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NO LONGER SECRET: OVERCOMING THE STATE SECRETS DOCTRINE TO EXPLORE MEANINGFUL REMEDIES FOR VICTIMS OF EXTRAORDINARY RENDITION

*“If the Government becomes a lawbreaker, it breeds
contempt for the law”¹*

Many, if not all, Americans would likely agree that state-sponsored torture is wrong. The very notion of state-sponsored torture brings to mind countless atrocities committed during the Twentieth Century. On the other hand, many Americans would equally agree that the United States, in its national security interests, should use all means necessary to discover terrorist plots and uncover the whereabouts of wanted terrorists. To suggest that the United States itself would engage in questionable methods of interrogation² that would rise to the level of state-sponsored torture in its fight against terrorism would almost certainly elicit reactions of denial, disgust, anger, and disbelief. Such techniques, however, lie at the heart of the government’s use of extraordinary rendition.

Extraordinary rendition is a controversial program that the executive branch, particularly the Central Intelligence Agency, has allegedly used in its ongoing campaign against post-September 11

¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

² See generally AMNESTY INT’L, ‘RENDITION’ AND SECRET DETENTION: A GLOBAL SYSTEM OF HUMAN RIGHTS VIOLATIONS—QUESTIONS AND ANSWERS (Jan. 2006), available at <http://www.amnesty.org/en/library/asset/POL30/003/2006/en/db1dbfd1-d468-11dd-8743-d305bea2b2c7/pol300032006en.pdf> (discussing the issue of extraordinary rendition, its practice by the United States and other countries, and the legality of secret detention); HUMAN RIGHTS WATCH, GHOST PRISONER: TWO YEARS IN SECRET CIA DETENTION 6–25 (Feb. 27, 2007), <http://www.hrw.org/sites/default/files/reports/us0207webwcover.pdf> (describing in detail the secret detention of Marwan Jabour, a Palestinian former detainee who was held and mistreated in a secret CIA detention facility).

terrorist plots. It involves the detention, both domestically and abroad, of individuals who are suspected of having information about Al-Qaeda and other terrorist groups. After the government detains these suspects, it then allegedly sends these individuals to secret U.S. detention facilities abroad, or foreign prisons. American or foreign officials then subject these suspects to harsh interrogation techniques that arguably rise to the level of torture.³

Victims of extraordinary rendition have attempted to sue U.S. officials for damages based on abuses that they sustained either directly at the hands of U.S. officials⁴ or at the hands of foreign governments acting in collaboration with the United States.⁵ Generally, they have brought their claims either as a *Bivens* action⁶ or under the Torture Victim Protection Act.⁷ These plaintiffs have encountered various obstacles to their claims in the federal courts, which have either refused to extend a *Bivens* action to the context of extraordinary rendition or dismissed their cases based on the “state secrets doctrine.”⁸ The result is that the federal courts have essentially created a class of victims of harsh interrogation techniques, arguably rising to the level of torture, for which relief is not currently available in the federal judicial system.

This Note explores the implications of how the federal courts have treated claims by victims of extraordinary rendition. Part I articulates an overview of the definitions and legal principles underlying the practice of extraordinary rendition, with particular emphasis on how it has changed since September 11, 2001. Part II addresses current “remedies” available to victims: the Convention Against Torture, the Foreign Affairs Reform and Restructuring Act, the Torture Victim Protection Act, and the *Bivens* claim. Part III examines the state secrets doctrine, the most significant obstacle to plaintiffs bringing a

³ See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1 (discussing alleged abuses by U.S. officials in interrogations of terrorism suspects); see also *infra* Part IV (describing the treatment of Maher Arar, Binyam Mohamed, and other terrorist suspects).

⁴ See, e.g., *El-Masri v. United States*, 479 F.3d 296, 300–01 (4th Cir. 2007) (dismissing plaintiff’s lawsuit against the former director of the CIA for abuses he sustained while detained at a CIA facility in Afghanistan).

⁵ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 563–64 (2d Cir. 2009) (dismissing plaintiff’s case against U.S. officials for his treatment, allegedly authorized by the United States, at the hands of the Syrian government).

⁶ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971) (permitting a victim of a Fourth Amendment violation by federal officers to bring suit for money damages against the officers in federal court); see also *infra* Part II.B.2 (explaining the *Bivens* cause of action).

⁷ Pub. L. No. 102–256, 106 Stat. 73 (1992) *reprinted in* 28 U.S.C. § 1350 (2006).

⁸ See *infra* Parts III.A–B (discussing the *Totten* Bar and the *Reynolds* privilege which, collectively, are the guiding principles of the state secrets doctrine).

cause of action under one of the aforementioned theories. Part IV then discusses two recent extraordinary rendition cases in which plaintiffs' cases were dismissed: *Arar v. Ashcroft*⁹ and *Mohamed v. Jeppesen Dataplan, Inc.*¹⁰ Finally, Part V completes the analysis of this Note by: (1) offering a re-evaluation of current remedies that federal courts have wrongly applied; (2) examining two precedents where victims of state abuse received compensation through a formal commission of inquiry: the compensation of Maher Arar by the Canadian government and the compensation of Japanese Americans interned during the Second World War by the American government; and (3) proposing that Congress establish a commission of inquiry into the extraordinary rendition program in light of the limitations of judicial relief to victims of extraordinary rendition reinforced by the holdings of *Arar* and *Jeppesen*.

I. AN OVERVIEW OF THE PRINCIPLES AND PRACTICES BEHIND EXTRAORDINARY RENDITION

A. Evolution of the Doctrine of Extraordinary Rendition

One of the challenges of approaching the subject of extraordinary rendition is the confusion that the term creates in modern parlance. Indeed, the term "extraordinary rendition" is different from the traditional definition of "rendition," which is "[t]he return of a fugitive from one state to the state where the fugitive is accused or was convicted of a crime."¹¹ Margaret Satterthwaite incorporates this baseline definition when she defines "extraordinary rendition" as "the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture."¹² This would seem to imply that, at the very least, the removal of a person by the government of one country

⁹ 585 F.3d 559 (2d Cir. 2009).

¹⁰ 614 F.3d 1070 (9th Cir. 2010), *cert. denied* 131 S. Ct. 2442 (2011) (mem.).

¹¹ BLACK'S LAW DICTIONARY 1410 (9th ed. 2009).

¹² Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 (2007); *see also* Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1406 (2008) (critiquing that under the doctrine of extraordinary rendition, "the President claims to possess inherent authority to seize individuals and transfer them to other countries for interrogation and torture"). Fisher and other legal commentators maintain that the practical application of executive authorization of extraordinary rendition, particularly in the post-September 11 context, involves sending potential terrorism suspects to countries in which they will be tortured. While this author shares those views, one should acknowledge that President Bush maintained that "[t]he United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it." *See* Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1573 (Sep. 6, 2006) (discussing the U.S. policy regarding torture).

to another country involves a definite legal process, ordinarily requiring explicit congressional authorization.¹³ As the American legal system developed and foreign relations evolved, Attorneys General took the position that “extradition and rendition require congressional action by statutes or treaties.”¹⁴ They reiterated time and again that without the express authorization by Congress or treaty, the President had no inherent power to render foreign nationals to another country.¹⁵ Subsequent “[a]dministrations that did depart from those principles paid a political price.”¹⁶

The idea that the President needs authorization from Congress or a treaty in order to render someone in U.S. custody to another country began to change during the Clinton administration. In 1995, President Clinton signed Presidential Directive 39, authorizing the Secretary of State and the Attorney General to “use all legal means available to exclude from the United States persons who pose a terrorist threat and deport or otherwise remove from the United States any such aliens.”¹⁷ Then, in 1998, terrorist organizations working in collaboration with Osama bin Laden bombed the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.¹⁸ In response, the Clinton administration “pioneered the use of extraordinary rendition . . . [although the

¹³ For much of the history of the United States, the legal process of rendition of fugitives required a bilateral treaty between the United States and a foreign nation. Secretaries of State and Attorneys General were reluctant to approve the unilateral authority of the President to render fugitives to a foreign country absent an explicit Congressional authorization through a bilateral treaty. See Fisher, *supra* note 12, at 1407–1412 (providing a general overview and illustrative examples of the history and rationale for limitations on executive power to render a fugitive to a foreign country absent a treaty or explicit congressional authorization); see also *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936):

There is no executive discretion to surrender [a fugitive] to a foreign government unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

¹⁴ Fisher, *supra* note 12, at 1408.

¹⁵ See *id.* at 1408–09 (detailing the actions of Secretary of State Thomas Jefferson and Attorneys General Charles Lee, William Wirt, and Roger Taney and their determinations, in demands by France, Spain, and Portugal for the United States to turn over fugitives present in the United States and wanted in those countries, that the President lacked the authority to render the fugitives without congressional authority or a bilateral treaty).

¹⁶ See *id.* at 1411 (discussing the political outcry that President Lincoln received after he, without the authority of Congress or a treaty with Spain, ordered a Spanish subject to be seized during the Civil War and returned to Cuba for trial).

¹⁷ Presidential Decision Directive 39: U.S. Policy on Counterterrorism 2 (Jun. 21, 1995), available at <http://www.hsdl.org/?view&doc=62741&coll=limited> (login required).

¹⁸ See, e.g., James C. McKinley, Jr., *Kenya and Tanzania Attacks Are Nearly Simultaneous*, N.Y. TIMES, Aug. 8, 1998, at A1 (reporting on the nearly simultaneous bombings outside the U.S. embassies in the Kenyan and Tanzanian capitals, and the belief that Osama bin Laden was responsible for coordinating the attacks).

administration] also pressed allied intelligence services to respect lawful boundaries in interrogations.”¹⁹ In this way, extraordinary rendition became a power directly and independently claimed by the executive branch.

B. Extraordinary Rendition and Practices After September 11, 2001

*“We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”*²⁰

The government’s approach to extraordinary renditions changed in the wake of September 11 and the initiation of the George W. Bush administration’s “war on terror.” Given the classified nature of the information surrounding extraordinary renditions, it is difficult to know precisely how many suspected terrorists that the government has processed throughout the course of its extraordinary rendition program. In 2002, however, Dana Priest and Barton Gellman wrote one of the first investigative stories for the Washington Post about the extraordinary rendition program. Their article reported:

According to U.S. officials, nearly 3,000 suspected al Qaeda members and their supporters have been detained worldwide since Sept. 11, 2001. About 625 are at the U.S. military’s confinement facility at Guantanamo Bay, Cuba. Some officials estimated that fewer than 100 captives have been rendered to third countries. Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.²¹

Likewise, other than firsthand accounts from victims who have brought claims in federal court for abuses they experienced as a result of the government targeting them in its extraordinary rendition program, little verifiable, unclassified evidence exists with respect to detention and interrogation tactics. As one official has reported, ““

¹⁹ Priest & Gellman, *supra* note 3; see also *U.S. Counter-Terrorism Policy: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 33 (1998) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (“[PDD 77] sets explicit requirements for initiating [the return of] terrorists to stand trial in the United States.”). *But see* Presidential Decision Directive 39, *supra* note 17, at 4 (“If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government . . .”).

²⁰ Priest & Gellman, *supra* note 3 (emphasis omitted) (quoting an anonymous official involved in the United States’ extraordinary rendition program).

²¹ *Id.*

[t]his is a very highly classified area. . . . There was a before 9/11, and there was an after 9/11. . . . After 9/11 the gloves [came] off. ”²² Unlike Guantanamo Bay, “the CIA’s overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies. . . . [and the CIA] often uses the facilities of foreign intelligence services.”²³

The election of President Barack Obama in 2008 did not bring an end to the extraordinary rendition program, although the Obama Administration indicated that practices of interrogating terrorist suspects would be in full compliance with domestic and international law.²⁴ On his second day in office, President Obama signed an executive order purporting to ensure the lawful interrogation of terrorist suspects.²⁵ The executive order, entitled *Ensuring Lawful Interrogations*, expressly limited interrogation techniques to those listed in the Army Field Manual, emphasized the humane treatment of detainees, and ordered the closure of CIA detention facilities.²⁶ This “humane approach” to the extraordinary rendition program appears on the surface to help the United States meet its obligations under international law; however, the executive order has only solidified extraordinary rendition as an institution of the executive branch.

II. CURRENT LEGAL FRAMEWORKS FOR VICTIMS OF EXTRAORDINARY RENDITION

The developing doctrine of extraordinary rendition consolidates executive power to detain, remove, and interrogate terrorist suspects. Juxtaposed against this is a legal framework recognizing the need to protect and compensate victims of torture or abuse by the state or its agents. The United States is a party to international conventions prohibiting the use of torture and provides statutory remedies to torture victims.²⁷ Additionally, the Supreme Court of the United States has recognized the need to provide judicial remedies to victims

²² *Id.* (citing the description of Cofer Black, former head of the CIA Counterterrorist Center, who spoke about the agency’s “new forms of ‘operational flexibility’”).

²³ *Id.*

²⁴ See David Johnston, *Rendition to Continue, but with Better Oversight*, *U.S. Says*, N.Y. TIMES, Aug. 25, 2009, at A8 (reporting that the extraordinary rendition process begun under President Clinton and expanded under President George W. Bush would continue, but with closer scrutiny to ensure that interrogations were lawful and did not use physical force).

²⁵ Exec. Order No. 13,491, 3 C.F.R. 199 (2009).

²⁶ *Id.* at 200–02.

²⁷ See Torture Victim Protection Act of 1991, Pub. L. No. 102–256, § 2, 106 Stat. 73 (1992) reprinted in 28 U.S.C. § 1350 (2006) (establishing a cause of action for individuals subjected to torture to bring against their assailants); see also *infra* Part II.B.1 (discussing the Torture Victim Prevention Act).

of abuse by public officials.²⁸ Victims of extraordinary rendition have attempted to seek redress in the federal courts within these existing legal frameworks.

