. (2009).

courts have considered it to be "absolute."[54]

This makes its consideration as a special factor under *Bivens* particularly inappropriate. *Bivens* prescribed a framework for the judicial recognition of an implied cause of action against the backdrop of congressional deference to the creation of a damages remedy. The state-secrets privilege is quintessentially an executive tool, and when considered as a special factor, the court defers not to a congressional determination, but to an *executive* determination of whether a cause of action should exist. In other words, the *Arar* court did not give the Executive Branch's view of a case's impact on foreign policy "serious weight" when it considered the state-secrets privilege as a special factor.[55] On the contrary, the court gave it the unilateral power to deny the enforcement of a constitutional right. This is tantamount to complete executive deference to the creation of a damages remedy, which defies nearly forty-years of *Bivens* jurisprudence.

Second, the majority's consideration of the state-secrets privilege is a departure from recent Supreme Court pronouncements on the separation of powers. In *Hamdi v. Rumsfeld*, also involving the constitutional rights of an al Qaeda terrorist suspect, the Court cautioned that "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."[56] The state-secrets privilege envisions no role for the legislature in its construction and no role for the judiciary in its practice. Unlike the special factors the Court found in *Lucas*, Congress cannot "evaluate" the state-secrets privilege. Unlike *Chappell*, Congress does not "control" or regulate the state-secrets privilege. Nor is there any real judicial check on its application. Although the *Reynolds* Court stressed that the decision to withhold evidence is made by the presiding judge, an invocation of the state-secrets privilege rarely has been defeated.[57] Thus, the Second Circuit's consideration of a purely executive doctrine as a special factor abandoned the tripartite deliberations necessary to guard against an erosion of individual liberties in times of national challenge.

In *Arar v. Ashcroft*, the Second Circuit should not have considered the state-secrets privilege as a special factor counseling against the judicial creation of a damages remedy. The court contributed to a disturbing trend of executive interference in national security litigation through its

54. *See Reynolds*, 345 U.S. at 7-11 (collecting cases); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270 (2007). *But see* Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1008 (9th Cir. 2009) (rejecting the government's assertion of the state-secrets privilege in an extraordinary rendition case).

55. *See supra* text accompanying note 47.

56. *See* Arar v. Ashcroft, 532 F.3d 157, 213 (2d Cir. 2008) (Sack, J., concurring in part and dissenting in part) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)).

57. *See* Lyons, *supra* note 52, at 110-11.

improper *Bivens* analysis. The state-secrets privilege is a shield, not a sword: the Supreme Court recognized it to protect the legitimate interests of the U.S. government, not to empower federal officers to violate constitutional rights without consequence. Indeed, the government's persistent use of the state-secrets privilege[58] likely will foreclose the judicial creation of a damages remedy in matters concerning national security. But the outcome of this case extends beyond those involving terrorist suspects. By considering the states-secret privilege as a special factor under *Bivens*, the Second Circuit unmoors itself from enforcing the constitutional rights of all individuals whenever an executive interest is present.

58. *See* Editorial, *The Unfinished Case of Maher Arar*, N.Y. TIMES, Feb. 18, 2009, at A26 ("Last week, in a rendition case argued in San Francisco, Mr. Obama's Justice Department sent a troubling signal of continuity by embracing the extravagant state-secrets claims pioneered by the Bush administration."); *see also* Redacted, Unclassified Brief for Intervenor-Appellee the United States at 22, *Jeppesen Dataplan*, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693).