

NOTE

THE EXPLOITATION OF LEGAL LOOPHOLES IN THE NAME OF NATIONAL SECURITY: A CASE STUDY ON EXTRAORDINARY RENDITION

I. INTRODUCTION

During a layover in the United States, a thirty-three year-old man named Maher Arar, a dual citizen of Syria and Canada, was detained, denied his fundamental rights, and sent by U.S. authorities to Syria where he was tortured.¹ He fell victim to a program called “Extraordinary Rendition.” Arar recently brought his case before New York’s Eastern District Federal Court.² Because of foreign policy and national security considerations, the court continued a judicial posture of deference to the executive branch by ruling in favor of the federal government and not allowing Arar any redress for his injuries.³

This note will challenge the legality of the Extraordinary Rendition program by focusing on several key issues. First, the court erred in ruling for the government in *Arar v. Ashcroft*⁴ because foreign policy considerations and national security should not be an absolute bar to receiving damages for a substantive due process violation of the Fifth Amendment. Moreover, overturning the *Arar v. Ashcroft* decision and declaring that Arar’s Fifth Amendment rights were violated will help to challenge the legality of the Extraordinary Rendition program in conjunction with the Detainee Treatment Act of 2005 (DTA).⁵ Second, current international and domestic laws governing the United

1. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253-55 (E.D.N.Y. 2006).

2. *Id.* at 250.

3. *See Arar*, 414 F. Supp. 2d at 287. *See generally* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

4. *Arar*, 414 F. Supp. 2d 250.

5. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2006) [hereinafter DTA].

States' torture policies have not been interpreted or applied to prohibit the Extraordinary Rendition program. Lastly, if the judiciary continues to defer to the executive and legislative branches in this policy ambit, Congress must enact legislation prohibiting the Extraordinary Rendition program. This note proposes the enactment of actionable amendments to the DTA.

In the first section of this paper, the case of *Arar v. Ascroft* will be discussed and its ruling will be disputed. The second section will go over the current international and domestic laws governing torture in the United States and provide evidence as to how the government has circumvented the broad purposes of those laws by narrowly interpreting them. Finally, the last section will propose legislation that will expressly prohibit the Extraordinary Rendition program and allow civil remedies for anyone injured by it.

II. *ARAR v. ASHCROFT* SHOULD BE OVERRULED

The Fifth Amendment states in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."⁶ The U.S. Supreme Court has ruled that some due process rights are afforded to all people⁷ and that conduct by the government that "shocks the conscience" violates substantive due process.⁸ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁹ the U.S. Supreme Court created tort-like civil remedies for injuries suffered as a result of a constitutional violation by the government.¹⁰ In this instance, Arar availed himself to sufficient constitutional due process rights by entering the United States by way of an airport layover while on his way to another country. The U.S. government violated those rights by holding him captive in the United States for ten days without adequate access to counsel or food and

6. U.S. CONST. amend. V.

7. See *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987) (citing *Jean v. Nelson*, 472 U.S. 846, 873-79 (1984) (Marshall, J., dissenting)) ("[E]xcludable aliens do have due process rights.").

8. *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)).

9. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

10. *Id.* at 397. The Court awarded money damages to the plaintiff to remedy violations of the plaintiff's Fourth Amendment rights. *Id.* at 395, 397.

then by deporting him to Syria to be tortured.¹¹ As a result of the United States' actions, Arar suffered injuries.¹² Therefore, Arar should be afforded redress pursuant to the explicit purposes and spirit of the *Bivens* decision.

In *Bivens*, the plaintiff filed a complaint alleging that six agents of the Federal Bureau of Narcotics arrested him in his home on the morning of November 26, 1965, without a warrant, in violation of his Fourth Amendment right to be free from illegal search and seizure.¹³ The agents handcuffed Bivens "in front of his wife and children, and threatened to arrest his entire family."¹⁴ The agents then conducted a warrantless search of his home.¹⁵ The U.S. Supreme Court held that a violation of the Fourth Amendment "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."¹⁶ The high court premised its decision on three basic principles, one of which is particularly relevant here. Specifically, damages are an appropriate remedy "for injuries consequent upon a violation of the Fourth Amendment by federal officials"¹⁷ In *Arar* however, the New York federal court applied an exception to *Bivens* referred to as "special factors counseling hesitation"¹⁸ to avoid awarding him damages.¹⁹ This note contends that such an exception does not apply in this instance.

11. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253-54 (E.D.N.Y. 2006).

12. *Id.* at 254-56.

13. *Bivens*, 403 U.S. 388 at 389-90, 397.

14. *Id.* at 389.

15. *Id.*

16. *Id.*

17. *Id.* at 395.

18. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 279 (E.D.N.Y. 2006) (quoting *Chappell v. Wallace*, 462 U.S. 296, 298 (1983)) (recognizing "special factors counseling hesitation" as an exception to *Bivens*).

19. *Id.* at 279-83. The court found that the "special factors counseling hesitation" existed where the case gave rise to, among other things, "crucial national-security and foreign policy considerations." *Id.* at 281. Further, the court opined that this exception must apply when the court lacks "guidance or the authority of the coordinate branches in whom the Constitution imposes responsibility for our foreign affairs and national security." *Id.* at 283.