A. Laws Prohibiting Torture

1. Convention Against Torture

In 1988, the United States became a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.²⁹ Article 1 of the Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [sic] or a third person information or a confession, punishing him [sic] for an act he [sic] or a third person has committed or is suspected of having committed . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³⁰

Of particular relevance in the context of extraordinary rendition is Article 3 of the Convention:

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. For the purpose of determining whether there are substantial grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.³¹

²⁸ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971) (holding that a petitioner whose claim “states a cause under the Fourth Amendment . . . is entitled to recover money damages for any injuries he has suffered as a result . . .”); see also *infra* Part II.B.2 (discussing the *Bivens* remedy which individuals can seek against the government for engaging in the practice of torture).

²⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture* or *Convention*].

³⁰ Convention Against Torture, 1465 U.N.T.S. 113–14, art. 1.

³¹ Convention Against Torture, 1465 U.N.T.S., art. 3.

President Reagan signed the Convention Against Torture on April 18, 1988, and the Convention was ratified by the Senate on October 27, 1990, subject to certain declarations, reservations, and understandings.³² According to the United States' understanding of the Convention, in order 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.'"³³

2. *The Foreign Affairs Reform and Restructuring Act of 1998*

In light of the Senate's determination that the Convention Against Torture was not self-executing, in 1998 Congress enacted the Foreign Affairs Reform and Restructuring Act [FARR Act].³⁴ The FARR Act provides in pertinent part:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subject to torture, *regardless of whether the person is physically present in the United States.*³⁵

The FARR Act also directs appropriate agencies to "prescribe regulations to implement the obligations of the United States under Article 3 [of the Convention Against Torture]."³⁶

In this way, the FARR Act was designed to allow the United States to meet its obligations under the Convention Against Torture by prohibiting the removal of a person to a foreign country where he or she would be tortured. The application of the FARR Act, however, is not without its jurisdictional limitations. Indeed, Congress limited the jurisdiction of the federal courts to hear a claim under the FARR Act in section 2242(d), which states:

³² See Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment, 1 PUB. PAPERS 623 (May 20, 1988) (asking the Senate to ratify the CAT and explaining that it was signed with reservations, understandings and declarations); see also MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 5–6 (2008) (explaining that one of the most significant declarations regarding the Senate's ratification of the Convention was that that Articles 1 through 16 were not self-executing, meaning that in order to fulfill its obligations under the Convention, the United States had to pass implementing legislation in order to give the Convention domestic force of law).

³³ GARCIA, *supra* note 32, at 6–7 (quoting SEN. EXEC. DOC. NO. 101–30, 9 (1990)).

³⁴ Pub. L. No. 105–277, § 1001, 112 Stat. 2681–761 (1998) *reprinted in* 8 U.S.C. 1231.

³⁵ *Id.* § 2242 (a), 112 Stat. 2681–822 (emphasis added).

³⁶ *Id.* § 2242 (b).

[N]o court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination . . . except as part of the review of a final order of removal pursuant to Section 242 of the Immigration and Nationality Act.³⁷

In 2007, the U.S. Court of Appeals for the Fourth Circuit applied the Convention Against Torture, through the FARR Act, to the case of Petru Mironescu, a Romanian national wanted in Romania for various charges of automobile theft.³⁸ In that case, the government appealed a district court order denying its motion to dismiss Mironescu's habeas corpus petition. On appeal, the Fourth Circuit dismissed Mironescu's petition and noted that the FARR Act explicitly provided jurisdiction to review claims under the Convention Against Torture only in the context of immigration removal proceedings.³⁹

B. Current Remedies for Victims of Torture

1. The Torture Victim Protection Act of 1991

Article 14 of the Convention Against Torture requires the signatory parties to the Convention to ensure that victims of torture have a means through which they can obtain redress and compensation.⁴⁰ In response, and in order to carry out the obligations of the United States under the Convention, Congress enacted the Torture Victim Protection Act of 1991 [TVPA].⁴¹ The TVPA

³⁷ *Id.* § 2242(d).

³⁸ *See* *Mironescu v. Costner*, 480 F.3d 664, 667 (4th Cir. 2007).

³⁹ *Id.* at 674 (“[The FARR Act] plainly conveys that although courts may consider or review CAT or FARR Act claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims. As Mironescu presents his claims as part of his challenge to extradition, rather than removal, § 2242(d) [of the FARR Act] clearly precluded the district court from exercising jurisdiction.”).

⁴⁰ *See* Convention Against Torture, *supra* note 29, at art. 14 (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”).

⁴¹ Pub. L. No. 102–256, 106 Stat. 73 (1992) *reprinted in* 28 U.S.C. § 1350 (2006) [hereinafter TVPA]; *see also* H.R. REP. NO. 102–367, at 85–86 (1991):

One such obligation [under the Convention Against Torture] is to provide means of civil redress to victims of torture. . . . The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact. The Torture Victim Protection Act [TVPA] . . . would respond [sic] to this situation.

provides that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”⁴² The TVPA also requires the federal courts to dismiss a claim under the Act if the claimant “has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred”⁴³ and imposes a ten-year statute of limitations on all claims.⁴⁴ Unlike the Alien Tort Claims Act,⁴⁵ the TVPA is not in itself a jurisdictional statute.⁴⁶

As discussed above, the TVPA provides in part that an individual is liable for money damages for subjecting another individual to torture while acting “under actual or apparent authority.”⁴⁷ The U.S. Court of Appeals for the Eleventh Circuit has been particularly willing to uphold this agency theory of liability based on direct and indirect liability.⁴⁸ The Eleventh Circuit has based its application of direct and indirect liability to the TVPA on earlier, similar holdings in the Ninth and Fifth Circuits.⁴⁹

⁴² TVPA § 2(a)(1).

⁴³ *Id.* § 2(b).

⁴⁴ *Id.* § 2(c).

⁴⁵ 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

⁴⁶ *See Kadic v. Karadžić*, 70 F.3d 232, 246 (2d Cir. 1995) (“The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331 . . .”).

⁴⁷ TVPA § 2(a).

⁴⁸ *See, e.g., Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1265 (11th Cir. 2005) (sustaining a TVPA claim where plaintiffs alleged that U.S. corporation “hire[d] and direct[ed]” its employees and/or agents including a Guatemalan mayor, “to torture the plaintiffs and threaten them with death . . .”); *see also Romero v. Drummond Co.*, 552 F.3d 1303, 1315–16 (11th Cir. 2008) (upholding theory of aiding and abetting liability under the Alien Tort Claims Act and the TVPA); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (upholding suit by survivors of Chilean official who was killed during Pinochet regime against a former Chilean military officer on the basis that “the TVPA and the ATCA permit claims based on direct and indirect theories of liability . . .”).

⁴⁹ *See Romero*, 552 F.3d at 1315 (“We based our decision in *Cabello* on the text of the statutes [and] the decisions of two sister circuits [the 9th and the 5th Circuits].”); *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 776–777 (9th Cir. 1996) (holding that the former president of the Philippines, Ferdinand Marcos, could be held liable for human rights abuses if proved that he knew of abuses by military and paramilitary forces under his command and failed to prevent it); *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1988) (assuming, though not fully deciding, that the Alien Tort Claims Act “does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation.”).

2. Remedies for Victims of Abuse by Public Official: The *Bivens* Action

Another cause of action that has surfaced in suits against the government for extraordinary rendition is the *Bivens* remedy, named after a 1971 Supreme Court case, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁵⁰ While specific *Bivens* remedy claims in the context of extraordinary rendition are addressed below,⁵¹ this Section is an introduction to the principle behind the *Bivens* remedy: compensation for constitutional violations by federal officials. The primary allegation in *Bivens* was that agents of the Federal Bureau of Narcotics entered the plaintiff's home without a warrant, arrested him, and treated him roughly in front of his wife and children.⁵² The Court held that the agents had violated *Bivens's* rights under the Fourth Amendment⁵³ and that he was entitled to recover money damages.⁵⁴ The "purpose of the *Bivens* remedy 'is to deter individual federal officers from committing constitutional violations.'"⁵⁵ Since 1971, the *Bivens* remedy has been expanded outside of the Fourth Amendment search and seizure context only twice: (1) employment discrimination in violation of the Due Process Clause⁵⁶ and (2) Eighth Amendment⁵⁷ violations by prison officials.⁵⁸

⁵⁰ 403 U.S. 368 (1971).

⁵¹ See *infra* Part IV (analyzing two cases in which the courts declined to extend a *Bivens* remedy to victims of extraordinary rendition).

⁵² *Bivens*, 403 U.S. at 389–90 (detailing *Bivens's* complaint that the search was conducted without a warrant and that he suffered "great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct . . .").

⁵³ U.S. Const. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁵⁴ *Bivens*, 403 U.S. at 397 ("Having concluded that petitioner's complain states a cause of action under the Fourth Amendment . . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.").

⁵⁵ *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).

⁵⁶ See *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (extending the *Bivens* cause of action for damages arising under a violation of Fourth Amendment rights to a cause and action and damages remedy to a violation of the Due Process Clause of the Fifth Amendment).

⁵⁷ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

⁵⁸ See *Carlson v. Green*, 446 U.S. 14, 19 (1980) (extending a *Bivens* remedy to the context of a prisoner who suffered personal injuries while in the custody of federal prison officials).

III. THE STATE SECRETS DOCTRINE AND ITS BARRIERS TO EXTRAORDINARY RENDITION CLAIMS

A recurring theme arising in extraordinary rendition claims is that the plaintiff's suit cannot continue without relying on or revealing certain information that would compromise sensitive military and foreign policy information. While Part IV addresses this issue in the specific context of recent decisions regarding extraordinary rendition suits, this Section discusses the legal framework of the state secrets doctrine and focuses on two co-principles of the doctrine: the *Totten* bar and the *Reynolds* privilege.

A. *The Totten Bar*

The first principle that governs the state secrets doctrine is the *Totten* bar, which completely bars adjudication of claims premised on state secrets. The name is derived from a Civil War era Supreme Court case, *Totten v. United States*.⁵⁹ That case involved an action by the estate of a Union spy, contracted during the Civil War to infiltrate Confederate territory, to recover compensation for services rendered during the war.⁶⁰ The Court based its dismissal of the claim on the principle that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.”⁶¹ The Court added that “[m]uch greater reason exists for the principle [of barring a suit premised on confidential information] to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.”⁶²

The Supreme Court has since affirmed its holding in *Totten* in more recent lawsuits: one brought by an environmental group seeking to compel the Navy to release environmental impact statements regarding alleged storage of nuclear weapons in Hawaii,⁶³ and another petitioning the federal government to provide promised compensation

⁵⁹ 92 U.S. 105 (1875).

⁶⁰ *Id.* at 106–07 (holding that the action could not be maintained in the Court of Claims for damages arising from a contract for secret services during the Civil War between President Lincoln and the spy).

⁶¹ *Id.* at 107.

⁶² *Id.*

⁶³ See *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 141 (1981) (holding that unless the Navy openly stored nuclear weapons at the site in dispute, the judiciary could not force the Navy to release an environmental impact statement under the National Environmental Policy Act, since the “Navy’s regulations [forbade] it either to admit or deny that nuclear weapons [were] actually stored [at the naval base].”).

to foreign nationals who allegedly performed espionage services for the United States during the Cold War.⁶⁴ Thus, while the line of *Totten* cases would seem to limit its application to military and espionage contexts, the U.S. Court of Appeals for the Ninth Circuit has read *Totten* (as well as *Reynolds*, to which this discussion will presently turn) to “mean that the *Totten* bar applies to cases in which ‘the very subject matter of the action’ is a matter of state secret.”⁶⁵

B. The Reynolds Privilege

The second principle governing the state secrets doctrine is the *Reynolds* privilege: an evidentiary privilege that the government may invoke when state secrets are involved to exclude any privileged evidence, which can result in a dismissal of the case. The Supreme Court first officially recognized the doctrine in *United States v. Reynolds*,⁶⁶ which involved the crash of a military aircraft that was carrying secret electronic equipment, killing three civilian observers.⁶⁷ The widows of the civilian observers filed actions against the United States under the Federal Tort Claims Act⁶⁸ and, under the discovery rules of the Federal Rules of Civil Procedure,⁶⁹ asked the Air Force to produce its official accident investigation report.⁷⁰

The Supreme Court refused to require the Air Force to disclose the report and sustained the government’s claim of privilege on the theory that “there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.”⁷¹ The Court concluded that “[w]hen the Secretary of the Air Force lodged his formal ‘Claim of Privilege,’ he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence.”⁷²

⁶⁴ See *Tenet v. Doe*, 544 U.S. 1, 1–2 (2005) (reversing the decision of the lower court because that decision contravened “the longstanding rule, announced . . . in *Totten*, prohibiting suits against the Government based on covert espionage agreements.”).

⁶⁵ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1078 (9th Cir. 2010), *cert. denied* 131 S. Ct. 2442 (2011) (mem.) (quoting *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953)).

⁶⁶ 345 U.S. 1 (1953).

⁶⁷ *Id.* at 3.

⁶⁸ Pub. L. No. 79–753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

⁶⁹ See FED. R. CIV. P. 26 (outlining the general provisions and rules of discovery); FED. R. CIV. P. 34 (outlining the general provisions governing the requests and production of documents and tangible items).

⁷⁰ *Reynolds*, 345 U.S. at 2–3.

⁷¹ *Id.* at 10.

⁷² *Id.* at 6–7.

