CIVIL LIABILITY FOR TORTURE: THE VICTIM'S PRAYER FOR RELIEF

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And, since the [sovereign] ought not to suffer his subjects to molest the subjects of other states, or to do them an injury, much less to give open audacious offence to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment; or, finally, according to the nature and circumstances of the case, to deliver him up to the offended state, to be there brought to justice. This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations.[1]

Torture is its own master. It controls the torturer just as surely as it controls its victims.[2]

I. INTRODUCTION

In the aftermath of the 9-11 attacks, the U.S. government developed new interrogation techniques designed to elicit information from detainees about possible future acts of terror.[3] The Department of Justice determined that these techniques were legal and in compliance with international treaties to which the U.S. was a party.[4] In many instances, however, these techniques—which failed to produce actionable intelligence[5]—likely met the definition of torture under international and domestic law.[6] After their release from custody, some of the detainees that had been subjected to these techniques brought civil suit against the U.S. government officials who authorized these acts against them.[7] As they made their way through the

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[1] EMMERICH DE VATTEL, LAW OF NATIONS bk II, §76 at 162 (6th Amer. ed. 1844), http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/DeVattel_LawOfNations.pdf (last visited Jul. 19, 2018).

[2] Jeannine Bell, *"Behind this Mortal Bone": The (In)Effectiveness of Torture*, 83 INDIANA L. J. 339, 360 (2008).

[3] *See infra* text accompanying notes 18 and 42.

[4] *See infra* text accompanying notes 18, 22, and 23.

[5] *See infra* text accompanying notes 78-79.

[6] *See infra* text accompanying notes 77, 92, 118, and 143. *See generally,* Leila Nadya Sadat, *Shattering the Nuremberg Consensus: U.S. Rendition Policy and International Criminal Law*, 3 Yale J. Int'l Aff. 65 (2008).

[7] *See infra* notes 82, 107, and 129.

federal court system, the suits were dismissed based on a variety of legal doctrines, including official acts immunity and the state secrets doctrine.[8] This article argues that the current legal regime should take notice of these victims and alter four key legal principles in order to provide appropriate civil remedies and to deter future acts of torture by U.S. officials.[9]

II. TORTURE HAS DIFFERENT DEFINITIONS BASED ON PLAIN MEANING, INTERNATIONAL TREATIES, STATUTES, THE COMMON LAW, AND LEGAL OPINIONS FROM THE DEPARTMENT OF JUSTICE.

A. *Torture defined.*

Torture is commonly understood to mean "anguish of body or mind," "something that causes agony or pain," and "the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure."[10] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) defines torture as the intentional infliction of severe mental or physical pain or suffering on someone by a public official in order to obtain information or punish.[11] The Torture Victim Protection Act of 1991 (TVPA) implements the UNCAT and uses nearly identical language to define torture for purposes of U.S. law.[12] Beatings which lead to broken bones,

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[8] *See infra* text accompanying notes 81, 97, 99, 104, 119, 151, and 155.

[9] *See infra* text accompanying notes 158, 170, 173, 175, and 180.

[10] *Torture*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/torture (last visited Jul. 19, 2018).

[11] United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT] defining torture as:

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

http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (last visited Jul. 19, 2018).

[12] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 at §3(b) (2012) [hereinafter TVPA]:

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as

"whipping, burning, electric shock . . . violent shaking . . . acute limitations on food or sleep and even sensory deprivation or extreme discomfort, such as that caused by forcing the detainee to occupy a physically uncomfortable position for a prolonged period of time" are typical examples of torture which would be prohibited by the UNCAT and TVPA.[13]

Federal courts have successfully applied the definition of torture, as found in the TVPA, to specific cases. In a 1996 civil action under the TVPA, the U.S. Court of Appeals for the Ninth Circuit affirmed that the severe beatings suffered by the plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and cramped cell, and eight years of solitary or near-solitary confinement constituted torture.[14] In 2001, a federal district court found that the deprivation of adequate food, light, toilet facilities, and medical care for over six years also constituted torture.[15]

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obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

See also 18 U.S.C.A. § 2340 for a similar definition of torture.

