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Extraordinary Rendition: A Wrong Without a Right

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NOTE

EXTRAORDINARY RENDITION: A WRONG WITHOUT A RIGHT

I. INTRODUCTION

As America caught its collective breath on the morning of September 12, 2001, many undoubtedly realized that the prior day's events had ushered in a new era in our nation's history. Few, however, would have guessed exactly what that new era would entail over the coming years. A year and a half later, the United States would be engulfed in several wars: Afghanistan, Iraq, and the broader war against terror. The last was perhaps the most unsurprising in the aftermath of 9/11. However, engaging in this new, amorphous war would be unlike anything we as a country had faced before. This war against terror would consist of extremists armed with improvised explosives and fanatical religious beliefs who were far more nimble than traditional opponents. Facing this new landscape, the United States needed to change its tactics—drastically.

Congress granted the President sweeping powers to combat this new and unexpected threat,[1] and allies offered generous support.[2] But some of the most far-reaching—and questionable—

1. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S.C.) (reforming surveillance, money-laundering, terrorist, and intelligence laws); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006) (Congressional authorization "to use all necessary and appropriate force against" terrorist organizations or nations involved in the 9/11 attacks).

2. *See, e.g.*, S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (U.N. Security Council Resolution condemning attacks, offering sympathies, calling on members to "redouble their efforts" to combat terrorism, and expressing "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001").

tactics were carried out in private. As Cofer Black, then-director of the Counterterrorist Center of the Central Intelligence Agency ("CIA") later put it, "there was a 'before' 9/11 and 'after' 9/11. After 9/11 the gloves came off."[3] On September 17, 2001, just six days after the attacks, George W. Bush signed a presidential finding authorizing the CIA to disrupt terrorist activity and capture, detain, and interrogate Al-Qaeda leaders.[4] A week later, John Yoo, a lawyer in the Justice Department's Office of Legal Counsel, drafted the first of his now infamous legal memoranda, explaining the President's broad constitutional powers in wartime.[5] In these early days the executive branch took many more steps that would define the new era we had entered in our war against terror.

One of these new classified tactics only came to public light several years later. In 2005, journalists revealed that the CIA was holding top-level terrorist leaders in secret prisons around the world—an interconnected global web of "black sites" located from the Middle East to Thailand.[6] Further, they reported, some suspected terrorists were "captured" and delivered to foreign countries' intelligence services—Egypt, Jordan, Syria, and Morocco, for example—through a CIA-facilitated process called "rendition."[7] All of these countries, they noted, had a track record of torture.[8] When the story of this rendition procedure more fully worked itself into the public eye, the process took on a new name—extraordinary rendition.[9]

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3. *Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001: Hearing Before the J. Inquiry of S. Select Comm. on Intelligence and H. Permanent Select Comm. on Intelligence*, 107th Cong. 590 (2002) [hereinafter *Hearing on Intelligence Community Activities*] (testimony of Cofer Black, Director of the Counterterrorist Center, Central Intelligence Agency).

4. Douglas Jehl & David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, § 1, at 1.

5. Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Tim Flanigan, Deputy Counsel to the President (Sept. 25, 2001), *available at* http://www.torturingdemocracy.org/documents/20010925.pdf. For an accessible collection of the relevant memoranda that have been released, see George Washington University, The Interrogation Documents: Debating U.S. Policy and Methods, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/ (last visited Feb. 25, 2009).

6. *See, e.g.*, Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

7. Mayer, *supra* note 6.

8. *Id.*

9. While the term "extraordinary rendition" had been used before, it now primarily

This process has since come under intense scrutiny not only for its questionable morality, but also for its questionable legality. Many academics, commentators, critics, and victims claim the CIA is violating clearly established international law, including the United States' treaty obligations and principles of customary international law.[10] While the international reaction has been swift, it has failed to hold the United States accountable and provide meaningful redress for the victims of extraordinary rendition.[11] As a result, several released extraordinary rendition victims have taken their cases to United States courts seeking redress for these violations of international law.[12] These federal lawsuits, however, have all been quickly dismissed for a variety of reasons other than the merits of the cases.[13] Dismissal of these suits showcases not only the lack of redress for the victims, but also brings squarely to light the ever-present tension among individuals' rights, the government's obligation to keep secret its clandestine national security missions, and international law's broad principles that encompass the extraordinary rendition process.

Part II of this note will address the development and modern-day incarnation of the CIA's extraordinary rendition program. Part III will provide the background of the legal principles involved, including the international customary norm prohibiting torture and the Convention Against Torture. After reviewing this background material, Part IV will document the international response to the extraordinary rendition program, noting the lack of meaningful accountability on the international and institutional levels. Part V will then turn to the last resort for many victims—the United States judicial system. It will highlight the most viable existing cause of action in this context, the Alien Tort Statute, and the numerous legal obstacles that victims face when turning to this forum. Finally, Part VI will briefly propose a threefold solution to the legal obstacles victims encounter in domestic courts. The proposal involves a distinct role for each branch of government to ensure that each reinforces the rule of law while acting as a check on the others.

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refers to the extrajudicial transfers discussed in this note.

10. *See infra* notes 61–74 and accompanying text.
11. *See infra* Part IV.
12. *See infra* Parts V.B.3–4.
13. *See id.*

II. EXTRAORDINARY RENDITION

Rendition itself is by no means a novel concept. It simply means "[t]he return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime."[14] Rendition—or extradition, which is interchangeable in many instances[15]—has long existed in the United States.[16] As far back as George Washington's presidency, the legal principles applicable to extradition have been analyzed.[17] Most of this analysis, however, focused on the United States' extradition of individuals from our soil to other countries, and which branch of government had the power to authorize extradition.[18] While those legal principles remain, some renditions changed significantly in later years and forced an examination of other principles.

The first shift involved the use of international kidnapping to bring individuals *to* the United States for trial.[19] While it had been used for some time, this method became a more important tool in the latter half of the twentieth century.[20] The Supreme Court implicitly approved this method as recently as 1992 when it reaffirmed the *Ker* doctrine,[21] which maintains that "the power of a court to try a person for [a] crime is not impaired by the fact that he ha[s] been brought within the court's jurisdiction by reason of a 'forcible abduction.'"[22]

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14. BLACK'S LAW DICTIONARY 1322 (8th ed. 2004).

15. *See id.* at 623 ("The official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found."); *see also* Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1407 (2008) ("Rendition often seems indistinguishable from the definition of extradition.").

16. *See generally* Fisher, *supra* note 15, at 1406–12 (reviewing various historical legal analyses of extradition in the United States).

17. *See id.* at 1407 ("In a letter to President George Washington in 1791, Secretary of State Thomas Jefferson discussed the legal principles that guided the delivery of fugitives from one country to another.").

18. *See id.* at 1406–12.

19. *See* COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 15 (2004) [hereinafter TORTURE BY PROXY], *available at* http://www.chrgj.org/docs/TortureByProxy.pdf.

20. *See id.*

21. *See* United States v. Alvarez-Machain, 504 U.S. 655, 660–62 (1992) (applying Ker v. Illinois, 119 U.S. 436, 442–44 (1886)).

22. *Id.* at 661 (quoting Frisbie v. Collins, 342 U.S. 519, 522 (1952)).

This method of rendition, however useful, did not quite provide the United States with what it wanted or needed when faced with the new terrorist threat of Al-Qaeda in the mid-1990s. Thus, the seeds of the CIA's modern-day rendition program were only recently planted. According to Michael Scheuer, the former chief of the CIA's Bin Laden Unit, in the summer of 1995, President Clinton "requested that the CIA begin to attack and dismantle al-Qaeda."[23] But the United States did not want to bring suspected terrorists to America anymore; instead, it wanted to rely on other countries' legal processes to detain those it determined to be a threat to American interests.[24] Under Scheuer's leadership, the CIA's Bin Laden Unit was to "take each captured al-Qaeda leader to the country which had an outstanding legal process for him."[25] Scheuer maintains this was a "hard-and-fast rule," which would comport with the traditionally accepted notion of a rendition to justice.[26] It worked well for all involved. The initial renditions be-

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23. *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. 12 (2007) [hereinafter *Extraordinary Rendition Hearing*] (statement of Michael F. Scheuer, former Chief of Bin Laden Unit, Central Intelligence Agency).

24. *See id.*; *see also* Eur. Parl. Ass., *Report of the Comm. on Legal Affairs and Human Rights*, 13th Sess., Doc. No. 10957 (2006), at 15 [hereinafter *Comm. on Legal Affairs and Human Rights Report*], *available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf ("The central effect of the post-9/11 rendition programme has been to place captured terrorist suspects outside the reach of any justice system and keep them there."). The purpose of keeping suspected terrorists outside the reach of the United States legal system was clear to those involved:

> According to an unnamed senior U.S. intelligence official there have been "a lot of rendition activities" since September 11, 2001: "We are doing a number of them, and they have been very productive." Similarly, in an interview with the *Washington Post*, an unnamed U.S. diplomat acknowledged that "[a]fter September 11, [renditions] have been occurring all the time . . . . It allows us to get information from terrorists in a way we can't do on U.S. soil." According to another unnamed official, "[t]he temptation is to have these folks in other hands because they have different standards." "Someone might be able to get information we can't from detainees," said another. Another unnamed official who has been involved in rendering captives into foreign hands explained his understanding of the purpose of Extraordinary Renditions: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."

TORTURE BY PROXY, *supra* note 19, at 13 (alterations in original) (internal citations omitted).

25. *Extraordinary Rendition Hearing, supra* note 23, at 12 (statement of Michael F. Scheuer).