Subsequent case law has developed the *Reynolds* Privilege into a fuller test than the Supreme Court first established. The U.S. Court of Appeals for the Fourth Circuit analyzed the *Reynolds* privilege under a three-step framework in *El-Masri v. United States*.⁷³ Dismissing the case on the theory that it could compromise state secrets, the Fourth Circuit established a three-prong test to analyze a case under the *Reynolds* privilege. First, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied; second, the court must decide whether the information sought to be protected qualifies as “privileged” under the state secrets doctrine; and third, the court must determine how the matter should proceed in light of a successful privilege claim.⁷⁴

Under the first prong of its test, the Fourth Circuit noted that the “privilege . . . ‘belongs to the Government and . . . can neither be claimed nor waived by a private party.’”⁷⁵ Also important in the first prong of this test is the timing of the privilege assertion. In this respect, the court held that “dismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure.”⁷⁶

The second prong of the Fourth Circuit’s test is whether the information sought to be protected qualifies as privileged under the state secrets doctrine. The Fourth Circuit noted that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.”⁷⁷ Of particular importance in the analysis are matters of national security and foreign policy. Indeed, “[a] court is obliged to honor the Executive’s assertion of the privilege if it is satisfied, ‘from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the

⁷³ 479 F.3d 296 (4th Cir. 2007). The plaintiff in *El-Masri* was a German citizen of Lebanese descent who brought a *Bivens* action against the director of the CIA, George Tenet, and unknown CIA employees. The plaintiff alleged that he was unlawfully detained in Macedonia and removed to a CIA facility in Afghanistan, where he was mistreated by U.S. officials. *Id.* at 300.

⁷⁴ *See id.* at 304, 306 (explaining the three steps in this test).

⁷⁵ *Id.* (quoting *Reynolds*, 345 U.S. at 7). The court, however, clarified who specifically may claim the privilege, and under what considerations that claim may be made. *See id.* (quoting *Reynolds*, 345 U.S. at 8) (determining that “there must be a formal claim of privilege, lodged by the head of the department which has control over the matter” and that such formal privilege claim “may be made only ‘after actual personal consideration by that officer.’”).

⁷⁶ *Id.* at 308; *see also* *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F. 3d 1070, 1089 (9th Cir. 2010), *cert. denied* 131 S. Ct. 2442 (2011) (mem.) (“[F]urther litigation presents an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense.”).

⁷⁷ *El-Masri*, 479 F.3d at 305 (quoting *Reynolds*, 345 U.S. at 11) (internal quotation marks omitted).

interest of national security, should not be divulged.”⁷⁸ The court must review claims of privilege, however, “without forcing a disclosure of the very thing the privilege is designed to protect Too much judicial inquiry into the claim of privilege would force disclosure . . . while a complete abandonment of judicial control would lead to intolerable abuses.”⁷⁹

Finally, in the third prong of the Fourth Circuit’s test the court must decide how the matter should proceed in light of a successful privilege claim on behalf of the government. The court “must assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how.”⁸⁰ What seems certain is that under this third prong there are “three circumstances where the *Reynolds* privilege would justify terminating a case.”⁸¹ The first is where “the plaintiff cannot prove the *prima facie* elements of [his or] her claim with nonprivileged evidence”⁸² In the second circumstance, “if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.”⁸³ In the third circumstance, however:

[E]ven if the claims and defenses might theoretically be established without relying on privileged evidence, it may be

⁷⁸ *El-Masri*, 479 F.3d at 305 (quoting *Reynolds*, 345 U.S. at 10); see also *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (“[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”).

The Fourth Circuit noted, however, that deference to the executive in matters of state secrets “does not represent a surrender of judicial control over access to the courts.” *El-Masri*, 479 F.3d at 312; see also *Al-Haramain*, 507 F.3d at 1203 (“We take very seriously our obligation to review [documents that the government claims are protected by the privilege] with a very careful, indeed a skeptical, eye, and not to accept at face value the government’s claim or justification of privilege.”); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) (holding that the role of the court must be “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, [and as such] it is essential that the courts continue critically to examine instances of the invocation.”).

⁷⁹ *Reynolds*, 345 U.S. at 8.

⁸⁰ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010), cert. denied 131 S. Ct. 2442 (2011) (mem.); see also *Al-Haramain*, 507 F.3d at 1204 (“The effect of the government’s successful invocation of privilege ‘is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.’” (citing *Ellsberg*, 709 F.2d at 64)); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (stating that a successful invocation of the state secrets doctrine by the government means that “the evidence is completely removed from the case”).

⁸¹ *Jeppesen*, 614 F.3d at 1083.

⁸² *Kasza*, 133 F.3d at 1166. In such a case, the court would proceed with the dismissal as it would proceed with any plaintiff who failed to establish a *prima facie* case. See *id.* (“[T]he court may dismiss [the] claim as it would with any plaintiff who cannot prove [his or] her case.”).

⁸³ *Id.* (emphasis omitted) (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992) (internal quotation marks omitted)).

impossible to proceed with the litigation because—privileged information being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.⁸⁴

In light of this “third” circumstance—dismissal of a case when the “very nature” of the case would reveal state secrets—the discussion now turns to examine two recent cases involving extraordinary rendition.

IV. TWO RECENT CASE STUDIES: *ARAR V. ASHCROFT* AND *MOHAMED V. JEPPESEN DATAPLAN, INC.*

The Second and Ninth Circuits have recently heard two suits for damages arising from mistreatment of non-citizens as part of the government’s extraordinary rendition program. Both cases are illustrative of the troubling legal problems surrounding extraordinary rendition because they provide firsthand accounts of what is otherwise a secretive program. They clearly show the deficiencies of the current legal frameworks within which victims of extraordinary rendition must operate, as well as the obstacles to relief that such victims must overcome in successfully proving their case.

The first case, *Arar v. Ashcroft*,⁸⁵ involved the treatment of Maher Arar, a dual Syrian and Canadian citizen who was detained in New York’s JFK Airport in 2002 while returning to Canada from a vacation in Tunisia.⁸⁶ Arar was questioned “about his relationships with certain individuals who were suspected of terrorist ties,”⁸⁷ placed in a detention center, found inadmissible to the United States for being a member of a terrorist organization⁸⁸ and ordered removed to

⁸⁴ *Jepesen*, 614 F.3d at 1083; see also *In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007) (“If the district court determines that the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets, then the case must be dismissed.”); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1241–42 (4th Cir. 1985) (“[I]n some circumstances sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters.”). The case law seems to indicate, then, the courts’ willingness to dismiss a case if its prima facie claim is inextricably premised on—or is itself—a state secret.

⁸⁵ 585 F.3d 559 (2d Cir. 2009).

⁸⁶ *Id.* at 565.

⁸⁷ *Id.*

⁸⁸ See 8 U.S.C. § 1182(a)(3)(B) (2006) (describing the grounds in which an alien is inadmissible to the United States based on membership in or support of a terrorist organization); see also *id.* § 1227(a)(1)(A) (“Any alien who at the time of entry . . . was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”); *id.* § 1225(c):

If an immigration officer or judge suspects that an arriving alien may be inadmissible under [provisions excluding certain aliens on national security grounds] . . . the

Syria.⁸⁹ Prior to his removal, legacy Immigration and Naturalization Service⁹⁰ “made a (required) finding that such removal would be consistent with Article 3 of the Convention Against Torture”⁹¹ Arar spent a year in Syrian custody, and the conditions which he endured were nothing short of horrific:

[Arar spent] 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 allege[d] 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.⁹²

Arar’s complaint sought damages from federal officials as a result of his detention in the United States and his removal to and detention in Syria.⁹³ Specifically, Arar’s complaint sought “relief under the Torture Victim Protection Act . . . relief under the Fifth Amendment for [his] alleged torture in Syria . . . and his detention there . . . [and] relief under the Fifth Amendment for [his] detention in the United States prior to his removal to Syria.”⁹⁴

With respect to Arar’s cause of action under the TVPA, the Second Circuit, sitting *en banc*, held that Arar would need to “adequately allege that the [federal officials] possessed power under Syrian law, and that the offending actions . . . derived from an exercise of that power.”⁹⁵ Finding no sufficient evidence that the

officer or judge shall (A) order the alien removed . . . (B) report the order of removal to the Attorney General; and (C) not conduct any further inquiry or hearing until ordered by the Attorney General.

⁸⁹ *Arar*, 585 F.3d at 565–66 .

⁹⁰ Now Immigration and Customs Enforcement, part of the Department of Homeland Security.

⁹¹ *Arar*, 585 F.3d at 566; *see also supra* Part II.A.1 (discussing the Convention Against Torture).

⁹² *Arar*, 585 F.3d at 566.

⁹³ *Id.* at 567.

⁹⁴ *Id.*

⁹⁵ *Id.* at 568; The court also noted that “[a]ny allegation arising under the TVPA requires a demonstration that the defendants acted under color of foreign law, or under its authority.” *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 245 (2nd. Cir. 1995)).

federal officials acted under color of Syrian law, the court dismissed outright Arar's TVPA claim.⁹⁶

Turning next to Arar's petition for relief under the Fifth Amendment, the court analyzed Arar's claim in the context of extending a *Bivens* remedy to cases involving extraordinary rendition. The court explained that, absent explicit action by Congress creating a cause of action, courts have been reluctant to extend a *Bivens* remedy to various situations when "special factors [counsel] hesitation," such as, "military concerns, separation of powers, the comprehensiveness of available statutory schemes, national security concerns, and foreign policy considerations."⁹⁷ After weighing the various policy concerns in the case—namely, issues relating to national security and foreign relations—the court refused to extend a *Bivens* action to the context of extraordinary rendition because "such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation."⁹⁸

In the second case, *Mohamed v. Jeppesen Dataplan, Inc.*,⁹⁹ the Ninth Circuit allowed for a rehearing *en banc* of five plaintiffs, all foreign nationals, who alleged that the Central Intelligence Agency, "working in concert with other government agencies and officials of foreign governments, operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials."¹⁰⁰ This, according to plaintiffs, allowed the government to "employ interrogation methods that would [otherwise have been] prohibited under federal or international law."¹⁰¹

⁹⁶ *Id.* at 568 ("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.").

⁹⁷ *Id.* at 573 (citations omitted).

⁹⁸ *Id.* at 574. The majority opinion, however, did not delineate what circumstances would make extension of a *Bivens* action to extraordinary rendition cases appropriate; rather, it stopped at the factors that would counsel "hesitation" by the judiciary of such an extension, holding that "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." *Id.* at 580–81.

⁹⁹ 614 F.3d 1070 (9th Cir. 2010), *cert. denied* 131 S. Ct. 2442 (2011) (mem.).

¹⁰⁰ *Id.* at 1073.

¹⁰¹ *Id.* (internal quotations marks omitted). The plaintiffs were all detained outside of the United States and none were, at least according to the facts presented in this case, permanent residents of the United States. The named plaintiff in this case, Binyam Mohamed, "an Ethiopian citizen and legal resident of the United Kingdom," alleged that he "was arrested in Pakistan on immigration charges" and flown to Morocco, where he was subjected to physical and psychological torture by Moroccan security agents. He was then allegedly transferred back

The specific claim in this case was against not the government, but rather a U.S. corporation which provided “flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture.”¹⁰² The plaintiffs further alleged that Jeppesen “provided this assistance with actual or constructive ‘knowledge of the objectives of the rendition program,’ including knowledge that the plaintiffs ‘would be subjected to forced disappearance, detention, and torture’ by U.S. and foreign government officials.”¹⁰³

Analyzing the case in light of the state secrets doctrine,¹⁰⁴ the court upheld the contention of the government that, under either the *Totten* bar or the *Reynolds* privilege, “[the] plaintiffs’ lawsuit should be dismissed . . . because ‘state secrets are so central to this case that permitting further proceeding[s] would create an intolerable risk of disclosure that would jeopardize national security.’”¹⁰⁵ While the court acknowledged that “some of [the] plaintiffs’ claims might well fall within the *Totten* bar,”¹⁰⁶ it placed particular emphasis on the *Reynolds* privilege as a justification for dismissing the plaintiffs’ case.

Turning to the question of the *Reynolds* privilege, the court quickly disposed of the first step of the *Reynolds* analysis¹⁰⁷—the procedural requirements—by determining that the government complied with the requirement by filing “General Hayden’s¹⁰⁸ formal claim of privilege in his public declaration.”¹⁰⁹ After reviewing the government’s public

to American custody and flown to Afghanistan where he was detained in a CIA “dark prison,” where he lost a considerable amount of weight. He was then transferred to the U.S. military prison at Guantanamo Bay, Cuba, where he remained for five years before being released and returned to the United Kingdom. *Id.* at 1074.

¹⁰² *Id.* at 1075.

¹⁰³ *Id.*

¹⁰⁴ See *supra* Part III (providing an overview of the state secrets doctrine, including its two corollaries: the *Totten* bar and the *Reynolds* privilege).

¹⁰⁵ *Jeppesen*, 614 F.3d at 1083–84 (quoting Brief for United States at 13, *Jeppesen*, 614 F.3d 1070 (No. 08–15693)).

¹⁰⁶ *Id.* at 1084. The court ultimately concluded, however, that it could not “resolve the difficult question of precisely which claims may be barred under *Totten* because application of the *Reynolds* privilege leads us to conclude that this litigation cannot proceed further.” *Id.* at 1085.

¹⁰⁷ See *supra* Part III.B (providing an overview of the three steps of the *Reynolds* analysis).