[13] Bell, *supra* note 2, at 344. *But cf.* Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 18 (2009) (arguing for a narrower definition of torture under the TVPA than the one articulated by Bell).

[14] Hilao v. Estate of Marcos, 103 F.3d 789, 790–91, 795 (9th Cir. 1996).

[15] Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 45 (D.D.C. 2001) ("With respect to torture, the Court finds that the deprivation of adequate food, light, toilet facilities, and medical care for over six years amounts to torture within the meaning of section 1605(a)(7)."); *See also* Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136, 152 (D.D.C. 2010) (finding that treatment that included beatings, unsanitary conditions, inadequate food and medical care, and mock executions was torture under the TVPA).

B. *Department of Justice "torture memos"*

At the request of the Central Intelligence Agency (CIA), in 2002 and 2004 the Department of Justice Office of Legal Counsel (OLC) issued two memoranda which were part of a longer series of OLC opinions known as the "torture memos."[16] These memos purported to provide legal guidance to the President (and ultimately to the CIA) about what would constitute torture under the UNCAT and TVPA.[17] The legal guidelines found in the memos allowed for the development and deployment of Enhanced Interrogation Techniques (EITs) against detainees captured in counterterrorism operations worldwide.[18] The first of these memoranda, issued on August 1, 2002, and authored by James Bybee, defined torture as physical pain at a "level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions" or mental pain resulting in prolonged mental harm caused by:

> 1) the intentional infliction or threatened infliction of severe pain or suffering;
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> 2) the administration or application, or threatened administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality;
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> 3) the threat of imminent death; or
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> 4) the application or threats of application of any of these actions against a third party.[19]

The Bybee memorandum also stated that "severe mental pain or suffering must be evidenced by prolonged mental harm, the type of which could result in post-traumatic stress disorder or depression."[20] Finally, the Bybee memorandum opined that, to qualify as torture, the actor must have had

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[16] *See* 28 U.S.C.A. § 512 (2000) (providing that "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.").

[17] *See* 28 U.S.C. § 511 (2012) ("The Attorney General shall give his advice and opinion on questions of law when required by the President.").

[18] *See* Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 94-6 (2008).

[19] Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney Gen., Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 6-7 (Aug. 1, 2002), http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf (last visited Jul. 19, 2018) [hereinafter Bybee memorandum].

[20] *Id.* at 7.

specific intent to inflict severe physical or mental pain or suffering.[21] Relying on the legal conclusions from the Bybee memorandum, the OLC advised the CIA that EITs—including waterboarding—would not violate the prohibitions on torture found in the TVPA.[22] Alternatively, the memo concluded that even if the practices were illegal, the president's commander-in-chief powers could override the legal force of the statute.[23]

The OLC revoked and replaced the Bybee memorandum after two years due to considerable criticism for its controversial legal conclusions "effectively condon[ing] torture."[24] In its December 2004 opinion, known

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[21] *Id.* at 8.

[22] Boehm, *supra* note 13, at 6; *See also* Memorandum for [Redacted], from Jay S. Bybee, Assistant Attorney Gen., Re: Interrogation of [Redacted] 16 (Aug. 1, 2002) https://www.aclu.org/sites/default/files/pdfs/safefree/cia_3686_001.pdf (last visited Jul. 19, 2018); S. SELECT COMM. ON INTELLIGENCE, THE S. INTELLIGENCE COMM. REPORT ON TORTURE 46 (Melville House ed. 2014) [hereinafter SENATE TORTURE REPORT] ("[T]he representatives from the OLC, including Deputy Assistant Attorney General John Yoo, advised that the criminal prohibition on torture would not prohibit the methods proposed by the interrogation team because of the absence of any specific intent to inflict severe physical or mental pain or suffering.").

[23] Bybee memorandum, *supra* note 19, at 36; *See also* Philip Zelikow, *Codes of Conduct for a Twilight War*, 49 HOUS. L. REV. 1, 24 (2012):

> Since Common Article 3 had been put aside, Yoo did not need to do a CID compliance analysis. So he used this contrast between CID and "torture" to show that the proposed procedures did not amount to "torture," at least as proscribed by federal law. For good measure he threw in language saying that, even if this was torture, the President could override the statutory prohibition under his Commander-in-Chief powers.

