

CASENOTE

ARAR WITH A TWIST: SHOULD A BIVENS REMEDY BE EXTENDED TO A U.S. CITIZEN SUBJECTED TO EXTRAORDINARY RENDITION? AN EVALUATION OF WHETHER THE EXTENSION OF CONSTITUTIONAL TORT REMEDIES SHOULD BE BASED ON IMMIGRATION STATUS

*Greg Laux**

I. INTRODUCTION

During the past decade, the civil lawsuit has emerged as one of the primary accountability mechanisms for questioning the policy of the Bush Administration in its handling of the War on Terror. Most of these lawsuits—sometimes called “counter-counterterrorism suits”¹ or “reverse War on Terror”² suits by academics and commentators—have taken the form of constitutional tort suits brought by plaintiffs under the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.³ The damages action brought by Canadian citizen Maher Arar against the United States based on his “extraordinary rendition”⁴ to Syria represents one of the most high-profile of these cases.⁵

* Associate Member, 2010-2011 *Immigration and Nationality Law Review*.

¹ Richard Klingler, *The Court, the Culture Wars, and Real War*, 30 A.B.A. NAT'L SECURITY L. REP., at 1, 4 (2008).

² George D. Brown, *Accountability, Liability, and the War on Terror – Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 196 (2011).

³ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴ “Extraordinary rendition” is defined in *Black's Law Dictionary* as “[t]he transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation.” BLACK'S LAW DICTIONARY 1410 (9th ed. 2009).

⁵ *Arar v. Ashcroft*, 585 F.3d 559 (2d. Cir. 2009), *cert. denied*, 130 S.Ct. 3409 (2010).