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Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States

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LEAVING THE INVISIBLE UNIVERSE: WHY ALL VICTIMS OF EXTRAORDINARY RENDITION NEED A CAUSE OF ACTION AGAINST THE UNITED STATES

Peter Johnston[*]

INTRODUCTION

It begins with the "twenty minute takeout," as that is all it takes for the victim to be "transformed into a state of almost total immobility and sensory deprivation."[1] The victim, usually in a small room, is quickly blindfolded by four to six Central Intelligence Agency ("CIA") agents who are "dressed in black like ninjas" with their faces concealed.[2] The agents, elite and highly trained, operate pursuant to an established *modus operandi* and they do not speak to each other.[3] The victim is brutally punched, shoved, or firmly gripped, and then his hands and feet are

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[1] COUNCIL OF EUR., PARLIAMENTARY ASSEMBLY, COMM. ON LEGAL AFFAIRS AND HUMAN RIGHTS, ALLEGED SECRET DETENTIONS AND UNLAWFUL INTER-STATE TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES 22–23 (June 12, 2006), *available at* http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf [hereinafter COUNCIL OF EUROPE JUNE 2006 REPORT].

[2] *Id*. at 23; *see also* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition,'* WASH. POST, Dec. 4, 2005, at A01 [hereinafter Priest, *Wrongful Imprisonment*].

[3] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 22–23.

shackled.[4] All of the victim's clothes are then methodically cut from his body and he is subject to a full body cavity search.[5] Next, the victim is photographed totally or nearly naked, and a foreign object, perhaps a tranquilizer, is forcibly inserted into his anus.[6] Then, the victim is dressed in a diaper, has his ears muffled, and a cloth bag, without holes for breathing or detecting light, is placed over his head.[7] He is forced into an airplane, where he is placed on a stretcher, shackled, strapped to a seat or mattress, or "laid down on the floor of the plane [bound] up in a very uncomfortable position that makes him hurt from moving."[8] The flight can take up to an entire day, and the destination is either a detention facility operated by a cooperative nation in Central Asia or the Middle East, or one of the CIA's own covert prisons, called "black sites."[9]

If the victim is sent to a black site, he is taken to his cell and his clothes are cut up and torn off.[10] He may be kept naked for several weeks, and all he is given is a bowl, a bucket to urinate into, and a blanket that is too small.[11] The weather in the cell is controlled to produce temperature extremes: sometimes "freezing cold," sometimes "so hot one would gasp for breath."[12] The victim never experiences natural light or natural darkness, and he is frequently blindfolded.[13] He will likely experience the "four month isolation

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[4] *Id*. at 23.

[5] *Id*.; *see also* Priest, *Wrongful Imprisonment*, *supra* note 2.

[6] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 23–24; *see also* Priest, *Wrongful Imprisonment*, *supra* note 2.

[7] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 24; *see also* Priest, *Wrongful Imprisonment*, *supra* note 2.

[8] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 24.

[9] Priest, *Wrongful Imprisonment*, *supra* note 2.

[10] COUNCIL OF EUROPE., PARLIAMENTARY ASSEMBLY, COMM. ON LEGAL AFFAIRS AND HUMAN RIGHTS, SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT 51 (June 7, 2007), *available at* http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf [hereinafter COUNCIL OF EUROPE JUNE 2007 REPORT]. For more details of the conditions of a typical CIA detention cell, *see id*. at 51–53.

[11] *Id*. at 51–52.

[12] *Id*. at 52.

[13] *Id*.

regime:" for more than 120 days, he is granted absolutely no contact with human beings other than masked, silent guards.[14] Additionally, his cell is subject to constant surveillance by cameras, microphones, and guards.[15]

There is likely a shackling ring in the wall of the cell, and the victim's body will be shackled and forced into contorted shapes for "long, painful periods."[16] The victim will be unable to sleep due to relentless noises and disturbances, such as engine noise, loud rock and rap music, cackling laughter, and the screams of women and children.[17] Other torture techniques he may experience include "the cold cell," where the victim is forced to stand naked in a cell kept at about fifty degrees and is continuously doused with cold water, and being forced to stand upright with his wrists and ankles shackled for more than forty hours.[18]

The victim may also be waterboarded, a technique the United States considered a war crime in the tribunals after Japan's defeat in World War II.[19] Waterboarding is a form of "slow motion drowning" which involves placing cloth over the victim's face and then pouring water on the cloth, causing the victim to choke or become unconscious because his throat is slowly being filled with water.[20] Often the prisoner is strapped onto a board during the

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[14] *Id*.

[15] *Id*.

[16] COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 53.

[17] *Id*.

[18] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866.

[19] Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17; Eric Weiner, *Waterboarding: A Tortured History*, NATIONAL PUBLIC RADIO, Nov. 7, 2007, *available at* http://www.npr.org/templates/story/story.php?storyId=15886834. In 1947, the United States charged Yukio Asano, a Japanese officer, with war crimes because he allegedly waterboarded an American civilian. He was convicted and sentenced to fifteen years of hard labor. *Id*.

[20] Weiner, *supra* note 19. Another less common form of waterboarding involves pumping water directly into the stomach of the victim, creating intense pain and a feeling like the victim's "organs are on fire." *Id*.

process.[21] The victim's gag reflex inevitably kicks in and he experiences a "terrifying fear of drowning."[22] Waterboarding is an attractive technique to some because it causes great physical and mental suffering without leaving any marks on the victim.[23]

The process described above is not a horror movie, conspiracy theory, or set of allegations. It is a real practice created and executed by the United States of America.[24] It is called "extraordinary rendition," and it has happened to hundreds of people.[25]

For purposes of this Note, extraordinary rendition is defined as "the transfer of an individual, with the involvement of the United States or its agents, to a foreign state where there are *substantial grounds* for believing the person would be in danger of being subjected to torture."[26] Extraordinary rendition includes situations in which the victim is transferred to a foreign state but is still in the custody of United States agents. It is one type of extra-legal transfer employed by the United States in the so-called "War on Terror."[27] By contrast, "regular" rendition is a process in which an

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[21] *See id.*; Ross & Esposito, *supra* note 18.

[22] Ross & Esposito, *supra* note 18.

[23] Weiner, *supra* note 19.

[24] *CIA Chief Backs Rendition Flights*, BBC NEWS, Oct. 31, 2007, *available at* http://news.bbc.co.uk/2/hi/americas/7070483.stm [hereinafter *CIA Chief Backs Rendition Flights*]; COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 3.

[25] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 2.

[26] The "substantial grounds" standard is the same standard employed in the Foreign Affairs Reform and Restructuring Act of 1998:

> [I]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

Pub. L. No. 105-277, div. G, Title XXII, § 2242.

[27] *See* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336–37 (2007). Other types of extra-legal transfers include the repatriation of detainees held at Guantanamo Bay or the transfer of detainees captured in battlefields in Iraq or Afghanistan. *Id*.

individual is transferred from one nation to another without the benefit of legal procedures like extradition, removal, or exclusion and without allegations of involvement in torture.[28] However, the distinction between rendition and extraordinary rendition is "increasingly being blurred" and U.S. officials and media reports frequently fail to distinguish between them.[29]

Although victims of extraordinary rendition currently have several possible causes of action to redress their wrongful capture, torture, and suffering, each cause is subject to serious, often fatal, limitations. For example, the United States has successfully invoked the state secrets defense[30] and the separation of powers and political question doctrines[31] in response to lawsuits from victims of extraordinary rendition. The extent of civil liability for American officials who participate in extraordinary renditions is unclear, leaving the Executive Branch free to operate without checks and balances and deprive individuals of their due process rights. This Note argues that a law specifically allowing victims of extraordinary rendition to sue the United States will compensate victims while also discouraging the Executive Branch from acting outside the purview of Congress and the Judiciary. The national security and due process issues surrounding the practice of extraordinary rendition are best addressed by three branches of government, not one.[32] Such a law will allow the Executive Branch

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[28] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 5 (New York: ABCNY & NYU School of Law, 2004), *available at* http://www.chrgj.org/docs/TortureByProxy.pdf [hereinafter TORTURE BY PROXY].

[29] *Id*. at 13.

[30] *See* El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied* El-Masri v. United States, 128 S.Ct. 373, 2007 WL 1646914, *1 (2007) (dismissing El-Masri's lawsuit because the government invoked the state secrets defense). For a detailed explanation of this defense, *see infra* Part II.A.

[31] *See* Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissing Arar's extraordinary rendition claims on separation of powers and political question doctrine grounds). For explanation of these two doctrines, see *infra* notes 188–190, 197–205 and accompanying text.

[32] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (O' Connor, J.,

to enforce the law and protect the United States while empowering the Judicial Branch to ensure that the Executive adheres to the constitutional requirements of due process.

High-ranking members of the Executive Branch, such as President Bush and CIA Director Michael Hayden, claim that the extraordinary rendition program is justified because it produces valuable intelligence for the fight against terrorism.[33] However, other members of the Executive Branch and some scholars maintain that the program actually harms the fight against terrorism.[34] They argue that the components of extraordinary rendition, such as secret arbitrary detention and torture, erode the moral high ground that the United States must maintain to defeat terrorism, thereby facilitating the recruitment of new terrorists.[35] Furthermore, extraordinary rendition is not *necessary* because less coercive interrogation methods are equally or more effective at eliciting information.[36] Finally, the premise of the government's argument—that the individual rights of freedom from arbitrary detention and torture should be subjugated to claimed national security interests—is false. The means of extraordinary rendition turn the United States into the very type of place the government is supposed to protect its people against.

Part I of this Note explains the development and mechanics of extraordinary rendition and the extent to which the U.S. government admits to the practice. It demonstrates why the core human rights of freedom against arbitrary detention and torture, both of which are violated by extraordinary rendition, should not be subjected to a balancing test just because the Executive Branch asserts that these rights need to be sacrificed in the name of national security. Part I also shows why extraordinary rendition is

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plurality) ("Whatever 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.").

[33] *See infra* note 88 and accompanying text; *CIA Chief Backs Rendition Flights*, *supra* note 24.

[34] *Infra* Part I.E.

[35] *Id*.

[36] *Infra* Part I.D.

not necessary to protect the United States, how, in some ways, it actually damages the security of the nation, and that it promotes disrespect for human rights around the world. Part I concludes by detailing the plight of two innocent men, Khaled El-Masri and Maher Arar, wrongfully subjected to extraordinary rendition. Part II describes the three main existing causes of action for victims of extraordinary rendition and the problems litigants face in pursuing these theories of liability. Part III explains the proposed law and its essential elements, arguing that Congress should create a specific cause of action for victims of extraordinary rendition. This cause of action will alleviate concerns that the Judiciary is violating the political question doctrine and the separation of powers doctrine because Congress will specifically authorize the lawsuit. Such a legal remedy will also allow the Executive to preserve state secrets but still allow victims of extraordinary rendition to recover damages. Finally, the law will address practical problems that victims of extraordinary rendition face in suing the United States, such as the difficulty of corroborating their claims with evidence.

I. EXTRAORDINARY RENDITION EXPLAINED

A. Evolution and Mechanics of Extraordinary Rendition

The CIA created the extraordinary rendition program in 1995 in response to fears that Osama bin Laden was acquiring weapons of mass destruction.[37] Though the Agency had located many suspected terrorists, it was reluctant to bring them into the United States.[38] If prosecuted in the United States, suspects must be granted due process,[39] and the CIA would have to reveal secrets about its intelligence methods and sources.[40] The fear that foreign

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[37] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 13.

[38] Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, THE NEW YORKER, Feb. 14 & 21, 2005, at 109.

[39] *Id*.

[40] *Id*. For example, normally mundane tasks like establishing the chain of custody of a computer become complicated when foreign governments are

governments would be uncooperative if called to testify in court, coupled with CIA views that other branches of the government interfered,[41] led the CIA to send suspects to Egypt, a nation frequently cited by the State Department for torturing its prisoners.[42] Many of these suspects, some of them allegedly senior al Qaeda members, were Egyptian, and the Americans wanted them arrested while the Egyptians wanted custody over them so they could be interrogated.[43] These complimentary interests led the American and Egyptian intelligence agencies to develop a close partnership whereby the Americans "could give the Egyptian interrogators questions they wanted to put to the detainees in the morning . . . and get answers by the evening."[44]

While questionable, these early extraordinary renditions still had more safeguards than the programs used today: every rendered individual was convicted in absentia, and all renditions were approved by CIA legal counsel on the basis of a substantive dossier.[45] After the September 11, 2001 attacks, however, the extraordinary rendition program changed drastically: "there was a 'before 9/11' and there was an 'after 9/11.' After 9/11, the gloves came off."[46] For example, "[w]hat began as a program aimed at a small, discrete set of suspects—people against whom there were outstanding foreign arrest warrants—came to include a wide and ill-defined population."[47] The initial safeguards were eliminated due to

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involved, as these governments may not want to admit their secret cooperation in open court. *Id*.

[41] For example, one time the State Department would not let the CIA and FBI question one of Osama bin Laden's cousins in the United States because he had a diplomatic passport protecting him from law enforcement. *Id*.

[42] *Id*. For example, *see* U.S. DEPT. OF STATE, EGYPT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm.

[43] Mayer, *supra* note 38, at 109.

[44] *Id*. at 110.

[45] *Id*. This statement is according to Michael Scheuer, a former CIA counter-terrorism expert involved in establishing the practice of extraordinary rendition.