26. *See id.*; *see also* TORTURE BY PROXY, *supra* note 19, at 15 ("On the record, U.S. government officials acknowledge only the existence of the practice of 'rendition to justice'. . . . In the early 1990s, renditions to justice were allegedly exclusively law enforcement operations in which suspects were apprehended by covert CIA or FBI teams and brought

gan after an agreement with Egypt, which authorized the United States to "actively seek out and render Egypt's most wanted prisoners back to Cairo" for interrogation or imprisonment.[27] This collaborative effort allowed the United States to facilitate the capture of suspected and convicted terrorists abroad, not only getting them "off the streets," but also returning them to other countries for interrogation, trial, or sentencing.[28] When faced with the same issue now in focus—whether those rendered would be tortured once they were returned—Scheuer contends that the CIA sought assurances from the receiving country that the prisoner would be treated in accordance with the *receiving* country's own laws.[29] Despite most of the receiving countries' records as human rights abusers, the CIA rendered suspected terrorists and Al-Qaeda leaders to such countries.[30] According to then-CIA director George Tenet, the CIA executed roughly eighty of these renditions in the years leading up to 9/11.[31]

After 9/11, the "gloves came off." Within days, President Bush had authorized the CIA to render suspected terrorists to third-party countries solely for detention and interrogation.[32] "This decision by the Bush Administration allowed [the] CIA to capture al-Qaeda fighters we knew were a threat to the United States without on all occasions being dependent on the availability of another country's outstanding legal process."[33] According to unnamed officials, through a still-classified presidential directive,

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to the United States or other states (usually the states having an interest in bringing the person to justice) for trial or questioning.").

27. STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM 140 (2006); *see also* TORTURE BY PROXY, *supra* note 19, at 9 (documenting mid-1990s renditions to Egypt).

28. *See Comm. on Legal Affairs and Human Rights Report*, *supra* note 24, at 13.

29. *See id.* at 14; *see also Extraordinary Rendition Hearing*, *supra* note 23, at 12 (statement of Michael F. Scheuer). Scheuer contends that President Clinton's assertion that the United States insisted receiving countries treat detainees according to U.S. law was a lie. *See id.*

30. *See Extraordinary Rendition Hearing*, *supra* note 23, at 12 (statement of Michael F. Scheuer).

31. *See* National Commission on Terrorist Attacks upon the United States, Eighth Public Hearing: Counterterrorism Policy (March 24, 2004) (testimony of George Tenet, Director of the Central Intelligence Agency), *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf.

32. *See* Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, § 1, at 1; *see also Extraordinary Rendition Hearing*, *supra* note 23, at 12–13 (statement of Michael F. Scheuer).

33. *Extraordinary Rendition Hearing*, *supra* note 23, at 13 (statement of Michael F. Scheuer).

the President granted the CIA broad latitude in carrying out the rendition program, freeing it from case-by-case approval by the White House, the Justice Department, or the State Department.[34] Most importantly, renditions no longer required the suspected terrorist to be wanted or convicted in the receiving country through any legal process.[35] Instead, detention and interrogation alone were now reason enough to capture a suspected terrorist and transfer him to a foreign intelligence service.[36]

To carry out this new directive, the CIA stepped up its rendition efforts. Generally, the CIA still collaborated with the country where the suspected terrorist would be abducted.[37] As Michael Scheuer later put it: "[The CIA] would advise [the country where the suspect would be transferred,] and if they would have arrested him, we would have assisted in facilitating his move to the country where he was wanted."[38] For the most part, this post-9/11 rendition process followed a consistent pattern. According to most accounts, authorities in the country where the suspect was abducted initially arrested the individual.[39] Many suspects remained in the arresting authorities' custody for preliminary questioning—in most cases without access to their consulate, a lawyer, or anyone else.[40] The CIA played the crucial role in transportation: once the arresting country was through with the detainee, the CIA would arrange and facilitate the prisoner's transfer on an executive jet to a third country.[41] Once there, the CIA delivered the suspect to the receiving country's intelligence service.[42] Victims were blindfolded and drugged by agents dressed head-to-toe in black before being strapped down to a seat or mattress in-

34. *See* Jehl & Johnston, *supra* note 32.

35. *Extraordinary Rendition Hearing*, *supra* note 23, at 12–13 (statement of Michael F. Scheuer). The Bush Administration's rendition program was "aimed only at those suspected of knowing about terrorist operations." Jehl & Johnston, *supra* note 32.

36. Jehl & Johnston, *supra* note 32.

37. *See, e.g.*, *Extraordinary Rendition Hearing*, *supra* note 23, at 28 (testimony of Michael F. Scheuer) (describing how the United States would facilitate an arrest in France).

38. *Id.*

39. *See generally Comm. on Legal Affairs and Human Rights Report, supra* note 24, at 24–45 (describing individual accounts of various extraordinary rendition victims).

40. *See, e.g.*, First Amended Complaint paras. 104, 169, Mohamed v. Jeppesen Dataplan, Inc., No. 5:07-cv-02798 (JW) (N.D. Cal. Aug. 1, 2007); *Comm. on Legal Affairs and Human Rights Report*, *supra* note 24 at 25–26.

41. GREY, *supra* note 27, at 135. For extensive background on the program, primarily concerning the transportation aspect of the process, see generally *id.*

42. *See id.* at 29–30.

side an otherwise luxurious Gulfstream jet and flown to a destination unknown to them.[43] There are now extensive reports on the CIA's elaborate network of private jets and contractors that shuttled these suspects around the globe.[44] Often referred to as the "CIA's travel agent" or "torture taxis," these private contractors were ready at a moment's notice to transport suspected terrorists at the CIA's direction.[45] The flights spanned many continents; logs indicate that one plane visited the United States, the United Kingdom, Germany, Jordan, Japan, Italy, Morocco, Pakistan, Sweden, Egypt, and Afghanistan, among many other countries.[46] The final destinations for many of these planes' unwilling passengers, though, were countries such as Egypt, Morocco, Jordan, and Syria—all of which the U.S. State Department consistently brands as human rights violators.[47]

After arriving, the CIA promptly handed over the suspects to the receiving country's intelligence service.[48] Each experience differed from that point, but all of the now-public accounts indicate grave mistreatment.[49] Accounts of those rendered and later released paint a disturbing picture of the detainees' treatment:

- being sliced with a scalpel, including on the genitals, and having hot liquid poured on the incisions;[50]

- enduring severe beatings while handcuffed and blindfolded;[51]

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43. *See Comm. on Legal Affairs and Human Rights Report*, *supra* note 24, at 23–24 (describing the "security check" process).

44. *See id.* at 16–17. In compiling its report, the Council of Europe reviewed flight logs, information from non-governmental individuals and organizations, "planespotters," Eurocontrol, which is the European Organisation for the Safety of Air Navigation, twenty national aviation authorities, detainees themselves, transportation authorities, airport operators, and exhibits from judicial and parliamentary inquiries. *See id.*

45. *See, e.g.*, TREVOR PAGLEN & A.C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA'S RENDITION FLIGHTS (2006); Jane Mayer, *Outsourcing: The C.I.A.'s Travel Agent*, NEW YORKER, Oct. 30, 2006, at 34.

46. *See* GREY, *supra* note 27, at app. B.

47. *See* TORTURE BY PROXY, *supra* note 19, at 8.

48. *See id.* at 12.

49. *See, e.g.*, *Comm. on Legal Affairs and Human Rights Report*, *supra* note 24, at 25, 35–44.

50. *See* First Amended Complaint para. 70, Mohamed v. Jeppesen Dataplan, Inc., No. 5:07-cv-02798 (JW) (N.D. Cal. Aug. 1, 2007).

51. *See id.* para. 105.

- being shackled naked to a wet mattress and shocked through electrodes attached to various body parts, including ear lobes, nipples, and genitals;[52]

- other severe psychological threats, including threats of death, rape, and electrocution,[53] as well as threats to do the same to family members.[54]

In addition, detainees were kept in horribly unsanitary conditions, often confined in very small cells that were completely dark and filled with open sewage.[55] Speakers blared loud music and tapes of women and children screaming into the prisoners' cells for days on end.[56] Many detainees would go months without any outside contact.[57] They would endure this treatment until they were released or convicted.[58] The United States acknowledges the number of these post-9/11 renditions it has conducted is somewhere in the "mid-range two figures."[59] It was through this process that the rendition program, once aimed at returning fugitives to the United States to face trial, earned its new name: extraordinary rendition.[60]

Given these drastic measures, it is not surprising that many people oppose the program, including domestic politicians,[61] foreign governments,[62] and, perhaps most vocally, domestic and international human rights groups.[63] Congressional leaders have

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52. *See id.* para. 145.

53. *See id.* para. 70.

54. *See id.* para. 95.

55. *See id.* paras. 71, 77, 78, 104, 141, 165.

56. *See id.* paras. 79, 164, 217, 218.

57. *See id.* paras. 104, 140, 163, 169.

58. *See id.* paras. 107, 108, 117.

59. *See* Michael V. Hayden, Director of the Central Intelligence Agency, Address Before the Council on Foreign Relations (September 7, 2007), *available at* http://www.cfr.org/publication/14162/conversation_with_michael_hayden_rush_transcript_federal_news_service.html.

60. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, ON THE RECORD: U.S. DISCLOSURES ON RENDITION, SECRET DETENTION, AND COERCIVE INTERROGATION 1 (2008) [hereinafter ON THE RECORD], *available at* http://www.chrgj.org/projects/docs/ontherecord.pdf.

61. *See Extraordinary Rendition Hearing, supra* note 23, at 2 (statement of Rep. Bill Delahunt).

62. *See infra* Parts IV.B–C.

