

**THE WAR ON TERROR  
AND INTERNATIONAL HUMAN RIGHTS:  
DOES EUROPE GET IT RIGHT?**

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I. INTRODUCTION

The global war on terror, spearheaded by the United States since September 11, 2001, has seen ongoing tensions between military, law enforcement and political expediencies on the one hand, and protection of basic international human rights law principles, including those reflected in national constitutions and statutes, on the other. Seldom has any regime ostensibly committed to rule of law as a core national value drawn more criticism outside its borders than the United States over the waging of this “war.”<sup>3</sup> Images of Guantanamo detentions, military commissions with ambiguous jurisdictional authority, Abu Ghraib prisoner abuses, extraordinary renditions, erratic U.S. court decisions, U.S. government memoranda attempting to justify torture, and a U.S. administration that openly stated its disagreement with applying international laws (human rights and otherwise) to how this war is conducted, all combine to raise doubts about whether the U.S. commitment to the rule of law is real, imagined, or somewhere in-between.<sup>4</sup>

In 2002, reflecting upon the September 11 tragedy just a year after its occurrence, Professor Aronofsky warned against arbitrary justice and making up our anti-terrorism laws as we go along, contrary to the American way.<sup>5</sup> Although

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3. See, e.g., Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole”*, 10 HUM. RTS. BRIEF 2 (2003); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345 (2002).

4. Julie Mertus & Lisa Davis, *Citizenship and Location in a World of Torture*, 10 N.Y. CITY L. REV. 411, 416 (2007) (describing the Bush administration intent to “respect international law only so far as it chose to,” and the Bush declaration that his authority permitted the U.S. to ignore international treaties in times of conflicts) (citations omitted).

5. See David Aronofsky, *September 11 Reflections from Ground Zero: Parent, International Law Teacher and Rule of Law Perspectives*, 34 CASE WEST. RES. J. INT’L L. 185, 187 (2002).

the U.S. Supreme Court has, at least to a limited extent, mitigated some of the more egregious abuses of Guantanamo detainee legal rights, the Court's refusal to apply the full range of substantive and procedural legal protections characterized in both the U.S. Bill of Rights and in international human rights law treaties (modeled in no small part from the U.S. Bill of Rights) continues to treat meaningful rule of law values as undesirable annoyances. This is not to criticize or downplay the ferocious legal advocacy engaged in to date within the U.S. court system in defense of these legal protections, but instead to ask aloud here about how to make such advocacy more effective in redressing two serious ongoing problems as to the litigation of such U.S. cases: 1) the lack of viable causes of action, and 2) the insufficient opportunities for remedial redress.

With the recent change in U.S. Administration, the question of how the U.S. will (and should) approach the ongoing problems in the coming years is to date unresolved. Although the present authors make no guess as to how the U.S. *will* proceed, the answer of how the U.S. *should* proceed may well lie in Europe's well-developed human rights jurisprudence. This article will survey a number of U.S. court decisions since September 2001, followed by an examination of the legal policy problems with the Bush administration's tactics and the accompanying U.S. litigation results, and conclude with a comparative examination of the European human rights law approach. It is the position of the present authors that the U.S. would be well served to, at the very least, examine Europe's relative success in fighting the war on terror, while at the same time preserving the rule of law, and incorporate the European experiences into the U.S. system of law.

## II. INTRACTABLE PROBLEMS IN U.S. LITIGATION REGARDING THE WAR ON TERROR: THE LACK OF VIABLE CAUSES OF ACTION AND MEANINGFUL REMEDIAL REDRESS

*In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches . . . . There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.<sup>6</sup>*

Despite protections outlined in the Bill of Rights, as well as safeguards in both international customary and treaty law, many suspected terrorists detained in the United States have been denied fundamental due process prior to, during, and after trial. Included among such transgressions are "extraordinary renditions," insufficient "enemy combatant" status reviews, warrantless wire-tapping and searches, collaboration with non-U.S. human rights violators, and the elimination

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6. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

of guaranteed congressional safeguards, such as *habeas corpus*.<sup>7</sup> The lack of viable causes of action and meaningful remedial relief has left detainees in a world of limbo, in which they have suffered illegal treatment (sometimes as gross as torture), but have nowhere to turn for legal redress. This fact has only served to increase the already widespread criticism of the United States' response to terrorism, both inside and outside the country. This section highlights some of these failings.

*A. Extraordinary Rendition: No Viable Legal Claim*

Although internationally condemned, the policy of "extraordinary rendition" has met with tacit acceptance by U.S. courts, which have avoided the issue either by reframing the question presented, or by excessively deferring to the discretion of Congress and/or the executive branch. *Arar v. Ashcroft* is a telling example.<sup>8</sup> After being removed in 2002 to Syria, where he was subjected to torture, Maher Arar, a dual citizen of Syria and Canada, brought action against the United States and several government officials, including Attorney General John Ashcroft.<sup>9</sup> Arar alleged violations under the Torture Victim Prevention Act (TVPA)<sup>10</sup> and the Fifth Amendment of the U.S. Constitution, claiming that after being detained and unlawfully mistreated in the U.S., he was removed to Syria for the purposes of interrogation and torture by Syrian authorities.<sup>11</sup> Despite acknowledging its obligation to accept the facts of the complaint as true (including the allegations of torture),<sup>12</sup> and to draw inferences in favor of the plaintiff,<sup>13</sup> the court found that

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7. See *infra* Sections II(a)-(g).

8. *Arar v. Ashcroft*, 532 F.3d 157, 184 (2d Cir. 2008) (finding no private right of action for alleged rendition victim taken to a country where torture would likely occur).

9. "Arar alleges that the defendants directed the interrogations by providing information about Arar to Syrian officials and receiving reports on Arar's responses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating, and torturing Arar. Arar argues in the alternative that, at a minimum, the defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria." *Id.* at 199 (Sack, J., dissenting) (citing *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 257 (E.D.N.Y. 2006)).

10. *Arar*, 532 F.3d 157 at 163.

11. *Id.*

12. *Id.* at 168 (citing *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007); the dissent, at 203, characterized the facts that must be accepted as follows: "1) Arar was apprehended by government agents as he sought to change planes at JFK Airport; he was not seeking to enter the United States; 2) his detention, based on false information given by the government of Canada, was for the purpose of obtaining information from him about terrorism and his alleged links with terrorists and terrorist organizations; 3) he was interrogated harshly on that topic—mostly by FBI agents—for many hours over a period of two days; 4) during that period, he was held incommunicado and was mistreated by, among other things, being deprived of food and water for a substantial portion of his time in custody; 5) he was then taken from JFK Airport to the MDC in Brooklyn, where he continued to be held incommunicado and in solitary confinement for another three days; 6) while at the MDC, INS agents sought unsuccessfully to have him agree to be removed to Syria because they and other U.S. government agents intended that he would be questioned there along similar lines, but under torture; 7) thirteen days after Arar had been intercepted and incarcerated at the airport, defendants sent him against his will to Syria. The defendants intended that he be questioned in Syria under torture and while enduring brutal and inhumane conditions of captivity. This was, as alleged, all part of a single course of action, conceived of and executed by the defendants in the United States. Its purpose: to make Arar 'talk.'" *Id.*

Arar had no right of action. It did so mainly by reframing a case of *torture* into one of *immigration*.<sup>14</sup>

On September 26, 2002, Arar was detained at John F. Kennedy International Airport in New York, while travelling from Tunisia to Montreal.<sup>15</sup> Upon review by INS officials, Arar was deemed a member of Al Qaeda and therefore found to be inadmissible to the United States.<sup>16</sup> However, instead of removing Arar to his country of choice, Canada, as is customary under U.S. immigration law, Arar was removed to Syria.<sup>17</sup> There, he was interrogated and tortured by Syrian government officials.<sup>18</sup> Arar claimed that Attorney General Ashcroft, among others, was responsible for his mistreatment, both in the U.S. and in Syria, and that accordingly Arar should be given redress from the United States for the wrong he endured.<sup>19</sup> Such redress was denied.

In denying a right of action for all of Arar's claims, the court made several puzzling findings. First, it relied upon the separation of powers, claiming that "the creation of civil damage claims is quintessentially a legislative function, and the protection of national security and the conduct of foreign affairs are primarily executive."<sup>20</sup> Although one cannot readily dispute the separation of powers argument *per se*, the court here misapplied the doctrine, combining "national challenge" rhetoric with illusive reasoning to avoid tackling the potentially serious due process problems that accompany "extraordinary rendition."<sup>21</sup> In one breath, the court states: "Congress did not intend to preclude [the federal courts'] consideration of removal-related claims that raise questions of law or allege constitutional violations, so long as they are properly before this [c]ourt."<sup>22</sup> In the next breath, the court proclaims its loathness to interfere with "the prerogative of Congress to determine the jurisdiction of the district courts,"<sup>23</sup> leading to a holding finding no right of action.

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at 203 (Sack, J., dissenting).

13. *Id.* at 168.

14. *See infra* text accompanying notes 17-53.

15. *Id.* at 194.

16. *Id.* at 166.

17. Despite multiple attempts to force Arar to consent to removal to Syria, he refused; he was rendered to Syria nonetheless. *See id.* at 196 (Sack, J., dissenting).

18. *Id.* at 163.

19. *Id.* Count one of Arar's complaint requested relief under the Torture Victim Protection Act (TVPA); counts two and three requested relief under the Fifth Amendment to the U.S. Constitution for Arar's alleged torture and detention in Syria; and, count four requested relief under the Fifth Amendment for alleged mistreatment while Arar was detained in the United States. In conjunction, Arar sought declaratory judgment "that defendants' conduct violated his 'constitutional, civil, and international human rights,'" as well as compensatory and punitive damages for the alleged violations. *Id.*

20. *Id.* at 165.

21. *Id.*

22. *Id.* at 170.

23. *Id.* at 171.

As there is a “long history of judicial review of executive and legislative decisions related to the conduct of foreign relations and national security,”<sup>24</sup> the court’s conclusion will undoubtedly lead the reader to ask what led the court to this seemingly contradictory conclusion. With regard to detention and torture in Syria, the court first seemed to accept the Government’s assertion that the “INA places removal-related claims beyond the reach of a district court’s federal question jurisdiction by creating an alternative-and exclusive-mechanism for resolving those claims,” i.e. exclusive INA review pursuant to 8 U.S.C. § 1252(a)(5).<sup>25</sup> Again, the present authors have no argument with this process – i.e. Congressional determination of proper remedies. However, what is troublesome is the court’s readiness to ignore (openly) the fact that the reason Arar was unable to exhaust this remedy was the fault of the defendants, not Arar himself.<sup>26</sup> The defendants denied Arar access to counsel, concealed his location from his lawyer, and removed him secretly before his lawyer could file a petition.<sup>27</sup>

The court also faltered by reframing the issue of torture into one of immigration.<sup>28</sup> The court deemed Arar an unadmitted alien,<sup>29</sup> and therefore undeserving of the full protections of the Bill of Rights.<sup>30</sup> The court explained that the Attorney General was specifically authorized to remove Arar “without further inquiry or hearing by an immigration judge’ if the Attorney General, after reviewing the evidence establishing his inadmissibility, determined that a hearing ‘would be prejudicial to the public interest, safety, or security.’”<sup>31</sup> Accordingly, the court found that Arar was not entitled to a hearing or counsel, as set forth in 8 U.S.C.A. § 1362 and reiterated in *Montilla* and *Waldron*.<sup>32</sup> In so doing, the court

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24. *Id.* at 213 (Sack, J., dissenting), (citing *e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (holding “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (finding “despite our recognition of the importance of [the Attorney General’s activities in the name of national security] to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary.”); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (holding “even the war power does not remove constitutional limitations safeguarding essential liberties.”); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (finding “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”); *see also* Brief of Retired Federal Judges as *Amici Curiae* at 11 (stating “[t]he Supreme Court has made clear that the Executive’s power to protect national security or conduct foreign affairs does not deprive the judiciary of its authority to act as a check against abuses of those powers that violate individual rights.”)).

25. *Id.* at 170-71.

26. *Id.* at 169-71, 180-81.

27. *Id.* at 171.

28. *See id.* at 185-90. Judge Sack echoes this position stating that the majority avoids addressing the general principles of due process “by mischaracterizing this as an immigration case, when it is in fact about forbidden tactics allegedly employed by United States law enforcement officers in a terrorism inquiry.” *Id.* at 193 (Sack, J., dissenting).

29. *Id.* at 186.

30. *Id.* at 187 n.26.

31. *Id.* at 187.

32. *See Waldron v. I.N.S.*, 17 F.3d 511, 517 (2d. Cir. 1993); *Montilla v. I.N.S.*, 926 F.2d 162, 166 (2d. Cir. 1991); The court held, “[i]n sum, Arar is unable to point to any legal authority suggesting that,

evades the ultimate cause of action. Arar was not merely seeking redress for improper removal, but for being subjected to *torture*.

According to the dissent, the notion that Arar was not “physically present” in the U.S., and therefore not subject to the protections of the Constitution, is “a *legal fiction* peculiar to immigration law.”<sup>33</sup> “Presence” is relevant only for determining an alien’s immigration status and related matters.<sup>34</sup> It is improper for assessing mistreatment by law enforcement agents during detention and interrogation.<sup>35</sup> However, again by avoiding the heart of the issue, the court failed to allow the proper process of redress, which would be to allow full pre-trial discovery (at the very least) in order to determine responsibility for Arar’s mistreatment.<sup>36</sup>

Ultimately, the court determined it would not apply *Bivens* relief (an equitable judicial remedy), despite its availability to petitioners who have suffered damages caused by constitutional violations at the hands of federal officers, such as Arar.<sup>37</sup> The *Bivens* analysis requires the court to first determine whether Congress has provided “any alternative, existing process for protecting the interest” in question.<sup>38</sup> If no alternative scheme exists, *Bivens* relief is a matter of judicial

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as an unadmitted alien who was excluded pursuant to the procedures set forth in 8 U.S.C. § 1225(c), he possessed any form of entitlement to the assistance of counsel-let alone a constitutional entitlement, the violation of which could constitute a predicate for the *Bivens* relief he seeks. Accordingly, we conclude that Arar's allegations about the various ways in which defendants obstructed his access to counsel fail to state a claim under the Due Process Clause of the Fifth Amendment.” *Arar*, 532 F.3d 157 at 188.

33. *Id.* at 206 (Sack, J., dissenting) (emphasis added).