[46] *Id*. at 112. This quote is from Cofer Black, then-in-charge of counter-terrorism at the CIA, to the House and Senate Intelligence Committees.

[47] *Id*. at 107.

the intense pressure on the CIA after September 11 to prevent another potential attack.[48] Today, many people subject to extraordinary rendition have not been charged with a crime.[49] The focus of these renditions has changed as well: rather than further a criminal investigation or trial, rendition is increasingly used for the purpose of interrogation and is often employed in circumstances indicating a foreseeable possibility of torture,[50] Because the CIA does not normally comment publicly about the process, the exact number of renditions, extraordinary or regular, is unknown.[51]

Post-September 11 pressure bore especially hard on the Counterterrorist Center ("CTC"), an office of the CIA referred to by a counterterrorism official as "the Camelot of counterterrorism."[52] After September 11, 2001, the CTC received thousands of pieces of information about potential threats, and the staff was increased from 300 to almost 1,200 "nearly overnight."[53] Former and current intelligence officials have said that the shock of the attack, coupled with a frenzied, heightened responsibility led the "process of vetting and evaluating information [to] suffer[] greatly."[54] As admitted by a former senior intelligence official, "Whatever quality control mechanisms were in play on September 10th were eliminated on September 11th."[55]

Not only is the process of culling new information unchecked and admittedly pressurized, but the CTC is also criticized by others in the CIA for its operations techniques in rendering individuals.[56] Instead of using agents to penetrate terrorist networks, as it did in the past, the CTC presently employs a "Hollywood" model of capturing and detaining suspects, relying on

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[48] Priest, *Wrongful Imprisonment*, *supra* note 2.

[49] *Id*.

[50] *Id*.

[51] Danielle Knight, *Outsourcing A Real Nasty Job: Shipping Terrorism Suspects Overseas for Some Tough Questioning May Make Sense. But Is It Legal?* U.S. NEWS AND WORLD REPORT, May 23, 2005, at 34.

[52] Priest, *Wrongful Imprisonment*, *supra* note 2.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

flashy paramilitary efforts.[57]

Further adding to the Hollywood quality of its operations, some detainees are flown by private jets owned by a series of dummy American corporations.[58] These jets are operated by real companies controlled by or connected to the CIA, can often fly to locations where American military aircraft cannot, and have permits to land at American military bases worldwide.[59] Also, these planes sometimes allow the CIA to avoid reporting requirements imposed by foreign governments on flights operated by other foreign governments.[60] The CIA does not own or operate its own planes because it wants to act in secret.[61] However, the CIA's cover was blown by plane-spotting hobbyists with powerful binoculars and cameras, activists, investigative journalists, and investigations by foreign nations such as Italy and Sweden and multi-national investigative bodies such as the

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[57] *Id*. *See supra* notes 1–9 for a description of this process, known as the "twenty minute takedown."

[58] Scott Shane, Stephen Grey & Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005, at A1; Dana Priest, *Jet Is An Open Secret In Terror War*, WASH. POST, Dec. 27, 2004, at A01 [hereinafter Priest, *Jet Is An Open Secret*]. For all practical purposes, the CIA owns these planes, but puts them under the name of shell corporations with unremarkable names to keep their operations secret. *See id*. These corporations seemingly have no premise other than owning these planes, and the officers and directors of these companies "seem to be invented." *Id*. One such shell company is Premier Executive Transport Services: its directors and officers "appear to exist only on paper." *Id.* This company owns a Gulfstream V jet, tail number N379P, that has clearance to land at American military bases worldwide and has landed at known U.S. government refueling locations. *Id.*

[59] Shane, Grey & Williams, *supra* note 58. These operating companies owned by or with ties to the CIA include Aero Contractors, Pegasus Technologies, and Tepper Aviation. *Id*. Aero Contractors was founded in 1979 by a famous CIA officer and chief pilot for Air America, the CIA's air company during the Vietnam era. *Id*.

[60] *Id*.

[61] *Id*.; Priest, *Jet Is An Open Secret*, *supra* note 58. For more on the CIA's use of private aircraft to facilitate extraordinary rendition, see AMNESTY INT'L, BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND 'DISAPPEARANCE' 22–24, 27–30 (Apr. 5, 2006), *available at* http://web.amnesty.org/library/pdf/AMR510512006ENGLISH/$File/AMR5105106.pdf.

Parliamentary Assembly of the Council of Europe.[62] One reason why these investigations yielded so much information is that these people and groups often worked together and shared information.[63] Furthermore, the American Civil Liberties Union has filed a lawsuit against a company allegedly involved in extraordinary rendition flights, Jeppesen Dataplan, a subsidiary of Boeing, alleging that the company provided flight and logistical support services for more than seventy extraordinary renditions during a four year period.[64]

However, not all detainees are flown by privately-owned aircraft: some are flown by military planes, including large cargo planes.[65] When detainees finally arrive at the rendition location, they often vanish into an "invisible universe."[66] Rendered suspects are not provided a lawyer, and often their families are not informed

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[62] Priest, *Jet Is An Open Secret*, *supra* note 58; Shane, Grey & Williams, *supra* note 58; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 15–21.

[63] For example, the Parliamentary Assembly investigation pieced together information gained from plane-spotters, investigative journalists, certain websites, victims of extraordinary rendition, flight records and logs, and legal proceedings in Europe and the United States. COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 17–18. For more detailed findings of this investigation, *see id*. at 15–21.

[64] Henry Weinstein, *ACLU suit alleged firm is profiting from torture; The Boeing subsidiary is accused of helping facilitate mistreatment of terrorism suspects*, L.A. TIMES, May 31, 2007, at B1. The suit accuses the company of profiting from torture and providing flight and logistical support services to the CIA, such as "itinerary, route, weather, and fuel planning, as well as customs clearance assistance, ground transportation, food, hotels and security." *Id*.

[65] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 15.

[66] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A01 [hereinafter Priest, *CIA Holds Terror Suspects*]. The "invisible" term refers to the fact that the locations of these internment centers and basic information about how they operate is withheld from the public and almost all members of Congress responsible for oversight of the CIA's covert actions. Indeed, "virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long." *Id*. The "universe" term refers to the fact that this internment network is global and thus detainees could be in almost any part of the world. *See id*.

of their location.[67]

The extent of CIA participation in the interrogation of rendered detainees varies from case to case.[68] In some instances, U.S. officials observe live interrogations through one-way mirrors.[69] In others, Americans feed questions to the interrogators,[70] or question the detainees directly.[71] Sometimes, the CIA employs a "false flag" technique by using fake disguises and décor meant to trick a detainee into thinking he is in a nation with a reputation for brutal interrogation although he is actually still under CIA control.[72] In some cases, the CIA uses female interrogators to create a "psychologically jarring experience," as many detainees were raised in conservative Muslim cultures where women are never in control.[73]

Not only are suspected terrorists subjected to detention and abuse, but their family members—including children—are sometimes detained and subjected to coercive treatment as well.[74] Some of these family members have been subsequently released from custody, but others remain unaccounted for.[75] Yusuf al-Khalid, then nine years old, and Abed al-Khalid, then seven years old, were taken into custody by Pakistani intelligence officers in September 2002 when their apartment was raided.[76] Their father is

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[67] Mayer, *supra* note 38, at 107.

[68] Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects eld in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01.

[69] *Id*.

[70] *Id*.

[71] Glenn Kessler, *Rice Defends Tactics Used Against Suspects; Europe Aware of Operations, She Implies*, WASH. POST, Dec. 6, 2005, at A01.

[72] Priest & Gellman, *supra* note 68.

[73] *Id*.

[74] AMNESTY INT'L ET AL., OFF THE RECORD: U.S. RESPONSIBILITY FOR ENFORCED DISAPPEARANCES IN THE "WAR ON TERROR" 24–26 (2007), *available at* http://web.amnesty.org/library/pdf/AMR510932007ENGLISH/$File/AMR5109307.pdf [hereinafter OFF THE RECORD].

[75] *Id*. at 24.

[76] *Id*.; Olga Craig, *CIA holds young sons of captured al-Qa'eda chief*, SUNDAY TELEGRAPH (UK), Mar. 9, 2003, *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2003%2F03%2F09%2Fwalqa09.xml.

Khalid Sheikh Mohammed, accused of being the mastermind of the September 11 attacks, who is presently being held at Guantanamo Bay.[77] In March 2003, Yusuf and Abed were transferred into CIA custody at a "secret address" in the United States so the CIA could question them and use them to get their father "to talk."[78]

B. Extent to Which the Government Admits to Practicing Extraordinary Rendition

On the record, the United States government admits to the practice of "regular" rendition, but states that it is not U.S. policy to send detainees "to countries where [it believes or it knows] that they're going to be tortured."[79] In reality, however, this "policy" against international torture is rather flimsy. Former-U.S. Attorney General Alberto Gonzales has claimed that if a detainee were transferred to a country with a history of torture, the United States will seek "additional assurances" that the transferred detainee will not be tortured.[80] He nonetheless recognized, however, that the Bush Administration "can't fully control" what other nations do, and did not know if nations had complied with any promises not to torture detainees.[81]

Off the record, however, government officials admit to practicing extraordinary rendition involving as much torture as necessary.[82] This practice is illustrated by a December 2002 interview by *The Washington Post* with ten current national security officials and several former intelligence officials about detention and interrogation of captives.[83] "The picture that emerges is of a brass-knuckled quest for information, often in concert with

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[77] *Id*.

[78] OFF THE RECORD, *supra* note 74, at 25; Craig, *supra* note 76. The fate of these children is unknown to the author of this Note.

[79] R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A03.

[80] *Id*.

[81] *Id*.

[82] Priest & Gellman, *supra* note 68; Ross & Esposito, *supra* note 18; Pincus, *supra* note 19.

[83] Priest & Gellman, *supra* note 68.

allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred."[84] One of the officials interviewed, who supervised the capture and transfer of accused terrorists, told the paper, "If you don't violate someone's human rights some of the time, you probably aren't doing your job."[85] Another official directly involved in rendering captives said, "We don't kick the shit out of them. We send them to other countries so they can kick the shit out of them."[86] Similarly, a third official, also directly involved in rendition, told *The Washington Post* that he knew detainees were likely to be tortured, and that he "do[es] it with [his] eyes open."[87]

C. The Core Human Rights of Freedom Against Arbitrary Detention and Torture Should Not be Subverted in the Claimed Interest of National Security

President Bush has stated that a "small number of suspected terrorist leaders and operatives" have been "held and questioned outside the United States in a separate program operated by the Central Intelligence Agency," and that this program is "crucial to getting life-saving information" that will prevent future attacks.[88] Similarly, CIA Director Hayden has stated that the sole reason the United States has the rendition program is that it produces "irreplaceable intelligence."[89] Additionally, President Bush has stated that "Today's war on terror is, above all, a struggle for freedom and liberty . . . . We're fighting for our way of life and our ability to live in freedom. We're fighting for the cause of humanity against those who seek to impose the darkness of tyranny and terror upon the entire world."[90]

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[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] *Id*. His eyes are open to the fact that detainees will probably be tortured after they are rendered. *Id*.

[88] *Remarks on the War on Terror*, 42 Weekly Comp. Pres. Doc. 1568, 1570–74 (Sept. 6, 2006) [hereinafter *Remarks on the War on Terror*].

[89] *CIA Chief Backs Rendition Flights*, *supra* note 24.

[90] *Remarks on the War on Terror*, *supra* note 88, at 1575.

It is hypocritical, in the name of "a struggle for freedom and liberty," to in fact deny those same freedoms and liberties to victims of extraordinary rendition.[91] Extraordinary rendition defeats the very freedoms it is designed to protect by itself spreading the "darkness of tyranny," as arbitrary detention and torture are two of the primary tools of tyrants.[92] Indeed, in a recent Supreme Court case in which the Executive Branch unilaterally detained an individual on the grounds that he was an "enemy combatant" who conspired with terrorists, four Justices cautioned that such detention "ha[s] created a unique and unprecedented threat to the freedom of every American citizen:"[93]

> [A]t stake in this case is nothing less than the *very essence of a free society* . . . . Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber . . . executive detention of subversive citizens . . . may not . . . be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure . . . . For if this Nation is to remain true to the ideals symbolized by its flag, *it must not*

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[91] *See infra* note 137 and accompanying text describing how extraordinary rendition is a hybrid human rights violation.

[92] *See* THE FEDERALIST NO. 5 (Alexander Hamilton), *available at* http://www.law.ou.edu/ushistory/federalist/federalist-80-85/federalist.84.shtml (last visited Nov. 20, 2007) ("[T]he practice of arbitrary imprisonment[] ha[s] been, in all ages, the favorite and most formidable instrument[] of tyranny."); *see also* United States v. Staggs, 881 F.2d 1527, 1541 (10th Cir. 1989) ("We are mindful of the oft-quoted words of Judge Learned Hand that '[s]ave for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination.'").

[93] Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (5–4 decision) (Stevens, J., dissenting). In *Padilla*, Padilla was detained by the Department of Defense because the President determined that he was an "enemy combatant" who conspired with al Qaeda to execute terrorist attacks in the United States. *Id*. at 430. He filed a petition for a writ of habeas corpus challenging his detention, but the Court did not address the merits of Padilla's claim because it ruled that as a threshold matter, he filed the petition with the wrong district court. *Id*. However, the dissent did address the merits and ruled that Padilla was entitled to a habeas proceeding. *Id*. at 464.