63. For instance, the American Civil Liberties Union represented the plaintiffs in both the *El-Masri* and *Mohamed* cases, and maintains an extensive database of documents and sources regarding extraordinary rendition. *See* American Civil Liberties Union: Extraordinary Rendition, http://www.aclu.org/safefree/torture/rendition.html (last visited Feb. 25,

held hearings on the subject,[64] and foreign governments have conducted investigations into their own countries' involvement in the program.[65] Human rights groups have worked with extraordinary rendition victims, have vociferously opposed the program, and are working to bring it to light and eliminate it.[66]

Many of these opponents argue that the United States is breaching its domestic and international legal obligations without any accountability, and that the United States is abducting and imprisoning people not only in violation of the law, but also in violation of basic standards of human rights.[67] Detainees are gravely mistreated and cut off from any outside communication, including, in many cases, the aid of the International Committee of the Red Cross. They are deprived of the most basic essentials of humanity while held indefinitely without being charged with any crime.[68] Opponents further point to innocent victims of extraordinary rendition who were later exonerated, as was the case in several known instances.[69] Because their detention is not reviewable, most of these victims' innocence is discovered only after months or even years of detention.[70] Other opponents point to broader international concerns, primarily that the United States alienates itself from allied governments by conducting illegal renditions in their countries.[71] Moreover, these allies' continued support of the

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2009). Other groups, including Reprieve, the Constitution Project, and the New York City Bar Association, filed amicus curiae briefs in several cases, and various human rights clinics have assisted in representing victims as well. *See, e.g.*, The Constitution Project, Our Work, http://www.constitutionproject.org/about/index.cfm (last visited Feb. 25, 2009). In addition, Amnesty International has been vocal in its criticism of extraordinary renditions. *See* Amnesty International USA, Oppose the Outsourcing of Torture, http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/oppose-the-outsourcing-of-torture/page.do?id=1031038 (last visited Feb. 25, 2009).

64. *See, e.g.*, *Extraordinary Rendition Hearing*, *supra* note 23.

65. *See infra* Part IV.B.

66. *See supra* note 63 and accompanying text.

67. *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 123–30 (2006); *see also* TORTURE BY PROXY, *supra* note 19, pt. V.

68. *See, e.g.*, Peter Johnston, *Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States*, 16 J.L. & POL'Y 357, 382–84 (2007).

69. *See, e.g.*, *id.* at 381–84.

70. *See id.* at 383–84.

71. *See, e.g.*, *Extraordinary Rendition Hearing*, *supra* note 23, at 6 (statement of Julianne Smith, Director and Senior Fellow, Europe Program, Center for Strategic and International Studies) ("I can confirm that the issue of extraordinary rendition . . . ha[s] cast a rather dark shadow on our relationship with our European allies. While transatlantic intelligence and law enforcement cooperation does continue, European political leaders are

United States is crucial to eliminating the threat of worldwide terrorism.[72] Opponents also argue that the United States loses its moral high ground and credibility in the international arena by participating in extraordinary renditions while simultaneously condemning the same countries to which it has been rendering suspected terrorists for human rights violations.[73] Finally, and on a more utilitarian note, many characterize extraordinary renditions, and torture generally, as unnecessary and even counterproductive, producing little actionable intelligence and too many false positives.[74]

Despite objections to the program, many of its architects stand by its effectiveness in preventing international terrorists from attacking the United States. Several key executive branch leaders in the Bush Administration insist that the extraordinary rendition program is successful and is actively protecting the American public by detaining terrorists before they can strike.[75] Michael Scheuer explained the program's significance in his testimony before Congress: "[T]he Rendition Program has been the single most effective counterterrorism operation ever conducted by the United States Government. Americans are safer today because of the program."[76] He also insisted that the CIA only focused on high-

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coming under increasing pressure to distance themselves from the United States[,] . . . [which] could pose a threat to joint intelligence activity with our European allies.").

72. *See, e.g.*, *id.* at 6–7.

73. *See, e.g.*, *id.* at 2 (statement of Rep. Bill Delahunt) (extraordinary renditions "have undermined our very commitment to fundamental American values. These values are what define us [as] a people, as a nation. When we undermine them, we undermine everything we stand for, everything we are. . . . Nations across the globe envy our commitment to freedom and the rule of law. But they are appalled at our hypocrisy when we betray those values. The State Department recently issued its annual Human Rights Country Reports criticizing abusive practices carried out overseas. How much credibility can such a report have when we ourselves are involved in abusive practices?").

74. *See, e.g.*, Johnston, *supra* note 68, at 372–76.

75. *See Extraordinary Rendition Hearing*, *supra* note 23, at 14 (statement of Michael F. Scheuer); *see also Hearing on Intelligence Community Activities*, *supra* note 3, at 599 ("I know that we are on the right track today and as a result we are safer as a nation. 'No Limits' aggressive, relentless, worldwide pursuit of any terrorist who threatens us is the only way to go and is the bottom line. What we have managed to achieve abroad has been due in large part to the extraordinary professionalism of our men and women in [the CIA's Counterterrorism Center] and those CIA operatives overseas who do the risky, hard work of counterterrorism. Lastly, I was proud of them then, am now, and will be until I die.") (testimony of Cofer Black, Director of the Counterterrorist Center, Central Intelligence Agency); GREY, *supra* note 27, at 228 (recalling former Secretary of State Condoleezza Rice's defense of rendition as "a vital tool in combating transnational terrorism").

76. *Extraordinary Rendition Hearing*, *supra* note 23, at 14 (statement of Michael F. Scheuer).

level Al-Qaeda leaders whose capture would best interrupt terrorist activities.[77] Scheuer did not apologize for his involvement, but rather maintained that those who revealed the program publicly were endangering CIA officers who put their lives at risk to protect the public.[78]

III. APPLICABLE INTERNATIONAL LAW

Regardless of one's stance on the policy of extraordinary rendition, there can be no debate that the program has significant legal implications. Several substantive principles of international law regarding torture encompass the extraordinary rendition program. There are two broad categories from which these rules are derived: customary international law and treaties. Both sources have profound implications on the extraordinary rendition program.

A. *Customary International Norm Against Torture and Principles of* Jus Cogens

International law has long relied on custom to form its basis. Such law is created in the way its name implies: "from a general and consistent practice of states followed by them from a sense of legal obligation."[79] While these norms must be sufficiently widespread, they can nevertheless attain the status of customary law even if they are not universally followed.[80] Once a level of general acceptance is reached, the norm becomes binding on all states unless a state declares its dissent from that norm while the norm is developing into a widespread, customary practice.[81] Thus, these customs become binding law through states' practices and their developing senses of obligation created over time throughout the world.[82]

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77. *Id.* at 13.

78. *Id.*

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

80. *See id.* § 102 cmt. b ("A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.").

81. *See id.* ("A principle of customary law is not binding on a state that declares its dissent from the principle during its development.").

82. *See id.* § 102 cmt. d ("[C]ustomary law may be built by the acquiescence as well as

Closely related to the creation of customary international law is the concept of *jus cogens*. "The theory of *jus cogens* . . . posits the existence of rules of international law that admit of no derogation and that can be amended only by a new general norm of international law of the same value."[83] They "are said to be so fundamental that they bind all states, and no nation may derogate from or agree to contravene them."[84] Instead of being derived merely from custom and practice, though, *jus cogens* norms are considered to be overarching principles that are so basic to humanity that they cannot be breached, even if a state dissents and argues that it is not so bound.[85] While there is debate over which substantive rights qualify for this status, it is a limited field not easily entered.[86]

Few contest that customary international norms prohibit official torture; many authoritative sources further hold that official torture has reached *jus cogens* status. An American case provides a helpful guide in applying these principles. In *Siderman de Blake v. Republic of Argentina*, the Ninth Circuit discussed the distinctions and applications in depth.[87] It began by noting the

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by the actions of States and become generally binding on all states . . . .") (internal reference omitted).

83. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 297 (2006).

84. BARRY E. CARTER ET AL., INTERNATIONAL LAW 120 (5th ed. 2007).

85. Siderman de Blake v. Argentina, 965 F. 2d 699, 714, 715 (9th Cir. 1992).

86. Professor Shelton writes:

> Since the adoption of the Vienna Convention, the literature has abounded in claims that additional international norms constitute *jus cogens*. Proponents have argued for the inclusion of all human rights, all humanitarian norms (human rights and the laws of war), or singly, the duty not to cause transboundary environmental harm, freedom from torture, the duty to assassinate dictators, the right to life of animals, self-determination, the right to development, free trade, and territorial sovereignty (despite legions of treaties transferring territory from one state to another). During the Cold War, Soviet writers asserted the invalidity of treaties that conflicted with the "basic principles and concepts" of international law, defined to include universal peace and security of nations; respect for sovereignty and territorial integrity; noninterference in internal affairs; equality and mutual benefit between nations; and *pacta sunt servanda*. Examples of invalid agreements included the NATO pact, the peace treaty between the United States and Japan, the SEATO agreement, and the U.S.-UK agreement on establishing air bases. In most instances, little evidence has been presented to demonstrate how and why the preferred norm has become *jus cogens*. Władysław Czaplinski correctly comments that "the trend to abuse the notion of *jus cogens* is always present among international lawyers."

Shelton, *supra* note 83, at 303–04 (internal citations omitted).

87. *Siderman de Blake*, 965 F.2d at 714–15. The Sidermans lived in Argentina during

difference between the two sources: customary law relies on the consent of those bound, while *jus cogens* norms may not be derogated regardless of whether the state assents to them.[88] The court looked to the same sources as one would to derive customary law: the general usage and practice of nations, judicial decisions, and the works of jurists.[89] But it also looked to whether those norms were considered among nations to be non-derogable, thus rising to the status of *jus cogens* norms.[90] Easily reaching the primary level, the court held that "[t]here is no doubt that the prohibition against official torture is a norm of customary international law."[91] In support of this proposition, the court cited various American cases,[92] treaties evidencing a well-accepted customary norm,[93] and the Restatement of Foreign Relations,[94] all of which

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the 1976 military coup, when various family members were kidnapped and tortured at the direction of the new ruling military governor. *Id.* at 703. A full account is given in the *Siderman de Blake* opinion, including the family's flight to America and Argentina's continued harassment of the family. *Id.* at 703–04.

88. *Id.* at 715 ("While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law . . . rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm . . . . In contrast, *jus cogens* 'embraces customary laws considered binding on all nations' and is 'derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.' Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent . . . ." (internal citations omitted)).

89. *Id.* at 714–15 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820).