34. *Id.*

35. *Id.* at 207 n.23 (Sack, J., dissenting) (stating “[t]he Supreme Court's decisions and our own invoke the entry fiction in cases related to the determination of an alien's immigration status, and the procedural due process to which an alien is entitled by virtue of that status, not cases adjudicating alleged violations of an alien's substantive due process rights during detention. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (concluding that temporary parole in United States while alien's admissibility was being determined did not entitle alien to benefit of statute giving Attorney General authority to withhold deportation of any alien “within the United States” if alien would thereby be subjected to physical persecution); *Menon v. Esperdy*, 413 F.2d 644, 647 (2d Cir. 1969) (noting that “since a parole does not constitute an admission into the United States . . . th[e] appeal involve[d] an exclusion . . . rather than an expulsion”); *Dong Wing Ott v. Shaughnessy*, 247 F.2d 769, 770 (2d Cir. 1957) (per curiam) (holding that the Attorney General's “discretionary power to suspend deportation” did not apply to aliens “within the country on parole,” because parole, “by statute [, was] not [to] be regarded as an admission of the alien” (citation and internal quotation marks omitted)), *cert. denied*, 357 U.S. 925, 78 S. Ct. 1368, 2 L.Ed.2d 1370 (1958); *Knauff v. Shaughnessy*, 179 F.2d 628, 630 (2d Cir.1950) (per curiam) (alien stopped at the border and detained on Ellis Island “is not ‘in the United States’ . . . [and therefore] is not entitled to naturalization”); see also *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006) (rejecting application of the entry fiction to *Bivens* claims involving the use of excessive force), *cert. denied*, 549 U.S. 1096, 127 S. Ct. 837, 166 L.Ed.2d 667 (2006); *Kwai Fun Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004) (“The entry fiction is best seen . . . as a fairly narrow doctrine that primarily determines the procedures that the executive branch must follow before turning an immigrant away.”) (emphasis in original).”)

36. *Id.* at 208 (Sack, J., dissenting).

37. See generally *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001).

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

discretion.<sup>39</sup> As the dissent points out, citing to Judge Posner, if there were ever a strong case for these “substantive due process” procedures of relief, it would be in a situation of gross mistreatment during a period of extra-legal confinement.<sup>40</sup> Arar’s torture certainly qualifies.

However, the court denied relief, mistakenly relying on the Supreme Court’s reluctance to permit such relief.<sup>41</sup> In short, despite authority in support of Arar’s claim,<sup>42</sup> the court denied equitable relief because “no court has yet considered whether official misconduct of the sort alleged by Arar may vitiate Congress’s determination that a federal district court is not the appropriate forum,” and that the nature of the complaint as unverified “heighten[ed] [the court’s] hesitation.”<sup>43</sup> When dealing with an allegation as serious as torture, neither rationale seems sufficient to deny discovery proceedings, let alone a trial on the issue. Nevertheless, as a consequence of the perplexing decision, Arar had no forum to hear his constitutional claims.<sup>44</sup>

Even if one were to give full faith to this judgment and full respect to the necessity of maintaining the United States’ foreign and national security policies,<sup>45</sup> the fact remains that there exists no cause of action for persons subject to torture by means of extraordinary rendition (which violates *jus cogens* principles of international law).<sup>46</sup> Although protecting the international community from terrorism is at the acme of international concern, the process of preventing terrorism should not come at the expense of U.S. national commitment to the protection of fundamental rights of due process and the preservation of human dignity.<sup>47</sup>

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39. *Id.*

40. *Arar*, 532 F.3d at 210 (Sack, J., dissenting) (citing *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989)), *cert. denied*, 493 U.S. 1026 (1990) (stating “[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. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the Fourth Amendment—as no one doubts—and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the Eighth Amendment—as no one doubts—it 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.”)).

41. *Id.* at 178.

42. *Id.* at 171 (stating “[t]here is authority for the proposition that official obstruction similar to that alleged by Arar may (1) excuse a plaintiff’s failure to comply with a filing deadline, *see, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994) (equitable tolling), or (2) bar a defendant from asserting certain defenses, such as failure to exhaust administrative remedies, *see, e.g., Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) (equitable estoppel.”)).

43. *Id.*

44. *Id.* at 168-69.

45. The court explicitly stated, “[t]here can be no doubt that litigation of this sort would interfere with the management of our country’s relations with foreign powers and affect our government’s ability to ensure national security.” *Id.* at 182.

46. *E.g. Dinah Shelton, International Law and “Relative Normativity,” in INTERNATIONAL LAW 155* (Malcolm Evans ed., 2003).

47. *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) (noting that “[t]he ‘entry fiction’ that excludable aliens are to be treated as if detained at the border despite their physical presence in the

Especially telling about this case is what happened to Arar in Canada. A Commission established there to investigate Arar's situation found that Arar was not Al Qaeda.<sup>48</sup> A press release issued by the Commission summarized the report of the Commissioner, Dennis O'Connor, who stated: "I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada."<sup>49</sup> Following the report, the Office of the Prime Minister announced its acceptance of the Commission's findings and cooperated in a settlement with Arar for compensation, as well as issued letters to both Syria and the U.S. formally objecting to the treatment of Arar.<sup>50</sup> The U.S. has categorically refused to do the same. This discrepancy between two closely allied neighboring countries with similar legal systems in assuming responsibility for the illegal treatment afforded Arar casts the U.S. in a particularly bad light regarding rule of law commitment.

*B. Enemy Combatant Status Review: Limited To Habeas Corpus Action*

One of the most perplexing elements of the war on terror, at least to international jurists, is the peculiar designation given to those detained. Non-soldiers have been deemed "enemy combatants," falling somewhere in between the cracks of the provisions of the Geneva Conventions (according to the U.S. Government), while those caught on the battlefield have been termed "illegal enemy combatants," with few given the POW status envisaged by the international instruments dealing with international conflict. Equally perplexing are the procedures available to those designated as "enemy combatant" to challenge the designation. *Al-Marri v. Pucciarelli* evidences one of the greatest dangers of the "enemy combatant" designations – *indefinite* military detention of legal U.S. residents, seized upon American soil, who have never taken up arms against the United States, either abroad or in the U.S.<sup>51</sup>

Ali Saleh Kahlal al-Marri, a Qatari national, is a legal resident of the United States.<sup>52</sup> However, he was seized on American soil by military authorities and held in military detention as an enemy combatant for over five years, without charge, and with no indication of when his confinement would end.<sup>53</sup> During the first year and a half of his detention, al-Marri was not permitted any outside communication,

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United States . . . does not limit the right of excludable aliens detained within United States territory to humane treatment").

48. See generally ARAR COMM'N, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006).

49. Press Release, Arar Comm'n, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case 1 (Sept. 18, 2006), available at [http://www.ararcommission.ca/eng/Release\\_Final\\_Sept18.pdf](http://www.ararcommission.ca/eng/Release_Final_Sept18.pdf).

50. *Arar*, 532 F. 3d at 200 (Sack, J., dissenting); Press Release, 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=1509>.

51. See generally *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (a decision containing six separate opinions, with bare majority recognizing habeas as the only means available to challenge designation).

52. *Id.* at 217 (Motz, J., concurring).

53. *Id.* at 220.

including with his attorneys, his wife, and his children.<sup>54</sup> Furthermore, according to al-Marri, “he was denied basic necessities, interrogated through measures creating extreme sensory deprivation, and threatened with violence.”<sup>55</sup> Notably, al-Marri was not seized on a battlefield in Afghanistan, or at an Al Qaeda training camp; rather, he was taken from his home in Peoria, Illinois.<sup>56</sup> Throughout the entirety of al-Marri’s detention, the government never alleged that he was a member of any nation’s military, fought with any foreign military, or that he bore arms against the United States “anywhere in the world.”<sup>57</sup>

Consequently, al-Marri filed a petition for a writ of habeas corpus.<sup>58</sup> After the District Court erroneously denied all relief, a divided Fourth Circuit panel reversed the judgment and ordered that al-Marri’s military detention cease.<sup>59</sup> The case was reheard *en banc* and the Court of Appeals again reversed the decision of the District Court, remanding the case for proceedings consistent with the Fourth Circuit’s findings. According to the appellate court, even assuming that Congress had empowered the President to detain al-Marri as an enemy combatant (provided the allegations against him were true), al-Marri had not “been afforded sufficient process to challenge his designation as an enemy combatant.”<sup>60</sup>

Despite this apparent outcome of justice, we are reminded that causes of action and redress for individuals such as al-Marri are limited. This decision recognized the writ of habeas corpus as the only means available to challenge an erroneous detainee designation. Moreover, it did not articulate any possible means of remedial redress for al-Marri, which from the other cases summarized herein appears limited to non-existent. Therefore, it would be specious to argue that the grant of habeas, after five years of unlawful detention and harsh mistreatment, returns the plaintiff to the position he would have been in prior to the wrongdoing. Not that reparation could fully restore al-Marri to pre-detention condition, but it would be a step in the right direction.

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54. *Id.*

55. *Id.* (noting that “[a] pending civil action challenges the ‘inhuman, degrading,’ and ‘abusive’ conditions of his confinement.” (citing Complaint at 1, *Al-Marri v. Rumsfeld*, No. 2:05-cv-02259-HFFRSC (D.S.C. Aug. 8, 2005)).

56. *Id.* at 217.

57. *Id.*

58. *Id.* at 216.

59. *Id.* (citing *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007)).

60. *Id.* at 216-17 (Motz, J., dissenting) (stating that “[w]e would also grant al-Marri habeas relief. Even assuming the truth of the Government’s allegations, they provide no basis for treating al-Marri as an enemy combatant or as anything other than a civilian. This does not mean that al-Marri, or similarly situated American citizens, would have to be freed. Like others accused of terrorist activity in this country, from the Oklahoma City bombers to the convicted September 11th conspirator, they could be tried on criminal charges and, if convicted, punished severely. But the Government would not be able to subject them to indefinite military detention.”).

*C. Warrantless Electronic Wiretapping & Searches: No Cause of Action*

*The conduct giving rise to the alleged injuries is undisputed: the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications . . .*<sup>61</sup>

Another unfortunate part of the Bush administration's "war on terror" was the implementation of warrantless (illegal) wiretapping and invasive surveillance through the National Security Agency's (NSA) Terrorist Surveillance Program (TSP).<sup>62</sup> The program was aimed at monitoring only those believed to have contacts with Al Qaeda, but the deleterious privacy effects have gone much further, reaching into the homes and offices of Americans all throughout the United States and elsewhere.<sup>63</sup> When the American Civil Liberties Union (ACLU) and other attorneys and professionals, who regularly communicate with individuals overseas, challenged the program, the Circuit Court remanded for dismissal of the entire action, mainly for lack of standing.<sup>64</sup>

The diverse group of plaintiffs<sup>65</sup> brought suit seeking a permanent injunction against the NSA's continuation of the TSP, as well as a declaration that the warrantless wiretapping and data mining violate the First and Fourth Amendments, the Separation of Powers Doctrine, the Administrative Procedures Act (APA), Title III of the Omnibus Crime Control and Safe Streets Act (Title III), and the Foreign Intelligence Surveillance Act (FISA).<sup>66</sup> The District Court dismissed the data mining claim, but granted summary judgment for the plaintiffs with regard to the warrantless wiretapping, finding the program manifestly unconstitutional.<sup>67</sup> The Court of Appeals reversed the latter holding.<sup>68</sup>

While invoking a number of claims, the central claim of the plaintiffs can be reduced to the fundamental interest in the expectation of privacy. The plaintiffs claimed that TSP interfered with ethical duties to keep information confidential, created a "chilling effect" to working effectively with overseas clients, and

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61. *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (finding no private right of action to challenge warrantless electronic surveillance of international communications).

62. *See id.* at 649 (citing Press Briefing by Att'y Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>).

63. *Id.*

64. *Id.* at 687-88.

65. The plaintiffs included "journalists, academics, and lawyers who regularly communicate with individuals located overseas, who the plaintiffs believe are the types of people the NSA suspects of being al Qaeda terrorists, affiliates, or supporters, and are therefore likely to be monitored under the TSP." *Id.* at 649.

66. *Id.* at 650.

67. *ACLU v. NSA*, 438 F. Supp. 2d 754, 771, 775, 776 (E.D.Mich. 2006) (construing the Fourth Amendment as an absolute rule that "requires prior warrants for any reasonable search," and announcing that "searches conducted without prior approval by a judge or magistrate were per se unreasonable," and holding that President Bush had "undisputedly violated the Fourth [Amendment] . . . and accordingly ha[d] violated the First Amendment Rights of these Plaintiffs as well.").

68. *ACLU v. NSA*, 493 F.3d at 688.

violated their legitimate expectation of privacy.<sup>69</sup> Accordingly, they brought suit and sought further information from the NSA. In response, the NSA invoked the “state secrets doctrine” for the purpose of barring the discovery or admission of evidence it deemed contrary to the interest of national security.<sup>70</sup> The NSA claimed that discovery would lead undesirably to the exposure of privileged communications barred from disclosure to the public.<sup>71</sup>

Again, the court’s findings are disconcerting. First, the court refused to delineate between “lawful” and “warrantless” wiretapping. It refused to acknowledge that the presence of illegal wiretaps has a different result than legal wiretaps, at least regarding those subject to the intrusion. It stated:

[a]ll wiretaps are secret, and the plaintiffs are not challenging the *secret* nature, but only the *warrantless* nature, of the TSP. Because all wiretaps are secret, neither the plaintiffs nor their overseas contacts would know-with or without warrants-whether their communications were being tapped, and the secret possession of a warrant would have no more effect on the subjective willingness or unwillingness of these parties to “freely engage in conversations and correspond via email” than would the secret absence of that warrant.<sup>72</sup>

Such reasoning seems badly flawed. If applied in the same manner to domestic cases, the outcome would be chimerical. Imagine a case in which a police officer, suspecting criminal activity, set up a surveillance system that recorded communications coming in and out of the suspect’s home, doing so without any judicial oversight, i.e., a warrant. The court would not simply turn a blind eye, justifying the police officer’s actions based on whether the suspect does or does not know about the surveillance. The invasion is illegal, whether or not the suspect knows of the surveillance, or of its status of legality. The same constitutional limitations should apply in this case.

Turning to the more rational finding of the court, the present authors still find reason to be concerned. Even though the court separated the analysis for each of the claims to avoid confusion, as noted above, the analysis is basically the same for each claim – invasion of privacy. In due course, the court found that the plaintiffs lacked standing for all claims,<sup>73</sup> because they were unable to show “concrete” and “actual” injury.<sup>74</sup>

Up to this point, there is no problem at issue. A standing analysis is fairly straightforward; a plaintiff must show: 1) injury in fact, 2) causation, and 3) possibility for redress. The court noted that there was insufficient evidence to find

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69. *Id.* at 654-55.

70. *Id.* at 650 n.2 (stating “[t]he State Secrets Doctrine has two applications: a rule of evidentiary privilege,” (citing *United States v. Reynolds*, 345 U.S. 1, 10, 73 S. Ct. 528, 97 L.Ed. 727 (1953)), “and a rule of non-justiciability,” (citing *Tenet v. Doe*, 544 U.S. 1, 9, 125 S. Ct. 1230, 161 L.Ed.2d 82 (2005)).

71. *Id.* at 650.

72. *Id.* at 671-72.

73. *See id.*

74. *Id.* at 662.

injury in fact, which whether or not this is true, is within the discretion of the court. However, the court then continued:

[E]ven to the extent that additional evidence may exist, which might establish standing for one or more of the plaintiffs on one or more of their claims, discovery of such evidence would, under the circumstances of this case, be prevented by the State Secrets Doctrine.<sup>75</sup>

The court concluded that the “the plaintiffs do not—and because of the state secrets doctrine cannot produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants.”<sup>76</sup> Therefore, there is no standing and thus no relief.