A. Background of Extraordinary Rendition

The U.S. government has recently acknowledged its use of a practice called Extraordinary Rendition in which it “sends terrorism suspects to third[party] countries for interrogation.”²⁰ Extraordinary Rendition has been defined by one group as the “transfer of an individual, with the involvement of the United States or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading . . . treatment.”²¹ The program has been created “as a means of extraditing terrorism suspects” to states that use more “aggressive methods of persuasion,” including torture.²² It began as a small program aimed at a distinct set of people and has come to include a broad and poorly defined group described as “illegal enemy combatants.”²³ The *New York Times* recently reported, citing unnamed former intelligence officials, that the practice has been “widely used” since the 1990s and that “perhaps more than 100 cases” have arisen since September 11, 2001.²⁴

Some of the men, including Arar, who were subject to Extraordinary Rendition have now been released and are speaking out about

20. *Outsourcing Torture: The Legality of Extraordinary Rendition*, Center News, 12 NO. 3 HUM. RTS. BRIEF 46, 46 (2005).

21. ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 6 (Dec. 2005), available at http://www.extraordinaryrendition.org/data/APPG_NYU_Briefing_Paper.pdf [hereinafter TORTURE BY PROXY]; accord David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 (2006) (characterizing Extraordinary Rendition as a “hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals.”).

22. Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, THE NEW YORKER, Feb. 14, 2005, at 106.

23. *Id.* at 107.

24. Douglas Jehl, *Senate May Open Inquiry Into C.I.A.’s Handling of Suspects*, N.Y. TIMES, Feb. 13, 2005, at 15; see also Mayer, *supra* note 22, at 107 (reporting an expert’s estimate that 150 cases have occurred since September 11, 2001); Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of “Rendition,”* 20 GEO. IMMIGR. L.J. 213, 241 (2006) (estimating the number of cases since 2001 to be between 100 and 200); Weissbrodt, *supra* note 21, at 125 (stating that the U.S. Extraordinary Rendition “program has accelerated since September 11, 2001.”).

what they endured, blowing the cover off this covert program. Another known case involves Ibn al-Sheikh al-Libi, who reportedly was taken out of Federal Bureau of Investigation (FBI) custody by the Central Intelligence Agency (CIA) and shipped to Egypt, where he promptly gave bad information about the use of chemical weapons in Iraq.²⁵ Another suspected victim of Extraordinary Rendition is Hassan Mustafa Osama Nasr.²⁶ Nasr disappeared from Milan in February of 2003.²⁷ Italian prosecutors believe that “Nasr was flown from Italy to a military base in Germany before being” sent to Egypt where he was subsequently tortured on behalf of the CIA.²⁸ In 2005 alone, an Italian judge issued up to forty-one arrest warrants for alleged CIA agents in connection with the kidnapping.²⁹

In February of 2006, police and prosecutors in Munich opened investigations into the abduction of Khaled el-Masri.³⁰ Masri was arrested on December 31, 2003, in Macedonia and taken to a prison in Kabul, where he says he was mistaken as a terrorist and tortured for five months.³¹ German officials are investigating whether the German embassy in Macedonia was informed about the arrest and did nothing to help Masri and whether the German government was giving aid to the United States, specifically, to the Extraordinary Rendition program.³² Finally, in England, Sir Menzies Campbell, a political opposition leader, has called for an investigation “into allegations that British intelligence officers participated in the interrogation of” terrorism suspects abducted in Greece and sent to various Middle-Eastern countries after the bombings in London in July of 2005.³³ In this instance, im-

25. Mayer, *supra* note 22, at 114-15.

26. *Italy Seeks Arrests in Kidnapping Case*, N.Y. TIMES, Dec. 24, 2005, at A5.

27. *Id.*

28. *Id.*

29. *Id.* (stating that the Italian judge issued twenty-two warrants in December of 2005); TORTURE BY PROXY, *supra* note 21, at 7 (stating that the Italian judge issued nineteen warrants between June and July of 2005).

30. Don Van Natta Jr., *Germany Weighs if It Played Role in Seizure by U.S.*, N.Y. TIMES, Feb. 21, 2006, at A1.

31. *Id.*; see generally Gary Williams, *Indefinite Detention and Extraordinary Rendition*, 29 L.A. LAWYER 44, 48 (Sept. 2006).

32. Van Natta, *supra* note 30, at A1.

33. Alan Cowell, *World Briefing Europe: Britain: Call for Inquiry into Torture Claim*, N.Y. TIMES, Dec. 30, 2005, at A.

plicit parallels have been drawn between these allegations and the United States' Extraordinary Rendition program.³⁴

B. Case Summary³⁵

On September 26, 2002, returning from vacation in Tunisia, Arar arrived at in New York's John F. Kennedy Airport for a brief lay-over.³⁶ Upon showing his identification to an immigration inspector, Arar was apprehended and interrogated for eight hours regarding his suspected affiliations with Osama Bin Laden and terrorist organizations and activities.³⁷ Arar was kept overnight and transferred to the Metropolitan Detention Center (MDC) in Brooklyn, New York, "where he was strip searched and placed in solitary confinement."³⁸ Arar was held at the MDC until October 8, 2002, when he was deported to Syria against his will.³⁹ During Arar's ten-month detention in Syria he was kept in a rat-infested cell dampened by constant cat urine permeating through the ceiling and subjected to brutal torture and interrogations.⁴⁰ On October 5, 2003, Syrian officials released Arar to Canadian officials without filing any charges against him.⁴¹