> *wield the tools of tyrants* even to resist an assault by the forces of tyranny.[94]

This passage warns against the dangers of extraordinary rendition as well because many victims of extraordinary rendition are also deemed enemy combatants,[95] and victims of extraordinary rendition experience the same deprivation of liberty as enemy combatants: namely, incommunicado detention at the unrestrained will of the Executive Branch.[96]

D. Extraordinary Rendition is Not Necessary to Protect the Security of the United States

From a practical perspective, the United States should not practice extraordinary rendition because other, non-or less coercive means of interrogation are equally or more effective at eliciting information from suspects.[97] Indeed, experts on interrogation state that other interrogation methods—such as those employing carefully planned psychological techniques—are equally or more

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[94] *Id*. at 465 (Stevens, J., dissenting) (emphasis added).

[95] Mayer, *supra* note 38, at 107.

[96] *See infra* note 137 and accompanying text describing how extraordinary rendition is a hybrid human rights violation.

[97] Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 3, 2007, at A1 ("Many veteran interrogators, psychologists, and other experts say that less coercive methods are equally or more effective" than "slaps to the head[,] long hours held naked in a frigid cell[,] days and nights without sleep while battered by thundering rock music[,] long periods manacled in stress positions[,] or the ultimate, waterboarding."); *see also* Ross & Esposito, *supra* note 18 ("Two experienced officers have told ABC that there is little to be gained by these [coercive CIA techniques] that could not be more effectively gained by a methodical, careful, psychologically based interrogation."); *see also* Larry Johnson, Editorial, *Why Torture Should Never be an Option*, L.A. TIMES, Nov. 11, 2005, at 11. Mr. Johnson is a former CIA officer who was the deputy director of the State Department Office of Counterterrorism from 1989 to 1993. *Id*. Additionally, Deputy Assistant Secretary of Defense Charles Stimson told *The Washington Post* that interrogators "tell you that the intelligence they get from detainees is best derived through a period of rapport-building, long-term." R. Jeffrey Smith & Michael Fletcher, *Bush Says Detainees Will be Tried; He Confirms Existence of CIA Prisons*, WASH. POST, Sept. 7, 2006, at A1.

effective at eliciting information.[98] "What real CIA field officers know firsthand is that it is better to build a relationship of trust—even with a terrorist, even if it's time consuming—than to extract quick confessions through tactics such as those used by the Nazis and the Soviets, who believed that national security always trumped human rights."[99] More generally, the idea that the United States needs to subjugate the rights of some people for the alleged security of all people has been emphatically rejected by history.[100]

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[98] Shane, Johnston & Risen, *supra* note 97; Ross & Esposito, *supra* note 18; Johnson, *supra* note 97; Smith & Fletcher, *supra* note 97.

[99] Johnson, *supra* note 97.

[100] GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 12–13 (W.W. Norton & Co. 2004), identifies six crisis periods in American history when the government has significantly restricted civil liberties. These periods are: (a) the end of the Eighteenth Century, when the Sedition Act of 1798 was enacted, (b) the Civil War, (c) World War I, (d) World War II, (e) the Cold War, and (f) the Vietnam War. Professor Stone argues that the United States probably could have survived each of these crises without those infringements on civil liberties and that these infringements are regarded as mistakes. *Id*. at 528–29.

> The Sedition Act of 1798 has been condemned in the "court of history," Lincoln's suspensions of habeas corpus were declared unconstitutional by the Supreme Court in *Ex parte Milligan*, the Court's own decisions upholding the World War I prosecutions of dissenters were all later effectively overruled, and the internment of Japanese-Americans during World War II has been the subject of repeated government apologies and reparations. Likewise, the Court's decision in *Dennis* upholding the convictions of the leaders of the Communist Party has been discredited, the loyalty programs and legislative investigations of that era have all been condemned, and the efforts of the U.S. government to "expose, disrupt and otherwise neutralize" antiwar activities during the Vietnam War have been denounced by Congress and the Department of Justice.

Id. at 529. He continues arguing that history has proven that in the face of danger, American citizens are willing to disadvantage "others," such as Japanese Americans, Communists, and hippies, in the false belief that doing so will secure the safety of Americans. *Id*. at 529. Today, the "others" are suspected terrorists. *See* COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 50.

> The [Bush] Administration routinely speaks of "aliens," "deadly enemies" and "faceless terrorists," with the clear intention of dehumanizing its detainees in the eyes of the American population….

Indeed, "[a]ll of history shows that arbitrary decisions, contempt for human values and torture have never been effective, have failed to resolve anything and, ultimately, have led only to a subsequent exacerbation of violence and brutality."[101]

Not only are other interrogation methods equally or more effective at eliciting information, but most experts agree that information gleaned from torture is unreliable.[102] "You can get

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> By characterizing these people held in secret detention as 'different' from us—not as humans, but as ghosts, aliens, or terrorists—the US Government tries to lead us into the trap of thinking they are not like us, they are not subjects of the law, therefore their human rights do not deserve protection.

Id.

[101] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 58.

[102] *See* Mayer, *supra* note 38, at 116; *see also* Scott Shane & Mark Mazzetti, *Advisers Fault Harsh Methods In Interrogation*, N.Y. TIMES, May 30, 2007, at A1 (Experts advising the Bush Administration on interrogation rules state that harsh interrogation techniques used since the 2001 terrorist attacks are "outmoded, amateurish, and unreliable."); Ross & Esposito, *supra* note 18 (Many experienced intelligence agency and military interrogators feel that a confession induced by the CIA's harsh interrogation techniques, such as waterboarding, is unreliable.); COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 193 (Ottawa, Public Works and Governments Services Canada, 2006), *available at* http://www.ararcommission.ca/eng/AR_English.pdf [hereinafter ARAR COMMISSION ANALYSIS] (After hearing from expert witnesses, the commission concluded that "[g]iving credence to statements obtained through torture can be dangerous, as the reliability of such statements is at best uncertain."). For more on the Arar Commission, *see infra* note 158). Lt. Gen. John F. Kimmons, the Army deputy chief of staff for intelligence, has stated that "no good intelligence is going to come from abusive practices. I think the empirical evidence of the last five years, hard years, tell us that." Smith & Fletcher, *supra* note 97. Paul Eaton, formerly Major General in the U.S. Army, stated that "the only thing you are sure of with torture is that pain is involved—the information you get may waste your time or worse." *Extraordinary Rendition, Extraterritorial Detention, and Treatment Of Detainees: Restoring our Moral Credibility and Strengthening our Diplomatic Standing, Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2007) (statement of Paul Eaton, former Major General in the US Army), *available at* http://www.senate.gov/~foreign/testimony/2007/EatonTestimony070726.pdf.

anyone to confess to anything if the torture's bad enough."[103] Even Porter Goss, the former Director of the CIA, acknowledges that "torture is counterproductive."[104] A large part of the problem is that many detainees simply "have nothing to tell."[105] Compounding the problem of unreliability is the fact that false information regarding terrorism is "especially dangerous," as it can have "grossly unfair" consequences, such as extraordinary rendition, for innocent individuals like Maher Arar.[106] Therefore, any benefits flowing from information elicited by torture are offset to a certain degree by the harms of such information, which could include the torture of an innocent man.[107]

In fact, "one of the greatest intelligence failures in American history" occurred in part because the Bush Administration believed in the tortured confessions extracted by extraordinary rendition.[108]

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[103] Ross and Esposito, *supra* note 18. This statement is according to former CIA officer Bob Baer.

[104] William Branigin, *CIA Director Defends Detention Policy*, WASH. POST, Nov. 29, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/29/AR2005112900667.html.

[105] Mayer, *supra* note 38, at 116.

[106] ARAR COMMISSION ANALYSIS, *supra* note 102, at 13–14, 59, 61–62. Although the false intelligence regarding Maher Arar that led to his extraordinary rendition was not extracted by torture, that he was extraordinarily rendered based on false information demonstrates that false information, extracted by torture or not, can cause innocent people to be tortured. *See id*. at 13–14 (reporting that the Royal Canadian Mounted Police provided the United States with false information about Maher Arar, and it is "very likely" that American authorities relied on this information in extraordinarily rendering Arar). It is possible that some past or future extraordinary renditions were/may be based on false information gained by the torture of other past rendition victims.

[107] *See supra* note 106.

[108] *Extraordinary Rendition, Extraterritorial Detention, and Treatment of Detainees: Restoring our Moral Credibility and Strengthening our Diplomatic Standing, Hearing before the S. Comm. on Foreign Relations*, 110th Cong. (2007) (statement of Tom Malinowski, Human Rights Watch Washington Advocacy Director), *available at* http://www.senate.gov/~foreign/testimony/2007/MalinowskiTestimony070726.pdf; Stephen Grey, *CIA Rendition: The Smoking Gun Cable*, ABC NEWS, Nov. 6, 2007, *available at* http://blogs.abcnews.com/theblotter/2007/11/cia-rendition-t.html; S. Rep. No. 109-331, at 79–82 (2006); Ross & Esposito, *supra* note 18.

Ibn al Sheikh al Libi, a victim of extraordinary rendition to Egypt, was tortured by both the CIA and Egyptian authorities.[109] The CIA waterboarded al Libi and subjected him to the "cold cell" by forcing him to stand naked overnight in a cold cell and regularly dousing him with cold water.[110] Then, the CIA extraordinarily rendered him to Egypt, where he was beaten and effectively buried alive for about seventeen hours.[111] To prevent further torture by American and Egyptian hands, al Libi made a series of false claims to his American and Egyptian captors.[112] He claimed to be a member of al-Qaeda and he provided false information "regarding al-Qa'ida's sending representatives to Iraq to try to obtain [weapons of mass destruction] assistance."[113] In February 2003, then-Secretary of State Colin Powell used these claims at the United Nations to justify the war in Iraq.[114] However, when talking to CIA "debriefers" in 2004, al Libi recanted his claims and told the CIA that he was tortured.[115] The CIA believed that he was tortured and retracted the intelligence he provided in a cable sent to CIA headquarters in Langley, Virginia[116] This example demonstrates that not only is evidence regarding terrorism extracted by torture sometimes false, but that it can have extremely dangerous consequences affecting individuals around the world.

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[109] Malinowski, *supra* note 108; Grey, *supra* note 108; Ross & Esposito, *supra* note 18.

[110] Ross & Esposito, *supra* note 18; Malinowski, *supra* note 108.

[111] Grey, *supra* note 108; S. Rep. No. 109-331, *supra* note 108, at 79–82.

[112] Malinowski, *supra* note 108; Ross & Esposito, *supra* note 18; Grey, *supra* note 108, S. Rep. No. 109-331, *supra* note 108, at 79–82.

[113] Malinowski, *supra* note 108; Ross & Esposito, *supra* note 18; Grey, *supra* note 108, S. Rep. No. 109-331, *supra* note 108, at 79–82.

[114] Grey, *supra* note 108; Malinowski, *supra* note 108.

[115] Grey, *supra* note 108; S. Rep. No. 109-331, *supra* note 108, at 79–82.

[116] Grey, *supra* note 108; S. Rep. No. 109-331, *supra* note 108, at 82; *see also* Ross & Esposito, *supra* note 18 ("[I]t was later established that al Libbi had no knowledge of such training or weapons and fabricated the statements because he was terrified of further harsh treatment.").

E. The Extraordinary Rendition Program Damages the Security of the United States

The extraordinary rendition program damages the national security of the United States because it erodes the moral high ground between the United States and terrorists[117] and because it fuels anti-American sentiment around the globe.[118] The United States has traditionally been viewed as a role model for upholding the values of democracy, civil liberties, and human rights.[119] However, when the United States violates its own principles by secretly detaining and torturing prisoners, it erodes the moral dichotomy between the United States and terrorists.[120] Significantly, extraordinary rendition tarnishes the image of the United States in the minds of the Muslim mainstream,[121] whom, according to the April 2006 National Intelligence Estimate, the United States should make "the most powerful weapon in the war on terror."[122]

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[117] *Infra* notes 120–121.

[118] *Infra* note 123.

[119] COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 65; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 2; Malinowski, *supra* note 108.

[120] Malinowski, *supra* note 108; COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 65.

[121] Malinowski, *supra* note 108; *see also Extraordinary Rendition, Extraterritorial Detention, and Treatment of Detainees: Restoring our Moral Credibility and Strengthening our Diplomatic Standing, Hearing before the S. Comm. on Foreign Relations*, 110th Cong. (2007) (statement of Dr. Daniel Byman, Director, Center for Peace and Security Studies of the Edmund A. Walsh School of Foreign Service at Georgetown University and Senior Fellow, Saban Center for Middle East Policy at the Brookings Institution) ("More broadly, successful counterterrorism depends in part on convincing the world that there is no moral equivalency between the terrorists and the government they oppose. When the United States muddies these waters, this distinction begins to blur. This is particularly problematic for U.S. attempts to woo fence-sitters in the Muslim world—the very hearts and minds that the United States most needs.").