According to the court’s reasoning, the only way for a plaintiff to show standing for the NSA’s admittedly illegal program would be to show that plaintiff’s “privacy has *actually* been breached [emphasis added].”<sup>77</sup> Yet, the court acknowledges that when the NSA invokes the state secrets doctrine, to do so is impossible.<sup>78</sup> In actuality, the only conceivable way that one could even survive summary judgment would be if the government accidentally gave plaintiffs information that they were under surveillance, as coincidentally took place in *Al-Haramain*.<sup>79</sup> However, even then the state secrets doctrine ultimately barred the evidence (discussed more fully below).

Therefore, because standing fails, FISA claims also fail.<sup>80</sup> FISA’s civil suit provisions supposedly allow “aggrieved person[s],” i.e., someone other than a foreign power or an agent of a foreign power, to bring a cause of action for violations of the statute, which includes illegal subsection to “electronic surveillance.”<sup>81</sup> According to the court, however, “[T]he term [aggrieved person] is intended to be coextensive [with], but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance.”<sup>82</sup> Thus, as no plaintiff could ever conceivably show standing under the Fourth Amendment (according to this court’s reasoning), no plaintiff can ever establish status as an “aggrieved person” under the FISA statute, and will thus be unable to bring a claim under FISA either. The court implicitly acknowledged

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75. *Id.* at 687 (citing *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Halkin v. Helms*, 690 F.2d 977, 981 (D.C. Cir. 1982)).

76. *Id.* at 672; *see also Tenenbaum*, 372 F.3d at 777 (upholding dismissal because the defendants “cannot defend their conduct . . . without revealing the privileged information [so] the state secrets doctrine thus deprives [the d]efendants of a valid defense to the [plaintiff]s’ claims”).

77. *Id.* at 655 (i.e., to show that her communications had actually been wiretapped).

78. *Id.* at 657 (noting “[t]he problem with asserting only a breach-of-privacy claim is that, because the plaintiffs cannot show that they have been or will be subjected to surveillance personally, they clearly cannot establish standing under the Fourth Amendment or FISA.”).

79. *See infra* Section II.E.

80. *See ACLU*, 493 F.3d at 681-83.

81. *Id.* at 682.

82. *Id.* at 683, (citing H.R. Rep. No. 95-1283, at 66 (1978), *reprinted at* 1978 U.S.C.C.A.N. 3904 (citing *Alderman v. United States*, 394 U.S. 165 (1969)) Report by the Permanent Select Committee on Intelligence, in support of the proposed FISA bill and amendments).

that, based on its reasoning, the Government's illegal action would effectively be insulated from judicial review.<sup>83</sup> Nevertheless, it proceeded under the rationale described herein, again leaving mistreated plaintiffs without possibility of redress.

*D. United States Official Collaboration With Non-U.S. Human Rights Violators: Political Question Bar*

In the early 1970s, Chilean military officers staged a coup d'état, ousting elected President Salvador Allende, and installing Augusto Pinochet. The abuses presented at the hands of this ruthless dictator are so well known that they hardly need mention here.<sup>84</sup> Less known, however, are the several cases that have alleged U.S. funding and assistance for the coup, including aiding and abetting and/or conspiring with known human right abusers.<sup>85</sup> Despite serious allegations of torture, false imprisonment, wrongful death, and intentional infliction of emotional distress brought against the U.S. and Henry Kissinger under the Alien Tort Statute,<sup>86</sup> U.S. courts have refused to address the claims, citing the political question doctrine.<sup>87</sup>

In *Gonzalez-Vera v. Kissinger*, the plaintiffs alleged that Kissinger "purposefully act[ed] outside the proper channels of Congressional oversight,"<sup>88</sup> which led to collaboration with terrorists and human rights abusers, as well as torture and other gross mistreatment.<sup>89</sup> In response, the court found Kissinger's actions merely measures taken to implement United States policy with respect to Chile, which, even if outside Congressional oversight, were beyond the court's powers of review.<sup>90</sup> In short, the court held that it could not evaluate the legality of the actions because it would "require [the court] to delve into questions of policy 'textually committed to a coordinate branch of government.'"<sup>91</sup>

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83. *Id.* at 675 (acknowledging the District Court's finding that if it "were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control . . ." but responding that "[t]he Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch."). *Id.* at 676.

84. See generally Jonathan Kandell, *Augusto Pinochet, Dictator who Ruled by Terror in Chile, Dies at 91*, N.Y. TIMES (Dec. 11, 2006) available at <http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html>.

85. See, e.g., *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (refusing to permit private right of action against U.S. officials allegedly collaborating with Chile's Pinochet military government in torture and related human rights abuses, citing political question); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

86. E.g., *Gonzalez-Vera*, 449 F.3d at 1261 (citing Complaint ¶¶ 115, 152, 163, 175-76).

87. See, e.g., *id.*

88. *Id.* (citing Complaint ¶¶ 43, 65, 69).

89. *Id.*

90. *Id.* at 1264.

91. *Id.* at 1263.

Notably, the court acknowledged its ability to address cases “in which a rogue agent commits an act so removed from his official duties that cannot fairly be said to represent the policy of the United States,” but it unequivocally stated that this was not such a case.<sup>92</sup> In so finding, the court seemed to ignore the plaintiffs’ referral to specific acts of *torture*, and their reference to *Sosa v. Alvarez-Machain*, for support that “claims based on a narrow class of international norms, such as . . . claims of torture and extrajudicial killing, should be protected [sic] and adjudicated in U.S. courts.”<sup>93</sup> Ultimately, the *Gonzalez-Vera* finding appears to stand for a frightening proposition: if torture emerges from a policy of the government, then the courts cannot hear such claims, especially if committed at the hands of or instigated by U.S. officials.

*E. State Secrets Doctrine: Claims Preclusion*

**1. Government Claims Preclusion**

In some cases, the American legal process simply does not allow legal redress for persons subjected to mistreatment at the behest of the “war on terror.” As alluded to above, the most damaging bar to recovery is the state secrets doctrine. Under the doctrine, the United States government may prevent “the disclosure of information in a judicial proceeding if ‘there is a reasonable danger’ that such disclosure ‘will expose military matters which, in the interest of national security, should not be divulged.’”<sup>94</sup> The privilege applies even if the court thinks there may be a colorable claim or *prima facie* case.<sup>95</sup> According to the jurisprudence, when the state secrets privilege is presented, the court must resolve the matter by use of a three-part analysis.<sup>96</sup> First, the court must be sure that the procedural requirements for invoking the doctrine have been satisfied.<sup>97</sup> Second, it must decide whether the information that the government seeks to protect qualifies as privileged under the state secrets doctrine.<sup>98</sup> Finally, if the privilege does apply to the information in question, the ultimate question for the court is “how the matter should proceed in light of the successful privilege claim.”<sup>99</sup> When invoked, the doctrine imposes an almost insurmountable challenge upon the plaintiff,<sup>100</sup> and cases are almost always dismissed.

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92. *Id.* at 1264.

93. *Id.* at 1263 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

94. *El-Masri v. U.S.*, 479 F.3d 296, 302 (4th Cir. 2007) (citing state secrets doctrine bar to private litigants seeking legal recovery for alleged rights abuses); *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

95. See *El-Masri*, 479 F.3d at 307-310.

96. *Id.* at 304.

97. *Id.*

98. *Id.*

99. *Id.*

100. See *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (stating “[w]e recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear.”); *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, FN3 (4th Cir. 1985) (holding “[w]hen the state secrets privilege is validly asserted, the result is unfairness to individual litigants-through the loss of important evidence or dismissal of a case-in order to protect a greater public value.”).

To be sure, the doctrine performs an important constitutional function, as it allows the executive branch “to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”<sup>101</sup> Without such privilege, there would be little protection against litigation resulting in detriment to the executive’s foreign-affairs responsibilities, and thus the security of the United States’ citizenry as a whole. Thus, the Supreme Court has traditionally given great deference to the executive when it invokes the state secrets doctrine,<sup>102</sup> recognizing its constitutional basis.<sup>103</sup>

However, the doctrine often leaves injured plaintiffs in a situation of no redress, and often precludes the possibility of holding government agents responsible for their illegal actions. Although the courts have stated that “the State Secrets Doctrine does not represent a surrender of judicial control over access to the courts,”<sup>104</sup> and that “dismissal on state secrets grounds is appropriate only in a narrow category of disputes,”<sup>105</sup> the practical effect has been the preclusion of many otherwise potentially legitimate claims. Of primary concern, as articulated by the plaintiff in *El-Masri v. U.S.*, is that the invocation of the doctrine enables “the Executive to unilaterally avoid judicial scrutiny merely by asserting that state secrets are at stake in a given matter.”<sup>106</sup> Although the court in *El-Masri* addresses this concern by recognizing the government’s burden to prove the doctrine’s applicability,<sup>107</sup> and does so in an exacting analysis,<sup>108</sup> the situation still leaves one wondering whether the state secrets burden is really a difficult burden for the government to meet.

In *El Masri*, much of the information upon which the plaintiff relied was public information. Khaled El-Masri claimed that the “subject of this action is simply ‘a rendition and its consequences,’ and that its critical facts – the CIA’s operation of a rendition program targeted at terrorism suspects, plus the tactics employed therein – have been so widely discussed that litigation concerning them could do no harm to national security.”<sup>109</sup> Even so, El-Masri suggested employing special procedures during discovery to further protect any “sensitive information.”<sup>110</sup> Nevertheless, the court found if the civil action were to proceed, central facts that would *potentially* be exposed included: 1) the roles the defendants played in the events and, thus, in the CIA organization, and 2) how the CIA organizes and supervises its intelligence and operations.<sup>111</sup> The court also

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101. *El-Masri*, 479 F.3d at 303.

102. See *United States v. Nixon*, 418 U.S. 683, 710 (1974) (observing that the privilege provides strong protection because it concerns “areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities.”).

103. *Id.* at 711.

104. *El-Masri*, 479 F.3d at 312.

105. *Id.* at 313 (citing *Sterling*, 416 F.3d at 348; *Fitzgerald*, 776 F.2d at 1241-42).

106. *Id.* at 312.

107. *Id.*

108. *Id.*

109. *Id.* at 308 (citing Appellant’s Brief at 38).

110. *Id.*

111. *Id.* at 309.

explained that the defendants would not be able to properly defend themselves without using privileged evidence.<sup>112</sup> In short, the court averred, “virtually any conceivable response to El-Masri’s allegations would disclose privileged information.”<sup>113</sup>

So, where does this leave an injured plaintiff? If subjected to “extraordinary rendition” or torture, is there truly no way for a claimant to find redress, or to even get a chance at pre-trial discovery, let alone a trial? In a country purportedly committed to the rule of law, there must be judicial procedures that can more sufficiently balance the needs of state security with upholding fundamental human rights and due process. Perhaps the question to be addressed is whether the courts are giving too much deference to the executive in cases of alleged torture and gross abuse.

## 2. Potential Relief Against Government Claims Preclusion

Despite the apparent comprehensiveness of the state secrets doctrine, some decisions have indicated the possibility of relief. In 2006, Al-Haramain Islamic Foundation<sup>114</sup> brought suit against President Bush, claiming that it was subject to warrantless electronic surveillance pursuant to the Terrorist Surveillance Program (TSP),<sup>115</sup> which Al-Haramain claimed was in violation of the Foreign Intelligence Surveillance Act (FISA).<sup>116</sup> The program became known to the public after *The New York Times* exposed the controversial (if not outright illegal) surveillance program.<sup>117</sup> The day after the story broke, President Bush attempted to explain the program to the public, informing U.S. citizens that he had authorized the program.<sup>118</sup> As is now common knowledge, the program has led to widespread

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112. *Id.*

113. *Id.* at 310 (holding “[i]f a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if ‘the circumstances make clear that 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,’ dismissal is the proper remedy.”). *Id.* at 306.

114. “Al-Haramain is a Muslim charity which is active in more than 50 countries. Its activities include building mosques and maintaining various development and education programs. The United Nations Security Council has identified Al-Haramain as an entity belonging to or associated with Al Qaeda.” *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 (9th Cir. 2007).

115. *Id.* at 1192.

116. *Id.* In February 2006, Al-Haramain filed a complaint in the District of Oregon alleging violations of FISA, the First, Fourth, and Sixth Amendments to the United States Constitution, the doctrine of separation of powers, and the International Covenant on Civil and Political Rights. *Id.* at 1195.

117. *Id.* at 1192 (noting “General Hayden’s statements provided to the American public a wealth of information about the TSP. The public now knows the following additional facts about the program, beyond the general contours outlined by other officials: (1) at least one participant for each surveilled call was located outside the United States; (2) the surveillance was conducted without FISA warrants; (3) inadvertent calls involving purely domestic callers were destroyed and not reported; (4) the inadvertent collection was recorded and reported; and (5) U.S. identities are expunged from NSA records of surveilled calls if deemed non-essential to an understanding of the intelligence value of a particular report.”); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

118. *Al-Haramain*, 507 F.3d at 1192; President George W. Bush, President’s Radio Address (Dec.

indignation throughout the United States and the rest of the world. When suit was filed, however, the government simply invoked the state secrets privilege to block the litigation.

In 2004, the government had inadvertently given Al-Haramain a “Top Secret” document during a proceeding to freeze the foundation’s assets.<sup>119</sup> The document alerted the organization to the surveillance that it was under, and led to the suit. Because of the public nature of the TSP program, the court surprisingly determined that the case should not be dismissed outright.<sup>120</sup> However, the “Top Secret” document was essential to verifying Al-Haramain’s allegations, but its consideration was precluded under the state secrets doctrine.<sup>121</sup> Because Al-Haramain could not produce more than speculation outside the “Top Secret” document, the court dismissed the claim for lack of standing.<sup>122</sup> Again, despite good reason to believe (if not actual proof) that there had been a violation of both domestic and international law at the hands of the U.S. government, the plaintiffs were left in a situation of no redress.

Interestingly, however, the court alluded to potential relief, unlike in the previously mentioned cases. The court did not dismiss Al-Haramain’s claims that the FISA preempts the common law state secrets privilege, but instead remanded the case for further determination by the district court.<sup>123</sup> Upon remand, the Court found that FISA did indeed preempt the state secrets doctrine,<sup>124</sup> but that Al-Haramain could not use the “Top Secret” document to establish “aggrieved persons” status under the FISA.<sup>125</sup> However, the court did grant plaintiffs leave to amend the complaint,<sup>126</sup> and it thus remains to be seen whether there is indeed some form of relief for those subject to unlawful surveillance through TSP.<sup>127</sup>

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17, 2005).

119. *Al-Haramain*, 507 F.3d at 1193.

120. *Id.* at 1197-98 (holding “[w]e agree with the district court’s conclusion that the very subject matter of the litigation—the government’s alleged warrantless surveillance program under the TSP—is not protected by the state secrets privilege. Two discrete sets of unclassified facts support this determination. First, President Bush and others in the administration publicly acknowledged that in the months following the September 11, 2001, terrorist attacks, the President authorized a communications surveillance program that intercepted the communications of persons with suspected links to Al Qaeda and related terrorist organizations. Second, in 2004, Al-Haramain was officially declared by the government to be a “Specially Designated Global Terrorist” due to its purported ties to Al Qaeda. The subject matter of the litigation—the TSP and the government’s warrantless surveillance of persons or entities who, like Al-Haramain, were suspected by the NSA to have connections to terrorists—is simply not a state secret.”).