[24] Pines, *supra* note 18, at 95; *See also Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary* 109th Cong. 64 (2005) (statement of Sen. Edward Kennedy, Member, S. Comm. on the Judiciary) ("The Bybee torture memorandum, written at your request—and I would be interested in your reactions to this—made abuse of interrogation easier. It sharply narrowed the definition of torture and recognized it as new defense for officials who commit torture."); *id.* at 158 (statement of Harold Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School) ("Nevertheless, in my professional opinion, as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever heard."); Michael C. Dorf, *The Justice Department's Change of Heart Regarding Torture: A Fair-Minded and Praiseworthy Analysis That Could Have Gone Still Further*, FINDLAW (Jan. 5, 2005), http://supreme.findlaw.com/legal-commentary/the-justice-departments-change-of-heart-regarding-torture.html (last visited Jul. 19, 2018) (stating that "[T]he August 2002 memo can only be described as a serious departure from longstanding OLC practice. In content and tone, the memo reads much like a document that an overzealous young associate in a law firm would prepare in response to a partner's request for whatever arguments can be concocted to enable the firm's client to avoid criminal liability."); Definition of Torture Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297, 298 (2004),

as the Levin memorandum, the OLC explicitly renounced the Bybee memorandum's definition of torture.[25] First, the Levin memorandum reiterated the statutory definition of torture as conduct that is "specifically intended to inflict severe physical or mental pain or suffering."[26] In contrast to the Bybee memorandum, however, the Levin memorandum defined severe pain as "not limited to 'excruciating or agonizing' pain or pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.'"[27] Additionally, the Levin memorandum defined mental harm amounting to torture as harm that has "some lasting duration."[28] This memorandum ostensibly broadened the Bybee memorandum's definition of official conduct that would be deemed torture under the TVPA.[29] However, in a footnote, the Levin memorandum provided direct support to the practices allowed by the Bybee memorandum.[30] Thus, while the Levin memorandum provided a broader set of legal standards for defining torture than the Bybee memorandum, "[i]n the real world of interrogation policy,

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https://www.justice.gov/sites/default/files/olc/opinions/2004/12/31/op-olc-v028-p0297_0.pdf (last visited Jul. 19, 2018) [hereinafter Levin memorandum].

[25] *See* Levin memorandum, *supra* note 24, at 304 n.17:

> The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." We do not agree with those statements.

(citations omitted); *id.* at 311 n. 24:

> The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

(citations omitted).

[26] *See* Levin memorandum, *supra* note 24, at 297.

[27] *See id.*

[28] *See id.* at 311-13.

[29] *See* Pines, *supra* note 18, at 118; *see also* Dorf, *supra* note 24, (stating that the Levin memorandum "disavows the extremely high threshold [for torture] advocated in the August 2002 [Bybee] memo").

[30] Levin memorandum, supra note 24, at 299 n. 8:

> While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

nothing had changed."[31]

C. *The Enhanced Interrogation Techniques as proposed and practiced by the CIA*

Prior to the 9-11 attacks, the CIA had very little experience interrogating detainees.[32] At the time of the attacks, most of the institutional interrogation expertise resided in law enforcement and military organizations.[33] Consequently, in 2002, the CIA's Office of Technical Services (OTS) commissioned a report from two CIA contractor psychologists who had previously worked at the U.S. Air Force Survival, Evasion, Resistance, and Escape (SERE) school.[34] This report concluded that inducing a state of "learned helplessness" by subjecting a detainee to a series of "adverse or uncontrollable events" could encourage a detainee to cooperate and provide intelligence.[35] Notably, neither psychologist had experience as an interrogator, nor did either possess counter-terrorism expertise relevant to the then-current threat.[36] Moreover, the SERE model that the two psychologists relied on was based on experiences of American servicemen captured during the Vietnam War. These prisoners of war were subjected to torture not to provide actionable intelligence, but to prompt them to confess for propaganda purposes.[37] As was clear to some at the

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[31] JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 182-83 (2006):

> Though it criticized our earlier work, the 2004 opinion included a footnote to say that all interrogation methods that earlier opinions had found legal *were still legal*. In other words, the differences in the opinion were for appearances' sake. In the real world of interrogation policy, nothing had changed. The new opinion just reread the statute to deliberately blur the interpretation of torture as a short-term political maneuver in response to public criticism.