¹⁰⁸ General Michael V. Hayden (Air Force, Ret.) was director of the Central Intelligence Agency during the final two years of the Bush Administration. Before his departure in 2009, he defended the CIA’s interrogation techniques of terrorists. See Greg Miller, *Departing CIA Chief Hayden Defends Interrogations*, L.A. TIMES, Jan. 16, 2009, at A14 (reporting on Hayden’s tenure as CIA Director and his defense of controversial interrogation techniques used on terrorism suspects).

¹⁰⁹ *Jeppesen*, 614 F.3d at 1085.

and classified declarations, the court was convinced that under the second part of the *Reynolds* analysis, “at least some of the matters [the government sought to protect were] . . . valid state secrets, ‘which, in the interest of national security, should not be divulged.’”¹¹⁰ Finally the court held that “dismissal [was] . . . required under *Reynolds* because there [was] no feasible way to litigate Jeppesen’s alleged liability *without creating an unjustifiable risk of divulging state secrets.*”¹¹¹ In dismissing the case, the court reasoned that “further litigation present[ed] an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense.”¹¹²

V. REMEDIES FOR VICTIMS OF EXTRAORDINARY RENDITION: RE-THINKING EXISTING DOCTRINES AND EXPLORING NEW SOLUTIONS

The Second and Ninth Circuits dismissed the plaintiffs’ claims in both *Arar v. Ashcroft* and *Mohamed v. Jeppesen*. Where, then, does that leave victims of extraordinary rendition who bring future petitions for relief in the federal courts? Clearly, the holdings in both *Arar* and *Jeppesen*, coupled with the Supreme Court’s denial of certiorari in *Arar*,¹¹³ present significant challenges to further litigation in this area. The holdings in these cases, however, cannot and should not be the end of the discourse for victims of extraordinary rendition. This Section examines the shortcomings of the holdings reached by the majorities in *Arar* and *Jeppesen*, with particular emphasis on the dissents in both of those cases.¹¹⁴ It also analyzes potential remedies,

¹¹⁰ *Id.* at 1086 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). The government had asserted four categories of evidence that neither it nor Jeppesen should have been compelled to disclose:

[1] information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; [2] information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; [3] information about the scope or operation of the CIA terrorist detention and interrogation program; [or 4] any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.

Jeppesen, 614 F.3d at 1086 (quoting Brief for United States, *supra* note 105, at 7–8).

¹¹¹ *Id.* at 1087 (emphasis added).

¹¹² *Id.* at 1089.

¹¹³ *Arar v. Ashcroft*, 130 S.Ct. 3409 (2010) (mem.).

¹¹⁴ For a more detailed analysis of both the *Arar* and *Jeppesen* cases and their impact on future litigation by victims of extraordinary rendition see Benjamin Bernstein, Comment, *Over Before It Even Began: Mohamed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, 34 *FORDHAM INT’L L.J.* 1400, 1426–1429 (2011) (arguing that although the majority’s expansion of the *Reynolds* privilege in *Mohamed* was incorrect, the alternatives proposed by the dissent are insufficient to provide victims with proper redress in the federal court system).

both judicial and non-judicial, the courts and Congress should consider. Past precedent¹¹⁵ seems to indicate that many years may pass before these proposed remedies become politically and practically viable. This should not, however, preclude considerations of how to produce fair compensation and redress to victims who have endured significant physical and emotional injuries as a result of their treatment at the hands of U.S. and foreign officials.

A. Judicial Remedies

1. *The TVPA Should Be an Effective Remedy: Misapplication of “Color of Law” Requirement*

Under the Torture Victim Protection Act,¹¹⁶ “[a]n individual who, under actual or apparent authority, *or color of law*, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual”¹¹⁷ As noted above, the majority in *Arar v. Ashcroft* dismissed Arar’s claim for relief under the Torture Victim Protection Act because he failed to allege that the American agents who allegedly authorized his torture “possessed power under Syrian law”¹¹⁸

Judge Pooler, however, dissenting in *Arar*, criticizes the majority’s treatment of the “color of law” requirement in the TVPA and provides an important counterpoint about why Arar should have been allowed to raise a claim under the TVPA. Pooler writes that “[i]n construing [the color of law requirement] we look ‘to principles of agency law and to jurisprudence under 42 U.S.C. § 1983.’”¹¹⁹ Section 1983 allows a person to pursue a civil action against an official for deprivation of that person’s constitutional rights.¹²⁰ Pooler notes that

¹¹⁵ See *infra* Part V.B.2 (discussing the nearly forty-year process of obtaining redress for Japanese Americans interned during the Second World War).

¹¹⁶ Pub. L. No. 102–256, 106 Stat. 73 (1992) *reprinted in* 28 U.S.C. § 1350 (2006).

¹¹⁷ *Id.* § 2(a)(1) (emphasis added).

¹¹⁸ *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009).

¹¹⁹ *Id.* at 627 (Pooler, J., dissenting) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)).

¹²⁰ See 42 U.S.C. § 1983 (2006) (emphasis added):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States *or other person within the jurisdiction thereof* to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

One should note, however, that both Section 1983 and *Bivens* provide remedies for violations of constitutional rights; however, federal courts have distinguished the two causes of actions based on whether right exists under federal or state law, and whether the violator was a

“[u]nder 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.’”¹²¹

The crux of Pooler’s dissenting argument is that since private individuals who act in collaboration with state officials are clothed with “state law,” “non-Syrian actors who willfully participate in joint action with Syrian officials, acting under color of Syrian law, themselves act under color of Syrian law.”¹²² Pooler disagrees with the majority’s conclusion that “Arar’s pleading was deficient because he alleged only that ‘United States officials encouraged and facilitated the exercise of power by Syrians in Syria,’ not that defendants possessed power under Syrian law which they used to remove him to Syria to be tortured.”¹²³ As Judge Pooler suggests, however, under principles of agency law, and especially for purposes of a cause of action under section 1983, “private individuals may be liable for joint activities with state actors even where those private individuals had no official power under state law.”¹²⁴ Indeed, in interpreting the Alien Tort Statute,¹²⁵ the Second Circuit has a precedent of applying principles of agency law to support claims against non-state actors.¹²⁶

At first glance, Judge Pooler’s argument may seem convoluted. It almost conceptualizes the United States as a quasi-private entity in terms of how the United States related to and acted under color of Syrian law. Because of this relationship, Pooler argues that the United

federal or a state actor. *See Izen v. Catalina*, 398 F.3d 363, 367 n.3 (5th Cir. 2005) (“A *Bivens* action is analogous to an action under § 1983—the only difference being that § 1983 applies to constitutional violations by state, rather than federal, officials.”) (quoting *Evans v. Ball*, 168 F.3d 856, 863 n.10 (5th Cir. 1999), *overruled on other grounds* by *Castellano v. Fragozo*, 352 F.3d 939, 954–55 (5th Cir. 2003); *see also* *Rogers v. Vicuna*, 264 F.3d 1, 4 (1st Cir. 2001) (differentiating between *Bivens*, which offers redress for constitutional violations under federal law, and Section 1983, which offers redress for violations under state law).

¹²¹ *Arar*, 585 F.3d, at 627 (Pooler, J., dissenting) (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).

¹²² *Id.* at 629.

¹²³ *Id.* at 628 (quoting *Arar*, 585 F.3d at 603 (majority opinion)).

¹²⁴ *Id.* (Pooler, J., dissenting); *see also* *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980) (“[T]o act ‘under color of’ state law for § 1983 purposes does not 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.”).

¹²⁵ 28 U.S.C. § 1350 (2006).

¹²⁶ *See, e.g.,* *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188–89 (2d Cir. 2009) (holding plaintiffs adequately alleged the state action element of a claim under the Alien Tort Statute against Pfizer for non-consensual drug experimentation on Nigerian children); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (holding that in the Second Circuit, a plaintiff may plead a theory of aiding and abetting under the Alien Tort Statute).

States should be liable for the Syrians' torture of Arar. Her argument, however, is not as convoluted as it seems. It simply calls for greater accountability of American agents who have circumvented U.S. laws by transporting Arar to Syria with the knowledge that Syrian agents could interrogate him under conditions rising to the level of torture. If a private entity, with no official power under the law of a foreign state, can nevertheless be liable for operating jointly with that state, it should follow that a state actor acting jointly with another state actor should be equally liable.

2. A *Bivens* Remedy Should Apply: Re-Examining the Majority's Opinion in Arar

As discussed above, the majority in *Arar* dismissed not only Arar's cause of action under the Torture Victim Protection Act, but also his *Bivens* claim for relief.¹²⁷ Judge Sack criticizes the majority's particular treatment of "special factors that counsel hesitation" in its refusal to extend a *Bivens* cause of action to the context of extraordinary rendition. In his dissent, Judge Sack argues that "we think it mistaken to preclude *Bivens* relief solely in light of a citation or compilation of one or more purported examples of 'special factors.'"¹²⁸ Indeed, Sack seems to place much lower importance on circumstances that ultimately led to the dismissal of Arar's case—among them, the sensitive nature of the evidence surrounding the case—when he states that "the existence of such 'special factors' alone does not compel a conclusion that a *Bivens* action is unavailable."¹²⁹

Instead, Judge Sack argues, the circumstances of Arar's case in particular—"suffer[ing] a grievous infringement of his constitutional rights by one or more of the defendants,"¹³⁰—lend support to judicial consideration of extending a *Bivens* action to victims of extraordinary rendition. Sack first emphasizes the argument that it seems "no more appropriate to await express congressional authorization of traditional judicial relief with regard to [the plaintiff's constitutional] legal interests than with respect to interests protected by federal statutes."¹³¹

¹²⁷ *Arar*, 585 F.3d at 580–81 (holding that a judicial *Bivens* remedy was inappropriate in the context of extraordinary rendition for reasons of national security and foreign affairs, absent explicit congressional authorization of a remedy for victims of extraordinary rendition).

¹²⁸ *Arar*, 585 F.3d at 600 (Sack, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *Id.* at 603.

¹³¹ *Id.* at 604 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in judgment)). Sack also relies on Judge

Judge Sack's dissent is persuasive because it underscores an important theme in the majority's opinion in *Arar*: the recognition that Mr. Arar had suffered a legal injustice.¹³² Additionally, as Judge Sack notes, "Arar has no other remedy for the alleged harms the defendant officers inflicted on him."¹³³ It seems unfair then, as Judge Sack emphasizes, that the court would simultaneously acknowledge this injustice and refuse to extend any remedy.

Yet despite the persuasive arguments in Judge Sack's dissent in favor of extending a *Bivens* remedy for victims of torture by or at the behest of the U.S. government, the viability of such an argument remains unclear. In *Vance v. Rumsfeld*,¹³⁴ the Seventh Circuit recently attempted to distinguish *Arar* by allowing a *Bivens* claim brought by U.S. citizens allegedly detained and tortured by U.S. military personnel in Iraq.¹³⁵ The court in *Vance* particularly emphasized that "nothing in [*Arar* and similar cases] indicates that those courts were willing to extend the unprecedented immunity that [the federal government] . . . advocate[s] here, for claims that our government tortured its own citizens."¹³⁶ The opinion in *Vance*, then, would have represented an important first step in allowing a *Bivens* remedy—at least for U.S. citizens—in such cases. On October 28, 2011, however, the Seventh Circuit granted the government's petition for a rehearing *en banc*, and vacated the opinion.¹³⁷ As of the writing of this Note, the Seventh Circuit has not scheduled oral arguments for the case.

Posner's argument in *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989):

[I]f ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. . . . [I]t would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process.

¹³² See *Arar*, 585 F.3d at 580 ("None of this is to say that extraordinary rendition is or should be a favored policy choice.").

¹³³ *Id.* at 605 (Sack, J., dissenting).

¹³⁴ 653 F.3d 591 (7th Cir. 2011), *reh'g en banc granted, opinion vacated* 653 F.3d 591 (7th Cir. Oct. 28, 2011).

¹³⁵ *Id.* at 622 (distinguishing the claims brought by U.S. citizens in this case, as opposed to claims brought by foreign nations in *Arar* and other similar cases, and holding that "we should not let the difficulty of [*Arar* and other extraordinary rendition cases] lead us to lose sight of the fundamentally different situation posed by the claims of civilian U.S. citizens in this case").

¹³⁶ *Id.*

¹³⁷ *Vance v. Rumsfeld*, 653 F.3d 591, 591 (7th Cir. Oct. 28, 2011) (noting that a rehearing *en banc* was granted and that the opinion was vacated).

3. *Exceptions to the State Secret Doctrine When the Government Is Arguably Premising Privilege on Violation of Domestic and International Law Regarding Torture*

An exception to the state secrets doctrine where the government is premising its privilege on a violation of domestic and international law regarding torture would remedy the problem of dismissal of extraordinary rendition victims' cases on "state secrets" grounds.¹³⁸ The dissent in *Jeppesen* addresses this issue, particularly as it applies to the dismissal of Binyam Mohamed and his co-plaintiffs' case at the pleadings stage.¹³⁹

At the heart of the dissent's argument, then, is the belief that the majority has reached its decision at a premature stage, despite the potential validity of the government's claim of privilege under *Reynolds*, by dismissing the plaintiffs' case at the pleadings level. The dissent argues instead that if "Plaintiffs here have stated a claim on which relief can be granted, they should have an opportunity to present evidence in support of their allegations, without regard for the likelihood of ultimate success."¹⁴⁰ The dissent would remand the case for further proceedings in order for the lower court to "determine what evidence is privileged and whether any such evidence is indispensable either to Plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint."¹⁴¹

¹³⁸One commentator has proposed a framework for non-U.S. citizen victims of extraordinary rendition that continues to use the traditional – albeit increasingly difficult – recourse of the federal court system. See, e.g., Andrew Kingman, Note, *State Secrets Are a Privilege, Not a Right: Can Foreign Victims of Extraordinary Rendition and Torture Overcome the State Secrets Privilege Using the Alien Tort Statute?*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 118, 141–146 (2011) (arguing that non-U.S. citizens should continue to bring claims under the Alien Tort Claims Act; that Congress should pass legislation limiting the government's ability to raise state secrets as a defense; and that plaintiffs should choose their appellate jurisdiction carefully to avoid circuits particularly hostile to torture and extraordinary rendition claims).