[122] Press Release, Office of the Director of National Intelligence, Declassified Key Judgments of the National Intelligence Estimate "Trends in Global Terrorism: Implications for the United States," 2 (Apr. 2006), *available at*

Similarly, the extraordinary rendition program fuels anti-American sentiment all over the world, especially in Europe:[123]

> Undoubtedly and understandably, Europeans are not pleased about their citizens or legal residents disappearing off the streets of their cities or being shuttled against their will and without due process to detention centers in Afghanistan. One only needs to imagine how we would feel about something parallel happening here in the United States to understand the sense of outrage. What has surely exacerbated this anger has been the sense that torture is the inevitable concomitant to these movements.[124]

The fight against terrorism is as much a moral and political struggle as it is militaristic, and maintaining the moral high ground is critical because winning the minds of the Muslim mainstream, and thus dividing terrorists from the audiences they seek to persuade, is essential to defeating terrorism.[125] As the United States loses moral

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http://www.dni.gov/press_releases/Declassified_NIE_Key_Judgments.pdf [hereinafter National Intelligence Estimate]. These Muslims will be a weapon not in the literal sense, but by rejecting the use of violence by terrorists and therefore undermining their community support and dividing terrorists from the "audiences they seek to persuade." *Id*.

[123] COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 65; *Rendition to Torture: The Case of Maher Arar*: *Hearing before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Daniel Benjamin, Director, Center on the United States and Europe, The Brookings Institution and former director for counterterrorism on the National Security Council staff under the Clinton Administration) (Extraordinary rendition is at the "core of anger" among our European allies and others, and allegations of torture have contributed to the "deep slide" of America's image in opinion polls around the world.).

[124] Benjamin, *supra* note 123.

[125] In the words of former Marine Corps Commandant Charles Krulak and former CENTCOM Commander Joseph Hoar, "This war will be won or lost not on the battlefield but in the minds of potential supporters who have not yet thrown in their lot with the enemy." Malinowski, *supra* note 108. General David Petraeus recently told his troops in Iraq: "This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground." *Id*. According to the April 2006 National Intelligence

integrity in the minds of individuals around the globe, its national security is damaged because this loss of integrity facilitates the recruitment of new terrorists.[126] According to the U.S. Army's Counterinsurgency Manual, since the United States cannot capture or kill every terrorist, the United States must diminish the terrorists' "recuperative power"—their ability to recruit new fighters—by increasing its legitimacy and decreasing the terrorists' legitimacy.[127]

However, when the United States violates its own principles with activities like extraordinary rendition that involve secret detentions and torture, it loses the moral high ground as well as the minds of the Muslim mainstream, helping to fuel terrorists' "recuperative power."[128] Illegitimate actions by U.S. forces, such as excessive use of force, unlawful detention, and torture "quickly become known throughout the local populace and eventually around the world," and these actions "undermine both long-and short-term [counterinsurgency] efforts."[129] Because it entails contempt for the rule of law and massive violations of human rights, extraordinary rendition

plays right into the hands of the criminals who seek to

Estimate, the United States needs to "divide [terrorists] from the audiences they seek to persuade" and make the "Muslim mainstream . . . the most powerful weapon in the war on terror." National Intelligence Estimate, *supra* note 122, at 2.

> More broadly, successful counterterrorism depends in part on convincing the world that there is no moral equivalency between the terrorists and the government they oppose. When the United States muddies these waters, this distinction begins to blur. This is particularly problematic for U.S. attempts to woo fence-sitters in the Muslim world—the very hearts and minds that the United States most needs.

Byman, *supra* note 121.

[126] *See supra*, note 125.

[127] Counterinsurgency, Field Manual No. 3–24, Marine Corps Warfighting Publication No. 3-33.5, Dec. 2006, at 1–23, *available at* http://usacac.army.mil/cac/repository/materials/coin-fm3-24.pdf [hereinafter Counterinsurgency].

[128] *Id*; *see also* COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 65.

[129] Counterinsurgency, *supra* note 127, at 1–24.

> destroy our societies through terror. Moreover, in the process we give these criminals a degree of legitimacy—that of fighting an unfair system—and also generate sympathy for their cause, which cannot but serve as an encouragement to them and their supporters.[130]

As mentioned earlier, extraordinary rendition causes anti-American sentiment,[131] which, according to the April 2006 National Intelligence Estimate, is one factor that "fuel[s] the spread of the jihadist movement."[132] Compounding the problem is the fact that, according to retired Major General Paul Eaton, the United States "undoubtedly lost allies in the fight for Iraq . . . because of our policies on extraordinary rendition, secret detention, and the use of torture."[133]

Thus, it is clear that "[t]he best and most effective way to promote security is to preserve human rights and the rule of law. Departure from long established, fundamental legal protections only promotes lawlessness and ultimately makes everyone less safe."[134]

F. Extraordinary Rendition Diminishes Respect for Human Rights Around the World

The United States is the "most influential country on the face of the earth" and is a "standard setter in everything it does, for better or for worse."[135] Additionally, the United States is supposed

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[130] COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 5.

[131] COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 65; Benjamin, *supra* note 123.

[132] National Intelligence Estimate, *supra* note 122, at 2.

[133] Eaton, *supra* note 102.

[134] *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: J. Hearing before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 3 (2007) (statement of Amnesty International USA) [hereinafter *Extraordinary Rendition in U.S. Counterterrorism Policy*] .

[135] Malinowski, *supra* note 108; *see also* COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 65.

to be the world's leading protector of human rights.[136] Extraordinary rendition itself is a "hybrid" human rights violation, as it encompasses multiple acts, including "elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals," each of which independently constitutes a rights violation.[137]

When the United States engages in and justifies practices like extraordinary rendition, "all bets are off," and "the entire framework upon which we depend to protect human rights—from the Geneva Conventions and treaties against torture—begins to fall apart."[138]

> Because the whole idea of promoting democracy and human rights is so associated with the United States, America's fall from grace has emboldened authoritarian governments to challenge the idea as never before. As the United States loses its moral leadership, the vacuum is filled by forces profoundly hostile to the cause of human rights.[139]

G. Some Victims of Extraordinary Rendition Are Innocent and Have No Ties to Terrorism

Some victims of extraordinary rendition have absolutely no ties to terrorist activity.[140] The well-publicized cases of two such

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[136] Malinowski, *supra* note 108; *see also* COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 65.

[137] David Weissbrodt and Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 (2006); *see also Extraordinary Rendition in U.S. Counterterrorism Policy*, *supra* note 134.

[138] Malinowski, *supra* note 108; *see also* COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 65.

[139] Malinowski, *supra* note 108. Mr. Malinowski cites an example of a meeting between Human Rights Watch and the Prime Minister of Egypt concerning the torture of hundreds of prisoners by Egyptian security forces. The Prime Minister did not deny that the forces tortured prisoners; he simply stated that "we're just doing what the United States does." *Id*.

[140] Moreover, the secrecy surrounding extraordinary rendition, combined with the lack of judicial oversight, makes it difficult, if not impossible, to determine the exact number of victims of "erroneous rendition." Even CIA officials disagree over the number: one told *The Washington Post* that there were

victims who have sued the United States, Khaled El-Masri[141] and Maher Arar,[142] illustrate this problem. Khaled El-Masri, a German citizen of Lebanese descent and father of five, was captured in Macedonia on New Years Eve 2003 while attempting to cross the border between Serbia and Macedonia.[143] The Macedonian authorities informed the CIA that they had detained El-Masri, and the CIA extraordinarily rendered El-Masri to the "Salt Pit," a CIA prison in Afghanistan, because it thought his passport was forged and because his name was similar to that of a September 11, 2001 hijacker associate.[144] He was subjected to the "twenty minute takeout"[145] and then detained in a cold, filthy cell in a basement with no light and a dirty blanket for four months.[146]

The first night, he was kicked and beaten and told that "[y]ou are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you and no one will know."[147] All of his requests to meet with a German government official were denied, and his conditions were so bad that he went on a hunger strike for thirty-seven days until he was force-fed by tubes inserted into his nose and mouth.[148] He was finally released

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about thirty-six such victims, but other officials believe the number is smaller. Furthermore, there is no tribunal or judge to review the evidence against individuals seized by the CIA: the CIA is responsible for policing itself. Priest, *Wrongful Imprisonment*, *supra* note 2.

[141] El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

[142] Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

[143] Priest, *Wrongful Imprisonment*, *supra* note 2; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 25; El-Masri v. Tenet, 437 F. Supp. 2d 530, 532 (E.D.Va. 2006).

[144] Priest, *Wrongful Imprisonment*, *supra* note 2; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 25; *El-Masri*, 437 F. Supp. 2d at 533.

[145] Priest, *Wrongful Imprisonment*, *supra* note 2; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 25; *El-Masri*, 437 F. Supp. 2d at 533. For a description of the "twenty minute takeout," *see supra* notes 1–9.

[146] Priest, *Wrongful Imprisonment*, *supra* note 2; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 25; *El-Masri*, 437 F. Supp. 2d at 533.

[147] Priest, *Wrongful Imprisonment*, *supra* note 2.

[148] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 26; *El-Masri*, 437 F. Supp. 2d at 533–34.

by being left on the side of an abandoned road in Albania.[149] Fortunately, El-Masri has been re-united with his wife and children, but his German and Arab friends shun him due to his negative publicity.[150] Khaled El-Masri is an innocent man with no ties to terrorist activity,[151] and a Parliamentary Assembly of the Council of Europe report noted twice that El-Masri's descriptions of his extraordinary rendition were credible.[152]

A second innocent victim of extraordinary rendition is Maher Arar, a Canadian citizen who, in October 2002, was extraordinarily rendered from JFK Airport in New York City to Syria, where he was held in degrading conditions and tortured for almost a year.[153] Arar was repeatedly beaten with an electrical cable on his hands and upper body, and he was forced to hear the screams of other detainees and subjected to other psychological stressors.[154] The pain was so bad that "you forget the milk that you have been fed from the breast of your mother."[155] On top of the physical brutality, he was kept in a cell only six feet long, three feet wide, and seven feet high that was damp and "very cold" in the winter and "stifling" in the summer.[156] Over time, the beatings decreased, and the worst aspect of his detention became the "daily horror" of living in his cell, which he described as a "grave" and "slow death."[157]

After a two-and-a-half year inquiry, a Canadian judicial report concluded "categorically that there is no evidence" that Arar committed any offense or is a security threat.[158] The report is

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[149] *El-Masri*, 437 F. Supp. 2d at 534.

[150] Priest, *Wrongful Imprisonment*, *supra* note 2.

[151] *See*, *e.g.*, Priest, *Wrongful Imprisonment*, *supra* note 2; COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 32.

[152] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 25, 31.

[153] Doug Struck, *Canadian Was Falsely Accused, Panel Says*, WASH. POST, Sept. 19, 2006, at A01.

[154] ARAR COMMISSION ANALYSIS, *supra* note 102, at 55–56.

[155] Mayer, *supra* note 38, at 106.

[156] ARAR COMMISSION ANALYSIS, *supra* note 102, at 56.

[157] *Id*.

[158] *Id*. at 59. According to the Arar Commission's website, http://www.ararcommission.ca/eng/index.htm, "The Inquiry was established February 5,

unique as it is the first time that a commission in the Western world investigating an allegation of extraordinary rendition had access to all relevant government documents, allowing it to "[see] the practice of extraordinary rendition in full color."[159] The report, in large part, blamed Canadian officials for providing American officials with faulty intelligence about Arar.[160]

H. The Bush Administration's Legal Defense of Extraordinary Rendition

In defense of extraordinary rendition, the Bush Administration ("the Administration") posits three main legal arguments.[161] First, it argues that human rights treaties, or particular provisions therein, do not apply to extraterritorial transfers because these treaties only apply to territory within U.S. jurisdiction.[162] The Administration

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2004 under Part I of the *Inquiries Act*, [R.S.C. 1985, c. I-11], on the recommendation of the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness to investigate and report on the actions of Canadian officials in relation to Maher Arar." "A public inquiry in Canada is a strong instrument for investigation and accountability. It has full power to subpoena relevant documents and enjoys de facto independence from the executive and legislative branches of government." *Rendition to Torture: The Case of Maher Arar*: *Hearing before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Kent Roach, Professor of Law and Prichard and Wilson Chair in Law and Public Policy at the University of Toronto) [hereinafter *Rendition to Torture*]. This inquiry conducted a "thorough" investigation of the actions of Canadian officials, examined the classified versions of thousands of documents, and heard in-camera testimony of eighty-three witneses. *Id.*

[159] Struck, *supra* note 153. This quote is from Paul Cavalluzzo, counsel for the commission.

[160] ARAR COMMISSION ANALYSIS, *supra* note 102, at 13–14.

[161] For a detailed explanation and criticism of these arguments, *see* Satterthwaite, *supra* note 27, at 1350–1418.

[162] Satterthwaite, *supra* note 27, at 1350–51. For example, the American Convention on Human Rights applies to "all persons subject to [a State Party's] jurisdiction." *Id.* at 1352; American Convention on Human Rights art. 1, Nov. 22, 1969, 1144 U.N.T.S. 171.

has adopted a territorial rule of jurisdiction, arguing that jurisdiction is limited to the geographical spaces inside the United States.[163] Second, the Administration argues that the liability of the United States is barred when "host" nations that participate in extraordinary rendition provide diplomatic assurances that they will not torture detainees.[164] However, these assurances lack any degree of trustworthiness and systematically fail to prevent torture.[165] Finally, the Administration defends extraordinary rendition as a type of wartime transfer in a new type of war that is free from any limitations mandated by humanitarian law or human rights treaties.[166] This argument states that since the United States is in an international armed conflict with a non-state enemy (al Qaeda), humanitarian law and treaties like the Geneva Conventions do not apply because these laws only govern armed conflicts between nations or intrastate armed conflict.[167] However, international legal scholars and advocates reject this approach.[168]

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[163] Satterthwaite, *supra* note 27, at 1351. Some scholars argue that instead of defining jurisdiction in terms of geography, the better approach is to define jurisdiction in terms of whether or not the United States has personal control over an individual. *Id*. at 1369, 1375, 1379. This "personal control" approach takes into account the object and purpose of human rights law and prevents the United States from "carving out a space where no human rights law applies." *See id*. at 1378, 1351. For a more detailed explanation and criticism of this argument, *see id*. at 1351–79.