Arar subsequently filed a lawsuit against U.S. Attorney General John Ashcroft and other associated parties.⁴² The Federal District Court for the Eastern District of New York recently heard the case and dismissed Arar's action.⁴³ The court held that: 1) Arar lacked standing to bring a claim against U.S. officials for violating his Due Process rights; 2) as an alien, Arar cannot meet statutory requirements for a

34. *Id.*

35. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (E.D.N.Y. 2006). The court considered the defendant's motions to dismiss under Federal Rule of Civil Procedure sections 12(b)(1) and 12(b)(6). *Id.* These rules require that the "court accepts as true all the factual allegations in the complaint and must draw reasonable inferences in favor of the plaintiff." *Id.* (quoting *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003)); *see generally* *Hawkins*, *supra* note 24, at 222-27; *Williams*, *supra* note 31, at 48.

36. *Arar*, 414 F. Supp. 2d at 253.

37. *Id.*

38. *Id.*

39. *Id.* at 254.

40. *Id.* at 254-55.

41. *Id.* at 255.

42. *Id.* at 250.

43. *Id.* at 287-88.

cause of action under the Torture Victim Protection Act (TVPA); and 3) although Immigration and Nationality Act's (INA) jurisdiction did not preclude a *Bivens* claim, a remedy under *Bivens* is barred by national-security and foreign policy considerations.⁴⁴ The third holding, in effect, defers to the executive branch instead of providing civil remediation⁴⁵ and is a primary focus of this note.

III. ARAR'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED

A. *Arar's Due Process Rights Were Violated While He Was Held Captive in the United States*

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics stands for the proposition that damages may be awarded for injuries resulting from a constitutional violation by the U.S. government.⁴⁶ A comparison of *Arar* and *Bivens* shows that in both instances government agents exercised an extreme abuse of unmitigated power under the color of federal law to violate the plaintiffs' respective constitutional rights. In *Arar's* case, after being held captive for over ten days by federal officials, Immigration and Naturalization Service (INS) Regional Officer Blackman ordered *Arar* to be sent to Syria in accordance with "Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment."⁴⁷ INS officers explicitly told *Arar* the INS "was not governed by the 'Geneva Conventions.'"⁴⁸ These actions and statements show that *Arar* was apprehended, detained and transferred under the color of U.S. law. In *Bivens*, the U.S. Supreme Court found the government agents to be acting under the color of law when they used their authority as FBI agents to enter the home and conduct the illegal search.⁴⁹

44. *Id.* at 287.

45. *See generally id.* at 279-83 (analyzing the "special factors counseling hesitation" exception to *Bivens* and concluding that this exception applies to *Arar's* claim).

46. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

47. *Arar*, 414 F. Supp 2d at 254.

48. *Id.*

49. *See Bivens*, 403 U.S. at 389, 394-95.

Agents acting unlawfully under the color of law were particularly troubling to the Court because they possess a far greater capacity for harm.⁵⁰ Justice Brennan took on this problem by referring to several historical cases: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁵¹ “The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest.”⁵²

“In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime.”⁵³

Arar’s fundamental due process rights were violated when he was held in the United States and interrogated without counsel for five hours; kept in solitary confinement in a room always lit and without a bed; and, over the course of two days, only given one meal, cold food from McDonald’s.⁵⁴ Arar was then transported to the MDC where the INS initiated removal procedures.⁵⁵ Five days after his detainment Arar was allowed to make one phone call, and four days following that he was allowed one meeting with an attorney.⁵⁶ There is little guidance regarding the rights of a non-citizen “‘passing through the United States’ on his way to Canada”⁵⁷ with no intent to enter.⁵⁸

However, even if considered an “excludable alien,”⁵⁹ which is defined as an alien lacking the proper papers to enter the United States,⁶⁰

50. *Id.* at 392.

51. *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

52. *Id.* at 394 (citing *Weeks v. United States*, 232 U.S. 383, 386 (1914)).

53. *Id.* at 394-95 (quoting *United States v. Lee*, 106 U.S. 196, 219 (1882)).

54. *See Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (E.D.N.Y. 2006).

55. *Id.*

56. *Id.*

57. *See id.* at 284.

58. *See e.g. id.* at 275-77 (factually distinguishing previous cases from the facts surrounding Arar’s status in the United States before his capture).

59. *See id.* (referring to Arar as a potentially “excludable alien”); *Amanullah v. Nelson*, 811 F.2d 1, 5 (1st Cir. 1987), *vacated as moot* 872 F.2d 11 (1st Cir. 1989).

60. *See Amanullah*, 811 F.2d at 5 (citing 8 U.S.C. § 1182 (1982) (current version at 8 U.S.C. § 1182 (2006)) (defining excludable aliens as: “[t]hose aliens who lack the (valid) documentation which [8 U.S.C. § 1182] contemplates are subject to

Arar would still “have *personal* constitutional protections”⁶¹ such as not being beaten by police officers or having the death penalty arbitrarily imposed.⁶² Therefore, if an excludable alien was subjected to the same treatment as Arar, he or she would have a tenable cause of action against the U.S. government for constitutional violations.⁶³ In this case, Arar’s standing should exceed that of an excludable alien because he had no intention of gaining access to the United States. A mere stroke of airline convenience put Arar in the United States’ jurisdiction.