121. *Id.* at 1193.

122. *Id.* at 1205.

123. *Id.* at 1193, 1206.

124. *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1124 (D.D.C. 2008).

125. *Id.* at 1135.

126. *Id.* at 1137.

127. Compare *Al-Haramain*, 507 F.3d 1190 with *El-Masri v. United States*, 479 F.3d 296 (the Al-Haramain court did not adopt the reasoning in *El-Masri*, where the court, according to Al-Haramain, “merged the concept of ‘subject matter’ with the notion of proof of a prima facie case.” *Al-Haramain*, 507 F.3d at 1201 (finding that “[a]ccording to the Fourth Circuit, the subject matter of a lawsuit requires its dismissal if the action cannot be “litigated without threatening the disclosure of state secrets”). In

### 3. Private Claims Preclusion

Despite the slightly positive implications of *Al-Haramain*, subsequent cases have shown further application of the state secrets doctrine. The doctrine can also prevent a right of action against private individuals and corporations, even when the government is not a party to a case. If the government deems that its interests are affected, it can intervene, invoke the doctrine, and prompt the dismissal of private action for tortious acts. In *Mohamed v. Jeppesen Dataplan*, plaintiffs claimed that under the policy of “extraordinary rendition” they were “unlawfully apprehended, transported, imprisoned, interrogated and in some instances tortured – all under the direction of the United States.”<sup>128</sup> Plaintiffs brought suit against Jeppesen Dataplan, a U.S. corporation, for its alleged participation in the illegal renditions.<sup>129</sup> Jeppesen “provided the aircraft, flight crews, and the flight and logistical support necessary for hundreds of international flights”<sup>130</sup> resulting in the illegal renditions.

The plaintiffs brought claims of “Forced Disappearance” and “Torture and Other Cruel, Inhuman, or Degrading Treatment” under the Alien Tort Statute, which gives the district courts jurisdiction over tortious conduct against aliens in violation of international law.<sup>131</sup> The plaintiffs claimed that Jeppesen provided direct and substantial support for the illegal renditions and *should have known* that the plaintiffs would be “subjected to forced disappearance, detention, and torture in countries where such practices are routine.”<sup>132</sup>

Upon filing of the suit, the United States intervened to assert the state secrets doctrine on its own behalf and on that of Jeppesen.<sup>133</sup> With little trouble, the court approved the intervention<sup>134</sup> and dismissed the action.<sup>135</sup> The Court found that the

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contrast, the court refused to view “the ‘subject matter’ of a lawsuit as one and the same with the facts necessary to litigate the case.” *Id.* (noting “[i]n *Kasza*, we made the distinction between dismissal on the grounds that the subject matter of an action is a state secret, and dismissal on the grounds that a plaintiff cannot prove the prima facie elements of the claim absent privileged evidence (citing *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998)). . . . Because the Fourth Circuit has accorded an expansive meaning to the “subject matter” of an action, one that we have not adopted, *El-Masri* does not support dismissal based on the subject matter of the suit.”).

128. *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128, 1129 (N.D. Cal. 2008) (finding no state secrets privilege exception for suits against U.S. contractors and allowing U.S. Government to intervene and block the suit).

129. *See id.*

130. *Id.* at 1132 (citing First Amended Complaint ¶ 13).

131. *Id.* at 1129, 1132.

132. *Id.* at 1132.

133. *Id.*

134. *Id.* at 1133-34.

135. *Id.* at 1134 (noting “[o]nce state secrets privilege is invoked, the Court should consider whether the case may proceed under that circumstance. The invocation of state secret privilege is a categorical bar to a lawsuit under the following circumstances: (1) if the very subject matter of the action is a state secret; (2) if the invocation of the privilege deprives a plaintiff of evidence necessary to prove a prima facie case; and (3) if the invocation of the privilege deprives a defendant of information necessary to raise a valid defense. Since the Court finds that the very subject matter of this case is a state secret, the Court does not reach the other circumstances”).

U.S. satisfied all requirements for intervention, noting the United States had an important interest in the action “because it involves activities allegedly overseen by the CIA.”<sup>136</sup> The United States submitted that the proceeding could lead to knowledge about whom the CIA contracts with, as well as what foreign governments the CIA cooperated with, claiming that evidence regarding such relationships would result in “extremely grave damage to the foreign relations and foreign activities of the United States.”<sup>137</sup>

In supporting the U.S. position, the court referenced the findings of other courts that have determined “the ‘very subject matter’ of a case to be a state secret when the case involved classified weapons or other devices, or when the case involved covert operations by agencies of the United States in foreign countries.”<sup>138</sup> The court ignored plaintiffs’ pleas that the program was already public and thus not subject to the state secrets doctrine.<sup>139</sup> Accordingly, though no particularized danger was articulated, the case was dismissed in traditional form.

Again the rationale of the court does not seem entirely erroneous, but once more we are left with injured plaintiffs who have no means of redress. Moreover, the reasoning of the court seems to suggest that anytime mistreatment is the result of “covert U.S. military or CIA operations,”<sup>140</sup> there will be no cause of action. Because all “extraordinary renditions” and state-sponsored torture falls under this category, this is a troubling result.

#### F. Alien Detention Claims: Limited To Habeas Relief

In the past decade, not only has judicial *redress* been stymied, but so has remedial *relief* for inappropriately treated aliens. *Sissoko v. Rocha* presented a case in which an alien brought suit against an immigration inspector based upon false imprisonment and illegal detention in violation of the Fourth Amendment.<sup>141</sup> The court found that the district court lacked jurisdiction over Sissoko’s claim because it arose from a decision by the Attorney General to commence removal proceedings.<sup>142</sup> Sissoko, a native and citizen of Senegal, entered the U.S. in the 1980s and filed an application for legalization pursuant to a relief order resulting from a class action suit.<sup>143</sup> Initially denied status in the class, he was allowed to provide further documentation, but instead filed a second legalization application

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136. *Id.* at 1133.

137. *Id.* at 1135.

138. *Id.* (citing *Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006) (citing exemplary cases)).

139. *See id.* at 1135-36. Note that the Al-Haramain court made this exact finding.

140. *Id.* at 1136 (noting “[i]n sum, at the core of Plaintiffs’ case against Defendant Jeppesen are ‘allegations’ of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret.”).

141. *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007) (barring alien’s false imprisonment claim against U.S. official by finding relief limited to habeas proceeding).

142. *Id.* at 951.

143. *Sissoko v. Rocha*, 440 F.3d 1145, 1149 (9th Cir. 2006).

in 1991.<sup>144</sup> As a result of his two applications, Sissoko was mistakenly assigned two different alien registration numbers.<sup>145</sup>

Upon return from his father's funeral in Senegal in March 1997, for which he attained the necessary travel documentation, Sissoko was detained because the duplicate applications caused suspicion in the eyes of the inspecting immigration official.<sup>146</sup> Sissoko was placed in removal proceedings.<sup>147</sup> Subsequently, Sissoko claimed a fear of persecution if forced to return to Senegal.<sup>148</sup> However, as would be proper, he was never given a "credible fear interview" and he was placed in regular removal proceedings.<sup>149</sup>

Ultimately, Sissoko was improperly detained for nearly three months.<sup>150</sup> The District Court found that his detention was illegal.<sup>151</sup> However, upon appeal, in a revised opinion, the court held that the district court lacked jurisdiction over Sissoko's claim because it "aris[es] from the decision or action by the Attorney General to commence [removal] proceedings."<sup>152</sup> In refusing to apply a *Bivens* claim, the court limited Sissoko's relief to habeas corpus. The court held that "because Sissoko was never issued an expedited removal order, a habeas petition under 8 U.S.C. § 1252(e)(2) could have been successful in remedying his allegedly false arrest."<sup>153</sup> The court noted the limited context to which 8 U.S.C. § 1252(g)'s "jurisdiction-stripping language" covers a false arrest claim. Nonetheless, Sissoko was denied a *Bivens* remedy, which can be granted at the court's discretion in the absence of other adequate relief, and thus denied the opportunity for recovery of any damages.<sup>154</sup> This is only one of many examples in which the effects of the "war on terror" have adversely affected other areas of law, namely the humane treatment of immigrants, refugees, and asylum seekers.

#### G. Apparent Validity Of Military Tribunals Not Subject To Real Judicial Control

In *Hamdan v. Rumsfeld*, the U.S. Supreme Court produced one of its premier opinions, which, in spite of executive pressure to the contrary, preserves a number of fundamental due process rights owed to detainees under the U.S. Constitution as well as international law. The Court held that the Military Commission used to try Guantanamo detainees was not properly authorized by any congressional act, and that its procedures violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.<sup>155</sup> Nonetheless, there is reason to believe that despite the

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144. *Id.* at 1149-50.

145. *Id.* at 1150.

146. *Id.*

147. *Sissoko*, 509 F.3d at 948-49.

148. *Id.* at 949.

149. *Id.*

150. *Sissoko*, 440 F.3d at 1149.

151. *Id.*

152. *Id.* at 1155 (citing 8 U.S.C. § 1252(g) (May 11, 2005)).

153. *Sissoko*, 509 F.3d at 950.

154. *Id.* at 951.

155. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (suggesting that once Congress properly legislates military commissions procedural safeguards, habeas corpus may be eliminated for

landmark holding, if Congress properly legislates Military Commissions, procedural safeguards, such as habeas corpus may be eliminated for Guantanamo detainees, and other legal relief could be increasingly limited to non-existent if and when this occurs.<sup>156</sup>

The Court highlighted the formal shortcomings of the Military Commissions, as well as the broader failings on the part of the executive, to satisfy the basic procedural preconditions. The Court then nevertheless explicitly qualified its concerns with these failings “at least in the absence of specific congressional authorization,”<sup>157</sup> thereby leaving open the possibility of amendment. Additionally, the Court noted its obligation to give “complete deference” to the determinations of the President, alluding to the possibility that if the President determined it “impracticable to apply the rule for courts-martial,” the Court would have to defer to the authority of the President.<sup>158</sup> Finally, the Court stated: “It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.”<sup>159</sup> In combination, due process advocates cannot yet breathe easily.

Some solace may be found in the Court’s finding that the process used to try Hamdan not only violated the UMCJ, but also the Geneva Conventions.<sup>160</sup> Thus, even if Congress or the executive were to preempt the Court’s consideration of the matter, if the terms still violate international law, there may be a colorable claim and jurisdiction for the Court. The Court highlighted the necessity of complying with Common Article 3 of the Conventions, namely the necessity of a regularly constituted court “affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>161</sup> Inextricably intertwined with Article 3 are the procedures governing the trials commissioned by the government.<sup>162</sup> The Court noted that, at a bare minimum, those must include the protections embodied by customary international law,<sup>163</sup> noting that they may be international requirements, “[b]ut *requirements* they are nonetheless.”<sup>164</sup>

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Guantanamo detainees and other legal relief appears limited to non-existent if and when this occurs); *see also id.* at 624 (noting “[t]he military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter.”).

156. *See, e.g., id.* at 611.

157. *Id.*

158. *Id.* at 623 (holding “[w]e assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial”); *id.* at 634-35 (holding “the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted . . . . But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.”).

159. *Id.* at 635.

160. *Id.* at 625.

161. *Id.* at 630, 632.

162. *Id.* at 633.

163. *Id.* at 635 (noting that “[m]any of these are described in Article 75 of Protocol I to the Geneva

Like *Hamdan, Boumediene v. Bush* appears on its face to be another sizeable victory for due process advocates in the “war on terror.”<sup>165</sup> By reiterating the Court’s ability to hear habeas claims, the Court retained the powers of judicial review essential to ensuring the executive does not exceed the scope of its power. However, the decision may also contain one of the biggest blows to the rights of detainees – i.e. the suggestion by the Supreme Court that Congress could suspend habeas altogether if certain factors are present involving aliens detained outside the United States.<sup>166</sup> As shown above, the limits placed upon detainees who wish to challenge their detentions are already arduous. Such an extension could make their plight futile.

*Boumediene* presented consolidated cases, addressing the detention of prisoners designated “enemy combatants” at Guantanamo Bay who petitioned for writ of habeas corpus.<sup>167</sup> The petitioners were sent to Guantanamo after being captured in Afghanistan (and elsewhere abroad) and subsequently designated “enemy combatants” by Combatant Status Review Tribunals (CSRTs).<sup>168</sup> Each of the detainees denied membership in Al Qaeda or the Taliban regime, which was alleged to support the terrorist network, and thus sought a writ of habeas corpus in the District Court, which dismissed the cases for lack of jurisdiction because Guantanamo is “outside the sovereign territory of the United States.”<sup>169</sup>

The privilege of habeas corpus, fundamental to the U.S. Constitution and American system of justice, entitles any detainee or prisoner to a meaningful opportunity “to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”<sup>170</sup> The Suspension Clause, which provides that habeas may be suspended *only when public safety requires it in times of rebellion or invasion*,<sup>171</sup> is the only limiting factor to a writ of habeas corpus.<sup>172</sup>

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Conventions of 1949, adopted in 1977 (Protocol I) . . . . [including] the “right to be tried in [one’s] presence.”).

164. *Id.*

165. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (suggesting, without deciding, that Congress can suspend habeas altogether if certain factors are present involving aliens detained outside the U.S.).

166. It must be noted that the current authors take some comfort in the recognition by the Court that Congress has taken care to avoid suspending the writ of habeas corpus, and that we have confidence that the mishandling of the Guantanamo detainees up to date will strengthen this prudence in the future. *See, e.g., id.* at 2263-66. In addition, the Court’s focus on adequate alternatives to habeas corpus, if Congress is to litigate to that effect, provides some confidence that the Court is concerned with detainees’ rights, even if suspected of crimes as heinous as terrorism. *Id.* at 2240, 2269.

167. *Id.* at 2241.

168. *Id.* at 2240-41.

169. *Id.* at 2241.

170. *Id.* at 2266 (citing *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

171. *Id.* at 2246; *see also id.* at 2247 (holding “In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”).

172. *Id.* at 2246 (citing U.S. CONST., art. I, § 9, cl. 2).

In the wake of *Hamdan v. Rumsfeld*, Congress amended the Military Commissions Act of 2006 to more clearly deny jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants.<sup>173</sup> Nevertheless, the Supreme Court held that the petitioners had a constitutional privilege of habeas corpus, which was not precluded by either their designation as enemy combatant, or their presence at Guantanamo (a quasi-sovereign U.S. territory).<sup>174</sup> The Court rejected the Government's contention that *de jure* sovereignty is the "touchstone of habeas jurisdiction," finding it to be "contrary to fundamental separation-of-powers principles."<sup>175</sup> The Court found that the government presented "no credible arguments that the military mission at Guantanamo would be compromised if habeas courts had jurisdiction."<sup>176</sup> The Court averred:

[T]here is considerable risk of error in the tribunal's findings of fact . . . . And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore . . . for the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors . . . to assess the sufficiency of the Government's evidence . . . and to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.<sup>177</sup>

Again, despite the apparent due process victory, the Court's holding has limitations. First, the Court stated that its holding should not imply that a habeas court should intervene, except in situations of undue delay and after the CSRT has had opportunity to review the "enemy combatant" status determination.<sup>178</sup> More importantly, the Court suggested that Congress could deny the habeas privilege if it acted in accordance with the Suspension Clause's requirements.<sup>179</sup>

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173. *Id.* at 2234.