[164] *Id*. at 1379.

[165] *See infra* Part III.A.6. For additional reasons why diplomatic assurances should not shield the United States from liability, *see* Satterthwaite, *supra* note 27, at 1379–94.

[166] Satterthwaite, *supra* note 27, at 1395.

[167] *Id*. at 1399. For more explanation and criticism of this argument, *see id*. at 1399–1418.

[168] *Id*. at 1404–18. For example, some argue that while the laws of war are not applicable to the "war on terror," human rights law continues to apply. *Id*. at 1404. Other scholars maintain that the conflict between the United States and al Qaeda constitutes a non-international armed conflict to which the rules applicable to such conflicts apply. *Id*. A third argument agrees with the Administration's argument that the United States is in a new type of war, but posits that international humanitarian law must be read in conjunction with other rules of international law to protect the basic rights of every human being. *Id*.

Additionally, other scholars defend the practice in similar ways.[169] John Yoo, a professor at the University of California Law School, who was formerly the Deputy Assistant Attorney General in the Bush Administration,[170] argues that the September 11 attacks were an act of war perpetrated by al Qaeda, and, as a result, the United States is at war with al Qaeda.[171] According to Yoo, historical precedent demonstrates that the Constitution grants the President exclusive control over individuals captured during military operations.[172] Furthermore, Yoo maintains that treaties such as the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW")[173] and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT")[174] do not apply to al Qaeda or the Taliban.[175] Because al Qaeda is not a high contracting party to the Geneva Conventions, and as members of the Taliban fail to meet certain standards explained in Article 4 of the Convention, Professor Yoo argues that the GPW and the CAT do not protect either group.[176] For example, these eligibility standards require that individuals wear uniforms, openly bear arms, and follow the laws of war.[177]

Importantly, the above arguments in defense of extraordinary rendition do not directly state that the practice is legal; rather, they state that there is no law regulating the practice. Understandably,

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[169] *See, e.g.* A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1 (2006).

[170] Mayer, *supra* note 38, at 112.

[171] John Yoo, *Symposium: The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1193–98 (2004).

[172] *Id*. at 1204–23. Yoo gives examples from the Revolutionary War to the Gulf War. *Id*.

[173] Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135.

[174] Dec 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

[175] Yoo, *supra* note 171, at 1223–32.

[176] *Id*. at 1226–27.

[177] *Id*. *See also* John Yoo, *Commentary: Behind the 'torture memos,'* Jan. 4, 2005, *available at* http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml (arguing that al Qaeda members do not follow the laws of war because they hide among peaceful populations and attack civilians).

these defensive arguments are heavily criticized and rebutted,[178] leaving open the possibility that if these arguments are indeed meritless, and extraordinary rendition is in fact illegal, then victims of the process still face great legal hurdles for recovery, demonstrating the need for reform.[179] On the other hand, if the legal arguments in defense of extraordinary rendition do hold merit, and the program in fact exists in a legal vacuum, Congress must act to preserve the rule of law, due process, and separation of powers.

II. CURRENT OPTIONS AND THEIR PROBLEMS

Though victims of extraordinary rendition currently have three main causes of action, each legal claim has serious limitations. One option is to bring a *Bivens*[180] claim against the United States. A second option is to bring suit under the Torture Victim Protection Act,[181] and a third option is to file suit pursuant to the Alien Tort Statute,[182] alleging violations of international legal norms or treaties prohibiting prolonged arbitrary detention and/or torture.

A. Bivens *Claims*

Under the first option, victims of extraordinary rendition can bring a *Bivens* claim against the United States. *Bivens* establishes that "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[183] The

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[178] *See, e.g.*, Satterthwaite, *supra* note 27; TORTURE BY PROXY, *supra* note 28, at 30–100.

[179] *See infra* Part II (explaining the problems extraordinary rendition victims face in litigating their claims under existing law).

[180] As developed in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[181] Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350).

[182] 28 U.S.C. § 1350. The Alien Tort Statute is also known as the Alien Tort Claims Act.

[183] Carlson v. Green, 446 U.S. 14, 18 (1980). In *Bivens*, FBI agents entered Bivens' apartment, searched it, and arrested him in front of his family for

purpose of *Bivens* is to deter federal officers from violating individuals' constitutional rights, and *Bivens* suits can be brought only against individual federal officers rather than federal agencies.[184] A *Bivens* suit cannot proceed if either the plaintiff already has an identifiable, statutory cause of action or if "special factors" warrant hesitation in creating a new cause of action when Congress has declined to explicitly do so.[185] In subsequent cases, the Supreme Court has ruled that *Bivens* remedies are available for some, but not all, constitutional violations.[186]

The Supreme Court, however, is hesitant about allowing *Bivens* claims if the separation of powers or political questions doctrine is involved.[187] The separation of powers doctrine bars the judiciary from adjudicating matters solely within the purview of the executive or legislative branches, including the "conduct of foreign relations," which is constitutionally reserved to the Executive.[188] Likewise, "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution

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alleged narcotics violations. *Bivens*, 403 U.S. at 389. Bivens brought suit, claiming that the arrest and search were conducted without a warrant, that the FBI employed unreasonable force in making the arrest, and that the arrest was made without probable cause. *Id*. Bivens claimed damages for humiliation, embarrassment, and mental suffering. *Id*. at 389–90. The Supreme Court eventually heard the case and ruled that the complaint stated a valid cause of action and that Bivens was entitled to money damages for any injuries he suffered as a result of the FBI agents' violation of the Fourth Amendment. *Id*. at 397.

[184] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68–70 (2001).

[185] *Id*. at 67.

[186] When the *Bivens* remedy was created, it only applied to violations of the Fourth Amendment. *Id*. at 66. Since then, the Court has extended *Bivens* to cover some violations of the Due Process Clause of the Fifth Amendment and violations of the Cruel and Unusual Punishment Clause of the Eight Amendment, but not a First Amendment violation arising in the context of federal employment. *Id*. at 67–68. For a more detailed explanation of the Court's *Bivens* jurisprudence, see *id*. at 65–74.

[187] *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 280 (E.D.N.Y. 2006).

[188] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

to the halls of Congress or the confines of the Executive Branch."[189] The idea underlying this doctrine is that "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."[190]

In *Chappell v. Wallace*,[191] the Supreme Court "expressly cautioned . . . that [a *Bivens*] remedy will not be available when 'special factors counseling hesitation' are present."[192] These factors are not at all related to the merits of the case, rather, they involve "the question of who should decide whether . . . a remedy should be provided."[193] Pursuant to this rationale, courts will not extend a *Bivens* remedy if the court believes the issue can be better decided by other branches of government.[194]

Arar v. Ashcroft[195] provides an example of the difficulties a plaintiff may face in bringing a *Bivens* claim with respect to the separation of powers and political question doctrines. The plaintiff in *Arar* sued a number of United States officials, including former Attorney General John Ashcroft and former Secretary of Homeland Security Tom Ridge, and asserted two *Bivens* claims, alleging he was a victim of extraordinary rendition.[196]

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[189] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[190] *Id*.

[191] 462 U.S. 296 (1983).

[192] *Id*. at 298 (citing *Bivens*, 403 U.S. at 396).

[193] Bush v. Lucas, 462 U.S. 367, 380 (1983).

[194] *See id*. at 378–80. Indeed, the *Arar* court rejected Arar's *Bivens* claim for that exact reason. Arar v. Ashcroft, 414 F. Supp. 2d 250, 286 (E.D.N.Y. 2006) ("[G]iven the serious national-security and foreign policy issues at stake, *Bivens* did not extend a remedy to Arar for his deportation to Syria and any torture that occurred there.").

[195] 414 F. Supp. 2d at 280–83.

[196] *Id*. at 257–58, 266–67. Arar's first *Bivens* claim was that defendants violated his substantive due process rights, protected by the Fifth Amendment, by "knowingly and intentionally subjecting him to torture and coercive interrogation in Syria." *Id*. at 257. Arar's second *Bivens* claim was that his substantive due process rights were violated by defendants when they subjected him to arbitrary and indefinite detention without "access to counsel, the courts, or his consulate." *Id*. at 257–58, 266–67. Arar sought a declaratory judgment and compensatory and punitive damages for both of these counts. *Id*. at 258.

The *Arar* court dismissed Arar's *Bivens* claims pursuant to the separation of powers and political question doctrines.[197] In refusing to address the claims, the court noted that it must proceed cautiously in reviewing claims that involve foreign policy and relations with foreign governments, especially when such claims raise policy issues that "are the prerogative of coordinate branches of government."[198] Laying the groundwork for dismissal under the separation of powers and political question doctrines, the Court first wrote that the case did indeed raise national security and foreign policy considerations implicating multi-national agreements aimed at stopping terrorism, and that the propriety of these considerations was better reserved to the Executive and Legislative branches.[199] Additionally, the Court felt that allowing Arar's suit to proceed would make foreign governments who covertly cooperate with the United States think twice about future cooperation, given the possibility of exposure in court.[200] The Court further sidestepped review by quoting a Supreme Court case noting the difficulties with assessing or dealing with alien claims:

> Any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[201]

Finally, the court rejected Arar's *Bivens* claims by relying on the "fundamental difference" between evaluating the actions of domestic federal officials and those of international federal

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[197] *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 279–84 (E.D.N.Y. 2006).

[198] *Id*. at 281.

[199] *Id*.

[200] *Id.* This suggests that the United States needs to rely on secret agreements with other nations in order to "respond to situations involving our national interest" and that Arar's suit would basically force the U.S. government to disclose information it told other nations it would keep secret, which would cause "embarrassment of our government abroad." *Id*. (citations omitted).

[201] *Id.* at 282 (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

officials.[202] Evaluating federal officials' actions in the United States allows judges to balance individual rights vis-à-vis government interests by using their "experience derived from living in a free and democratic society."[203] The evaluation of foreign officials' actions, however, is different, as the government interests involved may be drastically distinct from fundamental American values, leaving judges with no knowledge or experience in evaluating such actions.[204] In short, the court determined that any judicial declaration that extraordinary rendition was unconstitutional would seriously impact foreign policy, a matter better left for other branches of government that could better balance the interests involved.[205]

In addition to arguing that the separation of powers and political question doctrines bar adjudication of the case, the government can also raise the state secrets defense in response to a *Bivens* claim.[206] This defense is a common law doctrine developed by the Supreme Court in *United States v. Reynolds*[207] and recognizes a privilege against revealing certain information that, if made part of the public record in a civil or criminal proceeding, would expose information detrimental to national security.[208] This privilege belongs only to the government, must be asserted by the

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[202] Arar v. Ashcroft, 414 F. Supp. 2d 250, 282 (E.D.N.Y. 2006).

[203] *Id*.

[204] *Id*.

[205] *Id*. at 283.

[206] *See* El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007). Khaled El-Masri, claiming to be a victim of extraordinary rendition, sued the Director of the CIA and other unknown agents pursuant to, *inter alia*, *Bivens*, alleging violations of his Fifth Amendment Due Process right. El-Masri v. Tenet, 437 F. Supp. 2d 530, 534 (E.D.Va. 2006). The United States intervened as a defendant and persuaded the court to dismiss El-Masri's complaint on state secrets grounds, and the Fourth Circuit upheld the dismissal. *El-Masri v. United States*, 479 F.3d at 299–300. This privilege is a barrier to a *Bivens* claim by any extraordinary rendition victim because the privilege arises out of the extraordinary rendition program itself and the government's contention that the program needs to be kept secret. *See El-Masri v. Tenet*, 437 F. Supp. 2d at 538–39.

[207] 345 U.S. 1, 7–8 (1953).

[208] *See id*. at 1, 7–8, 10.

government, and "is not to be lightly invoked."[209] When formally created and articled by the *Reynolds* court, the privilege was a means of preventing discovery by the plaintiffs against the government,[210] but has been extended by the Circuit Courts as a ground for dismissing the entire case when the state secrets are "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matter."[211]

As previously mentioned, the case of Khaled El-Masri illustrates how easily the government can use the state secrets

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[209] *Id*. at 7. The *Reynolds* Court imposed several requirements for successful invocation of the privilege. The head of the department with control over the issue, after personal consideration of the matter, must make a formal claim of privilege. *Id*. at 7, 8. Next, "the court itself must determine whether the circumstances are appropriate for the claim of privilege," and do so without examining the evidence; even the judge cannot examine the evidence privately in chambers. *Id*. at 8, 10. Considering all the circumstances of the case, if the court concludes that there is a "reasonable danger" that production of the evidence would expose matters that should not be disclosed due to national security concerns, the privilege should prevent disclosure of those matters. *Id*. at 10. Finally, even "the most compelling necessity" cannot overcome an approved claim of privilege. United States v. Reynolds, 345 U.S. 1, 11 (1953).