¹³⁹*Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1098 (9th Cir. 2010), cert. denied 131 S. Ct. 2442 (2011) (mem.) (Hawkins, J., dissenting):

Whatever validity there may be to the idea that evidentiary privileges can apply at the pleadings stage, it is wrong to suggest that such an application would permit the removal of *entire allegations* resulting in out-and-out dismissal of the entire suit. Instead, the state secrets privilege operates at the pleadings stage to except from the implications of [Federal Rule of Civil Procedure] 8(b)(6) the refusal to answer certain allegations, not, as the government contends, to permit the government or Jeppesen to avoid filing a responsive pleading at all.

see also FED. R. CIV. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.").

¹⁴⁰*Jeppesen*, 614 F.3d at 1100 (Hawkins, J., dissenting).

¹⁴¹*Id.* at 1101.

The dissent in *Jeppesen* posits an interesting theory of the *feasibility* of an alleged victim's case. Extraordinary rendition cases are unique (and frustrating) from an evidentiary perspective in that they involve facts that may tend to corroborate allegations of abuse by the government. If the holdings in *Arar* and *Jeppesen* are any indication, however, it would be difficult for the plaintiff to overcome governmental claims of privilege for state secrets. Certainly, the best-case scenario would be a congressional statutory exception to (or at least a more narrow definition of) the judicially created *Reynolds* privilege,¹⁴² particularly in cases that would tend to imply that the government itself is in violation of domestic or international law. Barring that, or a Supreme Court case overruling the doctrines of state secret privilege espoused in *Reynolds*, it seems unlikely that the current judicial interpretations of the *Bivens* action and the state secrets doctrine will change.

B. Non-Judicial Remedies: Providing Compensation to Victims

The counterpoints expressed in the dissenting opinions in both *Arar* and *Jeppesen* challenge the rationale of leaving the fate of victims of extraordinary rendition to the whim of the legislature or other non-judicial entities—entities that are (theoretically) more influenced by popular will or dissatisfaction than the judiciary. The counterarguments expressed in *Arar* and *Jeppesen* are important to understanding the development of the law in the context of providing some sort of future judicial remedy for victims of extraordinary rendition. But it seems unlikely that victims of extraordinary rendition will find relief in the court systems in the near future. Rather, relief for victims of extraordinary rendition must come in the form of a non-judicial remedy, which would include some form of compensation for the victims. This relief, as the following examples will demonstrate, could potentially arise from any combination of legislative action, executive action, investigative action initiated by governmental or

¹⁴² At least one bill proposed in Congress would have limited the state secrets privilege in such a way. See State Secrets Protection Act of 2009, H.R. 984, 111th Cong. (2009); S. 417, 111th Cong. (2009) (proposing a series of evidentiary proceedings, including *in camera* proceedings and other evidentiary hearings, to simultaneously protect the government's right to assert the state secrets privilege in any civil action, and allow litigants to proceed with meaningful discovery). One commentator has advocated for Congress to pass a "State Secrets Act," which would go far in narrowing the executive branch's ability to assert the state secrets privilege." Kingman, *supra* note 138, at 143. On November 5, 2009, the House Committee on the Judiciary ordered the State Secrets Act of 2009 reported to the House of Representatives for consideration. However, as of the writing of this Note, the House has not taken further action. See 155 CONG. REC. D1297-98 (daily ed. Nov. 5, 2009) (reporting the actions of the House Committee on the Judiciary ordering H.R. 984 reported to the House of Representatives).

non-governmental entities, or the diligent effort of public interest organizations. In spite of the dissents' misgivings in *Arar* and *Jeppesen*, this may mean subjecting victims more directly to public suspicion and hostility toward alleged suspected terrorists. Only through open, public, non-judicial actions, however, can victims of extraordinary rendition overcome the state secrets doctrine and achieve any meaningful redress for their injuries.

This Section begins by emphasizing the precedent for compensation of victims of extraordinary rendition that the Canadian government has already accomplished in the case of Maher Arar. The discussion then turns to the case of the Japanese Americans interned during World War II in the United States. The example of the Japanese American internment is important for two reasons: first, it established a significant precedent for victims of governmental abuses of power; and second, the method by which Japanese Americans received compensation was unique. Finally, the following discussion examines potential proposals for non-judicial compensation for victims of extraordinary rendition, as well as what challenges such proposals would face in light of the *Arar* and *Jeppesen* cases.

As a preliminary note, the government of the United Kingdom announced in July, 2010 that it would consider mediation and compensation claims with Mohamed and other detainees at Guantanamo Bay.¹⁴³ At the end of 2010, the British government declared that it would compensate Binyam Mohamed and other Guantanamo Bay detainees for abuses that they suffered.¹⁴⁴ The British government also indicated its desire to conduct an inquiry into the allegations of detainee abuse by British intelligence and security officials.¹⁴⁵ Prime Minister David Cameron appointed Sir Peter

¹⁴³ See Prime Minister David Cameron, A Statement Given by the Prime Minister to the House of Commons on the Treatment of Terror Suspects (July 6, 2010) (transcript available at <http://www.number10.gov.uk/news/statements-and-articles/2010/07/statement-on-detainees-52943>) [hereinafter *Terror Suspect Statement*] (“[W]e are committed to mediation with those who have brought civil claims about their detention in Guantanamo. And wherever appropriate, we will offer compensation.”).

¹⁴⁴ See John F. Burns & Alan Cowell, *Britain to Compensate Guantánamo Detainees*, N.Y. TIMES, Nov. 17, 2010, at A14 (reporting the plan of the British government to pay potentially millions of dollars to former Guantanamo detainees, including Binyam Mohamed); Patrick Wintour, *Guantánamo Bay Detainees to Be Paid Compensation by UK Government*, THE GUARDIAN, Nov. 16 2010, at 1 (reporting that the UK’s motivation for providing compensation is that “it is in the national interest that the cases are not brought to court so as to protect the [methods of the MI6] from scrutiny” and “settlement of the claims would allow an inquiry to be undertaken . . .”).

¹⁴⁵ See *Terror Suspect Statement*, supra note 143:

As soon as we’ve made enough progress, an independent Inquiry will be held. It will look at whether Britain was implicated in the improper treatment of detainees held

Gibson, a prominent British attorney, judge and commissioner, as Chair of the newly formed Detainee Inquiry on July 6, 2010.¹⁴⁶ Human rights organizations criticized the work of the Inquiry from the beginning, however,¹⁴⁷ and on January 18, 2012, the British government disbanded it.¹⁴⁸ Therefore, this discussion will primarily concentrate on the Canadian inquiry into the treatment of Maher Arar.

1. Relief for Maher Arar: The Canadian Example

The unfortunate reality of a post-September 11, 2001 world is that many, if not all, American allies have been touched in one way or another by American efforts to combat terrorism. Further, they have had to cope with an increasingly international and multi-border threat of terrorism. The means with which other countries have approached terrorist threats—and particularly the steps they have taken to correct wrongs committed in the course of their efforts to minimize terrorist threats—are fascinating case studies and potential models for similar United States compensation and redress programs.

In 2006, a Canadian Commission of Inquiry released a report detailing the treatment of Maher Arar, a Canadian citizen, at the hands of the U.S. government and the Syrian government based on information that the Canadian government obtained about Maher Arar.¹⁴⁹ The Report of the Arar Commission states that in the aftermath of September 11, American officials “pressed their allies to

by other countries that may have occurred in the aftermath of 9/11. And if we were, what went wrong, and what do we need to do to learn the lessons.

¹⁴⁶ *Panel Members, THE DETAINEE INQUIRY*, <http://www.detaineeinquiry.org.uk/people/panel-members/> (last visited Mar. 10, 2012).

¹⁴⁷ *See United Kingdom: Detainee Inquiry Terms of Reference and Protocol Fall Far Short of Human Rights Standards*, AMNESTY INT’L, *1 (Aug. 4, 2011), <http://amnesty.org/en/library/asset/EUR45/011/2011/en/36101b51-1a33-4528-8895-6bccd7158dcf/eur450112011en.pdf> (expressing concern about the extent to which the proceedings would be public, detainees would have procedural protections, and outside evidence could be introduced into the Inquiry’s hearings); *see also International Human Rights Experts Call for Key Changes to the Detainee Inquiry as Abdul Hakim Belhadj Joins List of Survivors Refusing to Participate*, HUMAN RIGHTS WATCH (Jan. 6, 2012), <http://www.hrw.org/news/2012/01/06/international-human-rights-experts-call-key-changes-detainee-inquiry-abdul-hakim-bel> (discussing criticism by prominent human rights officials of the Detainee Inquiry’s powers and mandate).

¹⁴⁸ *See* Owen Bowcott et al., *Inquiry into MI5 and MI6 Torture Roles Abandoned*, THE GUARDIAN, Jan. 19, 2012, at 4 (discussing that, although the British government has expressed continued interest in a formal inquiry, it has abandoned the current Detainee Inquiry after numerous human rights organizations voiced their opposition to it).

¹⁴⁹ *See generally* Comm’n of Inquiry into the Actions of Can. Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (2006), available at http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. [hereinafter *Arar Commission*].

assist [the War on Terror] by investigating terrorist threats within their borders. Canada received an enormous number of requests for information from the FBI and the CIA related to all aspects of 9/11, as well as other potential or suspected terrorist threats.”¹⁵⁰ The Canadian Security Intelligence Service (CSIS) delegated to the Royal Canadian Mounted Police¹⁵¹ “prime responsibility for the investigation of a number of individuals suspected of terrorist links.”¹⁵²

The Report concludes with a series of twenty-three policy recommendations directed toward the Canadian government.¹⁵³ Recommendation 22, however, specifically recommends that the “Government of Canada should register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar and Canadian officials involved with his case.”¹⁵⁴ The Commission cites the Vienna Convention on Consular Relations,¹⁵⁵ noting that under the Convention “a contracting state has an obligation to inform a foreign national of his or her right to contact consular officials and to facilitate such contact without delay.”¹⁵⁶ Regarding Canada’s cooperation with American officials in joint terrorism investigations, the Report continues that “Canada has an obligation to correct any inaccurate information about [Arar] that it may have provided to American authorities.”¹⁵⁷ Recommendation 22

¹⁵⁰ *Id.* at 66.

¹⁵¹ Part of the efforts by Royal Canadian Mounted Police was Project A-O Canada, a “criminal investigation . . . [whose] focus was to investigate terrorist threats to Canada’s national security and to co-operate [sic] with others, particularly [Canadian Security Intelligence Service] and its American partner agencies, in the investigation of those threats.” *Id.* at 73.

¹⁵² *Id.* at 66. Among the individuals under investigation were Abdullah Almalki and Ahmed El Maati. *Id.* at 72. El Maati was “allegedly implicated in a terrorist plot directed at a major Canadian target.” *Id.* Part of the basis for Arar’s detention was his knowledge of and relationship to Almalki and El Maati. *Id.* at 72–73.

¹⁵³ *See id.* at 312–363. The majority of the recommendations detail the means through which future national security and terrorism conducted by RCMP, CSIS and other agencies should take particular care to respect human rights and should be particularly careful in collaboration with countries having questionable human rights records.

¹⁵⁴ *Id.* at 361.

¹⁵⁵ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Vienna Convention*].

¹⁵⁶ *Arar Commission*, *supra* note 149, at 172; *see also Vienna Convention*, *supra* note 155, at art. 36(1)(b) (providing that if a foreign national is arrested, any communication he or she makes must be forwarded to authorities from his or her state). The Report notes that:

[W]hile [Arar was] in custody at [John F. Kennedy International Airport] in New York, he had asked to see someone from the Canadian Consulate. The Consulate General in New York was never contacted concerning Mr. Arar’s request. Moreover, Mr. Arar was held in American custody for four days without access to a lawyer or his family. Essentially, no one knew where he was.

Arar Commission, *supra* note 149, at 172.

¹⁵⁷ *Arar Commission*, *supra* note 149, at 362.

concludes with an assessment of Arar's treatment in Syria, and Justice Dennis O'Connor concludes that:

[T]he Syrian authorities tortured Mr. Arar when interrogating him and held him in inhumane and degrading conditions for about a year. Moreover . . . they misled Canadian officials about Mr. Arar's presence in Syria after he first arrived there. If Canada has not already done so, it should send a formal objection to the Syrians.¹⁵⁸

Recommendation 23 finds that "[t]he Government of Canada should assess Mr. Arar's claim for compensation in the light of the findings in this report and respond accordingly."¹⁵⁹ In addressing compensation the Report stresses that "the Government of Canada should avoid applying a strictly legal assessment to its potential liability."¹⁶⁰ Recommendation 23 notes that, "[b]ased on the assumption that holding a public inquiry has served the public interest, Mr. Arar's role in it and the additional suffering he has experienced because of it should be recognized as a relevant factor in deciding whether compensation is warranted."¹⁶¹

Significant in Recommendation 23 is the conclusion that the Commission is "specifically precluded from making any findings (or even assessments) as to whether the Government of Canada would be civilly liable to Mr. Arar."¹⁶² If a theoretical American Commission were to preclude a finding of negligence, this preclusion may not be as important because Arar's case was already dismissed in the United States; however, Recommendation 23 highlights the point that such a commission would not have to assess legal liability against the U.S. government in order to achieve the goals of redress and compensation.