174. *Id.* at 2262, 2270, 2274.

175. *Boumediene*, 128 S. Ct. at 2253. The Syllabus in (iii) states: The Government's sovereignty-based test raises troubling separation-of-powers concerns, which are illustrated by Guantanamo's political history. Although the United States has maintained complete and uninterrupted control of Guantanamo for over 100 years, the Government's view is that the Constitution has no effect there, at least as to noncitizens, because the United States disclaimed formal sovereignty in its 1903 lease with Cuba. The Nation's basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). These concerns have particular bearing upon the Suspension Clause question here, for the habeas writ is itself an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 128 S. Ct. at 2236.

176. *Id.* at 2261.

177. *Id.* at 2270.

178. *See id.* at 2275-76.

179. *See id.* at 2261-62 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). The Court articulated three relevant factors in determining the reach of the Suspension Clause: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 2259.

The present authors wish to highlight the potential risk of Congress sidestepping due process guarantees under habeas corpus, but must also acknowledge the Court's focus on "adequate and effective substitute[s]" for the habeas writ.<sup>180</sup> The Court found that MCA § 7 failed to meet the prerequisites for constitutionality, based on its due process deficiencies.<sup>181</sup> Hopefully this also gives reason to have faith in such a future determination being made, if and when necessary. In this light, the Court's rhetoric in *Boumediene* is worth repeating:

Security subsists, too, in fidelity to freedom's first principles . . . freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.<sup>182</sup>

As seen throughout this section, these words appear to be more rhetoric than reality. Nevertheless, this rhetoric will hopefully guide the policies of the U.S. government, as well as the judiciary, moving forward. If this does not happen, the consequences will continue to sap U.S. rule of law commitments and ultimately, the credibility of the U.S. judiciary itself.

### III. LEGAL POLICY PROBLEMS WITH U.S. LITIGATION RESULTS

The Bush administration's "war on terror" has evoked scathing criticism from the international community, including states, international jurists, human rights monitoring bodies and special *rapporteurs*, journalists, the world's citizenry, and more.<sup>183</sup> Many of the programs implemented in the wake of September 11 have proven not only to be illegal, but to violate some of international law's (and U.S. constitutional law's) most fundamental tenets, including violations of *jus cogens* norms such as the prohibition on torture. Of further concern to the present authors, however, is the apparent complicity in the illegal actions by American courts. Despite good reason to find fault in the illegal extraordinary renditions, warrantless-wiretapping, and unlawful detentions, and thus good reason to give redress to the injured plaintiffs, the courts have refused to implement the laws meant to protect those most vulnerable to the abuses of illegal government tactics – the people. This section highlights some of the fundamental legal policy problems with the U.S. litigation results.

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180. *See, e.g., id.* at 2275.

181. *See id.* at 2266-71.

182. *Id.* at 2277 (holding "[i]t is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.").

183. *E.g.,* Jordan J. Paust, *The Changing Laws of War: Do We Need A New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1335, 1340-42 (2004) (criticizing the Bush Administration's legal responses to, and characterization of, the new paradigm as a literal "War on Terror"); Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 853 (2004) (highlighting the concerns arising from the use of "stress and duress" interrogation styles); *see generally* DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007); DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); JOE CONASON, *IT CAN HAPPEN HERE: AUTHORITARIAN PERIL IN THE AGE OF BUSH* (2007); THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM (Richard C. Leone & Greg Anrig, Jr., eds., 2003).

*A. Inconsistent With Human Rights & Sound National Security Law Principles*

Human rights and security go hand in hand. The primary purpose of human rights law is to promote and protect human dignity,<sup>184</sup> as well as “life, liberty and security of person.”<sup>185</sup> Likewise, good national security policies are meant to protect not only the physical integrity of the state, but also the core values around which a nation is built. In the United States, these core values purportedly include “justice,” “domestic tranquility,” “common defense,” and the “general welfare.”<sup>186</sup> Any one of these values should not come at the expense of the others. In other words, “justice” and the “general welfare” of U.S. citizens should not be sacrificed at the expense of searching for a “common defense” against international terrorism. Likewise, fundamental human rights for *all*, which the U.S. has committed itself to upholding,<sup>187</sup> should also not be forgotten while searching for ways to increase domestic tranquility. If they are, then the “war” on terror is already lost because we have, by our own accord, transgressed our own national values – the very thing we are fighting so hard to preserve.

Although illustrated in the context of U.S. national values, this rationale transfers throughout the international community, which has also ostensibly committed itself to the preservation of human rights and the maintenance of international peace and security.<sup>188</sup> In the words of Gabor Rona, “[t]he governments, including the United States, that laboriously negotiated the details, including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Political and Civil Rights (ICCPR), surely understood that they were enhancing human security by establishing principles and rules to protect human dignity and liberty.”<sup>189</sup>

Common sense dictates that in the modern world, sound national security policy is underscored by a nation’s relationship with the international community as a whole. The more nations that are willing to come to a country’s aid, the more secure that country will be. This is especially true when fighting a battle in which the web of the enemy weaves itself throughout the entire globe. By flouting the rule of law, especially by transgressing upon the sovereignty of its allies, the U.S. has not increased its security.<sup>190</sup> In fact, there is no evidence that we are any safer from terrorism today than we were on September 12, 2001. However, to the contrary, many security experts believe that the U.S. has actually weakened its

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184. Gabor Rona, *Legal Issues in the “War on Terrorism” – Reflections on the Conversation Between Silja N.U. Voneky and John Bellinger*, 9 GERMAN L. J. 711, 713 (2008); see also International Covenant on Civil and Political Rights, pmbl., Dec. 19, 1966, S. TREATY DOC NO. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, at pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N.Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

185. UDHR, *supra* note 184, art. 3.

186. U.S. CONST. pmbl.

187. ICCPR, *supra* note 184, at pmbl.

188. U.N. Charter, pmbl., art. 1.

189. Rona, *supra* note 184, at 713.

190. Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1446 (2008) (stating “[t]o allow the Executive Branch to engage in extraordinary rendition and torture serves to recruit terrorists and spread hate against the United States.”).

security by compromising its moral high ground and international respect.<sup>191</sup> By foreclosing the possibility of judicial review and redress to those whom are entitled to state protection of their basic human rights, U.S. courts have plainly contributed to this quagmire.

*B. Mistaken View Of Human Rights Law Applicability To U.S. Anti-Terrorism Activities*<sup>192</sup>

One of the most controversial aspects of the U.S. approach to terrorism is the mystifying classification system employed to both those captured on the "battlefield" and those captured outside of armed conflict. Most captured on the battlefield in Afghanistan have been denied POW status,<sup>193</sup> as required by the Third Geneva Convention.<sup>194</sup> At the same time, those captured outside armed conflict have often been dubbed "enemy combatants,"<sup>195</sup> given neither the protections due to citizens or soldiers under international law. The Bush administration seemed to believe that only international laws of war govern overseas anti-terrorism activity, to the exclusion of international human rights laws and organizations that apply them.<sup>196</sup> In some instances, the Bush administration went so far as to purport that neither humanitarian law nor human rights laws apply to the war on terrorism, thereby creating a "legal accountability vacuum."<sup>197</sup> How far these beliefs pervade the current administration is yet to be seen. However, no legal authority appears to support such mutual exclusivity, while much authority appears to support the contrary position.<sup>198</sup>

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191. See, e.g., *id.* at 1417 (stating "The existence of torture creates a climate of fear and international insecurity that affects all people," citing the Torture Victims Relief Act, Pub. L. No. 105-320, 112 Stat. 3016 (1998) (codified at 22 U.S.C. § 2152)).

192. Philip Alston, Jason Morgan-Foster & William Abresch, *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror,"* 19 EUR. J. INT'L L. 183 (2008) [hereinafter Alston].

193. One argument posed is that terrorists do not follow the laws of war, and therefore they are not entitled to POW protection. However, the violations by some soldiers cannot serve to disqualify all members of the fighting forces. "Were that the case, no U.S. military personnel would ever qualify for POW status, so long as some 'special forces' operated out of uniform or some soldiers abused detainees, especially if done systematically, i.e., pursuant to policy." Rona, *supra* note 184, at 717.

194. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 4, 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

195. Rona, *supra* note 184, at 723 (asserting that "[t]he term 'enemy combatant' appears nowhere in U.S. criminal law or international law, including the law of war.").

196. Alston, *supra* note 192, at 191.

197. *Id.* at 207, (citing Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007)).

198. *Id.* at 195-96 (citing the International Court of Justice Palestinian Wall opinion; the European Court of Human Rights Chechnya decision applying the European Convention to that conflict; the UN Human Rights Committee and the Commission on Human Rights interpretations of jurisdiction; the African Commission on Human Rights application of the African Charter to the Chad conflict; the Inter-American Commission on Human Rights American Convention application to the El Salvador conflict; and International Committee of the Red Cross citations to UN Security Council and General Assembly condemnations of human rights abuses in various conflicts).

Even accepting the controversial proposition that international humanitarian law should *primarily* govern the “war” on terror,<sup>199</sup> in order to carry on its refusal to apply human rights protections, the U.S. has ignored the findings of numerous authoritative international bodies.<sup>200</sup> In *Nuclear Weapons, Armed Activities*, and the *Wall Opinion*, for example, the International Court of Justice explicitly observed that the protections of the ICCPR do not cease in times of war or armed conflict.<sup>201</sup> Far from standing alone, these findings have been echoed by the international community through bodies such as the UN Security Council, the UN General Assembly, the UN Human Rights Committee, the UN Commission on Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights, the International Law Commission, and the International Committee of the Red Cross,<sup>202</sup> “all of which have found that humanitarian law and human rights law are complementary.”<sup>203</sup>

International human rights law may have been seen as an inconvenience to the Bush administration. However, as reiterated in *Hamdan*, these are “binding requirements” upon the United States.<sup>204</sup> The willingness to abandon these values and laws has been very disturbing, especially because for so long the United States has viewed itself as setting the bar for how human rights should be protected *for all people*. In fact, the U.S. has played an integral part in catalyzing the human rights regime as it now stands.<sup>205</sup> Perhaps this is also why the Bush tactics were so disconcerting for the rest of the world – indeed, if the United States, which is overtly committed to these international ideals, can flout them so easily, what is in store for the rest of the world?

The primary question presented by this section is one of accountability. If the U.S. government is to flout its international obligations and even the will of its people, what is the recourse? The U.S. has strategically constructed its geopolitical positioning as to be minimally accountable before international bodies. The election process (arguably a process of accountability) hardly seems sufficient for serious crimes such as torture, especially when implemented as a policy. Thus, it appears the sole remaining recourse is the U.S. court system. Yet if U.S. courts will not maintain the balance of power outlined in the Constitution and solidified

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199. Undoubtedly, some of the “war on terror” involves true armed conflict, as envisioned by the Geneva Conventions and other war law regimes. However, to conclude that all aspects invoke humanitarian law, especially to the exclusion of human rights law, is simply erroneous.

200. Alston, *supra* note 192, at 192.

201. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 240 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. (Dec. 19) *available at* <http://www.icj-cij.org/docket/files/116/10455.pdf>.

202. Alston, *supra* note 192, at 194.

203. *Id.* at 192.

204. *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

205. Rona, *supra* note 184, at 713.

in *Marbury v. Madison*,<sup>206</sup> it appears that little recourse will be had for the victims of illegal acts inflicted upon them from the war on terror.

*C. Undermining Of Family Law Rights & Values Through Alien Detentions*<sup>207</sup>

The abusive human rights practices underlying the war on terror have not only adversely affected those suspected of being terrorists or having connections with terrorists, but have also significantly impacted the population most vulnerable within U.S. borders – immigrants. Once viewed as *the* land of opportunity, the U.S. has increasingly clamped the funnel of immigration, with its practices posing an ever-increasing threat to the respect for and promotion of human dignity of those seeking new life and opportunity in America. The manner in which the “problem” of illegal immigration has been focused has led to prejudice, hatred, and blatant racial discrimination. Moreover, behind-the-scenes images of how the government is dealing with aliens paint a picture of arbitrary detention, cruel treatment, and injustice.<sup>208</sup>

Coinciding with the inception of the war on terror has been a marked increase in immigrant detention. In just one decade, the number of detainees has more than tripled, with evidence pointing to increasing numbers in the future.<sup>209</sup> Included among these numbers are increased detentions of entire families, including children,<sup>210</sup> as well as refugees and asylum seekers.<sup>211</sup> What is most disquieting about this trend is the accompanying poor treatment of those detained.

First, detainees are afforded insufficient procedural rights, leading to an inability to defend their cases successfully.<sup>212</sup> These deficiencies include a lack of access to witnesses and documentary evidence, decreased legal orientations, lack of access to counsel, and insufficient contact with friends and family members on the outside who may be able to assist in the process.<sup>213</sup> All of this led the Human Rights Committee to express its concern that aliens in the U.S. receive lower standard of due process than in other developed countries.<sup>214</sup> The lack of process poses a particular problem for asylum seekers, who now not only face serious

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206. See *Marbury v. Madison*, 5 U.S. 137 (1803).

207. Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through the Human Rights Framework*, 22 GEO. IMMIGR. L.J. 147, 154-55 (2008) (citing UDHR, ICCPR, American Declaration and UN Rights of the Child Convention violations).

208. See generally Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, April 9, 2009, available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

209. Brané & Lundholm, *supra* note 207, at 147.

210. *Id.* at 148.

211. *Id.* at 150 (noting “[t]he practice of detaining refugees is not confined to the United States; it has become a global phenomenon, particularly in recent years.”).

212. *Id.* at 158.

213. *Id.* at 159-60.

214. U.N. Human Rights Committee, Consideration of reports submitted by states parties under article 40 of the covenant, Concluding observations of the Human Rights Committee, ¶ 18, CCPR/C/USA/CO/3 (Sept. 16, 2006) [hereinafter 2006 Human Rights Committee Report on U.S.].

mistreatment if returned to their native country, but also here in the United States.<sup>215</sup>

Beyond due process deficiencies, the conditions of alien detention themselves appear to often infringe upon both U.S. and international human rights guarantees.<sup>216</sup> Detentions are often arbitrary and/or unnecessary, as exemplified above in the case of *Sissoko*. They also frequently include inadequate facilities and treatment for those detained, as well as seclusion from the outside world, including family. Moreover, there is inadequate cultural training for detention staff, and little focus on meeting international human rights standards. At the extreme, some detentions may violate prohibitions on torture or cruel, inhuman, or degrading treatment, as embodied in the U.S. Constitution<sup>217</sup> and international law.<sup>218</sup>

International law requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity for the human person.”<sup>219</sup> It also gives “special protection” to families and children,<sup>220</sup> through, for example, the Universal Declaration of Human Rights,<sup>221</sup> International Covenant on Civil and Political Rights,<sup>222</sup> the American Declaration on the Rights and Duties of Man,<sup>223</sup> and the Convention on the Rights of the Child.<sup>224</sup> Similarly, the family unit is often touted as a core value in the United States.