90. *Id.* at 715 (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988)). The *Siderman de Blake* court relied heavily for its framework on *Committee of U.S. Citizens*, which, at the time, was the "only reported federal decision to give extended treatment to *jus cogens*." *Id.* at 715.

91. *Id.* at 716.

92. *Id.* (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) ("[O]fficial torture is now prohibited by the law of nations."); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("official torture constitutes a cognizable violation of the law of nations")). Since *Siderman de Blake*, several other courts have held that torture is a violation of customary international law. *See, e.g.*, Kadic v. Karadži, 70 F.3d 232, 243–44 (2d Cir. 1996); *In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 499 (9th Cir. 1992).

93. *Siderman de Blake*, 965 F.2d at 716 & n.15 (citing Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, Europ. T.S. No. 5; Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452 (XXX), at 91, U.N. GAOR, 30th Sess., 2433rd plen. mtg., U.N. Doc. A/10034 (Dec. 9, 1975), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 68–70 (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006) [hereinafter Declaration on the Protection of All Persons from Being Subjected to Torture]; International Covenant on Civil and Political Rights, Annex, G.A. Res. 2200 (XXI)a, at 49, U.N. Doc. A/6316 (Dec. 16, 1966); Universal Declaration of Human Rights, G.A. Res.

concluded that torture "is prohibited by customary international law."[95] The court did not stop there: "[W]hile not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status."[96] In declaring the right to be free from torture a *jus cogens* norm, the court again noted American jurisprudence[97] and widespread agreement among international law scholars accepting it as such.[98] The "extraordinary consensus" among these sources was especially important: it confirmed to the *Siderman de Blake* court that torture is not only prohibited by customary international law, but it has reached the status of one of the few recognized *jus cogens* norms.[99] By so finding, the court held that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."[100] Other authorities similarly have recognized that freedom from torture is a *jus cogens* norm.[101]

Many international instruments support the proposition that the right to be free from torture is a customary, non-derogable principle. The Convention Against Torture ("CAT"), which is discussed *infra* as the primary international instrument outlawing official torture,[102] expressly forbids torture and does not allow for *any* derogation for *any* reason.[103] The CAT's preamble recognizes

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217A(III), at 71, U.N. GAOR, 3d Sess., 177th plen. mtg., U.N. Doc. A/810 (Dec. 8, 1948)).

94. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 702(d) (1987)).

95. *Id.* at 716.

96. *Id.* at 717.

97. *Id.* (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (holding that torture is a *jus cogens* norm); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (describing freedom from torture as "[a]mong the rights universally proclaimed by all nations"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n. (1987)).

98. *Id.* (citing David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 354 n.111 (1988); Karen Parker & Lyn Beth Neylon, Jus Cogens: *Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 437–39 (1989); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 830 (1988); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 389, 393–94 (1989)).

99. *See id.* at 717.

100. *Id.*

101. *See* TORTURE BY PROXY, *supra* note 19, at 34–35 n.184 (citing various sources).

102. *See infra* Part III.B.

103. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, para 2, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; *see also* TORTURE BY PROXY,

several other indications that freedom from torture is of paramount importance, including Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, "both of which provide that no one shall be subjected to torture."[104] It also cites the Declaration on the Protection of All Persons from Being Subjected to Torture adopted by the United Nations' General Assembly.[105] One American case went further, citing the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms as evidence of a customary international norm against torture.[106]

While these international instruments do not create privately enforceable causes of action for their violation, they nevertheless have a "substantial indirect effect on international law" and may be used to show that the principles espoused therein have attained the status of customary international law.[107] Even though such declarations and treaties may not create separately enforceable legal rights, each is a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers"[108] and is "increasingly used . . . for codifying and developing customary law."[109]

In this light, it is clear that freedom from official torture has attained the force of customary international law and, arguably, the coveted status of a *jus cogens* norm.

B. *The Convention Against Torture*

Beyond customary law and *jus cogens* norms, the CAT is the primary international legal instrument specifically outlawing tor-

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supra note 19, at 80–81 (stating that the absolute prohibition against torture was "specifically included in CAT to distinguish freedom from torture as one of 'the few fundamental rights of the individual' from which no derogation is permitted under international law, even in times of war or other emergency").

104. *See* Convention Against Torture, *supra* note 103, pmbl.

105. *See id.* (citing Declaration on the Protection of All Persons from Being Subjected to Torture, *supra* note 93).

106. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 883–84 (2d Cir. 1980).

107. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 735 & n.23 (2004).

108. *Id.* (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (6th ed. 2003)).

109. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. F (1987).

ture.[110] The CAT includes provisions requiring each signatory to take steps to prevent acts of torture in territory under its jurisdiction,[111] to ensure that torture is a crime under its domestic law,[112] and to provide an effective and individual legal remedy where torture does occur.[113] The CAT also regulates cruel, inhuman, or degrading treatment occurring in the territories under each signatory's jurisdiction.[114] With such a broad reach, the CAT's prohibition of torture not only implicates domestic criminal law, but also immigration extradition proceedings and prison conditions.[115]

The CAT also contains a provision that implicates extraordinary renditions. Article 3 requires that "[n]o State Party shall expel, return (*'refouler'*), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[116] In ratifying the CAT, however, the United States legitimately restricted Article 3's applicability to situations in which torture is "more likely than not," in contrast to the "substantial grounds" standard in Article 3 itself.[117] This definition gives the United States more leeway to send individuals to foreign countries compared to the CAT's default scheme.[118] Further, the United States noted that it under-

110. *See* Convention Against Torture, *supra* note 103. The United States has also enacted domestic criminal legislation against torture occurring outside the United States, but, for obvious political reasons, federal prosecutors have not brought any criminal charges against any U.S. officials or agents for their participation in the CIA's extraordinary rendition program. *See* 18 U.S.C. §§ 2340–2340A (2006); *see also* Scott Horton, *Justice After Bush: Prosecuting an Outlaw Administration*, HARPER'S, Dec. 2008, at 49, 55 (stating that the Bush Administration's tight rein on its prosecutors has deferred such individuals from enforcing 18 U.S.C. § 2340's prohibition against torture, despite the fact that they have the authority to do so).

111. *See* Convention Against Torture, *supra* note 103, art. 2, para. 1.

112. *See id.* art. 4, para. 1.

113. *See id.* art. 14, para. 1.

114. *See id.* art. 16, para. 1. The United States adopted this provision with the understanding that cruel, inhuman, or degrading treatment is defined under the fifth, eighth, and fourteenth Amendments to the U.S. Constitution. *See* 136 CONG. REC. 36, 192 (1990).

115. *See* U.S. DEP'T OF STATE, UNITED STATES WRITTEN RESPONSE TO QUESTIONS ASKED BY THE COMMITTEE AGAINST TORTURE: LIST OF ISSUES TO BE CONSIDERED DURING THE EXAMINATION OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA, art. 1, para. 6 (Apr. 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf [hereinafter RESPONSE TO COMMITTEE AGAINST TORTURE].

116. Convention Against Torture, *supra* note 103, art. 3, para. 1.

117. *See* 136 CONG. REC. 36, 193 (1990). For a helpful background discussion on these reservations, see David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 600–05 (2006).

118. *See* A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL. L. REV. 1, 19 (2006).

stands torture in this context to be "an act . . . specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm" caused by a limited number of specific actions.[119]

Article 3 forms the basis of many attacks on the CIA's extraordinary rendition program, which seems to carry out precisely what the CAT prohibits. Although Article 3's language is fairly straightforward, the United States has advanced several legal defenses against claims that it has breached that provision of the CAT.[120] It first argues that Article 3 only applies to expelling or extraditing an individual *from* the United States; in other words, rendering someone from a foreign country to a different foreign country does not invoke Article 3's protections at all.[121] Scholars, as well as the Committee Against Torture,[122] question this legal argument and reply that it is untenable.[123] Further, the United States argues that it may seek diplomatic assurances from the receiving countries that individuals turned over will not be tortured.[124] This is a similarly shaky legal position, as Article 3 requires an assessment of "all relevant considerations" of the receiving country, including any "consistent pattern of gross, flagrant or mass violations of human rights," when determining whether an rendered individual is likely to endure torture upon his return.[125] The U.S. State Department has classified most of the countries to which extraordinary rendition victims are sent as human rights violators and has documented gross human rights violations by these countries in its annual country reports.[126] In

119. *See* 136 CONG. REC. 36, 193 (1990).

120. In addition to these legal arguments, the United States also flatly denies that it sends detainees to countries for the purpose of torture. *See* RESPONSE TO COMMITTEE AGAINST TORTURE *supra* note 115, art. 3, para. 16.

121. *See id.* art. 3, para. 13 ("[T]he United States, while recognizing that some members of the Committee may disagree, believes that Article 3 of the CAT does not impose obligations on the United States with respect to an individual who is outside the territory of the United States.").

122. *See infra* Part IV.A.

123. *See, e.g.*, Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1367–71, 1375–80 (2007) (arguing that the United States erroneously applies the territorial rule of jurisdiction rather than the personal control doctrine to interpret Article 3 of the CAT).

124. *See* RESPONSE TO COMMITTEE AGAINST TORTURE, *supra* note 115, art. 3, para. 18.

125. Convention Against Torture, *supra* note 103, art. 3, para. 2.

126. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100594.htm ("There were numerous, credible reports

more frank terms, Michael Scheuer relayed to Congress that these assurances were not "worth a bucket of warm spit."[127]

Accordingly, many nations other than the United States agree that the CAT condemns and outlaws renditions involving the transfer of an individual from one foreign country to another to be tortured.[128] Even taking into account the United States' reservation requiring a determination that the suspect will "more likely than not be tortured," many sources have questioned the United States' reliance on shaky diplomatic assurances from countries that are often flagged as human rights violators.[129]

As noted *supra*, the torture to which extraordinary rendition victims are subjected not only violates substantive customary international law—and arguably a *jus cogens* norm—against official torture, but also implicates Article 3 of the CAT, prohibiting the rendition of a suspect to another country to be tortured.