[32] *See* Zelikow, *supra* note 23, at 15.

[33] *See id.*

[34] *See* SENATE TORTURE REPORT, *supra* note 22, at 34-35.

[35] *See id.* at 35.

[36] *See id.* ("Neither psychologist had experience as an interrogator, nor did either have specialized knowledge of al-Qa'ida, a background in terrorism, or any relevant regional, cultural, or linguistic expertise.").

[37] *See id.* at 45:

> [A] senior CIA interrogator would tell personnel from the CIA's Office of the Inspector general that SWIGERT and DUNBAR's SERE school model was based on resisting North Vietnamese "physical torture" and was designed to extract "confessions for propaganda purposes" from U.S. airmen "who possessed little actionable intelligence." The CIA, he believed, "need[ed] a different working model for interrogating terrorists where confessions are not the ultimate goal."

(alteration in original). *See also* Zelikow, *supra* note 23, at 28-29.

time, the proposed SERE techniques were ill-suited to interrogations designed to extract actionable intelligence.[38]

Nevertheless, in July 2002, the two contract psychologists proposed twelve SERE techniques to the CIA for use in its interrogation program.[39] The proposed techniques were "(1) the attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) waterboard, (10) use of diapers, (11) use of insects, and (12) mock burial."[40] In July 2002 all of these techniques—with the exception of the mock burial—were approved for use by the Attorney General.[41] These techniques became known as EITs.[42] As the detention program matured, however, practices not briefed to the OLC including cold showers, "rough takedowns," and the use of mock executions were routinely used against detainees.[43]

D. *The torture memos and civil immunity*

While the legal opinions regarding the definition of torture contained in OLC opinions were binding on all executive branch employees,[44] they were not binding on the courts.[45] However, adherence to an OLC opinion will

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[38] *See* SENATE TORTURE REPORT, *supra* note 22, at 47 ("[A]n individual with SERE school experience commented that 'information gleaned via harsh treatment may not be accurate, as the prisoner *may say anything to avoid further pain*' . . . .") (emphasis added); *But cf.* Zelikow, *supra* note 23, at 29 ("I think it goes too far to say that coercive methods can never get anything uniquely valuable.").

[39] *See* SENATE TORTURE REPORT, *supra* note 22, at 44.

[40] *Id.* (Contemporaneous to this report, Swigert, one of the contract psychologists, "recommended that the CIA enter into a contract with Hammond DUNBAR, his co-author of the CIA report on potential al-Qa'ida interrogation resistance training, to aid in the CIA interrogation process.").

[41] *See id.* at 48.

[42] *See id.; see generally* Bybee memorandum, *supra* note 19, at 2-39 (detailing the administration's legal reasoning justifying the techniques approved by the Attorney General).

[43] *See* SENATE TORTURE REPORT, *supra* note 22, at 63.

[44] *See* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1319-20 (2000); *id.* at 1305 ("When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch . . . .").

[45] *See* Perkins v. Elg, 307 U.S. 325, 348-49 (1939) (finding that "[w]e are reluctant to disagree with the Attorney General . . . but we are compelled to agree with the Court of Appeals in the instant case that the conclusions of that opinion are not adequately supported and are opposed to the established principles which should govern the disposition of this case."); United States v. Dietrich, 126 F. 671, 676 (D. Neb. 1904) (declining to follow a one-hundred-year-old opinion and holding that while attorney general opinions are "always

generally result in a government employee being effectively immune from civil liability based on a successful argument that the employee was acting reasonably and within the scope of his employment.[46] However, there may be theoretical limits to the immunity conferred by OLC memoranda. If an employee relied on an objectively unreasonable OLC opinion, an opinion "that is so baseless in its legal research, argument, or conclusion, that no reasonable person would rely on it," he would likely be subject to civil and criminal liability.[47]