Nevertheless, even though ICE has specific Detention Standards in place, evidence points to the undermining of these international protections and family values.<sup>225</sup> There is inadequate training of detention center staff, limited resources,

215. Brané & Lundholm, *supra* note 207, at 160.

216. *Id.*

217. U.S. CONST. amend. VIII.

218. *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, [hereinafter CAT]; ICCPR, *supra* note 184, art. 7.

219. Brané & Lundholm, *supra* note 207, at 161 (citing ICCPR, *supra* note 184, art. 10).

220. *Id.* (citing GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 249 (2d ed. 1996)).

221. “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” UDHR, *supra* note 184, ¶ 16.

222. Article 23 of the ICCPR states, “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” ICCPR, *supra* note 184, art. 23. Article 17 states, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” *Id.* art. 17.

223. American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, ¶¶ V-VII, OAS/Ser.L/V/1.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949), *available at* <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm> [hereinafter American Declaration].

224. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) [hereinafter CRC]. Article 10 states, “[a]pplications by a child or his or her parents to enter or leave a State Party for the purpose of family unification shall be dealt with by States Parties in a positive, humane and expeditious manner. States parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.” *Id.* art. 10.

225. Brané & Lundholm, *supra* note 207, at 161-62.

and a simple lack of willingness to afford “aliens” with the human dignity and respect that *all* people deserve.<sup>226</sup> The undermining of family values, supposedly at the core of American values, is unacceptable. With the recent change in the presidential administration, the new policies may afford more protection for these exposed populations. However, until this proves true, the courts again remain the sole recourse for maltreated detainees. To date, the legal process has proven inadequate, and if the U.S. courts continue along their current path, there is little hope for the full protection of human dignity.

*D. No Apparent Legal Basis For Rendition In The Face Of Strong Contrary Authority*<sup>227</sup>

The most criticized policy of the Bush administration is likely that of “extraordinary rendition.” “Extraordinary rendition” refers to the transfer of a detainee from one state to another for the purpose of interrogation, detention, mistreatment, and more likely than not torture or cruel, inhuman, or degrading treatment.<sup>228</sup> This differs from ordinary rendition, which involves the handing over of a prisoner to another country for the purpose of prosecution or other legitimate judicial purposes.<sup>229</sup> Although the latter has been accepted by the international community, and was employed often by the Clinton administration, extraordinary rendition “has been vociferously criticized in the United States and abroad as both unlawful and ill-conceived.”<sup>230</sup> As already alluded to above, the policy of extraordinary rendition was explicitly put in place by the Bush administration,<sup>231</sup> and has led to widespread and methodical abuses of human rights.<sup>232</sup>

The illegality of such a policy is clear under international law. In fact, international jurists have been able to point to numerous sources of law to support this reality.<sup>233</sup> These include, among others, the Convention Against Torture, the Geneva Conventions, including Common Article III, the ICCPR,<sup>234</sup> the UDHR,

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226. *See, e.g., id.* at 161-64.

227. *See, e.g., Fisher, supra* note 190, (discussing legal prohibitions against torture applicable to the U.S., as well as various treaty violations); Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007) (discussing extraordinary rendition as a violation of fundamental human rights law norms dating all the way back to Nuremberg).

228. COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 4 (2004), *available at* <http://www.nyuhr.org/docs/TortureByProxy.pdf> [hereinafter *Torture by Proxy*].

229. *See Fisher, supra* note 190, at 1406-07.

230. Sadat, *supra* note 227, at 1201.

231. *Id.* at 1204; *see also Fisher, supra* note 190, at 1420 (citing 151 Cong. Rec. E282 (daily ed. Feb. 18, 2005) (statement by Rep. Edward J. Markey)).

232. Sadat, *supra* note 227, at 1220 (saying “[i]nformation obtained by human rights groups and news sources on the practice of extraordinary rendition indicate that the countries to which individuals have been transferred include Egypt, Syria, Saudi Arabia, Pakistan, and Uzbekistan, each of which has been cited by the State Department Country Reports on Human Rights Practices as engaging in torture.”) (citations omitted).

233. *See generally id.*

234. *Id.* at 1223.

and the findings of the Courts and Committees entrusted with the responsibility of interpreting these documents (e.g., the Inter-American Court and Human Rights Committee).<sup>235</sup>

Accordingly, the European Union Parliamentary Committee has called the rendition program “criminal” and “illegal,”<sup>236</sup> and “the Human Rights Committee issued a report in 2006 stating that the “[United States] should immediately cease its practice of secret detention and close all secret detention facilities.”<sup>237</sup> Moreover, and perhaps more importantly (for international diplomacy at least), European leaders were offended by the tactics of the U.S., as well as its response when Europe addressed concerns about the policy and use of European territory to facilitate the renditions.<sup>238</sup> According to one British member of the European Parliament, Bush “has now left the Europeans high and dry.”<sup>239</sup>

On the other side of the equation, U.S. government lawyers who have tried to justify the actions of Bush’s “war on terror” have been unable to point to any substantial legal authority that would even cause hesitation in declaring the program unlawful.<sup>240</sup> The thrust of the arguments consists of narrowing the applicable legal restraints on U.S. actions, and in arguing that the President is virtually unconstrained when acting as “Commander in Chief during a war.”<sup>241</sup> As Professor Sadat points out, “[w]here international sources are cited, their use has been highly selective and often misleading.”<sup>242</sup> As a result, it is commonly accepted that the policy of extraordinary rendition is unlawful. As seen above in Section I, by looking at the outcome of U.S. litigation, one reasonably questions whether the U.S. Government believes this.

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235. *See generally id.*

236. *Id.* at 1204. Eur. Parl. Ass., Comm. on Legal Aff. and Hum. Rts., *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, Doc. No. ajdoc16 Part II, at 6, 34 (2006), available at [http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf).

237. Sadat, *supra* note 227, at 1224 (citing 2006 Human Rights Committee Report on U.S., *supra* note 214, ¶ 12).

238. *See Fisher, supra* note 190, at 1429-31.

239. *Id.* at 1433 (citing Kevin Sullivan, *Detainee Decision Greeted Skeptically*, WASH. POST, Sept. 7, 2006, at A17 (quoting Sarah Ludford)).

240. *See, e.g., Sadat, supra* note 227, at 1210.

241. *Id.* (citing John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1221-22 (2004)).

242. *Id.* (noting “a recent article by John Yoo purporting to elucidate the meaning of the Geneva and Torture Conventions contains no references to the jurisprudence of the Inter-American Court of Human Rights on the question of rendition, the opinions of the International Criminal Tribunals for the former Yugoslavia and Rwanda (which have extensively interpreted the Geneva and Torture Conventions), the case law of the International Court of Justice, or even the practice of the United Nations.”).

*E. Increasing U.S. Public Objections To Clandestine U.S. Human Rights Abuses, Resulting In More Congressional Oversight*<sup>243</sup>

The clandestine element of the “war on terror,” which has led to the human rights abuses discussed throughout this study, has increasingly met with public objection and indignation. The election of Barack Obama, upon his platform for “change,” speaks most loudly to the discontent of the American people with the previous Bush policies. Because the policies of torture and “extraordinary rendition” proved unacceptable to the majority of the U.S. population, in addition to the international community, Congress began imposing more oversight on executive actions, and arguably fought for a more transparent system.<sup>244</sup>

Transparency is commonly accepted as central to true democratic legitimacy, which incorporates dedication to the rule of law. Accordingly, to supplement the Constitution, the U.S. Congress enacted legislation such as the Freedom of Information Act and the Official Secrets Act.<sup>245</sup> These safeguards were prompted in large part because of the repercussions of Watergate,<sup>246</sup> which included diminished respect for and faith in both the presidential office as well as government as a whole. In similar fashion, both the American public and Congress<sup>247</sup> have called for more accountability for the clandestine abuses that shamed the U.S. in Abu Ghraib and continue in Guantanamo.

According to Professor Kreimer, “[t]ransparency can potentially discipline an overreaching Executive before, during, or after the fact.”<sup>248</sup> However, in 2001, the Bush administration stopped reporting on those individuals that it detained and interrogated.<sup>249</sup> Consequently, the American public had no way to evaluate the legitimacy of its “representative’s” actions. It was left in the dark in a manner not dissimilar to the victims of the illegal detentions. Although Congressional representatives, lawyers, and a handful of judges tried to fight the secrecy of the executive, it took years for the Bush administration to let up on its blanket policy of secrecy and non-disclosure.<sup>250</sup> To date, the true extent of the Bush

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243. See generally Seth Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141 (2007) (sharply criticizing U.S. executive branch secret human rights abuses conducted in the name of the war on terror).

244. See generally *id.*

245. *Id.* at 1145 (citing Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (“The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect . . . . The Constitution, in other words, establishes the contest, not its resolution.”)).

246. *Id.* at 1146.

247. Sadat, *supra* note 227, at 1243 (discussing the Detainee Treatment Act of 2005). However, the Military Commissions Act of 2006 codified many of the Bush administration’s policies into federal law. *Id.*

248. Kreimer, *supra* note 243, at 1147.

249. *Id.* at 1149.

250. *Id.* at 1157.

administration's policies have not been disclosed, and the American public is still fighting for the truth.<sup>251</sup>

"Democracies die behind closed doors."<sup>252</sup> These prophetic words written by Judge Keith of the Sixth Circuit Court of Appeals should remind us that the U.S. was built on a fundamental belief that the people should be free from the tyranny of abusive government. In examining the plight of non-citizens labeled "suspect class," which gave the government the power to secretly deport persons unilaterally, Judge Keith noted that "[t]he Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door."<sup>253</sup> The same can be said of many of the policies of the "war on terror." Although claiming that the war is being conducted on behalf of the people, the Bush administration gave little thought to the effects of its policies on the very people it claimed to protect. Judge Keith called the government to account, but the court decisions described herein paint a different picture – one in which the courts are effectively complicit in shielding information from the public. This is patently contradictory to democratic principles.

*F. Inconsistency With U.S. Allies' Approaches To War On Terror Based On International Law Norms Applications*<sup>254</sup>

The United States is not the only nation engaged in the "war on terror." However, the U.S. has received the largest amount of criticism. This could be because the U.S. initiated the war, or perhaps because the U.S. displays the greatest characteristics of a hegemonic power. The more likely explanation, however, is that the U.S. has failed in ways other countries have not, including its closest allies. Although the Bush administration considered international human rights norms and due process requirements as merely a hindrance to the fight against terrorism,<sup>255</sup> U.S. allies were searching for ways to balance the two, not considering them as mutually independent. The present authors do not want to overstate other countries' commitment to human rights preservation throughout the "war on terror," as these countries have likewise failed at times to keep this commitment. However, the U.S. proved all too willing throughout the Bush administration to acknowledge or heed criticism and change course when its tactics began to appear counterproductive, whereas even the U.K., the U.S.'s closest ally, altered its course.<sup>256</sup> Important in the process, at least in Europe, was that the courts intervened when human rights were abused and due process procedures circumvented (discussed more fully below in Section IV).<sup>257</sup>

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251. Editorial, *A Truth Commission for the Bush Era?*, N.Y. TIMES, March 2, 2009.

252. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

253. *Id.*

254. See generally Shane Darcy, *Human Rights Protection During the "War on Terror": Two Steps Back, One Step Forward*, 16 MINN. J. INT'L L. 353 (2007) (discussing the ICCPR, the European Convention on Human Rights, and the application of human rights laws to anti-terrorism activity).

255. *Id.* at 353.

256. *Id.* at 358.

257. See, e.g., *Al-Skeini v. Sec'y of State for Def.*, [2005] W.L.R. 1401, 1406 (Q.B.D.).

Litigation taking place within Europe, which has been based in large part upon the U.K. Human Rights Act of 1998 and the European Convention on Human Rights, has shown the “resilience” of the human rights framework laid down in the UDHR and ICCPR.<sup>258</sup> Not only have European courts held Europe’s nations responsible for the protection of human rights within sovereign borders, but they have also required countries to uphold their treaty and customary law obligations beyond reified borders when those countries maintain “effective control” over the conduct.<sup>259</sup> The Bush Department of Defense declared its view that the ICCPR “does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.”<sup>260</sup> This claim is clearly wrong and unlawful. However, unlike European courts, U.S. courts have been loathe to grant redress to those subject to abuse as a result of this misconceived policy – a policy that not only distorts fundamentals of justice and human rights, but that also seems unwise for the furtherance of promoting national security.

#### IV. THE EUROPEAN HUMAN RIGHTS LAW APPROACH: A BETTER WAY?

The authors strongly urge readers to consider how European courts have proven to be up to the challenge of applying basic rule of law principles to war on terror cases similar to those seen in the U.S. court cases discussed above. From a rule of law perspective, the U.S. judicial system can see much across the Atlantic to guide their handling of these cases here.

##### *A. Neither Rendition Nor Other Removal Of Suspected Terrorists Are Allowed Absent Guaranteed Protections Of Their Human Rights*<sup>261</sup>

*Saadi v. Italy* presented the European Court of Human Rights (ECHR) with the question of whether states can *refoule* (return) a person to another state where there is a substantial likelihood of torture and other ill treatment. Saadi, a Tunisian national who was lawfully residing in Italy, was tried on terrorism-related grounds and convicted of criminal conspiracy (in lieu of “international terrorism”).<sup>262</sup> The Assize Court of Italy found that although there was reason to believe that Saadi had fundamentalist ties and objectives, there was insufficient evidence to prove that he would turn those objectives into violent action “covered by the definition of a terrorist act.”<sup>263</sup> In due course, Saadi was sentenced to four years in prison and subsequent deportation in 2002.<sup>264</sup> Simultaneously, while Saadi was in jail, a Tunisian military court sentenced him in absentia to twenty year’s imprisonment

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258. See Darcy, *supra* note 254, at 368-69.

259. See generally *id.* “The United Kingdom courts have recently joined the ranks of those upholding the application of human rights obligations overseas during conflict.” *Id.* at 358.

260. *Id.* at 356 (citing Working Group Report on Detainee Interrogations in the Global War on Terrorism; Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), available at <http://www.globalpolicy.org/empire/un/2004/mar03torturememotext.htm>).

261. E.g., *Saadi v. Italy*, Eur. Ct. H.R. App. No. 37201/06 (2008).

262. *Id.* ¶ 14.

263. *Id.* ¶ 21.

264. *Id.* ¶¶ 14-15.

for membership in a terrorist organization.<sup>265</sup> In 2006, upon Saadi's release, he was ordered deported to Tunisia.<sup>266</sup>

As a result, Saadi requested political asylum,<sup>267</sup> and ultimately alleged that enforcement of the deportation decision would expose him to the serious risk of being subjected to treatment contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).<sup>268</sup> The Article, which prohibits exposure to torture and other inhuman and degrading treatment, emulates Article 7 of the ICCPR and Article 3 of the Torture Convention.<sup>269</sup> Saadi relied upon country reports issued by Amnesty International,<sup>270</sup> Human Rights Watch,<sup>271</sup> and the U.S. State Department<sup>272</sup> to support the contention that there was serious risk that he would be subjected to torture and incommunicado detention, as well as unfair trial procedures, including falsified police reports, lack of legal counsel, and forced confessions.