IV. LACK OF INTERNATIONAL AND INSTITUTIONAL ENFORCEMENT

At the international and institutional level, despite numerous inquiries, investigations, and political consequences, the United States has not been held directly accountable for its practices.

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that security forces tortured and mistreated prisoners and detainees."); BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SYRIA (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100606.htm (characterizing the torture and abuse of detainees as common, including electrical shocks, pulling out fingernails, forcing objects into subject's rectum, and hanging from the ceiling while beating).

127. *Extraordinary Rendition Hearing*, *supra* note 23, at 36 (testimony of Michael F. Scheuer); *see also* GREY, *supra* note 27, at 223 ("'I can't say to you with any candor that there was anything more than the verbal assurance, or even a written assurance. There was very little effort to follow up on [the detainees' treatment].'") (quoting interview with Edward S. Walker, former U.S. ambassador to Cairo (March 13, 2006)); *id.* ("'No one was kidding anyone here[; w]e knew exactly what that kind of promise was worth.'") (quoting interview with Michael Scheuer, former Chief of Bin Laden Unit, Central Intelligence Agency (March 14, 2006)); *id.* ("'I cannot believe that anybody that was involved in this didn't in his heart of hearts, if he was halfway intelligent, think that [the detainees] were getting abusive, aggressive interrogation techniques that were tantamount to torture, or that they would be tried in a fair and U.S.-style trial.'") (quoting interview with Edward S. Walker, *supra*).

128. For example, the European Parliament, by a vote of 334 to 237, condemned the use of renditions and noted, in particular, the practice's violation of the CAT. *See* Press Release, European Parliament, Extraordinary Renditions: EU Member States are also Responsible, MEPs Say (Feb 19, 2009), *available at* http://www.europarl.europa.eu/elections2009/welcome/press_service.htm?language=EN&ref=20090218IPR49768&secondRef=0 (last visited Feb. 25, 2009).

129. *See* RESPONSE TO COMMITTEE AGAINST TORTURE, *supra* note 115, art. 3, para. 16.

A. *The Committee Against Torture*

The CAT provides an internal enforcement mechanism to monitor and enforce violations. Part II of the CAT establishes the Committee Against Torture, known as the Committee, to receive each State Party's required reports and to hear and decide disputes between State Parties or between an individual and her State.[130]

The Committee has taken some steps to ensure that the United States is properly adhering to the CAT, but those measures have been largely recommendatory, have carried little real weight, and have failed to hold the United States accountable for its breaches. In its Consideration of Reports Submitted by the United States, the Committee pointedly addressed extraordinary rendition.[131] It concluded and recommended that, among other things, the United States should "apply the *non-refoulement* guarantee to all detainees in its custody, [and] cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention."[132] The Committee was particularly "concerned that the [United States] considers that the *non-refoulement* obligation . . . does not extend to a person detained outside its territory."[133] The Committee further took issue with the United States' reliance on diplomatic assurances, concluding that the United States "should only rely on 'diplomatic assur-

130. Convention Against Torture, *supra* note 103, art. 17, para. 1, art. 19, para. 1, art. 21, para. 1.

131. U.N. Comm. Against Torture [CAT], Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America, paras. 15–20, U.N. Doc. CAT/C/USA/CO/2 (May 19, 2006) [hereinafter Consideration of Reports Submitted] (considering the second report of the United States).

132. *Id.* para. 20. The Committee also implicated the United States' practice of extraordinary rendition in its *Agiza v. Sweden* decision, which dealt with the extraordinary rendition of Ahmed Agiza from Sweden to Egypt, with the help of the American CIA. Comm. Against Torture [CAT], Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (May 21, 2005), *available at* http://www.unhcr.org/refworld/docid/42ce734a2.html. The Committee Against Torture found that Sweden breached Article 3 of the CAT by allowing Agiza to be sent back to Egypt to face that country's "consistent and widespread use of torture against detainees . . . particularly . . . in the case of detainees held for political and security reasons." *Id.* para. 13.4.

133. *See* Consideration of Reports Submitted, *supra* note 131, para. 20 (emphasis added).

ances' in regard to States which do not systematically violate the Convention's provisions."[134]

Beyond that, no other country has taken significant measures to hold the United States accountable under the Committee's dispute resolution powers. Article 21 of the CAT gives the Committee the power to hear disputes arising between parties to the CAT.[135] Under this power, the country of which an extraordinary rendition victim is a citizen can file a complaint with the Committee alleging that the United States is not fulfilling its obligations under the CAT.[136] The Committee then has the power to investigate the alleged violation and present a report of its findings, including facts and a proposed solution if the countries cannot agree on one.[137] To date, no country has initiated with the Committee any such proceeding against the United States.[138]

Although the Committee has taken broad action and seems genuinely interested in remedying the United States' violations, its pronouncements still fail to hold the United States accountable in any tangible way beyond imposing political consequences.

B. *International Investigations*

Besides the Committee, several other foreign governmental and intergovernmental organizations have conducted investigations. The Council of Europe has been the primary intergovernmental body involved in investigating and documenting extraordinary renditions.[139] The European Parliament has also weighed in.[140] Individual countries adding to this list include Italy,[141] and the United Kingdom.[142] Many of their reports and investigations reached the same result—extraordinary renditions had been taking place. In response, they too issued conclusions denouncing the

134. *See id.* para. 21.

135. Convention Against Torture, *supra* note 103, art. 21.

136. *See id.* art. 21, para. 1.

137. *Id.*

138. The United States also has not implemented Article 22 of the CAT, which allows an individual to file a claim against her own government. *See id.* art. 22.

139. *See generally Comm. on Legal Affairs and Human Rights Report*, *supra* note 24.

140. *See* Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. A6-0020/2007 (2007).

141. *See infra* Part IV.C.

142. *See* INTELLIGENCE & SECURITY COMMITTEE, RENDITION, 2007, Cm. 7171, at 5, *available at* http://www.fas.org/irp/world/uk/rendition.pdf.

program and their home countries' involvement in it, but still failed to hold the United States accountable for its violations of international law.[143]

C. *Italy's "Imam Rapito Affair"*

Italian prosecutors made one notable attempt to hold directly responsible American officials participating in the extraordinary rendition of Abu Omar, an Egyptian national granted political asylum in Italy. Omar was rendered from Italy to Egypt, where he claims he was tortured before being released.[144] When his rendition's existence unfolded, it created a firestorm in Italy, and prosecutors indicted more than twenty CIA officers whom they claimed took part in the rendition.[145] A judge issued arrest warrants, and the prosecutors sent a request to the Italian Justice Ministry seeking extradition of the indicted CIA officers from the United States to Italy for trial.[146] The Justice Ministry, however, denied this request; the United States has since stated that it would not have extradited the CIA officers even if presented with a request to do so from the Italian Ministry.[147]

These various international measures have elucidated the inner workings of the CIA's extraordinary rendition program, but still have failed to hold those responsible accountable in any meaningful way beyond issuing recommendations, condemnations, and unenforceable arrest warrants.

V. COURTS OF LAST RESORT: FRUSTRATION OF AMERICAN CLAIMS

As a result of the lack of international and institutional enforcement discussed in Part IV, several extraordinary rendition

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143. *See, e.g.*, *id.* at 29–30.

144. *See* GREY, *supra* note 27, at 191, 197–98.

145. *See id.* at 211–12.

146. *See id.*

147. *See id.*; Craig Whitlock, *U.S. Won't Send CIA Defendants to Italy*, WASH. POST, Mar. 1, 2007, at A12. Germany tried something similar and issued arrest warrants for the CIA officers responsible for Khaled El-Masri's kidnapping, but the case has not gained any traction. *See id.*; *see also* Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, at A1. And although the Italian trial eventually started without the CIA defendants present, it was drawn out for some time as questions arose over the Italian police's surveillance tactics. *See* Elisabetta Povoledo, *Kidnapping Trial of Operatives from the C.I.A. Delayed in Italy*, N.Y. TIMES, June 19, 2007, at A6.

victims have turned to a seeming last resort: seeking relief in U.S. federal courts. Several claims and causes of action exist that theoretically would allow the victim to pursue these lawsuits in domestic court, including, most notably, the Alien Tort Statute ("ATS").[148] Although this cause of action covers the substantive issues at play when litigating extraordinary rendition suits, none of the suits brought thus far has been successful in holding the United States accountable for its program because each has been dismissed before its merits have been analyzed. This part will describe the framework under which these claims arise before documenting the specific problems that several domestic suits have faced. It will also discuss further issues that would impair the successful prosecution of these suits, which highlight the larger issue looming in the background: the cases are impossible to win.

A. *The Alien Tort Statute*

The ATS is a federal jurisdictional statute that establishes a backdrop against which foreign plaintiffs can prove violations of international law in U.S. courts.[149] In short, the ATS only provides aliens access to the courts. Once there, the plaintiffs must prove a violation of international law through either the "law of nations" or a treaty to which the United States is a party.[150]

The First Congress passed the ATS as part of the Judiciary Act of 1789.[151] It led a quiet existence until relatively recently, when it was dusted off and first used as a tool to enforce international

148. 28 U.S.C. § 1350 (2006). The closely related Torture Victims Protection Act ("TVPA") applies only to foreign governments. *See id.* Although plaintiffs have tried to use the TVPA as a remedy for extraordinary rendition, those efforts have not succeeded; neither have *Bivens* claims. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 267, 287 (E.D.N.Y. 2006) ("*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.'") (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)). Federal Tort Claims Act ("FTCA") suits also have debilitating limitations in this context, primarily that any actions occurring outside the United States are exempt under the FTCA's foreign country exception. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 711–12 (2004) (rejecting the "headquarters exception" and holding that the FTCA does not waive sovereign immunity based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred). As the ATS is the most viable existing candidate for enforcing violations in the United States against the United States, it will be the primary focus of this part.

149. *See* 28 U.S.C. § 1350 (2006).

150. *See Sosa*, 542 U.S. at 724–25, 732–34.

151. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

human rights violations.[152] The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[153] Although the intricacies of substantive liability for violations of international law under the ATS are still being debated, as will be discussed *infra*, there is no question that the ATS provides nothing more than a jurisdictional grant. If there was any doubt about this premise, the Supreme Court solidified it in *Sosa v. Alvarez-Machain* in 2004:

> As enacted in 1789, the ATS gave the district courts "cognizance" of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law. The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature. . . . In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.[154]

The ATS's strictly jurisdictional limitation raised another important question in *Sosa*: what qualifies as a violation of international law under the ATS? Under the statute, there are two possibilities.

The first, which *Sosa* addressed, is a violation of the "law of nations";[155] in other words, a violation of customary international law. Precedent under the ATS provided a wide range of potential liability, but the Supreme Court in *Sosa* drastically limited the violations of customary international law actionable under the ATS.[156] The Court began with the premise that the Framers designed the ATS to give rise to a very limited number of actionable violations with definite content and acceptance among nations as

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152. *See Sosa*, 542 U.S. at 712 ("[F]or over 170 years after its enactment, [the ATS] provided jurisdiction in only one case."). More recently, and likely marking the end of the 170-plus-year dearth of case law, the District of Maryland upheld ATS jurisdiction in *Adra v. Clift*, 195 F. Supp. 857, 859, 865, 866 (D. Md. 1961). The oft-cited case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), marked the beginning of the ATS's frequent invocation, primarily as a tool for prosecuting human rights abuses taking place in foreign countries.

153. 28 U.S.C. § 1350 (2006). The ATS originally read that district courts "'shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.'" *See Sosa*, 542 U.S. at 712–13 (quoting Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77).

154. *Sosa*, 542 U.S. at 713–14 (internal citations omitted).

155. 28 U.S.C. § 1350 (2006).

156. *Sosa*, 542 U.S. at 732.

violations of customary international law. These actionable violations included primarily three offenses: violations of safe conduct, infringement of the rights of ambassadors, and piracy.[157] The Court also recognized that nothing prevented it from expanding the realm of actionable violations, and that the "First Congress . . . assumed that federal courts could properly identify some international norms as enforceable in the exercise of [ATS] jurisdiction."[158] Combining these two principles, the Court held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[159] Thus, new causes of action may only arise when the norm violated reaches the level held by piracy and the infringement of the rights of ambassadors in the eighteenth century when Congress passed the ATS.

Torture is undoubtedly one of these violations. As discussed above, freedom from torture has risen not only to customary international law status, but arguably has been added to the short list of universally applicable *jus cogens* norms.[160] Further, the Supreme Court has implicitly approved a cause of action for torture under the ATS,[161] while Congress has done the same.[162] Accordingly, an alien can bring a valid cause of action under the ATS for any torture she has suffered in violation of customary international law prohibiting the same.

In addition, the vast majority of federal courts facing the issue have acknowledged that the ATS covers direct as well as complicity or accomplice liability, which is crucial in many extraordinary rendition cases seeking to hold the United States accountable

157. *Id.* at 720.

158. *Id.* at 730.

159. *Id.* at 732.

160. *See supra* Part III.A.

161. The *Sosa* Court recognized *Filartiga* as a proper invocation of its holding. *Sosa*, 542, U.S. at 732 (citing Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)). *Filartiga*, also dealing with torture, noted that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890.

162. In enacting the closely-related TVPA, Congress noted that the ATS should remain intact because "claims based on torture . . . do not exhaust the list of actions that may appropriately be covered by section 1350." S. REP. NO. 102-249, at 5 (1991).

where it only transported suspects.[163] To prevail in the complicity context, plaintiffs must show that the United States knowingly provided practical assistance to the receiving country's acts of torture by delivering the plaintiffs to the receiving country's intelligence services.[164] Complicity liability is premised only on the *knowledge* that the transportation of suspects assisted in the commission of torture; the United States need not share the torturer's wrongful *intent*.[165] Simply stated, if the United States delivered a suspect to a third country knowing that country would torture him, the United States is liable under this complicity liability theory. Similarly, a victim theoretically can bring a claim under the ATS's second provision, which grants jurisdiction over breaches of treaties to which the United States is a party, including the CAT.

B. *Problems Arising in ATS Claims*

While extraordinary rendition victims have viable substantive causes of action under the ATS, actually litigating these claims is the difficult part. Through a variety of legal maneuvers, the United States and its agents have largely insulated themselves from accountability for the extraordinary rendition program. Several legal principles have foreclosed suits that have been filed, most notably the state secrets doctrine and the political questions doctrine, while other principles, including the doctrine of sovereign immunity, would quickly shut out any claims surviving the previous two.

1. Sovereign Immunity Prevents a Claim Against the United States

In suing the United States for damages under the ATS for its extraordinary rendition practices, a plaintiff would first need to show that the United States has waived its sovereign immunity for that cause of action. Federal courts generally may not entertain an action against the federal government without its con-

163. *See, e.g.*, Cabello v. Fernández-Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005); Bowoto v. Chevron Corp., No. C99-02506SL, 2006 WL 2455752, at *3 (N.D. Cal. Aug. 22, 2006); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 321–24 (S.D.N.Y. 2003).

164. *See, e.g.*, *Bowoto*, 2006 WL 2455752, at *4.

165. *See id.*

sent.[166] Further, overcoming sovereign immunity is a difficult task: any waiver of the federal government's sovereign immunity must be unequivocal and must be "construed strictly in favor of the sovereign."[167] More specific to the present context, at least one court has held that the ATS does not waive sovereign immunity in suits against the U.S. government, recognizing that nothing in the ATS's language waives the federal government's immunity.[168]

This principle poses an initial sticking point for any victim suing in a federal court seeking relief against the United States or its agents. Because the ATS does not waive the federal government's sovereign immunity, the United States can seek dismissal based solely on this principle.

2. The CAT Is Not Self-Executing

As noted above, the ATS grants aliens jurisdiction in federal district courts for violations of "treat[ies] of the United States" in addition to violations of the "law of nations."[169] Further, the CAT prohibits the United States from expelling or returning an individual to a country that the United States suspects is more likely than not going to torture that individual.[170] The CAT, however, is not a self-executing treaty and is not directly enforceable in U.S. courts.[171]

Sosa squarely addressed this issue. There, the plaintiff sued under the ATS claiming a violation of a rule pronounced in several treaties, but the Court was forced to look elsewhere for relevant guidance:

> [A]lthough the [treaty] does bind the United States as a matter of international law, the United States ratified the [treaty] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. Accordingly,

166. *See* United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

167. *See* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)).

168. *See* Canadian Trans. Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

169. 28 U.S.C. § 1350 (2006).

170. Convention Against Torture, *supra* note 103, art. 3, para. 1.

171. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734–35 (2004).

> [plaintiff] cannot say that the [instruments] themselves establish the relevant and applicable rule of international law.[172]

Likewise, the United States ratified the CAT with the express understanding that the treaty was not a self-executing instrument.[173] Any private claim under the ATS for a violation of the CAT cannot rely on the rules laid down in the CAT itself, effectively foreclosing the second branch of actionable ATS claims—those for violations of "treat[ies] of the United States."[174] Therefore, while the substantive provisions of the CAT forbid extraordinary rendition, individual victims are left without an effective private remedy due to the non-self-executing nature of the CAT itself.

3. The State Secrets Doctrine

There has long existed an evidentiary rule that "secrets of state" are inadmissible in a court of law.[175] The Supreme Court took this rule a step further in *Totten v. United States*.[176] In extending the "secrets of state" evidentiary privilege to its logical extreme, the *Totten* Court held that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[177] Thus, instead of excluding privileged material, the Court expanded the "secrets of state" privilege to mandate dismissal of the entire action where confidential government matters would need to be disclosed were it to proceed.[178] Later, in *United States v. Reynolds*, the Court, discussing a long line of state secrets cases, recognized that the United States may prevent the disclosure of evidence if "there is a reasonable danger that compulsion of the evidence will expose mili-

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172. *Id.* at 735 (internal citation omitted).

173. *See* RESPONSE TO COMMITTEE AGAINST TORTURE, *supra* note 115, art. 2, para. 5 (discussing the United States' ratification and purpose behind non-self-executing nature).

174. *See* 28 U.S.C. § 1350 (2006).

175. *See generally* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270–77 (2007) (tracing the origins of the state secrets doctrine from its common law conception through its solidification in American jurisprudence).

176. 92 U.S. 105 (1875).

177. *Id.* at 107.

178. *Id.*

tary matters which, in the interest of national security, should not be divulged."[179] *Reynolds* laid the groundwork for the modern application of the state secrets doctrine, which has seen frequent use since.[180]

Relying on the state secrets doctrine, two courts have recently dismissed claims challenging the extraordinary rendition program.[181] The plaintiff-victims sued various U.S. officials, CIA officers, and private corporations under the ATS for violations of the law of nations.[182] Both courts, though, quickly dismissed these claims when the United States formally intervened and asserted the state secrets privilege.

The *El-Masri* court explained its decision:

> It is enough to note here that the substance of [plaintiff's] publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the [CIA's] public declaration makes pellucidly clear, any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security.[183]

The *Mohamed* court provided that "inasmuch as the case involves 'allegations' about the conduct by the CIA, the privilege is invoked to protect information which is properly the subject of

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179. 345 U.S. 1, 10 (1953).

180. *See* Chesney, *supra* note 174, at 1289–1307 (discussing the state secrets doctrine in the post-*Reynolds* era).

181. The first was *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006). Khaled El-Masri, a German citizen of Lebanese descent, was abducted in Macedonia and claimed he was rendered to Afghanistan and tortured at a CIA "black site" there, known as the "Salt Pit." *See id.* at 532–34. Another group of extraordinary rendition victims, led by Binyam Mohamed, also brought suit alleging they had been rendered and tortured by the CIA. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1129–30 (N.D. Cal. 2008).