Following that logic, a non-citizen temporarily present in the United States as the result of a travel layover should enjoy sufficient constitutional protections to avoid being put in a situation similar to Arar. Nevertheless, the U.S. agents forced Arar to endure lengthy and aggressive interrogations; denied Arar access to food, counsel, and communication; and forced Arar to travel around the world to face inevitable torture. In totality, these actions “shock the conscience”⁶⁴ and therefore violate the Fifth Amendment.⁶⁵

B. Arar’s Fifth Amendment Rights Were Violated When He Was Tortured Abroad

Upon arriving in Syria, Arar alleged that he was subjected to excruciating torture.⁶⁶ This included being placed in a cell only three feet wide for ten months; being “beaten on his palms, hips and lower back with a two-inch-thick electrical cable”; being beaten on his stomach, face, and back of his neck by his captors’ fists; and being forced to listen to the screams of other detainees as they were put in a

exclusion . . .”).

61. *Id.* at 9.

62. *Id.*

63. *See id.*

64. *See, e.g.,* *Rochin v. California*, 342 U.S. 166, 172 (1952). The court found that law enforcement officers’ behavior “shocks the conscience” when the officers ordered physicians to force emetic solution into petitioner’s stomach via tube in order to induce vomiting-up of morphine pills that petitioner was suspected of swallowing. *Id.* Similarly, the district court should have found that the INS agents’ actions towards Arar “shock the conscience.”

65. *See id.* (holding that behavior that “shocks the conscience” violate the Due Process clause).

66. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 254-55 (E.D.N.Y. 2006).

spine-breaking chair and hung upside-down in a tire for beatings and electric shocks.⁶⁷

The U.S. Court of Appeals for the District of Columbia addressed a similar situation in *Harbury v. Deutch*.⁶⁸ In that case, a widow brought a *Bivens* action alleging that the CIA tortured and murdered her husband, a Guatemalan citizen.⁶⁹ Circuit Judge Tatel framed the issue as “whether the Fifth Amendment prohibits torture of non-resident foreign nationals living abroad.”⁷⁰ In an earlier case, *Rochin v. California*,⁷¹ the U.S. Supreme Court addressed whether torture can be used to extract evidence to help a criminal prosecution.⁷² The *Rochin* court held that actions taken by the U.S. government that “shock[] the conscience”⁷³ violate the subject’s Due Process rights.⁷⁴ Applying the *Rochin* test in *Harbury*, Judge Tatel concluded, “[n]o one doubts that under Supreme Court precedent, interrogation by torture like that alleged by Harbury shocks the conscience.”⁷⁵ Despite this conclusion, the court denied Harbury’s claim because her husband “was not physically present in the United States; not tortured in a country in which the United States exercised de facto political control; and not abducted for trial in a United States court.”⁷⁶

The *Bivens* court ultimately followed *United States v. Verdugo-Urquidez*,⁷⁷ which ruled that the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States.⁷⁸ However, both of these cases are patently distinguishable from *Arar*.

67. *Id.*

68. *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

69. *Id.* at 598.

70. *Id.* at 602.

71. *Rochin v. California*, 342 U.S. 165 (1952).

72. *See generally id.* at 166-68.

73. *Id.* at 172.

74. *Rochin*, 342 U.S. at 172-73; *see also supra* note 65 and accompanying text.

75. *Harbury*, 233 F.3d at 602 (citing *Rochin*, 342 U.S. at 172).

76. *Id.* at 604.

77. *Id.* at 603 (finding that “*Verdugo-Urquidez* controls this case”); *see United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

78. *Harbury*, 233 F.3d at 602-03 (citing *Verdugo-Urquidez*, 494 U.S. at 262-64).

Unlike the injured parties in both *Verdugo-Urquidez* and *Harbury*, Arar's deprivation of rights was initiated in the United States by U.S. officials under the color of U.S. law.⁷⁹ Arar was initially held captive at John F. Kennedy Airport in New York City and then transferred to the MDC in Brooklyn before being deported by the INS.⁸⁰ Arar adamantly objected to being deported to Syria, citing the torture that he would inevitably face.⁸¹ However, on October 8, 2002, Arar was taken on a small jet to Jordan and handed over to Syrian officials.⁸² Evidenced by Arar's personal statements, Syrian guards subjected him to excruciating pain, discomfort, and necessity deprivation in order to extract information for the United States.⁸³

The U.S. Supreme Court recently issued a ruling that hopefully begins a trend of maintaining constitutional standards while operating abroad. In *Rasul v. Bush*,⁸⁴ fourteen non-citizens "captured abroad during hostilities between the United States and the Taliban" challenged the legality of their detention at the Guantanamo Bay Naval Base in Cuba.⁸⁵ The Court held that federal district courts have jurisdiction over habeas challenges, as well as claims asserted under federal question jurisdiction and the Alien Tort Statute, from aliens held at Guantanamo Bay.⁸⁶ Jurisdiction over these claims exists because the United States has jurisdiction over the Guantanamo Bay Naval Base, and no distinction should be drawn between aliens and U.S. citizens.⁸⁷ While recognizing that the United States' power and control over Guantanamo Bay is significantly more than the control over Syrian officials, this jurisdictional extension concerning the rights of detained aliens lends support to the condemnation of the happenings in this case. The fact that the questioning by the Syrians was consistent with that of FBI and INS officials is convincing evidence that the Syrian government was acting in concert with or on behalf of the United

79. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (E.D.N.Y. 2006).