In *Reynolds*, three civilian observers riding in an Air Force B-29 aircraft died when the plane crashed, and their widows brought suits against the United States. *Id*. at 3. In pretrial discovery motions, the plaintiffs asked for production of the Air Force's official accident investigation report as well as statements of the three surviving crew members that were taken in connection with the investigation. *Id*. at 4. The government's argument, supported by an affidavit of the Judge Advocate General of the United States Air Force, was that the requested report and statements would "seriously hamper national security" if furnished. *Id*. at 5, 6. The District Court ordered the government to produce the evidence so the court could decide if it in fact contained sensitive matters, but the government did not obey the order. *Id*. at 5. Therefore, the court ordered that the facts on the issue of negligence would be decided in plaintiff's favor, and final judgment was entered for the plaintiffs after a damages hearing. *Id*. The government appealed, and the Court of Appeals affirmed in full. United States v. Reynolds, 345 U.S. 1, 5 (1953). In reversing the lower courts, the Supreme Court officially created the state secrets privilege. *See id*. at 6–10.

[210] *Id*. at 3.

[211] *See* El-Masri v. United States, 479 F.3d 296, 299–300, 306 (4th Cir. 2007) (dismissing El-Masri's suit on state secrets grounds and collecting cases where other Circuit Courts of Appeal dismissed cases on state secrets grounds).

doctrine to dismiss lawsuits alleging extraordinary rendition.[212] On appeal, the plaintiff acknowledged that although some of the information important to his claims may be protected by the state secrets privilege, his case could be litigated without their disclosure.[213] Moreover, the plaintiff argued that the facts central to his case are no longer secrets because they were made public by statements of United States officials or in reports by media organizations and foreign governments.[214] According to the plaintiff, the fact that the CIA operates a rendition program targeted at terrorism suspects and the tactics employed therein are so widely discussed that litigation concerning them could not harm national security.[215]

Although the Fourth Circuit agreed that the general subject matter of the litigation could be described without resort to state secrets, the court stated that the controlling inquiry was whether the action could be litigated without resort to state secrets.[216] In order to establish a *prima facie* case, the Fourth Circuit maintained that the plaintiff would have to produce evidence that the defendants detained and interrogated him in a manner rendering them personally liable.[217] "Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations," and gathering this evidence would require the plaintiff to rely on witnesses whose identities, and even very existence, must remain secret in the interest of national security.[218] Furthermore, even if the plaintiff could create a prima facie case, the Court continued, the defendants

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[212] *Id*. at 299–300.

[213] *Id*. at 303.

[214] *Id*. at 308. That Khaled El-Masri was subject to extraordinary rendition and the details of his experience have been extensively reported by the media and government reports. *See supra* Part II.G (citations to media and government reports detailing the extraordinary rendition of El-Masri.)

[215] *Id*. Indeed, the abundance of reports cited within this Note shows that the extraordinary rendition program has received extensive media coverage.

[216] *Id*. at 309.

[217] El-Masri v. United States, 479 F.3d 296, 309 (4th Cir. 2007).

[218] *Id*.

could not defend themselves without using privileged evidence.[219]

The fourth problem facing any *Bivens*-based cause of action is evidentiary: it is usually difficult, if not impossible, for victims of extraordinary rendition to gather enough corroborative evidence to bring a lawsuit.[220] Indeed, one of the reasons the CIA engages in extraordinary rendition is because doing so means it will not have to reveal sensitive information about its intelligence methods and sources in American courts.[221] The whole process of extraordinary rendition is secret; victims have been described as entering an "invisible universe,"[222] and detainees like Arar allege that they were held incommunicado and denied access to a lawyer, courts, or their consulate.[223] Additionally, outside organizations that provide relief to such detainees are often denied access to rendered individuals.[224] For example, the United States has prevented the International Committee of the Red Cross ("ICRC") from meeting with some overseas detainees, despite its request to meet with all of them, for

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[219] *Id*.

> The main avenues of defense available in this matter are to show that El-Masri was not subject to the treatment that he alleges; that, if he was subject to such treatment, the defendants were not involved in it; or that, if they were involved, the nature of their involvement does not give rise to liability. Any of those three showings would require disclosure of information regarding the means and methods by which the CIA gathers intelligence.

Id.

[220] *See infra* notes 221–25 and accompanying text discussing the secrecy surrounding the extraordinary rendition program. Maher Arar and Khalid El-Masri are exceptions to this general problem because their cases have received extensive media attention, and Arar's case is the subject of a detailed government investigation.

[221] Mayer, *supra* note 38, at 109.

[222] Priest, *CIA Holds Terror Suspects*, *supra* note 66.

[223] Arar v. Ashcroft, 414 F. Supp. 2d 250, 257–58, 266–67 (E.D.N.Y. 2006). Since detainees cannot see any humans other than their captors, there is no neutral third party who can evaluate the detainees' claims of torture and collect evidence supporting or denying those claims. *Id.*

[224] Steven R. Weisman, *U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret*, N.Y. TIMES, Dec. 10, 2005, at A10; *Red Cross Wants Access to Secret U.S. Jails*, CHI. TRIB., Dec. 10, 2005, at 7; Priest & Gellman, *supra* note 68.

reasons of "national security."[225] All of these factors demonstrate that many victims of extraordinary rendition who have not been the subject of media attention or official investigations probably could not bring any action against the United States because the very nature of their detention prevented them from gathering any evidence to corroborate their allegations.

B. Torture Victim Protection Act

A second cause of action for victims of extraordinary rendition is to bring a claim under the Torture Victim Protection Act ("TVPA").[226] Enacted in 1992, the TVPA reads:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[227]

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[225] *Supra* note 224. Under international law, the ICRC has a special status as the guardian of international humanitarian law. TORTURE BY PROXY, *supra* note 28, at 2 n.2. According to the ICRC website,

> The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

International Committee of the Red Cross, The Mission, http://www.icrc.org/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument (last visited Nov. 17, 2007). One of the Red Cross' central purposes is to visit prisoners and protect their human rights. *See* Weisman, *supra* note 224.

[226] The TVPA is appended as a statutory note to the Alien Tort Claims Act; it is codified at 28 U.S.C. § 1350.

[227] *Arar*, 414 F. Supp. 2d at 260. Under the TVPA, torture is defined as

Before one can bring a claim under the TVPA, however, all "adequate and available" local remedies must be exhausted,[228] and the timing of the suit is particularly important because of a ten year statute of limitations.[229] Although the text of the TVPA only grants a cause of action against direct, primary violators, every court that has considered the issue has held that the TVPA also allows claims against secondary violators who aid and abet, or conspire with, primary violators.[230]

Despite such judicial interpretation, the TVPA is an ineffective remedy for victims of extraordinary rendition as it requires that defendant(s) act "under actual or apparent authority, or color of law, of any foreign nation."[231] For example, even though the CIA agents allegedly involved in Arar's torture were "some of the highest policy-making officials of this country," those agents were held by the court to have been acting under color of American, not foreign law.[232] Therefore, the TVPA would not protect Arar.[233] Moreover, the court specifically rejected Arar's argument that the CIA agents should be deemed as acting under foreign law because

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> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Id.

[228] In nations like Syria there is no adequate, alternative remedy for torture victims. *Id*.

[229] *Id*.

[230] *Id*. at 261 (citing, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996); Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887, at *16 (S.D.N.Y. Feb. 28, 2002); *see also* Cabello v. Fernandez Larios, 402 F.3d 1148, 1158 (11th Cir. 2005)).

[231] Arar v. Ashcroft, 414 F. Supp. 2d 250, 260 (E.D.N.Y. 2006) (citing Torture Victim Protection Act § 2(a), 28 U.S.C. § 1350 (1991)).

[232] *Arar*, 414 F. Supp. 2d at 265.

[233] *Id*. at 266.

they conspired with foreign officials.[234] In a similar case, the District of Columbia Circuit Court of Appeals agreed with the *Arar* court's reasoning and held that former national security advisor Henry Kissinger, who was allegedly involved in a coup in Chile that resulted in the defendant's death, was acting pursuant to a Presidential directive, and therefore acting under auspices of U.S. law.[235] These two rulings do not bode well for victims of extraordinary rendition.

Like *Bivens* claims, suits under the TVPA are also easily defeated by the state secrets privilege,[236] the separations of powers and political questions doctrines,[237] or lack corroborative evidence

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[234] *Id*. Courts have held that sometimes, joint action between state and federal officials can be considered conduct under state law for purposes of 42 U.S.C. § 1983. Arar argues that his case, where federal officials acted with foreign officials, is analogous and thus these US officials should be deemed as acting under foreign law. *Id*. at 265–66. In rejecting this argument, the court notes "it is perfectly reasonable to hold federal officials liable for constitutional wrongs committed under color of state law because federal officials, when acting under color of state law, are still acting under a legal regime established by our constitution and our common jurisprudence in the domestic arena." *Id*. at 266. However, the issues federal officials face when acting in the foreign affairs realm "may involve conduct and relationships of an entirely different order and policy-making on an entirely different plane . . . . U.S. officials deal with unique dangers not seen in domestic life and negotiate with foreign officials and individuals whose conduct is not controlled by the standards of our society." *Id*.

[235] Schneider v. Kissinger, 310 F. Supp. 2d. 251, 267 (D.D.C. 2004), *aff'd* 412 F.3d 190 (D.C. Cir. 2005) (holding defendant was executing the direct orders of the President, which constitutes action pursuant to US law, even though defendant's alleged foreign co-conspirators might have been acting pursuant to foreign law).

[236] In fact, the United States raised this defense in response to Maher Arar's TVPA claim. Arar v. Ashcroft, 414 F. Supp. 2d 250, 257–58, 287 (E.D.N.Y. 2006). However, the court sidestepped the state secrets privilege and dismissed Arar's TVPA claim on other grounds. *Id*. at 266. Nonetheless, this defense could be raised against any future claim against the United States by an extraordinary rendition victim because the defense arises from the facts underlying extraordinary rendition, not any particular cause of action. *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 535–39 (E.D. Va. 2006) (explaining how the defense can be raised based on the alleged conduct of the executive branch irrespective of a plaintiff's particular cause of action).

[237] Any theory of liability an extraordinary rendition victim may have

supporting the plaintiff's claims.[238] These continuing problems, coupled with courts' refusal to view U.S. agents as acting under foreign law, make application of the TVPA virtually impossible for victims of extraordinary rendition.

C. ATS Claims

Victims of extraordinary rendition may alternatively file suit under the Alien Tort Statute ("ATS").[239] Although the statute grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"[240] the statute does not create any specific cause of action. Rather, the ATS merely grants federal courts jurisdiction over civil suits brought by aliens for violations of a limited set of well-recognized norms of international law.[241] Regardless of which international law a plaintiff bases his theory of liability upon, any action brought under the ATS will have four potentially fatal flaws. First, the brief language of the ATS makes clear that it applies only to aliens.[242] Therefore, U.S. citizens have no remedy under this statute. Second, in defense of any ATS-based claim, the government will likely raise a state secrets defense.[243]

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against the United States may be defeated by separation of powers and/or political question arguments because these doctrines arise from the alleged conduct of the executive branch in carrying out the extraordinary rendition program. *See Arar*, 414 F. Supp. 2d at 281–83 (explaining why courts should not intervene in matters better reserved for the other branches of government).

[238] Given the extreme secrecy surrounding the extraordinary rendition program and the fact that these victims do not have counsel while detained, it will likely be difficult for them to meet their preponderance of the evidence burden. *See supra* notes 221–25 and accompanying text.

[239] 28 U.S.C. § 1350.

[240] *Id.*; Sosa v. Alvarez-Machain, 542 U.S. 692, 699–700 (2004).

[241] *Sosa*, 542 U.S. at 724. The Supreme Court did not identify exactly which international legal norms are actionable under the ATS. *Id*. at 724–25.

[242] *See* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only . . . .").

[243] The government did just that in El-Masri v. Tenet, 437 F. Supp. 2d 530, 541 (E.D. Va 2006), *aff'd* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied* El-Masri v. United States, 128 S.Ct. 373, 2007 WL

Futhermore, like cases involving *Bivens* and/or TVPA claims, any ATS-based claim may be defeated by the separation of powers and/or political question doctrines.[244] Finally, like all other current causes of action, any plaintiff bringing an ATS claim would face tremendous evidentiary hurdles because the extraordinary rendition program is completely shrouded in secrecy.[245]

III. A SOLUTION: A SPECIFIC CAUSE OF ACTION AGAINST THE UNITED STATES FOR VICTIMS OF EXTRAORDINARY RENDITION THAT EXPANDS THE SUPERVISION OF DETAINEES

Although there are several causes of action available for victims of extraordinary rendition to bring suit against the United States, all of these options fail in practice. To truly provide checks and

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1646914, *1 (2007). In *El-Masri v. Tenet*, the defendant, claiming to be a victim of extraordinary rendition, brought two ATS-based claims against the United States, and the government successfully moved to dismiss based on the state secrets privilege. *Id*. The gist of the government's arguments in cases like *El-Masri* is that litigating these cases would result in the exposure of details about a clandestine intelligence program involving the United States and foreign governments that would harm national security. *See id*. at 537. The government could easily make this same argument in any future ATS-based suit brought by an alleged victim of extraordinary rendition because, by its very nature, the extraordinary rendition program involves state secrets. On a more general note, the Bush Administration has asserted this privilege nineteen times as of early June 2006, which is more frequent than any prior administration. Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, June 4, 2006, at 32. This number is according to William G. Weaver, a political scientist at the University of Texas at El Paso.

[244] Maher Arar, a victim of extraordinary rendition who sued the United States, lost his TVPA and *Bivens* claims on precisely these grounds. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 281–83, 287 (E.D.N.Y. 2006). Although Arar did not raise an ATS-based claim, the same logic the *Arar* court used against TVPA and *Bivens* claims also works against ATS claims. This defense can be asserted against any fact pattern involving extraordinary rendition, regardless of plaintiff's theory of liability, because this defense arises from the facts of the case, not the particular cause of action. *See id*. at 281–83 (noting that the defense arises from the executive branch's alleged conduct, irrespective of plaintiff's cause of action).