182. The *El-Masri* suit initially named "the following defendants: (1) former Director of the CIA George Tenet, (2) certain unknown agents of the CIA (John Does 1-10), (3) PETS, (4) ACL, (5) Keeler and Tate Management (KTM), (6) and certain unknown employees of the defendant corporations (John Does 11-20)." *See El-Masri*, 437 F. Supp. 2d at 534. The corporate defendants were alleged to have owned the aircraft used to transport El-Masri. *See id.* at 534 n.5. The *Mohamed* suit, in contrast, named only Jeppesen Dataplan, Inc., a Boeing subsidiary, which the plaintiffs alleged "provided [the CIA with] the aircraft, flight crews, and the flight and logistical support necessary" to carry out renditions. *See Mohamed*, 539 F. Supp. 2d at 1132.

183. 437 F. Supp. 2d. at 537.

state secrets privilege."[184] After successful interposition of the state secrets doctrine, both courts held that the suits could no longer continue as they would risk exposing important national security interests and dismissed both claims outright.[185]

This doctrine presents an enormous obstacle in any extraordinary rendition litigation: the government can keep secret its clandestine national security operations, and any violation of law occurring as a result is largely unenforceable in a private context.

4. Political Questions and Separation of Powers

Perhaps the most glaring issue, even if all the other problems were overcome, is that the federal judiciary is extremely reluctant to adjudicate disputes that it feels should properly be resolved by other branches of government. This reluctance is especially acute

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184. 539 F. Supp. 2d at 1134. The *Mohamed* court incorporated CIA Director Hayden's publicly available declaration filed in the case:

> First, this lawsuit puts at issue whether or not Jeppesen assisted the CIA with any of the alleged detention and interrogation. . . . Disclosure of information that would tend to confirm or deny whether or not Jeppesen provided such assistance—even if such confirmations or denial [sic] come from a private party alleged to have cooperated with the United States and not the United States itself—would cause exponentially grave damage to the national security by disclosing whether or not the CIA utilizes particular sources and methods and, thus, revealing to foreign adversaries information about the CIA's intelligence capabilities or lack thereof.
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> . . .
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> Second, this lawsuit puts at issues [sic] whether or not the CIA cooperated with particular foreign governments in the conduct of alleged clandestine intelligence activities. Adducing evidence that would tend to confirm or deny such allegations would result in extremely grave damage to the foreign relations and foreign activities of the United States.

Id. at 1135. Both judges received a classified declaration from Director Hayden in addition to the general public declaration quoted above. *See id.*; *El-Masri*, 437 F. Supp. 2d. at 537. This declaration was a more "detailed explanation of the facts and reasons underlying the assertion of the privilege." *El-Masri*, 437 F. Supp. 2d at 537.

185. *See Mohamed*, 539 F. Supp. 2d at 1135; *El-Masri*, 437 F. Supp. 2d at 539. El-Masri appealed the dismissal of his suit to the Fourth Circuit, which affirmed the District Court's dismissal based on the state secrets doctrine. El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007). The Supreme Court denied certiorari in El-Masri's final appeal, effectively affirming the dismissal of El-Masri's complaint under the state secrets doctrine. *See* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007). The plaintiffs in *Mohamed* have appealed to the Ninth Circuit, see Brief of Plaintiffs-Appellants, Mohamed v. United States *ex rel.* Jeppesen Dataplan, Inc., No. 08-15693 (9th Cir. Sept. 26, 2008), which recently declined to extend *El-Masri*'s state secrets analysis to the National Security Agency's Terrorist Surveillance Program, but also noted that dismissal based on the state secrets doctrine may have been appropriate in the extraordinary rendition context. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1200–01 (9th Cir. 2007).

in the foreign policy and national security context and has been expressed and applied in extraordinary rendition litigation.

As primarily discussed in *Arar v. Ashcroft*, a lawsuit involving the extraordinary rendition of Canadian citizen Maher Arar from a New York airport to Syria, the political question doctrine can override the entire legal process.[186] Recognizing the inherent limitations of the federal judiciary, the district court judge analyzed the political question issue:

> This case undoubtedly presents broad questions touching on the role of the Executive branch in combating terrorist forces—namely the prevention of future terrorist attacks within U.S. borders by capturing or containing members of those groups who seek to inflict damage on this country and its people. Success in these efforts requires coordination between law enforcement and foreign-policy officials; complex relationships with foreign governments are also involved. In light of these factors, courts must proceed cautiously in reviewing constitutional and statutory claims in that arena, especially where they raise policy-making issues that are the prerogative of coordinate branches of government.
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> . . . .
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> Second, this case raises crucial national-security and foreign policy considerations, implicating "the complicated multilateral negotiations concerning efforts to halt international terrorism." The propriety of these considerations, including supposed agreements between the United States and foreign governments regarding intelligence-gathering in the context of the efforts to combat terrorism, are most appropriately reserved to the Executive and Legislative branches of government. Moreover, the need for much secrecy can hardly be doubted.
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> . . . .
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> In sum, whether the policy be seeking to undermine or overthrow 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.[187]

While certainly recognizing legitimate concerns over political and foreign relations and separation of powers issues, this theory al-

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186. 414 F. Supp. 2d 250 (E.D.N.Y. 2006). Although analyzed in the context of a *Bivens* claim, the court's discussion can readily be transferred to any number of contexts in which aliens allege that the United States violated international law in situations like extraordinary rendition.

187. *Id.* at 281–83 (internal citations omitted). The Second Circuit approved of this analysis on appeal, noting the established policy of deference to executive branch officials when dealing with foreign policy and intelligence issues. *See* Arar v. Ashcroft, 532 F.3d 157, 181–83 (2d Cir. 2008).

lows the court to sidestep analysis of an extraordinary rendition claim regardless of whether "such conduct violates our treaty obligations or customary international law."[188]

The Supreme Court in *Sosa* adopted a similar limitation when determining which violations of the "law of nations" the ATS should recognize.[189] It held that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[190] Confirming what it implied by this sentence, the Court continued in a footnote that "[a]nother possible limitation that we need not apply here is a policy of case-specific deference to the political branches . . . [in which] there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[191] Even a clearly-defined norm such as torture is then subject to this "practical consequences" inquiry, which, in all likelihood, would result in the same outcome as *Arar*.

Accordingly, plaintiffs who overcome prior hurdles will have a difficult time arguing around the government's proverbial trump card, by which it can claim that national security and foreign policy actions—like extraordinary renditions—are properly left to the executive branch, despite the fact that they violate international law.

C. *The Effect of the Problems*

As demonstrated throughout this part, extraordinary rendition plaintiffs face unrealistic obstacles when they sue the United States or its agents for their injuries. As a result of the various legal arguments the United States can invoke, which are wholly unrelated to the substantive rights protected by binding customary and treaty law, not a single extraordinary rendition claim has had a trial on the merits in the United States. Coupled with the lack of international and institutional enforcement discussed in Part IV, these domestic legal principles allow the United States to

188. *Arar*, 414 F. Supp. 2d at 283.
189. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
190. *Id.* at 732–33.
191. *Id.* at 733 n.21.

escape accountability in victims' courts of last resort for the United States' violations of clearly established international law stemming from several binding sources.

VI. A THREEFOLD SOLUTION

As discussed above, extraordinary rendition victims have turned to American courts as a result of the lack of international enforcement.[192] Once there, however, several domestic legal principles have foreclosed their claims before they got off the ground.[193] As a result, many extraordinary rendition victims are left empty-handed, and even those later declared innocent are without a remedy. Because domestic courts have turned into victims' last resort, those courts should be able to decide the claims properly in front of them through a reasonable legal process.

This part will sketch a brief overview of a potential process that would not only address these claims, but also ensure that extraordinary rendition stops as a policy matter as well. The proposal will provide a limited framework under the ATS, extending only to extraordinary rendition victims.[194] It does not seek to resolve all detainee mistreatment issues in the broader war against terror; rather, its focus is to resolve the claims and issues specifically discussed throughout this note. By doing so, this proposal also takes advantage of ATS precedent, which is steadily increasing thanks to recent international human rights litigation.

As noted, the proposed interdependent roles must not only function together to address current claims but must also end the extraordinary rendition program as a policy matter. While the program's current activity level is unclear, executive branch leaders and agency officials in the Bush Administration showed no signs that they intended to stop it.[195] Officials consistently denied

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192. *See supra* Part V.

193. *See supra* Part V.B.

194. The ATS, as discussed above in Part V.A, is the most viable foundation on which to construct a cause of action here. It is already narrowly tailored, applying only to aliens and to well-recognized violations of international law. Further, it does not unnecessarily implicate other uses and does not risk foreclosing valid causes of action based on a variety of other procedural or jurisdictional defenses relating to domestic law, such as the constitutional questions implicated in trying to extend *Bivens* claims to meet the situation. For more on the various difficulties of other causes of action, see *supra* note 148.

195. *See, e.g.*, RESPONSE TO COMMITTEE AGAINST TORTURE, *supra* note 115, art. 3, para. 16 (noting that the United States has long used rendition to combat terrorism, but insist-

that the United States rendered suspects to countries where torture was more likely than not to occur, and they stood by the program generally.[196] Moreover, it seems that the Obama Administration will retain renditions as a counterterrorism tool, despite shuttering the CIA's "black sites."[197] But even if its use is waning, the program has claimed many victims, at least a handful of whom have since been declared innocent.[198] Accordingly, the proposed solution will provide a private remedy for victims, and also ensure that extraordinary renditions do not continue in the future. The aim is not to compensate terrorists who want to harm the United States, but rather to deter future extraordinary renditions by ensuring that the United States can apprehend a suspected terrorist using legal means.

A. *The Executive*

The executive branch has designed, implemented, and carried out the extraordinary rendition program. As such, the executive's role in eliminating extraordinary renditions as a policy matter is the most important of the three branches. With only tepid or no support so far for extraordinary rendition victims in the other two branches,[199] the executive must play the lead role in reforming the program.