80. *Id.* at 254.

81. *Id.* at 253.

82. *Id.* at 254.

83. *Id.* at 255.

84. *Rasul v. Bush*, 542 U.S. 466 (2004).

85. *Id.* at 470-71.

86. *Id.* at 483-85. The Alien Tort Statute the court is referring to is the Torture Victim's Protection Act of 1991. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

87. *Rasul*, 542 U.S. at 480-81.

States.⁸⁸ It is also telling that any information obtained would be given to U.S. officials.⁸⁹ Therefore, the United States could likely have prevented or stopped the torture from taking place, which goes towards the extent of control the U.S. government had over the torture of Arar. Such control should ultimately be considered when assessing the United States' liability.

C. The "Special Factors Counseling Hesitation" Exception to Bivens is Not Applicable to this Case

A *Bivens* remedy is unavailable when the "special factors counseling hesitation" exists.⁹⁰ The factors Judge Trager relied on to determine whether the exception applied were national security and foreign policy.⁹¹ He used these factors because these matters are "properly left to the political branches of government."⁹² Since the beginning of the "war on terror," "Congress has remained essentially silent about the [Bush] Administration's harsh measures for detaining and interrogating terrorist suspects."⁹³ However, the executive branch's duty to provide national security must be offset by Congress' duty to maintain civil liberties and freedoms. Congress is designated with this responsibility because its members represent the views and feelings of citizens across the nation.⁹⁴ However, when the executive and legislative branches act in concert and fail to uphold the law, the judiciary must insert its "check" as a governmental branch of authority.

Judge Trager writes, "Article I, Section 8 of the U.S. Constitution places the regulation of aliens squarely within the authority of the Legislative branch."⁹⁵ However, the issues relevant to this case begin with the unlawful detainment of a person while he was transferring between international flights in New York City on his way to Canada.⁹⁶ At no time did Arar attempt to enter the United States and at no

88. See *Arar*, 414 F. Supp. 2d at 255.

89. See *id.*

90. *Id.* at 279 (quoting *Chappell v. Wallace*, 462 U.S. 296, 298 (1983)).

91. *Id.* at 281.

92. *Id.*; see also Williams, *supra* note 31, at 48.

93. Michael Greenberger, *The Missing Link: Congress Has Shirked Its Constitutional Duties and Floundered in the War on Terror*, LEGAL AFFAIRS, Sept.-Oct. 2005.

94. See generally U.S. CONST. art. I.

95. *Arar*, 414 F. Supp. 2d at 281.

96. See *id.* at 253.

time was he even legally on U.S. soil until he was captured.⁹⁷ In short, at no time was Arar an alien in the United States by his own volition. Arar's status in the United States is currently undefined by U.S. law, and therefore, this situation may fall outside of the Congressional power to regulate aliens under Article 1, Section 8 of the U.S. Constitution.⁹⁸

Also, Judge Trager concludes, since Congress has not yet provided a specific cause of action for those in a similar position as Arar, and has not taken an "affirmative position"⁹⁹ on federal court review of rendition issues, it is reasonable to infer that no such review can occur.¹⁰⁰ However, this is completely contrary to the precedent set in *Bell v. Hood*,¹⁰¹ which stated: "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."¹⁰² The *Bell* Court concluded that federal courts indeed have jurisdiction to hear claims for damages arising out of violations of the Fourth and Fifth Amendments and other federal laws.¹⁰³ The lack of a congressional stance pertaining to the redress for deprivation of constitutional rights should not be determinative when evaluating whether a cause of action for damages can be sustained. To the contrary, it can be reasonably assumed that courts of appropriate jurisdiction are in the best position to decide whether one's constitutional rights have been violated and what remedies should be levied.

Judge Trager also explains that, while judges have the training and experience to evaluate decision-making of federal officials "in the domestic context,"¹⁰⁴ few, if any, have adequate background to make similar determinations regarding foreign affairs, "especially in circumstances involving countries that do not accept our nation's values or may be assisting those out to destroy us."¹⁰⁵ He opines, "[T]he task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority

97. *See id.* at 284-85.

98. *See id.* at 271. "The Congress shall have Power . . . To establish an [sic] uniform Rule of Naturalization . . ." U.S. CONST. art. 1 § 8 cl. 4.

99. *Arar*, 414 F. Supp. 2d at 281.

100. *Id.*

101. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

102. *Id.*

103. *Id.* at 684-85.

104. *Arar*, 414 F. Supp. 2d at 282.

105. *Id.*

of the coordinate branches To do otherwise would threaten ‘our customary policy of deference to the President in matters of foreign affairs.’”¹⁰⁶ Such logic is hard to reconcile. It should not be the United States’ policy that, merely because other countries participate in an action with the United States, federal judges are precluded from upholding and enforcing the Constitution. Additionally, the President should not have unrestricted, unilateral authority to violate the Constitution so long as his actions are couched in terms of “foreign affairs.”¹⁰⁷

Judge Trager’s decision goes on to include within the analysis of the “special factors counseling hesitation” exception¹⁰⁸ the potential embarrassment that would result for the United States, Canada, and other participating nations, should the details of these programs be disclosed to the public.¹⁰⁹ He writes that “extending a *Bivens* remedy ‘could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.’”¹¹⁰ To allow the remedy risks “‘embarrass[ing] . . . our government abroad’ through ‘multifarious pronouncements by various departments on one question.’”¹¹¹ However, “Americans and our government have historically condemned states that torture; we have granted asylum or refuge to those who fear it.”¹¹² So now that the United States seemingly endorses a torturous-type program, the embarrassment of hypocrisy must not prevent the judiciary from condemning it.