III. TORTURE IS ILLEGAL AND INEFFECTIVE AT PRODUCING INTELLIGENCE.

A. *Torture is illegal, and the law provides civil remedies for victims of torture.*

International and U.S. domestic law have long outlawed torture and empowered courts to provide civil remedies to victims.[48] For example, the Fifth and Eighth Amendments to the Constitution forbid torture by government officials,[49] and the victims of such violations may seek

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entitled to respectful consideration" in this case "the reasons assigned for the conclusion [were] brief and unsatisfactory").

[46] *See* Pines, *supra* note 18, at 113-114; *id.* at 139 (arguing that individual civil liability will not attach under the Federal Tort Claims Act, as the employee will likely be deemed to have operated within the scope of employment, and arguing that following the guidance of an OLC opinion would likely shield the employee against constitutional and statutory claims); *id.* at 145 (arguing that an employee relying on even a "poorly argued or poorly concluded Attorney General opinion" should not be subject to liability as long as the reliance was reasonable).

[47] *See* Pines, *supra* note 18, at 146 (arguing that an employee would not and should not receive immunity from knowingly committing an unlawful action simply because of reliance on an objectively unreasonable OLC opinion).

[48] *See* UNCAT, art. 2, *supra* note 11, at 114, (providing "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."); *see also* International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S 171 (providing *inter alia* "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (finding that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."); UNCAT, art. 14, ¶ 1, *supra* note 11, at 116 (providing "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to *fair and adequate compensation*, including the means for as full rehabilitation as possible . . . .") (emphasis added).

[49] *See* U.S. CONST. amend. V, providing *inter-alia*, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."; U.S. CONST. amend. VIII, providing, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . ."; *see also* Seth F. Kreimer, *Too Close to the Rack and*

damages via a *Bivens* action against the perpetrators.[50] In 1991, Congress outlawed torture by statute and provided a civil cause of action against government officials who, under color of law of any foreign nation, torture or commit an extrajudicial killing.[51] More recently, as one of the first acts of his presidency, Barack Obama called for the humane treatment of all detainees, consistent with Common Article III of the Geneva Conventions, and specifically directed that detainees not be subject to torture by U.S. government personnel.[52] The executive order also required that detainees only be subject to interrogation methods found in Army Field Manual (FM) 2-22.3.[53] In 2015, Congress codified the principles of this executive order into law in the National Defense Authorization Act, requiring that the interrogation of any person detained by any agency of the government be conducted in accordance with the techniques found in Army FM 2-22.3.[54]

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the Screw: Constitutional Constraints on Torture in the War on Terror, 6 U. PA. J. CONST. L. 278 (2003) (arguing that the Fifth and Eighth Amendments prohibit torture); Graham v. Florida, 130 S.Ct. 2011, 2021 (2010) (holding that "[t]he Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances."); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (holding that the Eighth Amendment forbids punishments of torture).

[50] *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 398 (1971) (holding that a person may bring a civil action for money damages against a federal official for a violation of his constitutional rights).

[51] *See* TVPA, *supra* note 12, at § 3, which provides:

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

[52] *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 § 3(a) Jan. 22, 2009, which provides:

> [detainees] shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and *torture*), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States. (emphasis added)

This executive order also provided at §3(b) that detainees may only be subject to interrogation techniques found in Army Field Manual 2–22.3, "Human Intelligence Collector Operations," Sep. 6, 2006. Chapter 8 of the Field Manual lists the approved techniques, all of which are non-violent and emphasize rapport-building. Approved techniques include, *inter-alia*, the direct approach, incentive approach, emotional love and emotional hate approach, emotional fear down, emotional fear up, emotional pride and ego-up approach, emotional pride and ego-down approach, and emotional futility.