In addition to discussing these theories of compensation, the Commission makes a particular point to clear Arar's reputation in the Report, stressing that:

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 363.

¹⁶¹ *Id.* Arar's mistreatment in Syria is accepted by the Commission, and documented in the factual background of his cases in the United States. See *Arar v. Ashcroft*, 585 F.3d 559, 566 (2d Cir. 2009) (discussing the details of Arar's mistreatment in Syria and his confinement to a tiny underground cell); *Arar Commission*, *supra* note 149, at 32 ("The actions of the [Syrian Military Intelligence] with respect to Mr. Arar were entirely consistent with Syria's widespread reputation for abusing prisoners being held in connection with terrorism-related investigations.").

¹⁶² *Arar Commission*, *supra* note 149, at 362.

[It had] heard evidence concerning all of the information gathered by Canadian investigators in relation to Mr. Arar . . . [and was] able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence [sic] or that his activities constitute a threat to the security of Canada.¹⁶³

As a result of the report, the Canadian government did reach a \$10 million settlement with Arar related to Canada's role in the United States' removal of Arar to Syria, and the Canadian government adopted all twenty-three recommendations in the Report.¹⁶⁴

2. *Compensation to the Japanese Interned During the Second World War*

The experience of the Japanese immigrants and Americans of Japanese ancestry provides an illustrative, pertinent, and relatively recent example of an entire class of persons mistreated by the U.S. government who, after more than forty years, had their grievances compensated and redressed through non-judicial remedies. The controversial cases discussed in this section, which upheld the constitutionality of Japanese internment during World War II, have never been explicitly overruled. Despite this uncomfortable fact, hundreds of Japanese Americans obtained appropriate redress and compensation as a result of efforts by Japanese Americans, particularly Japanese American members of Congress, during the 1970's. The example of redress and compensation for Japanese Americans could provide an important precedent for victims of extraordinary rendition because a similar model would allow victims of extraordinary rendition to achieve a meaningful remedy outside of—and despite—established jurisprudence which would seem to bar them from seeking a remedy in the courts.¹⁶⁵

a. Japanese Internment During the Second World War

After the Japanese bombing of Pearl Harbor on December 7, 1941, anti-Japanese sentiment¹⁶⁶ came to a head when, in 1942, President

¹⁶³ *Id.* at 59.

¹⁶⁴ See *Ottawa Reaches \$10M Settlement With Arar*, CBC NEWS (Jan. 25, 2007, 11:29 PM), <http://www.cbc.ca/canada/story/2007/01/25/arar-harper.html> (reporting on Arar's settlement and the Canadian government's formal apology to Arar); see also Press Release, Stephen Harper, Prime Minister of Canada, Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), available at <http://pm.gc.ca/eng/media.asp?id=1510> (apologizing to Mr. Arar and announcing that the government of Canada concluded a settlement with him).

¹⁶⁵ See *supra* Parts III–IV (discussing the state secrets doctrine and related recent cases).

¹⁶⁶ To understand the historical and legal framework of the Japanese internment

Roosevelt issued Executive Order 9066,¹⁶⁷ which authorized the Secretary of War and military commanders:

to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.¹⁶⁸

The U.S. Supreme Court upheld the constitutionality of the exclusion of the Japanese from the West Coast after the bombing of Pearl Harbor in 1941, as well as their subsequent internment in military-controlled camps for the duration of the war, in two important cases: *Korematsu v. United States*¹⁶⁹ and *Hirabayashi v. United States*.¹⁷⁰ In both cases, the plaintiffs had been convicted of violating the Act of Congress of March 21, 1942,¹⁷¹ which made it a misdemeanor for anyone to:

enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of

experience, one must first understand the Japanese community as it existed on the West Coast of the United States in the 1940s. Americans of Japanese ancestry, and Japanese immigrants in the United States, fell into one of three categories: the “immigrants [who were] called the Issei, in contrast to the first generation of ethnic Japanese born in this country, who [were] referred to as the Nisei, and those who returned to Japan as children to be educated, who [were] known as the Kibei.” Roy L. Brooks, *Japanese American Redress and the American Political Process: A Unique Achievement?*, in *WHEN SORRY ISN’T ENOUGH* 157 (Roy L. Brooks ed., 1999). Even though the Nisei were born in the United States and thus American citizens under the Fourteenth Amendment, “assimilation in America proved difficult for them. In the eyes of many Americans, the Japanese represented ‘otherness’ and were treated accordingly.” *Id.* Indeed, public antagonism of Japanese immigrants to the United States manifested itself in legislation specifically targeting—and excluding—Japanese immigrants to the United States. *See, e.g.*, Immigration Act of 1924, Pub. L. No. 68-139, § 11(a), 43 Stat. 153, 159 (1924) (limiting immigrant quotas to two percent of the total population in the United States from any given nation as of the 1890 census, and thus virtually eliminating further immigration from Southern and Eastern European and Asian countries).

¹⁶⁷ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹⁶⁸ *Id.* (justifying the imposition of such exclusions and restrictions by noting that “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities”).

¹⁶⁹ 323 U.S. 214 (1944).

¹⁷⁰ 320 U.S. 81 (1943).

¹⁷¹ Pub. L. No. 77-503, ch. 191, 56 Stat. 173 (1942).

War, contrary to the restrictions applicable to any such area or zone¹⁷²

In *Hirabayashi*, the plaintiff, a Japanese American who resided in Seattle, Washington (at the time a part of the West Coast military zone) was convicted of specifically violating (1) a curfew that persons of Japanese ancestry had to remain in their homes between 8:00 p.m. and 6:00 a.m.; and (2) failing to appear at a Civil Control Station to register, prior to the eventual evacuation of persons of Japanese ancestry from the military zone.¹⁷³ The issue for the Court, then, became whether there was a “substantial basis” for the decision by Congress and the commander of the military zone that “the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.”¹⁷⁴ The Court ultimately concluded that the curfew on persons of Japanese ancestry—including persons born in the United States whose only connection to Japan was a Japanese last name and certain physical traits—was reasonable because “Congress and the Executive could reasonably have concluded that [cultural preservation within the Japanese community has] encouraged the continued attachment of members of this group to Japan and Japanese institutions.”¹⁷⁵

The specific military order at issue in *Korematsu* was Civilian Exclusion Order No. 34, which ordered that after May 9, 1942 “all persons of Japanese ancestry” were to be excluded from the West Coast exclusion zone.¹⁷⁶ Fred Korematsu was convicted of “remaining in San Leandro, California, a ‘Military Area,’ contrary to Civilian Order No. 34 of the Commanding General of the Western Command.”¹⁷⁷ The Supreme Court upheld this conviction, stating that “when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the

¹⁷² *Id.*

¹⁷³ See *Hirabayashi*, 320 U.S. at 83–84 (detailing *Hirabayashi*’s violations of the prescribed military orders concerning persons of Japanese ancestry).

¹⁷⁴ *Id.* at 95.

¹⁷⁵ *Id.* at 98. In its decision, the Court enumerates certain elements of cultural preservation that supports a reasonable conclusion by Congress and the Executive that the Japanese community was a potential breeding ground for espionage. Among the evidence that the Court cites are Japanese language schools in the United States which operated outside regular school hours; Japanese laws which, under certain circumstances, recognized children of Japanese immigrants born in the United States as Japanese citizens; and the fact that many persons of Japanese ancestry in the United States were “of mature years and occup[ie]d positions of influence in Japanese communities.” See *id.* at 96–98.

¹⁷⁶ *Korematsu v. United States* 323 U.S. 214, 215–16 (1944).

¹⁷⁷ *Id.*

threatened danger.”¹⁷⁸ The Court rejected Korematsu’s argument of unequal protection. It seemed satisfied with the reasonableness of the exclusion order given the circumstances of the U.S. war with Japan, and summarized the justifications for Congressional and military action against the Japanese on the West Coast as follows:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we [were] at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.¹⁷⁹

The Supreme Court’s specific holding in *Korematsu* with respect to the internment of the Japanese Americans has never been overturned. Despite the difficulty of this legal precedent, the Japanese American community, after a nearly forty year struggle, achieved redress, compensation, and a formal apology through congressional legislation. This represents an important precedent for victims of extraordinary rendition: such victims will have to work towards non-judicial redress and compensation while remaining cognizant that the federal courts seem committed to upholding the state secrets doctrine.

b. The Japanese American Movement for Redress and Compensation

At the beginning of the 1970s, the Japanese American community, undoubtedly influenced by the civil rights movements of the 1960s, faced two questions: whether the community should seek redress from the federal government, and, if so, what should redress look like?¹⁸⁰ Many of the early redress efforts that ultimately led the way to the creation of the Commission on Wartime Relocation and Internment of Civilians¹⁸¹ were led by the Japanese American Citizens League (“JACL”).¹⁸² The general movement toward redress

¹⁷⁸ *Id.* at 220.

¹⁷⁹ *Id.* at 223.

¹⁸⁰ MITCHELL T. MAKI ET AL., *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS* 64 (1999).

¹⁸¹ See *infra* Part V.B.2.c (discussing the creation and findings of the commission).

¹⁸² See *About the Japanese American Citizens League*, JACL, <http://www.jacl.org/about/about.htm> (last visited Apr. 16, 2012) (describing the history, vision,

at the end of the 1970's was bolstered by a growing positive perception of Japanese Americans in American society generally, and a diminishing of pre- and post-war stereotypes about Japanese Americans.¹⁸³

Three early achievements for redress that the JACL accomplished were decidedly non-monetary in nature. The first of these was the repeal of Title II of the Internal Security Act of 1950.¹⁸⁴ Title II of the Act, passed during the communist scare of the Cold War era, gave the federal government the power to seize and hold persons suspected of espionage, sabotage, or insurrection.¹⁸⁵ On September 25, 1971 President Nixon signed a bill,¹⁸⁶ introduced by Senator Daniel Inouye, to repeal the Act.¹⁸⁷ In terms of redress to victims of the Japanese internment, the repeal of the Act was "largely symbolic;" however it represented an important step in the redress movement because "it provided the Japanese American community with political experience in obtaining federal legislation."¹⁸⁸ From a framework perspective, repealing the bill also helped undo some of the legislative and legal foundations impeding the redress movement.

The second early achievement in the redress movement was President Ford's revocation of Executive Order 9066 on February 19, 1976.¹⁸⁹ Later that same year, President Ford signed legislation repealing Public Law 77-503, which had attached criminal penalties to Executive Order 9066.¹⁹⁰ The repeal of Executive Order 9066 represented not only a legislative victory for the redress movement,

and mission of the Japanese American Citizens League).

¹⁸³ See MAKI, *supra* note 180, at 83 (noting that the shift in Japanese stereotypes in the 1970s).

¹⁸⁴ Pub. L. No. 81-831, 64 Stat. 987, 1019 (1950).

¹⁸⁵ *Id.* at 1019-21; see also MAKI, *supra* note 180, at 65 (describing the provisions of the Act and noting that the Act used the Japanese exclusion cases as a legal justification for its passage).

¹⁸⁶ Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (1971).

¹⁸⁷ See MAKI, *supra* note 180, at 65-66 (discussing the history of the repeal of Title II of the Internal Security Act of 1950).

¹⁸⁸ *Id.* at 66.

¹⁸⁹ See Proclamation No. 4417, 41 Fed. Reg. 7741 (acknowledging the forced evacuation was a mistake and terminating Executive Order 9066).

¹⁹⁰ See National Emergencies Act, Pub. L. No. 94-412, § 501(e), 90 Stat. 1255, 1258 (codified as amended in scattered sections of 50 U.S.C.) (limiting the powers of the President to declare states of emergency and providing for specified procedures for the declaration of a state of emergency); see also MAKI, *supra* note 180 at 71 & 251 n.31 (noting that the National Emergencies Act specifically repealed Public Law 77-503 (codified at 18 U.S.C. § 1383), which had provided criminal penalties for violations of Executive Order 9066); *supra* Part V.B.2.a (describing the executive decrees and legislation authorizing the Japanese American internment).

but also an important early public acknowledgement of the injustices of the Japanese American internment.¹⁹¹

Finally, the third early achievement in the redress movement was President Ford's pardon of Iva Ikuko Toguri d'Aquino, the Japanese American better known as "Tokyo Rose."¹⁹² Toguri d'Aquino was charged with treason for allegedly broadcasting Japanese propaganda to U.S. troops in the Pacific during World War II.¹⁹³ As a result of pressure from the Japanese American community and evidence tending to negate her guilt, Toguri d'Aquino received a full pardon on President Ford's last day in office in 1977.¹⁹⁴ The lesson was important for the Japanese American community because it demonstrated that "through political maneuvering and community involvement, past wrongs could be addressed."¹⁹⁵

c. The Commission on Wartime Relocation and Internment of Civilians

While the three accomplishments toward achieving redress described above were significant, in many ways they were largely symbolic. Indeed, toward the end of the 1970s, many Japanese American legislators expressed their doubts about the achievability of real redress.¹⁹⁶ A debate arose within the Japanese American community as to whether a presidential commission would be the best

¹⁹¹ See Remarks Upon Signing a Proclamation Concerning Japanese-American Internment During World War II, 1 PUB. PAPERS 366 (Feb. 19, 1976):

We now know what we should have known then—not only was that evacuation wrong but Japanese-Americans were and are loyal Americans. . . . I call upon the American people to affirm with me the unhyphenated American promise that we have learned from the tragedy of that long ago experience—forever to treasure liberty and justice for each individual American and resolve that this kind of error shall never be made again.

¹⁹² Maki, *supra* note 180, at 77.

¹⁹³ *Id.* at 77–78.