Additionally, the case law cited by Judge Trager in support of this logic is distinguishable from the matter at hand. In *Sanchez-Espinoza v. Reagan*, appellants were seeking damages because the United States

106. *Id.* at 283 (quoting *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 384 (2005)).

107. *See* Hawkins, *supra* note 24, at 268. Article II § 3 of the U.S. Constitution “states that the President ‘shall take care that the laws be faithfully executed.’” *Id.* Thus the executive branch has a good faith obligation to comply with the Convention Against Torture, even if the judiciary lacks the power to enforce compliance. *Id.*

108. *See Arar*, 414 F. Supp. 2d at 279.

109. *Id.* at 281-82.

110. *Id.* at 281-82 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-274 (1990)).

111. *Id.* at 281-82 (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985)).

112. David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425, 1425 (2005).

supported forces bearing arms against the government of Nicaragua.¹¹³ In evaluating whether the allegations were redressable pursuant to *Bivens* the court stated that “as a general matter the danger of foreign citizens’ using the courts . . . 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.”¹¹⁴ However, unlike in *Arar*, in *Sanchez-Espinoza* all of the activities giving rise to the allegations happened outside of the United States’ jurisdiction.¹¹⁵ Also, the allegations against the American government were conspiracy-like in nature and Nicaraguan operatives carried out the alleged acts.¹¹⁶ In contrast, *Arar* is seeking damages for conduct that clearly began on U.S. soil and was planned and carried out by U.S. agents.¹¹⁷ Therefore, the “special factors counseling hesitation” exception¹¹⁸ used in *Sanchez-Espinoza* to foreclose *Bivens* remedies is not synonymously applicable to *Arar v. Ashcroft*.

In conclusion, allowing *Arar* to sue the federal government for violating his rights may indeed cause the United States and its accomplices great embarrassment. However, if the transparency of government activity causes embarrassment, then the government is likely acting in a way that cannot be squared with the attitudes of the American people and its allies. The United States’ moral and ethical turpitude should not be subordinated to potential international embarrassment.¹¹⁹ *Arar v. Ashcroft* must be overturned in order to provide *Arar* adequate remediation for his injuries and because doing so would be a significant step towards terminating the Extraordinary Rendition program.

113. *Sanchez-Espinoza*, 770 F.2d at 204.

114. *Id.* at 209.

115. *Id.* at 205-06; *Arar*, 414 F. Supp 2d at 253.

116. *Sanchez-Espinoza*, 770 F.2d at 205.

117. *Arar*, 414 F. Supp 2d at 253.

118. *Sanchez-Espinoza*, 770 F.2d at 208 (quoting *Chappell v. Wallace*, 462 U.S. 296, 298 (1983)).

119. To the contrary, international embarrassment has traditionally been used as a “tool for preventing or discouraging human rights violations” Weissbrodt & Bergquist, *supra* note 21, at 153. When the international community learns of such violations it “can exert pressure on the offending governments to halt their practice.” *Id.*

IV. CURRENT LAW DOES NOT EFFECTIVELY PROHIBIT THE
EXTRAORDINARY RENDITION PROGRAM

A. *The United Nations Convention Against Torture is Ineffective
Because it Has Been Interpreted to Allow Torturous Acts to be
Outsourced to Nations Not Governed by the Convention*

Under international law, states are prohibited from sending a person to a territory where it is believed that he will be tortured.¹²⁰ This obligation is commonly referred to as the *non-refoulement* principle.¹²¹ Specifically, the primary legal governance of all types of domestic and international torture sponsored by the United States is the United Nations Convention Against Torture (CAT).¹²² The objective of the CAT is to criminalize all acts of torture by its signatories.¹²³ Article 3(1) of CAT states: “No State Party shall, expel, return . . . or extradite a person to another State where there are *substantial grounds for believing* that he would be in danger of being subjected to torture.”¹²⁴ CAT generally defines torture as the infliction of severe physical and/or mental suffering committed under the color of law¹²⁵ and allows for no circumstances or emergencies where torture is permitted.¹²⁶ With regard to Extraordinary Rendition, the CAT protections are supposed to apply when actions taken by its signatories “lead to a ‘substantial likelihood’ of a danger of torture that is greater than ‘mere suspicion,’ but the likelihood does not have to rise to a level of ‘high probability.’”¹²⁷

Unfortunately, when interpreting CAT’s statutory construction, the U.S. government has determined that an agent or representative of a signatory must have “substantial grounds for believing” a suspect

120. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

121. *See id.*; Weissbrodt & Bergquist, *supra* note 21, at 142, 145.

122. *See* Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, Congressional Research Service Report for Congress, Feb. 10, 2005, at 5.

123. CAT, *supra* note 120, Summary.

124. *Id.* art. 3 para. 1 (emphasis added).

125. *Id.* art. 1 para. 1; *see also* Garcia, *U.N. Convention Against Torture, supra* note 122, at 1-2.