[53] *See id.*

[54] The National Defense Authorization Act for Fiscal Year 2016 provides "An

B. *Torture is ineffective at producing intelligence.*

Torture has proven an ineffective method of producing intelligence, especially as compared to non-coercive techniques.[55] However, torture has been shown to be effective at producing confessions, as the victim will often say anything—regardless of its truth—to stop the pain.[56] Historically, the CIA agreed with this premise, repeatedly and unambiguously declaring torture to be not only "wrong",[57] but also an ineffective means of gathering intelligence.[58] A CIA handbook issued just after the 9-11 attacks reaffirmed this stance against "[t]orture, cruel, inhuman, degrading treatment or punishment, or prolonged detention without charges or trial," declaring all of these acts not only human rights violations but also contrary to CIA policy.[59]

The prolonged detention, interrogation, and use of EITs against detainees after the 9-11 attacks represented a sharp departure from long-held CIA policies and ideals. As presaged by previous public statements of CIA officials, the vigorous employment of EITs at detention sites worldwide failed to produce actionable intelligence.[60] For example, in August 2002,

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individual described in subparagraph (B) shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual 2–22.3." National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045, 129 Stat. 726, 977-79 (2016).

[55] *See* Bell, *supra* note 2, at 352, 355-7 (exposing the logical flaws in the "ticking time bomb" scenario often used to support the practice of torture as put forth by Prof. Alan M. Dershowitz in WHY TERRORISM WORKS at 143-145 (Yale University Press ed., 2002)).

[56] *See* Bell, *supra* note 2, at 354 ("When faced with torture, innocent individuals may yield to 'the pain and torment and confess things they never did.'").

[57] *See* SENATE TORTURE REPORT, *supra* note 22, at 32 ("Testimony of the CIA Deputy Director of Operations in 1988 denounced coercive interrogation techniques, stating, '[p]hysical abuse or other degrading treatment was rejected not only because it is wrong, but because it has historically proven to be ineffective.'").

[58] *See id.* ("In January 1989 the CIA informed the Committee that 'inhumane physical or psychological techniques' are counterproductive because they do not produce intelligence and will probably result in false answers.").

[59] *See id.* ("[I]t is CIA policy to neither participate directly in nor encourage interrogation which involves the use of force, mental or physical torture, extremely demeaning indignities or exposure to inhumane treatment of any kind as an aid to interrogation.").

[60] *See* SENATE TORTURE REPORT, *supra* note 22, at 3. *See also* Zelikow, *supra* note 23, at 35 for a more nuanced view of this question:

> The point is not whether the CIA program produced useful intelligence. Of course it did. Quite a lot. The CIA had exclusive custody of a number of the most important al Qaeda captives in the world, for years. *Any good interrogation effort would produce an important flow of information from these captives.* (emphasis added)
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> [. . .]

the CIA waterboarded Abu Zubaydah until he was completely unresponsive, "with bubbles rising through his open, full mouth."[61] Yet, at the close of these interrogations, the CIA concluded that he had been truthful throughout the process, and that these techniques produced no additional intelligence.[62] In fact, FBI special agents obtained all of the actionable intelligence from Abu Zubaydah shortly after his capture using non-coercive techniques.[63]

As the CIA gained new detainees, it began to standardize and plan the use of EITs, but with results similar to Abu Zubaydah. At Detention Site Cobalt, for example, the CIA placed Ridha al-Najjar in total darkness, reduced the quality of his food, subjected him to cold temperatures and continuous music, handcuffed one or both of his wrists over his head for "22 hours each day for two consecutive days," and kept him in a diaper while denying him access to a toilet.[64] This regime of treatment resulted in only one intelligence report.[65]

Remarkably, this treatment became "the model" for handling detainees at this site.[66] In November 2002, a detainee named Gul Rahman died—likely from hypothermia—after being found shackled to the wall of his cell at Site Cobalt in a position that required him to rest partially clothed on the bare concrete floor.[67] Observers from the Bureau of Prisons, after seeing the

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> So the issue is not whether the CIA program of extreme physical coercion produced useful intelligence; it was about its *net value when compared to the alternatives*.