¹⁹⁴ *Id.* at 78. Toguri d'Aquino was born in the United States but traveled to Japan in July of 1941 in order to take care of her aunt. She was trapped in Japan after being denied passage back to the United States later that year. Unable to leave Japan at the outbreak of war, she obtained a job as an announcer at a radio station whose music programs were aimed at American troops. Although the Japanese military police tried repeatedly to force her to revoke her American citizenship, she refused. Her conviction for treason upon returning to the United States was based on conflicting evidence that she had broadcast messages meant to demoralize American troops. She was convicted and sentenced to ten years imprisonment at a Women's Reformatory in West Virginia. *Id.* at 77–78.

¹⁹⁵ *Id.* at 78.

¹⁹⁶ *Id.* at 86 ("During the late 1970s, not one of the [Japanese American] legislators was convinced that redress was a viable legislative issue; instead they viewed it as a political liability."). Interestingly enough, though his legislative efforts later helped Japanese Americans achieve compensation, when initially asked about redress, Representative Norman Mineta reportedly replied "Ko mata ne" ("big trouble"). *Id.*

means of achieving redress and compensation for victims of exclusion and internment during World War II. Supporters of such a commission argued that without a commission established by the president and endorsed by Congress, “monetary redress legislation might be seen as special-interest litigation and result in a political backlash against the [Japanese American] community.”¹⁹⁷ Opponents warned not only of the risk that a commission might give an unfavorable recommendation, but also that older, first-generation Japanese Americans might die before hearings commenced, or might be unwilling to testify about their painful experiences in the internment camps.¹⁹⁸

Alongside the JACL, grassroots movements began to arise that also advocated redress for Japanese Americans. Some of these grassroots movements arose out of involvement with local issues in the Japanese and greater Asian American communities and had become disillusioned with the progress of the JACL.¹⁹⁹ One of these groups was the National Coalition of Redress/Reparations (NCRP).²⁰⁰ The NCRP identified five goals and principles for properly achieving redress for the Japanese American community: (1) “monetary compensation to individuals incarcerated or their heirs,” (2) some form of “restitution to the Japanese American community, (3) the overturning of the legal basis that justified the evacuation and the camps,” (4) support for other minority groups who had unjustly suffered from U.S. government actions, and (5) “education of the American public.”²⁰¹

Bolstered by the support of groups within the Japanese American community that advocated clear goals of redress, Congress passed the Commission on Wartime Relocation and Internment of Civilians Act.²⁰² The Act provided for seven commissioners: three chosen by the President, two by the Speaker of the House, and two by the

¹⁹⁷ *Id.* at 87.

¹⁹⁸ *Id.*

¹⁹⁹ *See, e.g., id.* at 90 (describing the parallel Japanese American community organizations that existed alongside JACL).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Pub. L. No. 96-317, 94 Stat. 964 (1980) (codified at 50 U.S.C. app. § 1981). The Act had three goals:

- (1) [R]eview facts and circumstances surrounding Executive Order Numbered 9066 . . . and the impact of such Executive Order on American citizens and permanent resident aliens;
- (2) review directives of United States military forces requiring relocation and . . . detention in internment camps of American citizens; . . . and
- (3) recommend appropriate remedies.

Id. § 4(a), 94 Stat. at 965.

President Carter signed the bill into law on July 31, 1980. MAKI, *supra* note 180, at 96.

President Pro Tempore of the Senate.²⁰³ Commissioners included former cabinet members, a former Supreme Court justice, a former ambassador, and clergy members.²⁰⁴ The Commission on Wartime Relocation and Internment of Civilians (CWRIC) held hearings for twenty days, primarily in cities along the west coast of the United States.²⁰⁵ The CWRIC heard testimony from legislators and community leaders—Japanese and non-Japanese alike. Perhaps the most powerful testimony was that of those Japanese Americans who vividly and painfully recalled their experiences in the camps.²⁰⁶

The CWRIC compiled the testimony from the hearings and published its findings in 1982.²⁰⁷ One of its most notable findings was that, although it had since been repealed, the promulgation of Executive Order 9066 was not justified by military necessity, but caused instead by “race prejudice, war hysteria and a failure of political leadership.”²⁰⁸ Indeed, despite the Supreme Court’s holdings in *Hirabayashi* and *Korematsu*, the Commission gathered evidence and heard testimony from many architects and former supporters of the Japanese American exclusion plan regretting their decisions.²⁰⁹ As the Commission noted, however, “in the spring of 1942 . . . not even the courts of the United States were places of calm and dispassionate justice.”²¹⁰

²⁰³ Pub. L. No. 96–317, § 3(b), 94 Stat. at 964–65 (1980). Subsequent legislation expanded the number of commissioners to nine. *See* Act of Feb. 10, 1981, Pub. L. No. 97–3, 95 Stat. 5 (expanding the number of members that could be selected).

²⁰⁴ *See* MAKI, *supra* note 180, at 97 (listing the members of the commission and their professions).

²⁰⁵ COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1 (1982) [hereinafter CWRIC].

²⁰⁶ *See, e.g.*, MAKI, *supra* note 180, at 106–08 (providing examples of testimony by members of the Japanese American community, many of whom recounted feelings of betrayal by the U.S. government and incidents of mistreatment of the prisoners within the camps).

²⁰⁷ CWRIC, *supra* note 205.

²⁰⁸ *Id.* at 18.

²⁰⁹ *See* MAKI, *supra* note 180, at 101 (discussing the acknowledgements of key figures in the exclusion of the Japanese Americans that they had made a mistake); *see also* CWRIC, *supra* note 205, at 18 (describing the regrets of Justice Douglas, who joined the majority opinion in *Korematsu* upholding the constitutionality of the exclusion program).

²¹⁰ CWRIC, *supra* note 205, at 116. The Commission noted, however, that despite the legal standards of *Hirabayashi* and *Korematsu*, some lower courts on the east coast presented with similar questions regarding the loyalty and threat of danger from German Americans reached different conclusions than those in the west confronted with the Japanese Americans. *Id.*; *see, e.g.*, *Ebel v. Drum*, 52 F. Supp. 189, 196–97 (D. Mass. 1943) (holding that, despite the overall validity of the military to secure strategic areas from espionage, the exclusion of the plaintiff from the military zone was invalid because there was not “a reasonable and substantial basis for the judgment the military authorities made, i.e., that the threat of espionage and sabotage to our military resources was real and imminent.”); *Schueller v. Drum*, 51 F. Supp. 383, 387 (E.D. Pa. 1943) (holding that the exclusion of the plaintiff from the eastern military zone, despite congressional authorization and despite the fact that the plaintiff was a member of an allegedly subversive German society, was not warranted because she did not pose “such a danger as

With respect to the economic loss that the Japanese Americans suffered as a result of their forcible exclusion and internment, the Commission acknowledged that the evacuees had little time to settle their affairs, and testimony from evacuees indicated that government efforts allegedly aimed at securing and protecting property were unsuccessful.²¹¹ Indeed, while in relocation centers, many evacuees learned of the destruction and looting of their homes and businesses; others discovered their losses only after returning home.²¹² Ultimately, the Commission found that “[t]he loss of time, of potential and of property were to many of the evacuees irreparable blows—financial blows from which many never wholly recovered.”²¹³

Perhaps the most important issue that the Commission addressed was the harsh conditions in the camps. Though the government allegedly established the camps to “protect” the Japanese American civilians, they more closely resembled prisons than protective facilities. The Commission noted that “the camps were built by the War Department according to its own specifications. Barbed-wire fences, watchtowers, and armed guards surrounded the residential and administrative areas of most camps.”²¹⁴ Although the military police guarding the centers were meant to only guard the exterior in case of an emergency, as tensions and discontent rose in the camps, police shootings of prisoners—whether intentionally or because of miscommunications—were not uncommon.²¹⁵ The original residential design and facilities in the camps were equally Spartan. The initial design of the buildings provided for no internal walls or ceilings, although they were later crudely winterized. There was no running water in the rooms, and the quarters were designed as military barracks.²¹⁶ Additionally, many camps had inadequate medical care for the evacuees.²¹⁷

One year after publishing its report, the Commission published its recommendations.²¹⁸ The CWRIC made five principal

would warrant denial . . . of her right to due process of law”).

²¹¹ See CWRIC, *supra* note 205, at 121 (describing the economic impact of evacuation on the Japanese American community).

²¹² *Id.* at 122.

²¹³ *Id.*

²¹⁴ *Id.* at 158.

²¹⁵ *Id.* at 175–76 (recounting testimony by some prisoners of unprovoked shootings in the camps).

²¹⁶ *Id.* at 159–61 (describing the facilities in the relocation camps).

²¹⁷ *Id.* at 163–65 (describing problems arising from shortages of medical supplies, medical personnel, and reports of disease outbreaks in the camps).

²¹⁸ See COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL

recommendations: (1) a joint resolution by Congress apologizing for the injustice, signed by the President; (2) a formal presidential pardon for all Japanese Americans convicted of violations of any curfew or exclusion order; (3) a congressional order directing executive agencies to liberally review Japanese Americans' applications for restitution; (4) appropriations for research and public educational funding; and (5) appropriations for individual compensation to surviving evacuees and internees.²¹⁹ The CWRIC also issued a series of recommendations for Aleutian Islanders who were also relocated during the war.²²⁰

d. A Community Achieves Justice: The Legacy of the Commission

Based on the recommendations submitted by the Commission on Wartime Relocation and Internment of Civilians, relief finally came for persons of Japanese descent interned during World War II in the form of the Civil Liberties Act of 1988.²²¹ The purpose of the Act was to, among other things: (1) acknowledge injustices of the Japanese internment; (2) issue a formal apology on behalf of the United States to those who were interned; (3) provide funding for public education about the Japanese internment experience; and (4) make restitution to Japanese Americans who were interned, as well as individuals of the Aleutian Islands who were evacuated during World War II.²²² Indeed, as Sandra Taylor notes in her essay about the Japanese internment experience, the Civil Liberties Act was significant because “[n]ever before had the government granted such redress to an entire group of citizens for a deprivation of their constitutional rights.”²²³ Part of the success for the passage of the Civil Liberties Act of 1988 is that it was supported by a broad spectrum of organizations—many of which were not specifically ethnically “Japanese”²²⁴—and proponents of the bill took “advantage of those organizations’ contacts, membership,

JUSTICE DENIED PART 2: RECOMMENDATIONS (1983) (providing the Commission’s recommendations for corrective actions).

²¹⁹ *Id.* at 8–9.

²²⁰ *See id.* at 11–12.

²²¹ Pub. L. No. 100–383, § 101, 102 Stat. 904 (codified at 50 U.S.C. app § 1989b (1996)).

²²² *See* Act of Aug. 10, 1988, Pub. L. No. 100–383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1989 (1996)) (describing the purposes of the Civil Liberties Act of 1988).

²²³ Leslie T. Hatamiya, *Institutions and Interest Groups: Understanding the Passage of the Japanese American Redress Bill*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 190, 190 (Roy L. Brooks ed., 1999).

²²⁴ *Id.* at 192 (discussing the strength that arose as a result of the cooperation between Japanese American organizations and other ethnic, religious, and civil rights organizations to promote the passage of the Act).

resources, and political expertise to pressure Congress [to pass the bill].”²²⁵

It is relevant to note the expectations of the Japanese American community during the movement for redress. At the beginning of the movement to urge Congress and the President to create a commission in the late 1970s, Representative Robert Matsui “urged Japanese Americans not to have unrealistic expectations about the commission.”²²⁶ The legacy of the CWRIC, however, is that it helped remind the entire American public that “redress was about more than lofty principles, historic revision, and constitutional issues. Redress was about real people who had endured real suffering. Redress was a human issue.”²²⁷

No single act or circumstance contributed to the passage of the Civil Liberties Act of 1988 in Congress; rather, passage was bolstered by the documentation gathered by the CWRIC, the coalition of diverse groups who came together in support of the redress movement, and the bill’s portrayal as a constitutional issue.²²⁸ Two additional factors also contributed to the passage of the bill: the leadership of Representative Barney Frank²²⁹ as chair of House Judiciary Subcommittee on Administrative Law and Governmental Relations, and the efforts of Senator Spark Matsunaga, who “all but guaranteed that the bill would pass in the Senate by a veto-proof margin.”²³⁰

Finally, three key factors influenced President Ronald Reagan’s signing of the Civil Liberties Act of 1988. The first was the manner in which Governor Thomas Kean, then the Republican Governor of New Jersey, presented the bill to him. Governor Kean presented the bill to President Reagan on an anecdotal level and reminded him of a medal ceremony posthumously honoring a young Japanese American staff sergeant killed during World War II—at which a young Captain Ronald Reagan gave a brief speech to the family.²³¹ The second was

²²⁵ *Id.*

²²⁶ MAKI, *supra* note 180, at 99. Representative Matsui understood the real political challenges facing the redress movement, and reminded the collaborators of the redress movement that “the Ninety-seventh Congress, elected with Ronald Reagan in 1980, was likely to be the most conservative Congress in recent years and unlikely to support monetary redress.” *Id.*

²²⁷ *Id.* at 106.

²²⁸ *Id.* at 186–87.

²²⁹ Representative Frank had a reputation for championing liberal causes, and as the only openly-gay member of Congress, “Representative Frank personally knew the pain of discrimination and prejudice and saw the parallels between what had happened to Japanese Americans in World War II and the current discrimination against all minorities.” *Id.* at 164.

²³⁰ *Id.* at 188.