[245] *See supra* notes 221–25 and accompanying text.

balances, and to ensure that victims are not left without a remedy, Congress must create a specific statutory cause of action against the United States for the victims.

To be effective, such a cause of action must have eight objectives. First, it will help prevent due process and separation of powers violations by the Executive Branch. Second, it will allow courts to adjudicate claims of extraordinary rendition without running into political question and separation of powers problems. Third, existing causes of action do not provide redress to all human beings, and all people deserve protection against torture. Fourth, the liability of U.S. officials who participate in extraordinary rendition, directly or indirectly, needs to be clarified. Fifth, this cause of action must prevent the government from escaping liability by asserting the state secrets privilege. Sixth, the United States cannot be able to avoid liability by obtaining diplomatic assurances that the rendered individual will not be tortured because such assurances lack an acceptable degree of credibility or sincerity. Seventh, there needs to be an outside monitor of detainees that can either corroborate claims of abuse or exonerate innocent government officials because the secret nature of the extraordinary rendition programs makes the gathering of evidence very difficult. Finally, extraordinary rendition victims must be compensated to redress their injuries and deter similar conduct in the future.

A. Objectives of the Law

1. Preserving Due Process and Separation of Powers

The greatest advantage of this proposal is that it will help protect due process rights of potential or actual victims of extraordinary rendition, while preserving the balance of power between the branches of the federal government. Due process ensures that the government operates within the bounds of the law and treats its constituents fairly and consistently.[246] Thus, due

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[246] *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) (Observing that the Due Process Clause was "intended to secure the individual from the arbitrary

process is an important check against tyranny because it prevents arbitrary treatment of people and helps prevent the punishment of innocent people. Like due process, ensuring the separation of powers is a similar critical check against tyranny.[247] The separation of powers doctrine is "at the heart of our Constitution;" indeed, one of the dominant themes underlying the founding of the United States was the danger of governments digressing into tyranny and the need to structure government to prevent such digression.[248]

2. Addressing the Separation of Powers and Political Question Issues

Another advantage of the above proposed law is that it will put to rest any separation of powers or political question doctrine problems that currently bar recovery for victims of extraordinary rendition.[249] The *Arar* court pointed out the necessity of explicit Congressional action with regard to rendition lawsuits: "whether the policy [involves] undermin[ing] or overthrow[ing] foreign governments, or *rendition*, judges should not, in the absence of explicit direction by Congress, hold officials who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law."[250]

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exercise of the powers of government."); *see also* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

[247] Buckley v. Valeo, 424 U.S. 1, 120 (1976) (per curiam); United States v. Brown, 381 U.S. 437, 443 (1965) (Separation of powers was written into the Constitution as a "bulwark against tyranny.").

[248] *Buckley*, 424 U.S. at 119–20 (explaining that James Madison in the Federalist No. 47 wrote of the importance of separation of powers as a check against tyranny).

[249] *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 279–84, 287 (E.D.N.Y. 2006) (dismissing Arar's extraordinary rendition causes of action on political question and separation of powers grounds).

[250] *Id*. at 283 (emphasis added).

3. Providing Redress For All Victims

Unlike the Alien Tort Statute,[251] any proposed legislative solution that provides a cause of action must be available to *all* human beings regardless of their citizenship or immigration status because the impropriety of extraordinary rendition is neither related to a person's citizenship or immigration status nor should relief be so conditioned.[252] There is no logical reason why non-citizens should be excluded from bringing claims pursuant to the proposed statute. Critics may argue that persons captured outside of the United States should not have the same protections against torture as those captured on U.S. soil.[253] However, Congress explicitly rejected arguments like this by enacting the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"):

> [I]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of *any person* to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States*.[254]

The language of the FARRA demonstrates that Congress intended to prohibit the extraordinary rendition of any person from any location. Therefore, not only would the universal application of the proposed law be consistent with Congressional intentions, but such a statute would also promote good public policy by

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[251] *See* 28 U.S.C. § 1350; *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 699-700 (2004).

[252] *See* COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 3 (explaining that the fact that extraordinary rendition so far has only happened to non-American citizens is shocking because it reflects a kind of "legal apartheid" and an exaggerated sense of superiority).

[253] The Supreme Court has sometimes held that Constitutional protections do not apply to foreign nationals outside of the United States. For example, in *United States v. Verdugo-Urquidez*, the Court ruled that the Fourth Amendment does not apply to property in a foreign country owned by a nonresident alien that was searched and seized by U.S. agents. 494 U.S. 259, 261 (1990).

[254] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242 (emphasis added).

extending a cause of action to all human beings. Extraordinarily rendering aliens captured abroad is as severe a violation of due process and other civil liberties as rendering Americans captured within the United States,[255] and accordingly, both groups of people should have the same remedy. Moreover, extraordinary rendition is not despicable because of the victims' citizenship or location, but rather because it offends human dignity and human rights that apply to all people by virtue of their humanity.[256]

Finally, this law will allow all human beings—even convicted terrorists—to sue the United States. While the idea of a terrorist suing the United States may be hard for some to stomach, due process protects convicted criminals,[257] and this law gives effect to that protection. Moreover, the "any person" language[258] in FARRA demonstrates Congressional intent that not even the worst of terrorists should be subject to extraordinary rendition. Additionally, as mentioned in the previous paragraph, extraordinary rendition is wrong because it is dehumanizing, and becoming a terrorist does not strip a person of his humanity.

4. Liability of U.S. Officials: Taking of Responsibility

American case law supports the notion that liability attaches to U.S. officials who indirectly torture detainees or aid and abet the primary torturers by transferring a detainee to a nation known to torture prisoners.[259] Further, organizations like Human Rights

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[255] Indeed, the Due Process Clause of the Fifth Amendment says no "person," as opposed to no citizen, shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V ("nor shall any *person*. . . be deprived of life, liberty, or property, without due process of law") (emphasis added).

[256] *See* COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 21 (Rendition is a "degrading and dehumanizing practice" that inflicts "grave and long-lasting psychological damage" upon its victims.).

[257] United States v. Pugliese, 805 F.2d 1117, 1122 (2d Cir. 1986).

[258] "[I]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of *any person* . . . ." Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242 (emphasis added).

[259] *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 261 (E.D.N.Y. 2006)

Watch persuasively argue that "rendition to torture is the legal and moral equivalent of engaging in torture directly."[260] If the law only creates liability for those officials who directly torture detainees, it would not accomplish the policy goal of reducing torture and abuse, as U.S. officials could easily transfer the detainee to foreign officials who could torture the detainee. In fact, that is often how extraordinary rendition works.[261] Therefore, as a practical matter, any law that does not include liability for those who aid or abet will have little effect in reducing torture or compensating the victims.

5. State Secrets Privilege: Balancing Secrets and Accountability

Any solution to the problem of extraordinary rendition must also address the state secrets privilege.[262] The government has an interest in keeping sensitive foreign affairs and intelligence gathering programs out of the public eye.[263] At the same time, victims of extraordinary rendition have an interest in being compensated for their wrongful capture and torture and in deterring future

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(citing, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 799 (9th Cir. 1996); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *16 (S.D.N.Y. Feb. 28, 2002); *see also* Cabello v. Fernandez Larios, 402 F.3d 1148, 1158 (11th Cir. 2005) (noting that every court considering the TVPA has concluded that it applies to indirect violators who aid and abet or conspire with the primary torturers).

[260] Wendy Patten, US Advocacy Director, Human Rights Watch, Statement on U.S. Rendition Legislation (Mar. 10, 2005), *available at* http://www.hrw.org/english/docs/2005/03/10/usint10294.htm.

[261] Priest & Gellman, *supra* note 68 (explaining that U.S. officials often send detainees to other countries so the other nations can torture them).

[262] *See supra* notes 212 and 236 (explaining that in the two instances where a person has sued the United States for being subject to extraordinary rendition, the government has raised the state secrets defense). These cases show the government's willingness to raise the privilege as a defense to extraordinary rendition suits.

[263] El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007) (dismissing El-Masri's extraordinary rendition lawsuit because the government has an interest in not revealing state secrets and litigating the matter would reveal those secrets).

extraordinary renditions.[264] The above proposed law will balance the competing interests of the parties by protecting sensitive information while providing for judicial oversight and compensation for victims.

Allowing the government to escape liability by asserting the state secrets privilege effectively subverts the rule of law,[265] which is especially problematic given that the consequence is torture. Moreover, as is clear from the government's constant invocation of the state secrets doctrine,[266] the Administration is overusing and abusing the privilege[267] despite warnings from the Supreme Court that the privilege "is not to be lightly invoked."[268]

Regarding extraordinary rendition specifically, "[t]he experience of the [Arar Commission] suggests that governments may be

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[264] *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 539 (E.D. Va 2006) (recognizing that Khaled El-Masri has private interests in bringing his lawsuit); *see generally* Fitzgerald v. Penthouse Int'l., Ltd., 776 F.2d 1236, 1238 (4th Cir. 1985) ("[W]hen the state secrets privilege is validly asserted, the result is unfairness to individual litigants.").

[265] *See* COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 3, 59 (explaining that invoking state secrets years after the event in question occurred, like the US government did in the *El-Masri* litigation, "is unacceptable in a democratic state based on the rule of law" and that "state secrecy cannot in any circumstances justify or conceal criminal acts and serious human rights violations.").

[266] Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, June 4, 2006, at 32.

[267] *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 85–112 (Spring 2005). In reviewing many cases where the executive branch asserts the state secrets privilege, the authors state that "the state secrets privilege, a judicial creation, is now judicially mishandled to the detriment of our constitutional system." *Id*. at 86. They also write that, "the privilege, as now employed, is tantamount to courts capitulating in their oversight function." *Id*. at 90. The authors also discuss several cases in which the government invoked the privilege that resulted in injustice of a "sharp and disturbing nature," such as Frost v. Perry, 919 F. Supp. 1459 (D. Nev. 1996) and Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998). *Id*. at 103–04. Finally, the authors write that "conflict of interest is a fundamental problem afflicting the current arrangement for assertion of the privilege and the deference with which courts are required to treat such assertions." *Id*. at 107.

[268] United States v. Reynolds, 345 U.S. 1, 7 (1953).

tempted to make overbroad claims of secrecy to protect themselves from embarrassment and to hinder accountability processes. It also suggests, however, that much information about even contemporary national security activities can be made public without harming national security."[269] Generally speaking, the government has a tendency to overclassify information, especially when facing lawsuits by whistle-blowers or people with grievances against the government.[270] For example, in a 2004 Congressional hearing, Carol Haave, the deputy undersecretary for counterintelligence at the time, admitted that "I do believe we overclassify information" and estimated that information is overclassified about half the time.[271] Similarly, Thomas Kean, the chairman of the 9/11 committee, stated that in his opinion three quarters of the classified information he reviewed as chairman should not have been classified.[272]

This trend in overclassification is not new, however. Erwin Griswold, the former U.S. Solicitor General who argued the Pentagon Papers Case,[273] wrote an Op-Ed piece in *The Washington Post* stating there was not "any trace of a threat" to national security from the publication of the Pentagon Papers, despite the fact that the government classified the papers under national security concerns.[274] Mr. Griswold continued: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security,

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[269] *Rendition to Torture*, *supra* note 158. For more on the Arar Commission, *see supra* note 158.

[270] *See infra* notes 271–78 and accompanying text.

[271] *Too Many Secrets: Overclassification As a Barrier to Critical Information Sharing: Hearing before the Subcommittee on National Security, Emerging Threats and International Relations*, 108th Cong. 82 (2004) (statement of Carol Haave, deputy undersecretary for counterintelligence), *available at* http://www.fas.org/sgp/congress/2004/082404transcript.html.

[272] Tom Blanton, Editorial, *Eyes Only; The Lie Behind the Secrets*, L.A. TIMES, May 21, 2006, at M1.

[273] New York Times Co. v. United States, 403 U.S. 713 (1971).

[274] Erwin Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

but with governmental embarrassment of one sort or another."[275]

Similarly, Tom Blanton, the director of the National Security Archive at George Washington University, recently argued in a *Los Angeles Times* editorial that the great irony about the state secrets privilege is that the case in which it was developed, *Reynolds v. United States*,[276] was based on government dishonesty.[277] Specifically, he notes that the documents the government tried to keep secret in Reynolds did not contain actual state secrets; rather, the government classified them to cover up its own negligence.[278]

The problem of overclassification, together with an imbalance between the rights of the government and the rights of the individual, has ensured that victims of extraordinary rendition do not have any effective remedies for their injuries. However, individual rights should not be subverted in the context of fighting terrorism.[279] In *Hamdi v. Rumsfeld*,[280] eight Justices of the Supreme Court held that a U.S. citizen, captured in a foreign combat zone and being detained as an enemy combatant, was entitled to, at a minimum, "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker:"[281]

> [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever 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.[282]

This individual right, not only of habeas corpus, but of the right to have the actions of the government reviewed in how it treats

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[275] *Id.*

[276] 345 U.S. 1 (1953).

[277] Blanton, *supra* note 272.

[278] *Id*.

[279] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (O' Connor, J., plurality).

[280] 542 U.S. 507.

[281] *Id*. at 509–10, 541, 573.