126. CAT, *supra* note 121, at art. 2 para 2; *see also* Garcia, *U.N. Convention Against Torture, supra* note 122, at 3.

127. TORTURE BY PROXY, *supra* note 21, at 9.

will be tortured to be in violation.¹²⁸ Martin Lederman, a former lawyer for the Department of Justice, stated, “The [CAT] only applies when you know a suspect is more likely than not to be tortured, but what if you kind of know? That’s not enough. So there are ways to get around it.”¹²⁹ Put another way, “for a public official to acquiesce to an act of torture, that official must, ‘prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.’”¹³⁰ In sum, pursuant to CAT the United States and other CAT signatories can negligently allow for torturous acts to be committed by foreign nations so long as their actions do not rise to a level of willfulness. Proving that the government has a subjective intention to have a foreign nation torture a detainee is a hard burden to overcome when assessing the legality of rendition cases.

The facts in *Arar v. Ashcroft* give strong evidence of the U.S. government’s awareness of the ways to circumvent the CAT and a wanton disregard for its broad purpose. Upon deportation, Arar was orally informed that his removal to Syria was in compliance with Article 3 of the CAT,¹³¹ and while Arar pleaded for reconsideration the INS officials told him that the Geneva Conventions did not govern the agency.¹³² Those statements go towards the individual officials’ awareness of international torture laws. Also, to further attenuate the causal chain between the actions of the United States and the torture by the Syrians, Arar was placed in the hands of the Jordanians, who subsequently handed him over to the Syrians.¹³³ This was likely done to reduce the perceived foreseeability of Arar’s eventual torture. Thus, it is almost impossible to implicate the United States pursuant to the CAT according to the language prohibiting the acquiescence of torture by other countries.

B. Current Executive Policy Supports Extraordinary Rendition Notwithstanding the CAT and Other International Treaties

Armed with experienced lawyers, the Bush Administration continues to rebuke notions of impropriety with the need for executive

128. Mayer, *supra* note 22, at 107-08.

129. *Id.* at 108.

130. Garcia, *supra* note 122, at 6.

131. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 254 (E.D.N.Y. 2006).

132. *Id.*

133. *Id.*

deference in the name of national security. Attorney General Alberto Gonzalez, a Harvard graduate and former member of the Texas Supreme Court,¹³⁴ argued during his confirmation hearings that CAT's ban on "cruel, inhumane and degrading treatment" of suspects does not apply to American interrogations overseas.¹³⁵ Also, in what has been referred to as the "Gonzalez Memo," the Attorney General gave support to his legal opinion that provisions of the Geneva Conventions do not apply generally to the war on terror.¹³⁶ He writes, "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners."¹³⁷ He went on to discuss how being outside of the Geneva Conventions' limitations also reduces the chances of U.S. officials being convicted of war crimes.¹³⁸ John C. Yoo, a Yale Law School Graduate and former clerk for Supreme Court Justice Clarence Thomas, advised President Bush that Geneva Conventions restrictions could be avoided by creating a new label for opposition forces: "illegal enemy combatants."¹³⁹ This term was used in place of the current categories of "civilians" and "prisoners of war" because the new opposition was not from "regular foreign armed forces,"¹⁴⁰ but rather from a "failed state."¹⁴¹ He goes on to say, "[t]hey can't prevent the president from ordering torture" and that the people of the United States implicitly agreed with the president's actions as commander-in-chief, including the use of tortuous programs, when he was reelected in 2004.¹⁴²

134. *The Nomination of the Honorable Alberto Gonzalez: Hearing Before the Senate Judiciary Committee*, 109th Cong. 121 (2005) available at http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6_2.html [hereinafter Gonzalez] (statement of Alberto Gonzalez, Nominee).

135. *Id.*

136. Memorandum from Alberto Gonzalez, White House Counsel to the President (Jan. 25, 2002), <http://www.msnbc.msn.com/id/4999148/site/newsweek> [hereinafter Gonzalez Memo].

137. *Id.*

138. *Id.*

139. Mayer, *supra* note 22, at 112.

140. *See* Gonzalez Memo, *supra* note 136.

141. Mayer, *supra* note 22, at 112.

142. *Id.*

*C. The DTA (Incorporating the McCain Amendment
and the Graham-Levin Amendment on Detainees)
Does Not Address Extraordinary Rendition*

Section 2000dd of the DTA states, in pertinent part:

(a) In General. – No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. (b) Construction. – Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman or degrading treatment or punishment under this section . . . (d) Cruel, Inhuman, or Degrading Treatment or Punishment Defined – . . . means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.¹⁴³

The limitations of this language are evident. The phrase, “in the custody or under the physical control of the United States Government,”¹⁴⁴ does not apply to the actual, concrete injuries suffered as a result of the torture committed once a detainee is handed over to a sovereign nation. So, when taken literally, Arar is not entitled to remediation from the United States for the suffering brought upon him once he was in control of the Syrians even if he was handed over by the U.S. government to be tortured.