²³¹ *Id.* at 192–93; *see also* Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians, 2 PUB. PAPERS 1054–55 (Aug. 10, 1988)

the relative importance of the bill to the President and his administration. While of great importance to the Japanese American community, the bill was not a major bill for Reagan or his administration in terms of its political significance for the administration.²³² Finally, Congress and President Reagan were able to work toward a compromise on key aspects of the bill.²³³

C. Following Precedent: Establishing a Commission of Inquiry to Achieve Redress for Victims of Extraordinary Rendition

The example of compensation and redress for Japanese Americans and Aleutian Islanders evacuated from their homes or interned in prison camps during the Second World War is an important foundation for exploring issues of redress for other groups wronged by U.S. government actions. For victims of extraordinary rendition, it is an important precedent in two respects: (1) it provides a framework for a neutral commission to gather testimony and conduct an independent investigation into the alleged government wrongdoing; and (2) while Japanese Americans ultimately achieved some monetary compensation, the history of the Japanese American redress movement exemplifies various monetary and non-monetary forms of redress that Japanese Americans achieved. This is particularly important in the context of a movement to secure redress for victims of extraordinary rendition in the United States, where monetary redress is likely not realistic.²³⁴ Thus, it is likely that any redress efforts for victims of extraordinary rendition would primarily be non-monetary.²³⁵

(recounting the story of when President Reagan, as a young actor, paid tribute to the fallen Japanese soldier by giving a speech at his medal ceremony and affirming, "here we admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law.").

²³² MAKI, *supra* note 180, at 197.

²³³ *Id.* (noting that President Reagan "felt that Congress had met his administration's concerns halfway, and he recognized that since H.R. 442 was an authorization bill, further concerns could be addressed in the subsequent appropriations bill").

²³⁴ As the Canadian example demonstrates, however, it is certainly not unprecedented. *See* CBC NEWS, *supra* note 164 ("Ottawa has reached a \$10-million settlement with Maher Arar over Canada's role in a U.S. decision to deport him to Syria, where he was jailed and tortured."). Furthermore, in spite of suspending a formal inquiry into treatment of suspected terrorists, the British government also provided monetary compensation to Binyam Mohammed and others. *See* Burns & Cowell *supra* note 144 (discussing this agreement to pay compensation).

²³⁵ There are, however, certain procedural elements of a well-structured commission of inquiry that should occur long before any consideration of monetary redress and compensation. These procedures in themselves constitute a certain level of redress. *See, e.g.,* AMNESTY INT'L, TRUTH, JUSTICE AND REPARATION: ESTABLISHING AN EFFECTIVE TRUTH COMMISSION 37 (2007), available at <http://www.amnesty.org/en/library/asset/POL30/009/2007/en/77ee33de->

The successes of the Commission on Wartime Relocation and Internment of Civilians and the Arar Commission provide support to the proposition that a commission to investigate the extraordinary rendition program and consider compensation for victims is necessary and appropriate. Congress has the power to conduct investigations,²³⁶ and should use this power to establish a commission to investigate abuse claims by victims of extraordinary rendition. What, then, are the necessary characteristics of such a commission? Morgane Landel provides several important preliminary suggestions.²³⁷ A central theme to Landel's proposal is that the commission be victim centered; that is, that victims have the opportunity to openly and honestly testify; that the commissioners themselves, in the interest of fairness to the victims, represent national and international entities; and that the commission have the capacity to fully understand the background of the victims' claims through subpoena of sensitive documents.²³⁸ Additionally, Landel emphasizes the need for the commission to be open and transparent through public hearings.²³⁹

In principle, Landel's propositions establish a solid framework for a commission to investigate extraordinary rendition claims. The CWRIC and the Arar Commission certainly reflect Landel's emphasis on public inquiry.²⁴⁰ But one must ultimately consider the recent

d38a-11dd-a329-2f46302a8cc6/pol300092007en.pdf (discussing the importance of establishing such a commission so that it has the power to make recommendations to the national government and widely publish its findings to the general public); James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, LAW & CONTEMP. PROBS., Winter 2009, at 123, 139 ("The most pressing task of a truth commission is to establish legitimacy with the members of a society. Legitimacy typically requires fair and reasonably transparent procedures.").

²³⁶ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 498 (1977) (Powell, J., concurring) ("Congress unquestionably has . . . broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch."); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process.").

²³⁷ See Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16 ILSA J. INT'L & COMP. L. 115, 117 (2009) (proposing a truth commission to conduct inquiry into the detention of suspected terrorists and their treatment by U.S. officials).

²³⁸ See *id.* at 139:

In order to be victim centered, a truth commission in the United States should . . . have a consultation process to ensure that victims are able to participate in setting it up, should have an equal number of international and national commissioners and should have strong powers to compel disclosure of documents and compel people to testify.

²³⁹ See *id.* at 128 (arguing that "[t]he commission should also have the power to hold hearings in public, at least those taking place in the United States.")

²⁴⁰ See *Arar Commission*, *supra* note 149, at 9–10 (discussing the establishment of the Arar Commission based on mounting public pressure concerning the role of the Canadian

holdings of *Arar* and *Jeppesen*, which would seem to represent the willingness of the federal courts to uphold the *Reynolds* privilege in the context of extraordinary rendition cases.²⁴¹ To overcome this burden, Congress should establish a commission to investigate abuses carried out by the federal government as part of its extraordinary rendition program. Congress should grant this commission full access to all sensitive materials that would otherwise be excluded from a judicial proceeding under either the *Totten* bar or the *Reynolds* privilege.²⁴² Congress should also explicitly exempt information gathered by a commission on extraordinary rendition from the *Reynolds* privilege. To achieve this, Congress may have to require that certain commission proceedings be closed to the general public, and may have to prohibit the commission from publishing the exact bases of its findings and recommendations if those factual findings would compromise issues of national security.²⁴³ In full accordance with jurisprudence on the *Reynolds* privilege, however, the government should still have the burden of asserting the privilege in

government in the detention of Maher Arar); CWRIC, *supra* note 205, at 1 (describing the process and locations of the public hearings and the extent of the evidence that the CWRIC gathered).

²⁴¹ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1090 (9th Cir. 2010), *cert. denied* 131 S. Ct. 2442 (2011) (mem.) (“[P]artial disclosure of the existence and even some aspects of the extraordinary rendition program does not preclude other details from remaining state secrets if *their* disclosure would risk grave harm to national security.”); *Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (“The sensitivity of . . . classified material are ‘too obvious to call for enlarged discussion.’ 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.” (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 529 (1988))).

²⁴² The Ninth Circuit in *Jeppesen* recognized this congressional authority in the context of extraordinary renditions and noted that “Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented [in *Jeppesen*].” *Jeppesen*, 614 F. 3d at 1092; *see also id.* (quoting *Halkin v. Helms*, 690 F.2d 977, 1001 (D.C. Cir. 1982):

When the state secrets doctrine ‘compels the subordination of appellants’ interest in the pursuit of their claims to the executive’s duty to preserve our national security, this means that remedies for . . . violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress.’

²⁴³ The *Arar* Commission was also constrained by certain closed proceedings in its investigation of the extraordinary rendition of Maher Arar. *See Arar Commission, supra* note 149, at 10 (describing the compilation of evidence and witness testimony, and noting that:

The process was complex because of the need to keep some of the relevant information confidential, to protect national security and international relations interests. [The Commission] received some of the evidence in closed, or *in camera*, hearings and [is] unable to refer to some of the evidence heard in those hearings in the public version of [the] report.

order to prevent certain sensitive materials from general public access.²⁴⁴

Of course, this proposal for a commission to investigate the extraordinary rendition program contains certain flaws. First, by limiting the access of information available to the public, and essentially conducting a secret investigation of a secretive government program, Congress might decrease the value of an investigatory commission.²⁴⁵ Indeed, it would certainly make it more difficult to hold the Executive Branch publicly accountable for the extraordinary rendition program. Second, unlike the Japanese Americans, victims of extraordinary rendition lack a common community forum around which to mobilize and coalesce.²⁴⁶ The redress movement for victims of extraordinary rendition from within the United States would likely be championed not by the victims themselves, but rather by various human rights organizations.²⁴⁷ Finally, the Japanese American redress movement exemplifies the painfully slow process through which Congress would realistically operate to provide some form of redress—monetary or not—for victims of extraordinary rendition.

²⁴⁴ For a discussion of the *Reynolds* privilege, see *supra* Part III.B.

²⁴⁵ The Second Circuit in *Arar* also recognized the shortcomings of secret hearings, and the preference for open courts, in refusing to extend a *Bivens* action to the context of extraordinary rendition. See *Arar*, 585 F.3d at 577 (noting that such “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”).

²⁴⁶ While all victims of extraordinary rendition share the common experience of interrogation for alleged participation in terrorist activities, not all victims share the same factual experiences. See, e.g., *Jeppesen*, 614 F.3d at 1073–75 (summarizing the various ordeals, means of detention, and locations of detention that the specific plaintiffs endured). Additionally, many victims of extraordinary rendition may be inadmissible to the United States on terrorism and national security grounds. See *supra*, note 88 (listing statutes describing when such victims may be inadmissible to the United States).

²⁴⁷ See *ACLU Asks Supreme Court to Hear Extraordinary Rendition Case*, ACLU (Dec. 8, 2010), <http://www.aclu.org/national-security/aclu-asks-supreme-court-hear-extraordinary-rendition-case> (announcing the ACLU’s petition of certiorari to the US Supreme Court to hear the *Jeppesen* case); AMNESTY INT’L, *supra* note 2, at 11–12 (detailing Amnesty International’s specific demands with regard to halting the extraordinary rendition program); *US: Torture Should Not Go Unpunished*, HUMAN RIGHTS WATCH (Nov. 9, 2010), <http://www.hrw.org/en/news/2010/11/09/us-torture-should-not-go-unpunished> (arguing that the United States has an obligation under domestic and international law to prosecute CIA officials who have used harsh interrogation techniques rising to the level of torture). While human rights organizations will play a key role in the mobilization of a redress program for victims of extraordinary rendition, they may encounter limitations to the extent of their advocacy. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (holding that statutes prohibiting knowingly providing material support to terrorist organizations did not violate freedom of speech as applied to organizations and individuals who sought to provide advice and support regarding peaceful petition of humanitarian relief before the UN and other representative bodies to foreign terrorist organizations).

Victims of extraordinary rendition may face another obstacle. Unlike the Japanese Americans that the government compensated for their treatment during the Second World War, victims of extraordinary rendition are primarily not American citizens.²⁴⁸ This alone, however, should not hinder efforts to provide them with meaningful remedies for two reasons. First, American citizens appear to be in no greater position to overcome the state secrets doctrine in claims involving their mistreatment at the hands of U.S. officials than foreign nationals.²⁴⁹ Second, at least one recent example shows that the government has been willing to take preliminary steps to investigate grievances by foreign nationals who were victims of scientific research in Guatemala in the 1940s.²⁵⁰

CONCLUSION

In its recommendations, the Commission on Wartime Relocation and Internment of Civilians poignantly reminded Congress, “[n]ations that forget or ignore injustices are more likely to repeat them.”²⁵¹ Ten years after the attacks of September 11, 2001, the United States has had to address the challenges of eradicating domestic and international threats from terrorist organizations. In meeting this challenge, however, the United States may have compromised its commitment to human rights and the rule of law through the extraordinary rendition program. Victims of extraordinary rendition, for the moment at least, will likely find no relief in the federal judicial system for their legitimate claims of torture and abuse.

²⁴⁸ Maher Arar is a Canadian citizen. *See supra* note 86. His compensation by the government of Canada is thus similar to the U.S. government’s compensation to Japanese Americans. As of the writing of this Note, however, Binyam Mohamed is a legal resident, but not a citizen, of the United Kingdom. *See supra* notes 100–01 and accompanying text.

²⁴⁹ As discussed above in Part V.A.2, *Vance v. Rumsfeld* would have appeared to place American citizens on a different footing than their foreign national counterparts and would have allowed a claim against the government for abuse by U.S. officials in Iraq; the Seventh Circuit, however, recently granted a rehearing *en banc* and vacated the opinion. *See Vance v. Rumsfeld*, 653 F.3d 591, 622 (7th Cir. 2011) (distinguishing the claims brought by U.S. citizens in this case, as opposed to claims brought by foreign nations in *Arar* and other similar cases, and holding that “we should not let the difficulty of [*Arar* and other extraordinary rendition cases] lead us to lose sight of the fundamentally different situation posed by the claims of civilian U.S. citizens in this case.”), *vacated en banc*, No. 101687 (Oct. 28, 2011) (The court will set oral argument at a later date.).

²⁵⁰ *See generally* PRESIDENTIAL COMM’N FOR THE STUDY OF BIOETHICAL ISSUES, ‘ETHICALLY IMPOSSIBLE’: STD RESEARCH IN GUATEMALA FROM 1946 TO 1948, at 2–8 (2011), available at http://bioethics.gov/cms/sites/default/files/Ethically-Impossible_PCSBI.pdf (outlining the work of the commission, which President Barack Obama charged with investigating allegations of unethical American scientific research practices in Guatemala in the 1940’s).

²⁵¹ PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS, *supra* note 218, at 6.

This should not, however, preclude social justice advocates from calling into question the legal theories that have barred judicial relief. More importantly, the past precedent of compensation for Japanese Americans illustrates that victims of abuse by the federal government may achieve redress outside the judicial system without explicitly overturning established legal precedents. While the redress movement in the United States for victims of extraordinary rendition may be slow, two of our closest allies—Canada and the United Kingdom—have already commenced the process.

Victims' advocates and members of Congress should consider these examples and begin to move forward with establishing a commission to obtain meaningful redress and compensation for victims of extraordinary rendition. In this way, the United States can begin to strike the appropriate balance between combating terrorism and upholding respect for proper criminal procedures, the rule of law, and human rights.

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