[282] *Id*. at 536 (O' Connor, J., plurality) (internal citations omitted).

individuals, must be protected and strengthened, as the above law aims to do.

Certainly, critics of the above proposal regarding the state secrets privilege may argue that the proposal will require the government to defend itself, even when claims are meritless, by disclosing sensitive information.[283] This would effectively force an innocent party—the government—to pay for something that it did not do. As valid as this concern may be, however, the absence of such a requirement would permit a guilty governmental party to avoid liability for an entire set of offenses simply by asserting the privilege.[284] Moreover, the proposed law provides a mechanism to deal with such concerns: the requirement that detainees be monitored by the ICRC will allow an innocent government to cite the testimony of Red Cross officials that the detainee was not tortured without having to reveal sensitive information. [285]

6. Diplomatic Assurances

Former Attorney General Alberto Gonzales has stated that is not U.S. policy to render detainees "to countries where we believe or we know that they're going to be tortured" and that if a country has a history of torture, the United States will seek additional assurances that the rendered detainee will not be tortured.[286] The United States claims that these assurances are not treated lightly.[287] *The Washington Post* reports that the CIA's general counsel office requires that "the station chief in a given country [] obtain a verbal assurance from that country's security service [that torture will not occur]. The assurance must be cabled back to CIA headquarters

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[283] *See supra* note 219 (explaining how an innocent government facing an extraordinary rendition lawsuit would have to disclose state secrets to defend itself).

[284] *See* COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 58 (Khaled El-Masri is unable to hold anyone accountable for his extraordinary rendition because of the state secrets privilege.).

[285] For more on this requirement, *see infra* Part III.B.7.

[286] Smith, *supra* note 79.

[287] Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 1.

before a rendition takes place."[288] An anonymous U.S. official has stated that "we get assurances, we check on those assurances, and we double-check on these assurances to make sure that people are being handled properly in respect to human rights," and that compliance is ''very high.''[289] Nonetheless, ''nothing is 100 percent unless we're sitting there staring at [the rendered detainees] 24 hours a day.''[290]

This process, therefore, only illustrates that government officials should not be allowed to defend themselves with diplomatic assurances that the detainee will not be tortured in the host nation because "the odds of torture after a rendition are much higher than fifty percent and diplomatic assurances [in this context] are legally worthless."[291] Even U.S. intelligence agents involved in renditions claim that the CIA recognizes the flimsy nature of diplomatic assurances.[292] Vincent Cannistraro, the former head of the CIA's counterterrorism division, has stated in regards to Maher Arar's case that "you would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they

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[288] Dana Priest, *CIA's Assurances On Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, WASH. POST, Mar. 17, 2005, at A01 [hereinafter Priest, *CIA Assurances Doubted*].

[289] Jehl & Johnston, *supra* note 287.

[290] *Id*.

[291] Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 Geo. Immigr. L.J. 213, 263–64 (2006). Ms. Hawkins examined twenty cases of rendition, seventeen of which involved allegations of torture. If the prisoners in the other three cases were tortured, they have no way of making their allegations known because they have not been released or heard from after being rendered. In two of the seventeen cases, the allegations of torture were vague and from a source of suspect credibility, but the detainees were in Egypt, a nation with a long history of torture. In two other cases, the torture allegations are vague, but they come from U.S. officials who "have no reason to fabricate them." In the remaining thirteen cases, the torture allegations were detailed, corroborated by other evidence, and consistent with reports from other detainees and human rights groups describing the process. Ms. Hawkins' argument is that diplomatic assurances are worthless because in at least seventeen of these twenty cases, there is reason to believe the detainee was tortured anyway. *Id*.

[292] *Id*. at 261.

were making claims to the contrary."[293] Arar's case is probably the best documented example of the failure of diplomatic assurances to prevent torture. Current and former intelligence officers and lawyers have told the media that this system of relying on diplomatic assurances is "ineffective" and "virtually impossible to monitor."[294] Another U.S. official who has visited foreign detention sites stated that the issue "goes far beyond" the assurance: "They say they are not abusing them, and that satisfies the legal requirement, but we all know they do."[295] The picture that emerges from these media accounts is that diplomatic assurances are made and accepted in bad faith and do not serve to prevent or reduce torture of extraordinary rendition victims.

7. ICRC Monitoring of Detainees

Ensuring that the ICRC monitors all detainees will be advantageous to all sides. Detainees will benefit because the ICRC will monitor their condition and get them any necessary help. Moreover, if the detainee's allegations regarding extraordinary rendition are true, the ICRC may provide corroborating evidence in court. The government will also benefit from the presence of the ICRC because if the plaintiffs allegations are false, then ICRC evidence will bolster its defense.

If, however, the ICRC is not allowed to monitor all detainees, the detainee's allegations will be presumed true in order to prevent abuse and bad faith actions. This is necessary because otherwise, the ICRC will not be able to corroborate the detainee's story, nor rebut the story with other evidence and act as a defense for the government. This aspect of the proposal will ensure that both sides are balanced and dependent on the presence of the ICRC for evidentiary purposes. For example, if the United States sends a detainee to a nation that it knows will not admit the ICRC, it is creating an inherently unfair situation for the detainee, because the

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[293] Shannon McCaffrey, *Canadian Sent to Syrian Prison Disputes U.S. Claims Against Torture*, KNIGHT-RIDDER, Aug. 1, 2004.

[294] Priest, *CIA Assurances Doubted*, *supra* note 288.

[295] *Id*.

very circumstances of his detention make it difficult to prove his allegations in court. Moreover, the Executive Branch is in the best position to ensure that the ICRC has access to detainees,[296] and if it cannot do so, it must shoulder the burden.

8. Making Things Right: Awarding Plaintiffs Damages

Victims of extraordinary rendition are tortured both mentally and physically.[297] On the most basic level, the uncertainty arising from being detained secretly, without anyone other than the detainee's captors knowing about his whereabouts or well-being, and without any judicial or ICRC control, is a form of torture.[298] Extraordinary rendition is a degrading and dehumanizing process that inflicts "grave and long-lasting" psychological damage on its victims.[299] What's worse, these "deep psychological scars" persist long after the detainee is located or released.[300] Victims have a "permanent fear of death," are unable to have normal relationships, and suffer from flashbacks and panic attacks.[301] Additionally, "on a daily basis, stigma and suspicion seem to haunt anybody branded as 'suspect' in the 'war on terror,'" making links with normal society "practically impossible to restore."[302] It is undeniable, therefore, that all plaintiffs should be able to recover damages for extraordinary rendition.

To begin, victims should be able to receive punitive damages if they demonstrate a valid case of extraordinary rendition. At a basic level, courts award punitive damages to punish defendants for malicious or willful conduct and to deter others from similar

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[296] The executive is in the best position because it is the detainer.

[297] *Infra* notes 298–302 and accompanying text.

[298] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 25, and COUNCIL OF EUROPE JUNE 2007 REPORT, *supra* note 10, at 51 (Louise Arbour, the United Nations High Commissioner for Human Rights, has said that detention without judicial or ICRC review in an unknown location is a form of torture.).

[299] COUNCIL OF EUROPE JUNE 2006 REPORT, *supra* note 1, at 19.

[300] *Id*. at 23.

[301] *Id*.

[302] *Id*.

conduct.[303] Sometimes, decent law-abiding people are careless and injure another; society however reacts more strongly to the deliberate wrongdoer, and punitive damages are one way of expressing the high level of condemnation of certain morally reprehensible acts.[304] Torturing a person, or rendering him to a nation when the renderer has substantial grounds to believe the victim will be tortured, is certainly malicious, willful conduct that must be deterred. Furthermore, punitive damages are "especially appropriate" when the government violates individuals' Constitutional rights.[305]

Moreover, compensatory damages do not always compensate the plaintiff fully, especially when the injury is real but difficult to quantify.[306] Understandably, torture and deprivation of liberty are very difficult to quantify, so there is the risk that compensatory damages will be inadequate. Since torture does more harm than good to society,[307] punitive damages will ensure that extraordinary rendition victims are adequately compensated without risking the suppression of a socially valuable activity.[308] If compensatory damages cannot compensate for the actual harm done, and if punitive damages are not awarded, then the behavior will not be deterred.[309] Punitive damages will "assure full compensation without impeding socially valuable conduct," even if they provide what some may consider excessive damage awards, because the

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[303] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

[304] Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996).

[305] Carlson v. Green, 446 U.S. at 22. As this Note argues, extraordinary rendition violates a number of Constitutional provisions, most notably the Due Process Clause of the Fifth Amendment.

[306] *Kemezy*, 79 F.3d at 34.

[307] That torture does more harm than good to society is implicit in the various international treaties and agreements banning torture, such as the United Nations Convention Against Torture (Dec 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85), federal laws banning torture, such as the Torture Act of 2000 (18 U.S.C. §§2340 and 2340A), and policy statements such as FARRA (*see supra* note 254 and accompanying text).

[308] *Kemezy*, 79 F.3d at 34.

[309] *Id*.

deterrent value will be so high.[310]

Additionally, punitive damages are necessary when the tortuous conduct is concealable, because a judgment equal to the value of the harm done will under-deter, as not all actions will be discovered.[311] It is difficult to conceive of a tort more concealable than extraordinary rendition: the government will not even officially admit to the practice[312] and victims of extraordinary rendition are said to enter an "invisible universe."[313] Indeed, in both instances where an alleged victim of extraordinary rendition has sued the United States, the government has tried to conceal aspects of the case by invoking the state secrets privilege.[314]

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[310] *Id*.

[311] *Id*. at 34–35.

> Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.

Id. at 35.

However, if punitive damages are imposed:

> [k]nowing that he will have to pay compensation for harm inflicted, the potential injurer will be deterred from inflicting that harm unless the benefits to him are greater. If we do not want him to balance costs and benefits in this fashion, we can add a dollop of punitive damages to make the costs greater.

Id. at 34.

[312] President Bush has admitted that "a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States" in a program operated by the CIA that employs "an alternative set of procedures" that are tough. *Remarks on the War on Terror*, *supra* note 88, at 1570-71. However, President Bush denies that the procedures employed in this program are illegal and that maintains that "the United States does not torture." *Id*. at 1571, 1573.

[313] Priest, *CIA Holds Terror Suspects*, *supra* note 66.

[314] El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007); Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

B. Specific Elements of this Cause of Action

The specific elements of this proposed cause of action may be grouped according to the definition of extraordinary rendition and limits on who can be a potential plaintiff or defendant; the procedural element of the permissible claim; the checks and balances required; and the damages that may be awarded. First, extraordinary rendition will be defined the same way it is in this Note: "the transfer of an individual, with the involvement of the United States or its agents, to a foreign state when there are *substantial grounds* for believing the person would be in danger of being subjected to torture."[315] Second, the remedy will extend to any human being, regardless of his citizenship status or the location where he was allegedly seized and/or tortured. A third element will be that the plaintiffs will be allowed to sue any individuals who were either directly or indirectly liable for the extraordinary rendition and torture, including those who aid and abet or conspire with the primary actors

As for the procedural element, fourth, this cause of action should provide that if the government raises a state secrets defense to any or all the elements, then the court will automatically grant judgment for the plaintiff(s) on those element(s) but will not force the government to reveal the secrets.

In regard to the checks and balances in place, a fifth requirement will be a mandate that the United States must allow members of the ICRC to visit and monitor every detainee without exception.[316] This provision will require the Executive Branch to enforce its provisions as best as possible and will explicitly state that if a prisoner can show that he or she was *not* monitored by the ICRC (such as through testimony of ICRC personnel), everything the victim alleges that could have been corroborated by the ICRC will be presumed true.

Additional checks and balances will also require that the

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[315] *See supra* note 26 and accompanying text.

[316] This section will apply to any human being, in any location, who is in the custody of U.S. agents, except for prisoners in federal custody who are in some stage of the regular criminal justice system.

plaintiff(s) must show that the defendants had or should have had substantial grounds to believe that the "host" nation would torture the plaintiff.[317] A reliance on diplomatic assurances from foreign officials by U.S. officials that the "host" nation will not torture will be explicitly rejected as a defense, requiring more active responsibility on the part of the United States in monitoring the host nation.

Finally, the seventh requirement relates to compensation, and will provide damages to eligible plaintiffs for pain and suffering, loss of liberty, emotional distress, damage to reputation, as well as punitive damages. As a practical matter, these seven requirements are essential to this cause of action, and they will advance the goals listed above.

CONCLUSION

Extraordinary rendition violates the due process rights of its victims and is a blatant example of unchecked executive power. This Note calls on Congress to create a cause of action for victims of extraordinary rendition that solves both of these problems. In doing so, this Note proposes a number of legal changes concerning who may be protected, how evidence will be ensured, and the damages that plaintiffs will be able to collect, in an effort to help resolve such a sensitive and controversial practice. The proposed law will balance both governmental and individual interests, but provide victims with a presumption of torture if other factors are present, prodding the Executive Branch into complying with the law. Similarly, the proposed law will mandate independent monitoring of detainees, producing evidence from a neutral source that may be used by either side at trial. In the end, we must not forget that an important purpose of government is to protect individuals from all threats, including those threats from the government itself. The best way to fulfill this purpose is to have all

[317] Plaintiffs could make this showing with reports by the State Department or another agency of the U.S. government, United Nations reports, reports by foreign governments, media reports, reports of human rights organizations, decisions by international or domestic courts, academic articles, or other evidence.

three branches of the government work together to ensure the security of the United States and the rights of all people.