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Why Constitutional Rights Litigation Should Not Follow the Flag

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*Editor's Note: In this issue we present commentary on a range of interesting developments in the field of national security law. First, we have **Professor Julian Ku** of Hofstra University School of Law and **Professor Stephen I. Vladeck** of the University of Miami School of Law debating the merits of a little-noticed but immensely important recent opinion. In *Arar v. Ashcroft*, 414 F. Supp.2d 250 (E.D.N.Y. 2006), the court dismissed a civil suit brought by a Canadian citizen who alleged that the U.S. government caused him to be transferred to Syria in order to undergo torture and other forms of coercive interrogation; the court held among other things that national security and foreign policy considerations foreclosed consideration of Arar's constitutional claims. We also present the views of **Professor Tung Yin** of the University of Iowa College of Law regarding developments in the case of Jose Padilla, whose petition for certiorari recently was denied by the Supreme Court. Finally, we present an edited version of a speech titled "Legal Policy in the Twilight of War," delivered by **Dr. Philip D. Zelikow**, currently Counselor at the State Department and formerly Staff Director of the 9/11 Commission, at a recent Standing Committee breakfast event.*

Why Constitutional Rights Litigation Should Not Follow the Flag

Julian Ku

Since the onset of the global war on terrorism in 2001, non-U.S. citizens have repeatedly asked U.S. courts to recognize and enforce their rights under the U.S. Constitution. Such claims have been brought by aliens detained by the U.S. at overseas bases or in Guantanamo Bay, Cuba. They have also been brought by non-U.S. citizens alleging they have been "rendered" to foreign countries for inhumane interrogation or detained in secret CIA prisons. Such claims raise a difficult but absolutely essential legal question for the ongoing prosecution of the global war on terrorism: Can U.S. courts entertain lawsuits alleging that the U.S. government's foreign policy actions violated the constitutional rights of non-U.S. citizens?

One of the best efforts to resolve this difficult question can be found in U.S. District Court Judge David Trager's recent decision in *Arar v. Ashcroft, et. al.* In that case, Judge Trager dismissed a complaint by a non-U.S. citizen seeking damages for violations of his constitutional rights when he was subject to an "extraordinary rendition" to a foreign country.

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Rights Without Remedies: The Newfound National Security Exception to *Bivens*

Stephen I. Vladeck

Few stories—that we know of, anyway—are as depressing a reminder of just how much the world has changed since September 11 as is the tale of Maher Arar. According to the preliminary fact-finding of the official inquiry conducted by the Canadian government (the final report is due out later this year), Arar was detained in September 2002 while changing planes on his way home at New York's Kennedy Airport, and after thirteen days of incommunicado detention under unpleasant conditions in New York, was removed to Syria, where he had not lived since he was a teenager, so that he could be detained and tortured by the Syrian government at the direction and behest of U.S. authorities. In Syria, he spent over ten months in custody, suffering from mistreatment that makes the reported Abu Ghraib transgressions sound positively humane.

And yet, when all was said and done, Arar was released and sent home; the U.S. government, it would seem, no longer saw him as a threat.

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Judge Trager could not have chosen a more difficult set of facts, however, in which to take this position. Unless he is a remarkable liar, Maher Arar, the plaintiff, has suffered a terrible injustice. Arar, a dual citizen of Syria and Canada, has alleged that he was wrongly detained as a suspected terrorist during his transit through the U.S. and purposely handed over to the Syrian government for interrogation. Arar then charges that he was tortured and abused during ten-month confinement before he was finally released to the custody of the Canadian government. Arar has become a public symbol of the abuses resulting in the unofficial U.S. government policy of “extraordinary rendition.” His case was taken up by the Center for Constitutional Rights which sued various U.S. government officials charging they are responsible for his abuses.

The power of Arar’s case, both as a story of individual suffering and as a potent challenge to a highly controversial U.S. government policy, only highlights how difficult it must have been for Judge Trager to dismiss Arar’s lawsuit. Although Arar filed claims under a federal statute, the Torture Victim Protection Act (TVPA), the bulk of his claims allege that his treatment violated his constitutional right to substantive due process under the Fifth Amendment to the U.S. Constitution.

These constitutionally-based claims were invoked by Arar pursuant to the Supreme Court’s decision in *Bivens v. Six Unknown Agents* to create private causes of actions for plaintiffs to bring claims that their constitutional rights had been violated. Crucially for Arar, *Bivens* permits such private lawsuits to be brought even if Congress has not passed legislation specifically authorizing such a private constitutional claim.