The language of subsection (d) defines cruel treatment within the context of the Constitution. Since only U.S. citizens are availed to the full privileges of the U.S. Constitution, different standards of treatment will inevitably be applied when determining what is cruel, inhumane and degrading (CID). Therefore, the U.S. government may be able to subject non-citizens to a higher degree of CID treatment than citizens. Section 2000dd(d) of the DTA seems to suggest that non-citizens have less human rights than U.S. citizens¹⁴⁵ and thus can be subjected to some forms of torture. Consequently, citizenship becomes a proxy by which standards of decency and humanity should be

143. DTA, *supra* note 5, § 2000dd.

144. *Id.*

145. *See id.* While subsection (a) of this statute applies to all individuals, subsection (d) limits the definition of Cruel, Inhuman or Degrading Treatment or Punishment to apply only to those individuals who are protected by the Fifth, Eighth, and Fourteenth Amendments. *Id.* Therefore, the statute could exclude aliens.

applied. Additionally, there are no enforcement or liability provisions within the statutory body of the DTA.¹⁴⁶ In order to combat this hypocrisy the U.S. judiciary must interpret the Fifth Amendment to protect citizens and non-citizens alike from the Extraordinary Rendition program. Once deemed a Fifth Amendment violation, Extraordinary Rendition will fit squarely under the definition of CID treatment, thus illegalizing it and aiding in the termination of its existence.

V. THE U.S. GOVERNMENT MUST TAKE INITIATIVE TO BAN THE EXTRAORDINARY RENDITION PROGRAM

A. *Proposed Statutory Amendment*

To coincide with the overturning of *Arar v. Ashcroft*, Congress must amend the DTA to definitively prohibit the Extraordinary Rendition program. The executive branch's determination that the Geneva Conventions do not apply to the war on terror¹⁴⁷ compels the creation of domestic laws that uphold the Constitution and prevent the torture and CID treatment of all people. The goals of this legislation must be to prohibit torture in all forms. This includes prohibiting the aiding and abetting of torture, conspiracy to torture, and all CID treatment. In addition, there must be an express prohibition of any transfer, or relocation of any detainee to a country where that individual is likely to be tortured.

The definition section of the DTA should be amended to read as follows:

Definitions—

“United States government” includes any agents acting under the authority of the laws of the United States or at the behest of the U.S. government.

“Cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendment to the Constitution of the United States, and the transfer, relocation, or movement of any individual to any country where he or she may be subjected to cruel, inhumane or degrading treatment or punishment, either authorized or unauthorized, by the government of that country.

146. *See id.*

147. Gonzalez Memo, *supra* note 136.

Civil liability shall be assessed to the U.S. government for the commission of, or acquiescence to, any violation of this statute.

B. Implications of the Amended Statute

Expanding the reach of this statute to all agents or anyone acting under the authority of the U.S. government will prevent the use of private citizen groups or third-party organizations from carrying out torturous programs. Instituting the phrase “may be subjected” is intended to deter the movement of a detainee to any country where they can reasonably be expected to be tortured. This language lessens the standard of knowledge from a substantial likelihood to one of reasonableness. This statute will mandate greater diligence when evaluating the likelihood that certain governments or other groups will torture a detainee transferred to another country. Lastly, the ability to hold all responsible parties liable is essential in order to make the statute enforceable.

Such a law would be consistent with existing international doctrines addressing the treatment of prisoners of war and civilians.

The transfer of a prisoner of war (POW) to a State where the POW is likely to be tortured or inhumanely treated is a violation of Geneva III. . . . The unlawful transfer of a civilian classified as a “protected person” to such a State has harsher consequences—the transfer is a “grave breach” under Geneva IV, and is a criminal act. . . . The 1951 Refugee Convention also affords protection against *refoulement* to individuals with a “well-founded fear of persecution” on identified grounds.¹⁴⁸

Opponents of this legislation will rely on precedent and theory similar to that in *Arar*, in particular, deference to the executive branch when dealing with national security and foreign policy. Also, the statute may be viewed as inhibiting the military’s ability to be autonomous and flexible when fighting wars, thus disturbing some of the unfettered ability of the executive branch to circumvent existing doctrine and torture terror suspects. As a result, those in support of the current executive posture will be in opposition to this amendment. However,

148. TORTURE BY PROXY, *supra* note 21, at 10. In addition to criminal penalties for unlawful transfer, “[c]ountries seeking to avoid the responsibility to prosecute officials responsible for grave breaches may themselves be violating the Geneva Conventions.” Weissbrodt & Bergquist, *supra* note 21, at 156.

these views are superseded by the need for a distinct denouncement and illegalization of the Extraordinary Rendition program so as to prevent torture worldwide.

VI. CONCLUSION

The ruling handed down by Judge Trager of New York's Eastern District Federal Court in *Arar v. Ashcroft* was an abdication of the judiciary's responsibility to condemn constitutional and human rights violations by the U.S. government. Extraordinary Rendition is designed to exploit deficiencies in the current anti-torture laws. As the debate about torture rages on in America, the government has taken steps to appease those opposed to torture with new legislation. However to date, U.S. regulations, both old and new, do not stop officials and agents from deporting non-citizens to countries where they can be lawfully tortured on behalf of the U.S. government.

The U.S. government violated Maher Arar's constitutional and human rights. For that he should receive adequate compensation. However, the broad reverberations of remediation for Arar exceed in importance far beyond the typical tort intentions of making him individually whole. It will be a step towards eliminating the covert operation of Extraordinary Rendition. Furthermore, Congress must take an aggressive stance and institute legislation banning such programs from existence. Ending Extraordinary Rendition will promote the United States as a supporter of all human rights and a fair player in the war against terror.

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