See also Mark Danner, *The Twilight of Responsibility: Torture and the Higher Deniability*, 49 HOUS. L. REV. 71, 97 (2012):

> For the real question to ask about torture is . . . whether that information it uniquely extracts is likely to outweigh the enormous downsides it brings, the negative consequences—not just diplomatic, legal, or even moral, but political, as a national security matter—that the decision to use these techniques is certain to have.

[61] SENATE TORTURE REPORT, *supra* note 22, at 52-54.

[62] *See id.* at 54-5.

[63] *See id.* at 56-7 (consider Abu Zubaydah's statement to a CIA psychologist in February 2003, wherein he revealed that Al-Qa'ida believed that every captured operative would talk during interrogation, and that the organization will "make adjustments to protect people and plans when someone with knowledge is captured."). *See also* Danner, *supra* note 60, at 82:

> [T]he two most valuable pieces of intelligence we know—the identification of Jose Padilla (the so-called 'dirty bomber') and the revelation of Khalid Sheik Mohammed's pseudonym, and thus his role in planning the 9/11 attacks—were drawn from Zubaydah during this period [of FBI questioning using non-coercive techniques].

[64] *See* SENATE TORTURE REPORT, *supra* note 22, at 61.

[65] *See id.*

[66] *See id.*

[67] *See id.* at 62.

treatment of detainees at Site Cobalt, concluded that the "detainees were not being treated humanely [sic]."[68]

As the detention and interrogation program matured, CIA officers developed variants on the originally approved EITs. One enterprising interrogator gave a detainee a forced bath with a stiff brush and placed the same detainee in a stress position for approximately two and a half days with "his hand affixed over his head."[69] (This position was so extreme that a CIA medical officer intervened because she was concerned that the position would result in the dislocation of the detainee's shoulders.)[70] During the same interrogation, the officer placed a pistol near the blindfolded detainee's head and operated a cordless drill near his body.[71] Predictably, this program of interrogation produced no actionable intelligence.[72] Other variants on the original EITs included forced rectal rehydration,[73] and 183 instances of waterboarding the same detainee that escalated to a "series of near drownings."[74] This particularly brutal program of interrogation caused the detainee to fabricate information which led to the CIA detention of two innocent individuals.[75] At Detention Site Cobalt, the CIA employed other techniques including standing sleep deprivation, "nudity, dietary manipulation, exposure to cold temperatures, cold showers, 'rough takedowns,' and, in at least two instances, the use of mock executions."[76]

As practiced by the CIA, many of these EITs and detention conditions likely met the definition of torture found in the TVPA, as codified in federal common law.[77] Additionally, throughout the CIA's program from 2002 to 2006, the coercive and brutal interrogation techniques employed were not an effective means of producing actionable intelligence and led to the fabrication of intelligence by a detainee.[78] This outcome was sadly predictable because torture is generally an ineffective method of producing intelligence, especially when compared to other, non-coercive techniques,

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[68] *Id.* at 66.

[69] *See* SENATE TORTURE REPORT, *supra* note 22, at 74.

[70] *See id.*

[71] *See id.* at 74.

[72] *See id.* at 76-77.

[73] *See id.* at 84.

[74] *Id.* at 87.

[75] *See id.* at 85.

[76] *See id.* at 63.

[77] *See supra* text accompanying notes 13-15; *But cf.* Boehm, *supra* note 13, at 18 (arguing that stress positions, isolation, and deprivation of light, "while cruel, do not rise to the level of 'systematic beating' envisioned by the anti-torture statute's drafters" and also arguing that waterboarding is not torture under the TVPA).

[78] *See* SENATE TORTURE REPORT, *supra* note 22, at 3. *But see supra* note 60.

such as rapport building.[79]

IV. PARADOXICALLY, THE CURRENT REGIME OF TREATIES, CUSTOM, AND LAWS, HAS ALLOWED AND WILL LIKELY CONTINUE TO ALLOW U.S. OFFICIALS TO AVOID PERSONAL CIVIL LIABILITY FOR TORTURE THEY AUTHORIZE OR PERSONALLY COMMIT.