The ECHR ultimately found in Saadi's favor, relying on the sources described above. In doing so, the Court first found that "substantial grounds" of a "real risk" of being subjected to torture or other cruel, inhuman, or degrading treatment is sufficient to invoke Article 3.<sup>273</sup> Most notably, the Court concluded that there is no place for balancing the risks presented to the extraditing community against the *absolute* nature of the prohibitions against torture and CIDT.<sup>274</sup> The Court patently recognized the "immense difficulties in modern times [for countries] in protecting their communities from terrorist violence."<sup>275</sup> However, the Court noted:

The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. *Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not.* The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment [emphasis added] . . . .<sup>276</sup>

Ultimately, the Court held that absent sufficient assurances by the receiving country, deportation or extradition to such a country would invoke the responsibility of the sending state.<sup>277</sup> The Court went further in pointing out that even with assurances, a sending country must be certain that the detainee would be

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265. *Id.* ¶ 29.

266. *Id.* ¶ 32.

267. *Id.* ¶ 35.

268. *Id.* ¶ 3.

269. *Id.*

270. *Id.* ¶¶ 65-72.

271. *Id.* ¶¶ 73-79.

272. *Id.* ¶¶ 84-93.

273. *Id.* ¶ 140.

274. *Id.* ¶ 139.

275. *Id.* ¶ 137.

276. *Id.* ¶ 139. The Court further found that "[t]he weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time." *Id.* ¶ 148.

277. *Id.* ¶¶ 147-49.

protected against prohibited treatment.<sup>278</sup> Saadi was granted remuneration for costs and expenses.<sup>279</sup>

*B. No Military Judges Can Adjudicate Suspected Terrorists Because Of Fair Trial Concerns*<sup>280</sup>

*Kenar v. Turkey* originated with an application against Turkey under the Convention by Mr İbrahim Kenar, a Turkish national, on 18 September 2000.<sup>281</sup> Kenar claimed that he had not received a fair hearing by an “independent and impartial” judiciary, as is required by Article 6(1) of the Convention, because a military judge was sitting during his trial before the Istanbul State Security Court.<sup>282</sup> Again, the terms of the Convention mimic safeguards incorporated in ICCPR Article 14(1), Common Article 3 of the Geneva Conventions, and customary international law.

The Turkish government submitted that Kenar had been lawfully convicted by the court because the military judge had been replaced during the proceedings, and thus Kenar was convicted by three civilian judges.<sup>283</sup> However, the court found this argument unpersuasive and decided that *military courts should have no role over judicial determinations* and that the presence of a military judge, even if removed, makes the independence of the court questionable.<sup>284</sup> As a consequence, the court stated that the proper remedy was a retrial or reopening of the case.<sup>285</sup> Although the ECHR allows for pecuniary damages in such a situation, the court found a damages remedy inappropriate in this case for lack of evidence.<sup>286</sup>

*C. All Alleged Governmental Abuses Require “Effective Investigations”*<sup>287</sup>

The European Human Rights Convention requires “effective investigations” of *all* alleged abuses by government authorities (i.e. deaths, torture, and illegal detentions).<sup>288</sup> In comparison, as a general rule we see no such investigation priority in the United States. In fact, it has seemed fanciful even to imagine the Justice Department investigating the Pentagon or Central Intelligence Agency (CIA) in rendition cases, whether there are serious allegations of illegal detention

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278. *Id.* ¶ 148.

279. *Id.* ¶5 of holding.

280. *E.g.*, *Kenar v. Turkey*, Eur. Ct. H.R. App. No. 67215/01 (2007).

281. *Id.* ¶ 1.

282. *Id.* ¶ 31. Article 6(1) of the Convention reads as follows: “In the determination of . . . any criminal charge against him, everyone is entitled to a fair . . . hearing within a reasonable time by an independent and impartial tribunal established by law.” European Convention on Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

283. *Id.* ¶ 35.

284. *Id.* ¶ 37 (“The Court has consistently held that certain aspects of the status of military judges sitting as members of the state security courts rendered their independence from the executive questionable (see *İncal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68; and *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 39).”).

285. *Id.* ¶ 50.

286. *Id.* ¶ 48.

287. *E.g.*, *Askharova v Russia*, Eur. Ct. H.R. App. No. 13566/02 (2008).

288. *See, e.g., id.* ¶¶ 76-89 (citing ECHR, *supra* note 282, art. 2).

and torture or not.<sup>289</sup> The central issue, of course, is that if there are no investigations, let alone “effective,” “meaningful,” or “full” investigations, there are no means to protect individual and collective liberties owed to American citizens and aliens under the Constitution and international law. Cases will never proceed beyond complaint, let alone have a chance of seeing the courtroom.

Situations in which the ECHR has required “effective investigation” into the actions of public officials are far-reaching and diverse, despite the same concerns for national security seen within the United States. In *Askharova v Russia*, for example, the applicant alleged that her husband had “disappeared after being detained by servicemen in Chechnya.”<sup>290</sup> The facts mimic those seen *infra* in *Takhayeva v. Russia*, in which a group of armed men wearing masks invaded the Askharov home early in the morning, forcefully removing the Mr. Sharani Askharov by placing a bag over his head, and physically abusing him.<sup>291</sup> Several others detained at the same time were found dead or badly beaten, but Mr. Askharov was never to be heard from again.<sup>292</sup>

The Court reiterated that Article 2 of the Convention required the Court to subject deprivations of life to “the most careful scrutiny,” noting the particular vulnerability of those detained at the hands of State agents.<sup>293</sup> The Court also focused on the combination of the obligation to protect life under Article 2 with the State’s duty under Article 1 to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention,” which lead the Court to conclude that there must always be some form of “effective official investigation.”<sup>294</sup> According to the Court, the essential purpose of such investigations is to 1) protect the right to life and security, and 2) ensure *accountability* of public officials.<sup>295</sup>

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289. With the inauguration of the new Obama Administration, this appears to be changing. How far it will go again remains to be seen.

290. *Id.* ¶ 3.

291. *Id.* ¶¶ 8-9.

292. *Id.* ¶¶ 7-18.

293. *Id.* ¶ 61 (noting “[t]he Court reiterates that, in the light of the importance of the protection afforded by Article 2, it must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter (see, among other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002, and the authorities cited therein).” Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV).”).

294. *Id.* ¶ 78.

295. *Id.* (holding “This investigation should be independent, accessible to the victim’s family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109,

In this case, the Court noted that the authorities were made aware of the crime shortly after the events, but that the investigation was not opened until five months later,<sup>296</sup> that there were significant delays in crucial steps of the investigation,<sup>297</sup> that essential steps, such as investigation of the crime scene to trace the vehicles implicated, had never been taken,<sup>298</sup> that authorities did not uphold their obligation to exercise “exemplary diligence and promptness in dealing with such a serious crime”,<sup>299</sup> that the applicant was not informed of significant developments; that investigators failed to ensure the investigation received the required level of public scrutiny, and to “safeguard the interests of the next of kin in the proceedings”,<sup>300</sup> that the investigation was adjourned and resumed several times,<sup>301</sup> and that, based on the foregoing, the applicants could not have effectively challenged the inadequate investigation before a court.<sup>302</sup> Consequently, the Court found that the investigation was ineffective<sup>303</sup> and that Ms. Askharova was to be given reparations.<sup>304</sup>

Similarly, in *Mehmet Eren v. Turkey*, where a reporter was detained and subjected to ill treatment, including allegations of torture and threats of rape,<sup>305</sup> the Court found that an investigation was not effective when the only step taken was to obtain statements from Eren and his representative, and when the prosecutor delayed even those minimum steps for 20 months after the complaint.<sup>306</sup> The Court reaffirmed that “the rights enshrined in the Convention are practical and effective, and not theoretical and illusory,” and that, therefore, in cases of ill treatment, an effective investigation must be conducted in such a manner as could lead to “identification and punishment of those responsible.”<sup>307</sup>

Likewise, *Jasar v. The Former Yugoslav Republic of Macedonia* illustrates the Court’s commitment to ensuring accountability of government officials by insisting on effective investigations.<sup>308</sup> Again, the applicant was subject to mistreatment at the hands of State officials, this time police, which allegedly left him in a situation with “no effective remedy against the prosecutor’s inactivity” because of a lack of effective investigation.<sup>309</sup> The Court reiterated the importance of effective investigations, which are capable of leading to the identification and

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4 May 2001, and *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002”).

296. *Id.* ¶ 80.

297. *Id.* ¶¶ 81-82.

298. *Id.* ¶ 83.

299. *Id.* ¶ 84.

300. *Id.* ¶ 85.

301. *Id.* ¶ 86.

302. *Id.* ¶ 88.

303. *Id.* ¶ 87.

304. *Id.* ¶ 11 of holding.

305. *Mehmet Eren v. Turkey*, Eur. Ct. H.R. App. No. 32347/02, ¶¶ 5, 8, 14 (2008).

306. *Id.* ¶¶ 53, 55-56.

307. *Id.* ¶ 50 (citing *Nevruz Koç v. Turkey*, App. No. 18207/03, § 53, 12 (2007)).

308. *Jasar v. The Former Yugoslav Republic of Macedonia*, Eur. Ct. H.R. App. No. 69908/01 (2007).

309. *Id.* ¶ 3.

punishment of the perpetrators.<sup>310</sup> Importantly, the Court noted the essential link between effective investigation and the prevention of torture, cruel, inhuman, and degrading treatment, stating that without effective investigation “the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be *ineffective in practice* and it would be possible in some cases for agents of the State to abuse the rights of those within their control with *virtual impunity* (emphasis added).”<sup>311</sup>

These cases are only a sampling of the demonstrated commitment to “accountability” and the “effective” and “practical” application seen in Europe of the prohibitions on torture and cruel, inhuman, and degrading treatment. Europe faces the same threats of terrorism that plague the U.S., perhaps even more so. Nevertheless, the ECHR has applied these fundamental principles in all member countries and in all circumstances.

*D. All Detainees’ Injuries & Other Physical Abuses Require Full Investigations*<sup>312</sup>

*Koçak v. Turkey* also originated with alleged violations under the Convention, particularly Articles 3, 6(1), and 6(3)(c).<sup>313</sup> Under allegations of terrorism, the Istanbul Security Directorate detained Memet Koçak, a Turkish national, between December 12 and 27, 1993.<sup>314</sup> Koçak alleged that throughout detention he was subject to gross mistreatment and torture. The complaint alleged:

[H]e was blindfolded and forced to listen to the cries of other detainees being tortured. He was threatened with torture and forced to admit that he was a member of the PKK. When he refused to do so, he was stripped naked, immersed in cold water and beaten with a truncheon on various parts of his body, including the soles of his feet. He was then forced to walk on a salt-strewn floor. His hands were tied with a blanket, he was strung up by his arms and subjected to a form of torture known as “Palestinian hanging”. In this position, electric shocks were administered to his genitals, his fingers and feet. He was subsequently coerced into signing a statement, of which he only signed the first two pages. During his detention in police custody the applicant was kept in a cell, deprived of food and water and prevented from sleeping.<sup>315</sup>

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310. *Id.* ¶¶ 55-56 (holding “[t]he investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (citations omitted).”).

311. *Id.* ¶ 55.

312. *E.g.*, *Koçak v. Turkey*, Eur. Ct. H.R. App. No. 32581/96 (2007).

313. *Id.* ¶¶ 1, 3.

314. *Id.* ¶ 13.

315. *Id.*

Subsequent to detainment, Koçak was examined by the Forensic Medicine Institute, which found serious injuries all over Koçak's body.<sup>316</sup>

As a result, Koçak complained that he had been denied the right to legal assistance during investigatory stages of the proceedings, pursuant to Article 6 of the Convention, and subjected to torture, inhuman, and degrading treatment, pursuant to Article 3 of the Convention.<sup>317</sup> The first claim was dismissed.<sup>318</sup> However, the Court found in Koçak's favor regarding the maltreatment. The Turkish government claimed that Koçak's allegations were unsubstantiated and meant to dishonor the fight against terrorism.<sup>319</sup> The Court determined, however, that the government bore the burden of disproving mistreatment when a prisoner is taken into custody in good health but is found injured at the time of release, particularly when injuries are backed by medical reports.<sup>320</sup>

The focus of the Court was the fact that the events at issue were wholly within the exclusive control and knowledge of the authorities.<sup>321</sup> In such a situation, according to the Court, there is a strong presumption in favor of the plaintiff.<sup>322</sup> Based on the allegations described above, in combination with the strong inferences that can be drawn from the evidence, the Court found that Koçak was tortured.<sup>323</sup> Consequently, the Court awarded Koçak both non-pecuniary damages and costs.<sup>324</sup> Thus, while U.S. courts deny standing and apply the state secrets doctrine to preclude any possibility of discovery and/or trial for cases of serious abuse, European courts are invoking accountability for the abuses perpetrated at

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316. *Id.* ¶ 17 (noting “. . . presence of pain in the shoulders, the armpits and the neck, a yellow ecchymosis on the right armpit, an ecchymosis of 3x2 cm on the upper part of the right arm, widespread ecchymotic area and abrasions on both arms and wrists, hyperaemic lesions of 3x2 cm and 2x1 cm on the upper part of the right hand and on the left hand, widespread pain in the hands, widespread ecchymotic area of yellow colour on both gluteal regions on the back, ecchymotic area on the groin, pain in the testicles, pain during defecation, swollen area on the right leg and foot, a yellow ecchymosis and swollen area on the sole of the right foot, pain in the left leg, a yellow ecchymosis on the malleolar region, a yellow ecchymosis and swollen area on the sole of the left foot, several old wounds on both wrists and ankles . . .”).

317. *Id.* ¶¶ 32, 41.

318. *Id.* ¶ 40.

319. *Id.* ¶ 43.

320. *Id.* ¶ 44 (holding that upon failure to produce evidence to the contrary, “a clear issue arises under Article 3 of the Convention” (see *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 30, 8 January 2004; *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2278, § 61; and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34”).

321. *Id.* ¶ 45.

322. *Id.* (holding “the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).”).

323. *Id.* ¶ 48.

324. *Id.* ¶ 56; Article 41 of the Convention provides: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” ECHR, *supra* note 282, art. 41.

the hands of executive officials by putting the burden upon the government to discredit credible claims of torture and gross abuse.

*E. All Detainees' Alleged Mistreatment Claims Require Judicial Adjudication*<sup>325</sup>

*Atici v. Turkey* also involved the case of a Turkish national detained by Turkish government officials upon suspicion of terrorism. However, the facts of this case are somewhat unusual. In 1992, Atici was arrested by the anti-terrorism branch of the Istanbul Security Directorate on suspicion of his membership of the Dev-Sol (*the Revolutionary Left*).<sup>326</sup> He was detained, and along with sixteen co-accused, charged with membership in an illegal armed organization aimed and undermining the constitutional order of the Turkish state.<sup>327</sup> The prosecutor sought the death penalty for all accused.<sup>328</sup> Despite being arrested in 1992, it was not until 2004 that the case was transferred to the Istanbul Assize Court, where Atici was convicted and sentenced to life imprisonment.<sup>329</sup> The Court of Cassation quashed the judgment and remanded the case, where it was still pending at the time of this 2007 decision.<sup>330</sup> Thus, Atici was essentially in jail for over 14 years before having his case fully adjudicated.