Initially, executive branch and agency leaders must reverse the policy course of the last several years and refuse to use extraordinary rendition as a tool in the continued war against terror. They should enforce this directive throughout the executive branch and the CIA. As the executive branch has been the impetus behind this program,[200] a top-down approach starting with the President is the most important step in its elimination.

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ing that it abides by all relevant laws).

196. *See id.* art. 3, para. 13 ("[W]here the United States conducts renditions of individuals, the United States does not transport anyone to a country if the United States believes he or she will be tortured."); *see also* ON THE RECORD, *supra* note 60, at 4–5 (collecting public statements from government officials supporting the rendition program).

197. *See* Greg Miller, *CIA Retains Power To Abduct; Obama Preserves the Rendition Program, A Counter-terrorism Tool Whose Role, Officials Say, Might Expand*, L.A. TIMES, Feb. 1, 2009, at A1.

198. *See, e.g.*, Johnston, *supra* note 68, at 381–84.

199. *See supra* text accompanying notes 115–27 (discussing Congress's interpretation of Article 3 of the CAT); *supra* Part V (discussing extraordinary rendition victims' lack of success in United States federal courts).

200. *See supra* Part I.

Instead of continuing the CIA's extraordinary renditions, the executive must use only legal means to pursue the fight against international terrorists. This includes abiding by the CAT and refusing to send suspected terrorists to foreign countries to be tortured for intelligence. Moreover, the executive branch must ensure that the CIA abides by all domestic and international laws controlling its treatment of suspects and detainees.

Finally, to the extent that the executive retains the extraordinary rendition program, it should use rendition only in its original form by returning suspected terrorists to countries in which they are wanted through a legitimate legal process.[201] Even in this process, the executive branch must ensure reliably that the suspect will not be tortured upon his return.[202]

As a further check on the executive's power, and as a method of accountability, the executive branch should acknowledge that it will defer to Congress's new legislation proposed *infra*[203] and that the judiciary may decide such claims without case-by-case deference to the executive branch. This acknowledgement would allow a proper claim to reach a judge despite the executive's opposition, negating the Supreme Court's discussion in *Sosa* regarding the practical consequences of deference to the executive when making a cause of action available under the ATS.[204] In that way, the legislature and judiciary can ensure that the executive is not continuing to use extraordinary rendition, and can hold it accountable if it does.

The executive branch must take the initiative and establish a clear policy prohibiting extraordinary rendition while cooperating with the legislative and judicial branches to ensure legitimacy and accountability.

B. *The Legislature*

The legislature's role is more intertwined with the judiciary's, but must still rely on policy support from the executive branch to

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201. *See supra* notes 23–31 and accompanying text for a description of the original rendition program.

202. Article 3 of the CAT would still apply regardless of whether there is outstanding legal process for the suspect.

203. *See infra* Part VI.B.

204. *See supra* notes 190–92 and accompanying text.

be truly effective. Under this proposal, Congress should pass a narrow legislative framework for extraordinary rendition victims, allowing them to pursue legitimate ATS claims in a proper judicial forum.

This legislation would first waive the United States' sovereign immunity specifically for extraordinary rendition suits brought under the ATS.[205] To make this proposal both focused and more politically palatable, the legislation should waive only sovereign immunity for two types of suits: those brought under the ATS alleging that the United States clandestinely rendered the plaintiff from a foreign country to a third country where he claims he was tortured; and those brought under the ATS alleging that the United States rendered a plaintiff from a foreign country to another foreign location operated directly by the CIA, where he claims he was tortured.

In terms of focus, the legislation's structure limits itself to the basic premise of extraordinary rendition without potentially including immigration disputes and other irrelevant claims. As far as making the approach more politically palatable, this limited waiver of sovereign immunity would make the United States liable only for directly torturing suspects or delivering them to a third country knowing that country would torture them. Further, the complicity liability aspect closely mirrors Article 3 of the CAT, but does not involve making that provision of the CAT self-executing. As such, the customary international laws against torture, as well as complicity liability for the same, will cover largely the same issues as the CAT without having to alter the implementation of the treaty itself.

The most important issue in developing this framework is maintaining the inherent secrecy of the CIA's intelligence-gathering methods, as recognized by the *El-Masri* and *Jeppesen* courts' invocation of the state secrets doctrine.[206] Because the information on which plaintiffs must rely to prove their claims is classified, Congress should create a specialized forum to hear these claims. The forum's structure may be loosely modeled after the Foreign Intelligence Surveillance Court ("FISC").[207] Like the

205. *See supra* Part V.B.1.
206. *See supra* Part V.B.3.
207. 50 U.S.C. § 1803 (2006).

FISC, this specialized court would rely on rotating federal district court judges in each federal circuit to hear the victims' claims in partially sealed proceedings.[208] State secrets would be divulged only to the extent necessary to resolve the immediate claim, and only the portions of the trial relying on classified information would be sealed.[209] Losing parties could appeal to a higher body that could overturn a liability decision based on classified information, similar to the Foreign Intelligence Surveillance Court of Review.[210] For any ruling based on unclassified information, plaintiffs can appeal to the federal circuit court of appeals in their jurisdiction. Finally, like the FISC's structure, a losing party could appeal any liability decision to the Supreme Court of the United States under seal.[211] The Supreme Court, as it does in its regular docket, would have discretion in whether to hear the case, in addition to any unclassified disputes in cases that arise through the normal appellate procedure. Given the nature of the proceeding, the legislation would require a bench trial with no jury election.

Congress also should clarify that it intends for this forum to be the proper dispute resolution system for any ATS claims arising out of the CIA's publicly acknowledged rendition program. This pronouncement would cover not only the focus of this note—renditions to a third country implicating the United States under a complicity liability theory—but also those instances in which the CIA detained suspects itself. By acknowledging this forum in conjunction with the executive, Congress would specifically grant the judiciary the right to hear and decide these cases, which the political question doctrine currently prevents.[212] Thus, by creating an appropriate forum that is legitimized by the executive's deference to it, Congress can create a functional system to ensure that extraordinary renditions stop.

C. *The Judiciary*

To complete this proposal, the judiciary must implement and administer fairly the specialized courts Congress will create.

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208. *Id.* § 1803(a) (Supp. V. 2007).
209. *See infra* Part VI.C.
210. 50 U.S.C. § 1803(b) (2006).
211. *Id.*
212. *See supra* Part V.B.4.

Judges must be able to determine fairly when a plaintiff has a legitimate claim against the United States, as federal judges do in many other situations. Given Congress's legislation and the executive's deference to the courts, the judiciary should resolve faithfully the claims brought before it.

Of course, proper mechanisms should be implemented to ensure any classified information remains between the parties and the tribunal. As noted above, only portions of the trial involving classified information should be sealed. Further, all lawyers practicing, or anyone else appearing, in front of the court during the classified portions must receive the proper security clearance. This presents a unique problem for plaintiffs, as they will almost certainly be rejected for such clearance because they are often suspected terrorists. One solution may be to create a specialized, but limited, bar that would be licensed to practice in front of these courts. Plaintiffs could bring their claims before the court, and the members of the specialized bar would collaborate with the plaintiffs' outside attorneys. The lawyers holding the proper security clearance could argue and brief the classified portions of the case, while the plaintiffs' outside attorneys could handle the remainder.[213] No classified information could pass to the plaintiff or his outside lawyer except information regarding the specific outcome of the classified portions—whether the United States is liable for a substantive violation of international law under the ATS. Written opinions would be redacted similarly to the extent necessary.

Revealing only the narrow decision of liability should not compromise classified information. Many government leaders and agents have acknowledged that the rendition program exists.[214] A federal judge's finding stating solely that, based on all the relevant circumstances, the United States rendered an individual to a country, knowing that he probably would have been, and in fact was, tortured does not divulge any further classified information. Neither the details of the program nor any other substantive information would be revealed to the public. Given the govern-

213. For instance, the United States may assert a statute of limitations defense or other procedural issue. It may further dispute the amount of damages to which the plaintiff is entitled or argue that the plaintiff had preexisting mental or physical conditions. Before or after the sealed liability portion, the plaintiff's outside attorney could handle these unclassified portions of the case.

214. *See, e.g.*, ON THE RECORD, *supra* note 160, at 4–5.

ment's acknowledgement of the rendition program, the liability decision would focus primarily on whether the United States knew the suspect was likely to be tortured. The judge could base his determination on ample public information, including the State Department's own Country Reports, as well as classified information that would not be revealed publicly. To the extent that case law treats any of this information as classified and nonjusticiable under the state secrets doctrine,[215] the statutory framework should carve out a specific exception and allow disclosure only to the extent necessary to decide the issue of substantive liability. With the executive branch's cooperation and congressional legislation, the judiciary would hold both other branches accountable for any continuing extraordinary renditions by enforcing international law in a private context.

This proposal would create a limited context in which extraordinary rendition victims can seek relief for past wrongs. In addition, if each branch faithfully executes its role, extraordinary renditions as a governmental policy will stop. Further, the United States will bring itself back in line with its international legal obligations and regain its moral high ground in the war against terror.

VII. CONCLUSION

For years, the United States has been able to avoid meaningful accountability for violations of established international law committed in the CIA's extraordinary rendition program after 9/11. Although there have been political and practical ramifications on the international level, individual victims of this program are left without any redress. The international dispute resolution system has yet to enforce the United States' breaches of its treaty obligations, and American jurisprudence and courts, which have turned into victims' last resorts, effectively have foreclosed any relief despite substantive violations of customary and treaty-based international law. As a result, extraordinary rendition victims are left without a remedy in many instances. Clearly, something must change. And while it may not eliminate the United

215. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1133 (N.D. Cal. 2008) (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)); El-Masri v. Tenet, 437 F. Supp. 2d 530, 536–37 (E.D. Va. 2006) (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).

States' various other legal and moral dilemmas in the war on terror, a workable solution across all three branches of government that addresses current legal claims and ends the extraordinary rendition program is a good start in righting these wrongs.

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