Because *Bivens* claims displace Congress’ traditional power to control the creation private causes of action under federal law, however, the Supreme Court has asked courts to consider “special factors

counseling hesitation” where a *Bivens* remedy would trammel on a matter best decided by either the Congress or the President. The traditional dominance of Congress and the President over the conduct of foreign policy, as Judge Trager correctly recognized, represents exactly the kind of special situation where a judicially-created *Bivens* remedy would be inappropriate.

For instance, the policy of “extraordinary renditions” that Arar is seeking to challenge is not even officially acknowledged by the U.S. government. The merits of such a policy to render suspected terrorists to foreign countries involves a wide variety of difficult considerations such as the likelihood of gleaned information about a future terrorist attack, the coordination of law-enforcement efforts, and the relationship of the U.S. with a variety of foreign governments. Even defending such a policy in a domestic litigation (a policy which is supposedly a secret) could undermine the efficacy of the U.S. government’s foreign policy goals.

Arar and his attorneys might respond by arguing that any U.S. government policy, no matter how important, must comply with the restrictions imposed by the U.S. Constitution. The protection of the Constitution, it might be said, should follow the

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flag, at least where the violation of fundamental constitutional rights is alleged.

This argument is powerful, but it is not irrefutable. First, the right of aliens to invoke the Constitution against U.S. actions overseas has never received unqualified, or even qualified, support from the Supreme Court. As a pragmatic matter, this is hardly surprising given the traditional notions of a country's laws being limited to the territory of that country.

Second, even if such constitutional protections extend overseas to non-Americans, the decision as to whether and how to enforce those rights is not solely a question for the U.S. judicial branch. When and whether an individual can bring a private cause of action in U.S. courts has traditionally been a question for Congress, not the courts, and *Bivens* represents a limited departure from this standard rule.

Finally, when the U.S. government takes actions abroad that involve non-U.S. citizens, it already faces a panoply of legal constraints. First and foremost, any U.S. activity occurring in another country must satisfy the requirement of that country's domestic laws. Moreover, U.S. government actions are also constrained by its obligations under treaties it has entered and the various forms of customary international law to which it is bound. Finally, in many instances, the U.S. government's activities abroad are governed by the requirements of federal statutory law. In other words, when the U.S. government acts abroad, it is hardly unconstrained by laws—not to mention its political relations with other countries.

Adding constitutional limitations on U.S. actions abroad via a judicially created *Bivens* action, however, is radically different from these other legal constraints. Unlike the other kinds of legal limitations on U.S. foreign policy, constitutional requirements cannot be repealed, abrogated or modified by a decision of the political branches of the U.S. government. Congress can repeal its own earlier statute or abrogate the domestic effect of a treaty or

even customary international law. But it has no power to modify or adjust constitutional rights recognized by domestic U.S. courts. Such rights are the sole province of the courts.

The judiciary's supreme position in the interpretation and development of constitutional rights would also require courts to inject themselves directly into the supervision of certain aspects of U.S. foreign policy. If courts recognized the right of aliens to bring claims for constitutional violations for actions occurring overseas, courts would have no choice but to sit in judgment on decisions of the most delicate and complex nature. Once recognized, constitutional rights cannot be repealed.

For example, Arar appears to have a very strong case for arguing that his constitutional rights were violated. But because Arar was in transit and never officially entered United States territory, finding that Arar has enforceable constitutional rights would also mean extending constitutional rights to all aliens outside of the United States, including suspected terrorists that the U.S. is currently attempting to capture or kill. One might imagine that U.S. policymakers would reasonably want the freedom to act more aggressively in some circumstances free from the supervision of courts. But even if the executive and legislative branches agreed, for instance, to attack individuals such as Osama Bin Laden or Abu al Zarqawi, U.S. federal courts would always be in a position to overrule their decisions on the basis of the Constitution.

All of these reasons suggest that Judge Trager was right to refuse to permit Arar to enforce claims to protection under the U.S. Constitution for actions taken by the U.S. government abroad. The U.S. government may very well decide that allowing aliens to challenge U.S. government actions in U.S. courts is the best way to oversee and regulate the conduct of the global war on terrorism. But such a momentous decision to subject almost all foreign policy activity to constitutional litigation should, as Judge Trager recognized, be made by Congress.

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