Consequently, Atici brought a claim under Article 6(1) of the Convention for violation of the entitlement to “hearing within a reasonable time” requirement.<sup>331</sup> The Court had reason to suspect the guilt of the accused in this case; however, the ECHR upheld the rule of law and found that Atici was indeed deprived of his right to a speedy trial.<sup>332</sup> Because the Turkish government did not offer any evidence capable of discounting Atici’s claim, the Court found the case justiciable and found on behalf of Atici.<sup>333</sup> Again, based on the finding of wrongdoing, the Court awarded damages in the attempt to restore the wrong done.<sup>334</sup> In short, the *Atici* decision stands for the proposition that both the government and the courts have a responsibility to uphold the rights of its citizens, and when they do not, remedial redress must be given.

*F. Evidence Obtained By Torture Is Inadmissible In Any UK Judicial Proceeding*<sup>335</sup>

*A and others v. Secretary of State for the Home Department* is a landmark decision in the field of judicial oversight regarding torture.<sup>336</sup> The question

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325. *Atici v. Turkey*, Eur. Ct. H.R. App. No. 31540/02 (2007).

326. *Id.* ¶ 5.

327. *Id.* ¶ 7.

328. *Id.*

329. *Id.* ¶¶ 8-9.

330. *Id.* ¶ 10.

331. *Id.* ¶ 11.

332. *See id.* ¶ 17.

333. *See id.* ¶ 17, 21, 24-25.

334. *Id.* ¶¶ 19-25.

335. *E.g.*, *A v. Sec’y of State for Home Dept.* [2005] UKHL 71.

336. TOM FROST, LEGAL COMMENTARY ON THE USE OF TORTURE EVIDENCE, 15, Campaign Against the Criminalization of Communities (CAMPACC) (Jan. 2006), available at [http://www.campacc.org.uk/Library/legal\\_commentary\\_torture\\_evidence\\_220106.pdf](http://www.campacc.org.uk/Library/legal_commentary_torture_evidence_220106.pdf).

addressed by the House of Lords was whether evidence that has been procured by torture might be used in any judicial proceedings, even if the torture was not inflicted at the hands of state officials.<sup>337</sup> After giving thorough attention to the English Common Law, the Convention Against Torture, the European Convention on Human Rights, and general public international law, Lord Bingham came to the well-accepted conclusion that the prohibition of torture is a norm of *jus cogens*, from which no derogation is permitted, and imposes obligations *erga omnes*, which entail obligations owed towards the international community as a whole.<sup>338</sup> In due course, Lord Bingham, along with the entirety of the Appeals Court, found that evidence procured through torture is *never* admissible in any UK judicial proceeding.<sup>339</sup>

Although the judgment has particular application in the case of suspected terrorists in the UK, it has been acknowledged that its practical effects will extend much further, such as deportation proceedings, issuance of control orders, and depriving naturalized British persons of their UK citizenship.<sup>340</sup> The decision affects all levels of government within the UK and likely Europe. But it could go even further. The laws upon which the Lords rely are principles of general international law applicable, at a minimum, to those state parties to the CAT,<sup>341</sup> ECHR,<sup>342</sup> and ICCPR,<sup>343</sup> and arguably to all states by virtue of their customary status.<sup>344</sup> Therefore, the conclusions should logically transfer to the United States as well.

The question becomes of particular importance when considered in the context of the United States' "extraordinary rendition" program referred to herein. In each of these scenarios, the U.S. Government could make a claim that the torture and mistreatment has not been perpetrated by U.S. officials or on U.S. territory, and therefore any resulting evidence should not be precluded. However, applying the rationale of the Lords' decision, this argument should be rejected. The Lords opined that a contrary conclusion would "bring British justice into disrepute."<sup>345</sup> To note the same of the U.S. system is not much of a leap, as it has already received voluminous criticism. The Lords also relied heavily on the magnitude of international condemnation of torture and all its related evils. Indeed, to accept the fruits of torture does in effect condone the torture itself. Therefore, akin to the exclusionary principle applied by U.S. courts to Fourth

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337. A v. Sec'y of State for Home Dept., *supra* note 335, ¶1.

338. *Id.* ¶¶ 151, 153.

339. *See id.*

340. Frost, *supra* note 336, at 1 n.1 (noting "[t]his point was made in the House of Lords by Lord Brown, who accepted that this would be the most likely outcome of the judgment: [2005] UKHL 71, at ¶168.").

341. CAT, *supra* note 218, art 15.

342. ECHR, *supra* note 288, art. 3.

343. ICCPR, *supra* note 184, art. 7.

344. *See, e.g.*, UDHR, *supra* note 184, art. 5.

345. A v. Sec'y of State for Home Dept. [2005] UKHL 71, ¶ 165.

Amendment abuses, exclusion of all evidence accessed through torture, as well as full investigation into such charges, would further the system of justice.

*G. All Human Rights Law Violation Victims Must Have Meaningful Legal Relief*<sup>346</sup>

*Takhayeva v. Russia* presents on its facts a scenario that seems almost untouchable by the Courts – a situation of incommunicado detention in which the government acknowledges absolutely no involvement. Nevertheless, the ECHR did not shy away from the difficult questions presented. Instead, the Court confronted the circumstantial situation head on, forcing the government to account for its actions.

At approximately 3 a.m., November 13, 2002, five men in masks and armed with machine guns and grenades broke into the applicants' home in the Chechen village of Mesker-Yurt.<sup>347</sup> They threatened the residents, locked some of them in their rooms, beat the others, and ultimately kidnapped Ayub Takhayev, disappearing into the night never to be seen or heard from again.<sup>348</sup> The next morning, the applicants began inquiring to all possible official bodies in the attempt to locate their son.<sup>349</sup> After much prodding, they eventually convinced the prosecutor to open an investigation.<sup>350</sup>

Over the next nine months, despite continued pressure from the applicants, official investigations went nowhere. On September 19, 2003, the military prosecutor informed the applicants that there was no reason to believe that Russian federal troops had anything to do with the kidnapping.<sup>351</sup> For two years, despite inquiries, the applicants heard nothing, and on July 3, 2005, the investigation was suspended.<sup>352</sup> It was not resumed until May 8, 2007, and only then, *for the first time*, did investigators visit the applicants' house to question them.<sup>353</sup> Throughout this entire time, "despite specific requests by the Court, the Government did not disclose any documents from the investigation file."<sup>354</sup>

Despite the lack of cooperation from the Russian government, the applicants maintained that it was state agents that had kidnapped Ayub Takhayev. To support this contention, they referred to the fact that the armed men had moved around freely in APC vehicles, which were only in the possession of the military.<sup>355</sup> The abductors also spoke Russian without an accent, proving they were not of Chechen origin.<sup>356</sup> Finally, the applicants highlighted the government's unwillingness to submit the investigation file because it contained "information of a military nature

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346. *E.g.*, *Takhayeva v. Russia*, Eur. Ct. H.R. App. No. 23286/04 (2008).

347. *Id.* ¶ 9.

348. *Id.* ¶¶ 9-16, 110.

349. *Id.* ¶¶ 20-21.

350. *Id.* ¶ 22.

351. *Id.* ¶ 35.

352. *Id.* ¶ 38.

353. *Id.* ¶ 39.

354. *Id.* ¶ 48.

355. *Id.* ¶ 63.

356. *Id.* ¶.

disclosing the location and nature of actions by military and special security forces.<sup>357</sup>

The Court responded in a way that is unfamiliar to litigants seeking redress against the government in the United States – it gave the applicants the benefit of the doubt. It stated:

When, as in the instant case, the respondent Government have exclusive access to information able to corroborate or refute the applicants' allegations, any lack of cooperation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations.<sup>358</sup>

In short, the Court found that the evidence presented by the applicants established a *prima facie* case, which, because the Russian Government did not dispute the facts alleged, established that *state* servicemen kidnapped Ayub Takhayev.<sup>359</sup>

Accordingly, the Court found that the government had violated several fundamental human rights principles codified in the Convention, including Article 2, which states “[e]veryone’s right to life shall be protected by law”<sup>360</sup>; Article 3, which protects persons from torture, inhuman, and degrading treatment<sup>361</sup>; Article 5, which protects the right to liberty and security of person<sup>362</sup>; and Article 13, which affords effective remedies in respect of Convention violations.<sup>363</sup>

In assessing redress for the victims of this atrocious situation, the Court opined that “given the fundamental importance of the right to protection of life,” not only is compensation appropriate, but so is a thorough and effective investigation capable of leading to criminal punishment of the offenders.<sup>364</sup> In the end, the Court awarded remedial relief in the form of damages, noting that it was appropriate in certain circumstances to include compensation for loss of

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357. *Id.* .

358. *Id.* ¶ 65 (noting *Taniş and Others v. Turkey*, Eur. Ct. H.R. App. No. 65899/01, § 160 (2005)).

359. *Id.* ¶¶ 74-77.

360. *Id.* ¶ 86 (holding “The Court has already found it established that Ayub Takhayev must be presumed dead following his unacknowledged detention by State servicemen and that his death can be attributed to the State. In the absence of any justification in respect of the use of lethal force by State agents, the Court finds that there has been a violation of Article 2 in respect of Ayub Takhayev.”). The Court also noted that “investigators failed to ensure that the investigation received the required level of public scrutiny, or to safeguard the interests of the next of kin in the proceedings . . . and that, therefore, authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearance of Ayub Takhayev, in breach of art 2 in its procedural aspect.” *Id.* ¶¶ 94, 96.

361. *Id.* ¶ 103 (holding “In view of the above, the Court finds that the applicants have suffered distress and anguish as a result of the disappearance of their close relative and the inability to find out what happened to him. The manner in which their complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to art 3.”).

362. *Id.* ¶ 105.

363. *Id.* ¶¶ 116, 121.

364. *Id.* ¶ 121 (citing *Angelova v. Bulgaria*, Eur. Ct. H.R. App. No. 38361/97, §§ 161-162 (2002) and *Süheyla Aydın v. Turkey*, Eur. Ct. H.R. App. No. 25660/94, § 208 (2005)).

earnings,<sup>365</sup> as well as for the suffering of the family members of the kidnapped Takhayev.<sup>366</sup> Ultimately, the holding of the Court stands for the proposition that not only should victims of human rights abuses be granted relief, but that it should be *adequate and meaningful*.

*H. Judicially Unsupervised Electronic Surveillance Is Strictly Prohibited*<sup>367</sup>

The final case study in this section, *Liberty v. U.K.*, builds upon the premise of meaningful relief, and presents a useful comparison to *ACLU v. NSA*, and *Al-Hamadain* (discussed above in Section II). Aptly named, *Liberty* ultimately stands for the principle that electronic surveillance that is not supervised by the courts is strictly prohibited. Prior to this action, several Acts existed in the UK regarding the use of electronic information and surveillance, with the most recent Act coming into force at the end of 2000.<sup>368</sup> The Court noted that according to the legislature, the main purpose of the Act was “to ensure that the relevant investigatory powers were used in accordance with human rights.”<sup>369</sup>

The applicants, Liberty, British Irish Rights Watch, and the Irish Council for Civil Liberties, brought a claim, alleging that the interception of their communications<sup>370</sup> was contrary to Article 8 of the Convention, which provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>371</sup> The applicants argued that because the procedures permitted the interception of virtually all communications, with little protection afforded, namely that the nature of the program was not available to the public, it was unlawful.<sup>372</sup> Moreover, they claimed that the interferences into their private affairs pursued no legitimate aim, or in the alternative, that they were not proportionate because of the over-breadth of the interceptions.<sup>373</sup>

The government neither confirmed nor denied the allegations set forth by the applicants, claiming “security reasons.”<sup>374</sup> However, it accepted for the purposes of the application that the Court proceed on the “hypothetical basis that the applicants could rightly claim that communications sent to or from their offices were intercepted . . . during the relevant period.”<sup>375</sup>

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365. *Id.* ¶ 135.

366. *Id.* ¶ 138.

367. *Liberty v. U.K.*, Eur. Ct. H.R. App. No. 58243/00 (2008).

368. *Id.* ¶ 34.

369. *Id.*

370. *Id.* ¶ 42 (“The applicants complained that, between 1990 and 1997, telephone, facsimile, e-mail and data communications between them were intercepted by the Capenhurst facility, including legally privileged and confidential material.”).

371. *Id.* ¶ 41. Section 2 states: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” *Id.*, citing ECHR, *supra* note 282, art. 8(2).

372. *See id.* ¶ 44.

373. *Id.* ¶ 46.

374. *Id.* ¶ 47.

375. *Id.*

In short, the Court affirmed its previous cases, stating that legislation that allows for the secret monitoring of communications “strikes at freedom of communication” and thereby “amounts in itself to an interference with the exercise of the applicants’ rights under Article 8.”<sup>376</sup> Contrary to the U.S. decisions, *Liberty* found that there was a violation of the applicants’ rights “irrespective of any measures actually taken against them.”<sup>377</sup> It attacked the illegal legislation itself, concluding that its mere presence causes harm (or “injury in fact” in American standing terms).<sup>378</sup> Thereby, it found a lack of necessity in proving how and when the communications were actually intercepted – a burden that may have been impossible given the lack of public disclosure underlying the program.<sup>379</sup> What appears to ultimately lead the Court to its decision is the “protection against abuse of power.”<sup>380</sup> Thus, it seems that while U.S. courts have been more concerned with the “separation of powers,” the European courts have focused more on the “balance of power.”

#### V. CONCLUDING COMMENT

The U.S. would do well to look at how Europe wages the “war on terror” without violating fundamental legal rights. Or at least when violations occur, European courts give proper redress to the victims of illegal treatment at the hands of the government. The courts do not balance torture against security, but uphold the international law principle that torture is never acceptable. They refuse to extradite without adequate assurances against torture. They do not allow the executive branch, through military courts, to violate the independence and impartiality of the civilian courts. They force the government to answer to serious charges of abuse and torture. They ensure timely trials. They refuse to reward torture by excluding the fruits of its application. They refuse to ignore blatantly illegal legislation because those subject to warrantless surveillance cannot prove actual injury when government secret evidence is needed to do so. And, finally, they require that each of these situations be given *adequate and meaningful* remedy and redress.

With the end of the Bush administration, the era of extraordinary rendition and torture at the hands of U.S. officials likewise appears to be coming to an end. As stated by Professor Kreimer, “the [American] public is increasingly cognizant of the outrages committed in its name, and the legislative branches, freed from one-party control by the election of 2006, are beginning to reassert their constitutional oversight authority, backed by the subpoena power.”<sup>381</sup> Whether this will be enough to return the United States to its tradition of respect for and promotion of human rights is not yet determined.<sup>382</sup> However, by looking outside

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376. *Id.* ¶ 56.

377. *Id.*

378. *Id.* ¶ 57.

379. *See id.* ¶¶ 44, 57.

380. *Id.* ¶ 69.

381. Kreimer, *supra* note 243, at 1220.

382. *Id.*

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its own borders, and by examining the actions of a community that began dealing with the threat and consequences of terrorism long before September 11, the U.S. has a good opportunity to start over and reintegrate the respect for human rights that has been so sorely missed in the past eight years.