Despite the great weight of international law (including widely accepted norms that developed after the Nuremberg tribunals), constitutional amendments conferring well-defined protections, U.S.-ratified treaties, and federal statutes,[80] individuals who suffer torture at the direction of U.S. officials have had, and likely will continue to have, scant success in seeking to hold these officials personally civilly liable. Reasons for this lack of success include official acts immunity and the state secrets doctrine.[81]

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[79] *See* Bell, *supra* note 2, at 355, 357 ("Research on interrogation in the human intelligence field, for instance, has identified the *establishment of rapport* as an important factor in non-coercive interrogations.") (emphasis added). *See also* Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, 51-76 at 58, https://www.theatlantic.com/magazine/archive/2003/10/the-dark-art-of-interrogation/302791 (last visited Jul. 20, 2018):

> You want a good interrogator? . . . Give me somebody who people like and who likes people. Give me somebody who knows how to put people at ease. Because the more comfortable they are, the more they talk, and the more trouble they're in—the harder it is to sustain a lie.

[80] *See* TVPA, *supra* note 12 (implementing the UNCAT and providing a civil cause of action in U.S. courts against individuals who torture or kill under color of law); G.A. Res. 61/153, ¶ (Dec. 19, 2006) ("[The General Assembly] stresses that national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation, and urges States to take effective measures to this end.); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); UNCAT *supra* note 11, at 5 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible"). *See also* Bardo Fassbender, *Can Victims Sue State Officials for Torture? Reflections on* Rasul v. Myers *from the Perspective of International Law*, 6 J. OF INT'L. CRIM. JUSTICE 347, 363 (2008) (stating that "a general exclusion of individual civil liability for acts of torture runs counter to the obligation of states party to the Convention against Torture").

[81] *See* Richard Henry Seamon, *U.S. Torture as a Tort,* 37 RUTGERS L.J. 715, 719 (2006) ("In short, the availability of civil remedies for U.S. torture under current law is razor-thin."); Pines, *supra* note 18, at 114 (stating "absent extraordinary circumstances, such a government employee will be found effectively immune from suit under each legal claim if the employee relied upon the Attorney General opinion in taking the alleged action."); Fassbender, *supra* note 80, at 368:

Some examples of unsuccessful attempts to sue U.S. officials for authorizing acts of alleged torture will be helpful to illustrate this point.

A. *Shafiq Rasul*

Shafiq Rasul—a citizen and resident of the United Kingdom—was a detainee at the United States Naval Base at Guantanamo Bay, Cuba, from 2002 until his release in March 2004.[82] In October 2004, he (along with three other citizens of the United Kingdom also detained at Guantanamo during this period) brought suit against various U.S. officials in the U.S. District Court for the District of Columbia alleging torture and other human rights violations while in custody at Guantanamo.[83] In seven causes of action, the plaintiffs alleged violations of the Geneva Conventions and international law under the Alien Tort Statute (ATS),[84] violations of the Fifth and Eighth Amendments to the Constitution under a *Bivens* action,[85] and violations of the Religious Freedom Restoration Act (RFRA).[86]

In his suit, Rasul alleged that in October 2001 he traveled from Pakistan to Afghanistan to provide humanitarian relief.[87] Once there, he was captured by a Northern Alliance warlord and then transferred to U.S. custody in December 2001.[88] After some months in U.S. custody in

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The United States claims that "US law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention [Against Torture]". However, in practical terms none of these avenues appears to be available to persons claiming to be victims of acts of torture at Guantanamo.

[82] Rasul v. Myers, 512 F.3d 644, 651 (D.C. Cir. 2008) (Rasul I).

[83] *Id.*

[84] The Alien Tort Statute (28 U.S.C. § 1350) provides that "[t]he 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."

[85] *See* cases cited *supra* note 50; Harlow v. Fitzgerald, 102 S.Ct. 2727, 2729 (1982) (holding that the federal official is entitled to qualified immunity "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *see also* United States v. Smith, 499 US 160, 166-67 (1991) (holding that the substitution of the United States as a defendant under the Federal Tort Claims Act (FTCA) (See *infra* note 97) may preclude recovery completely).

[86] 42 U.S.C. § 2000bb–1(a)–(b) (prohibiting the government from burdening or otherwise placing obstacles in the way of a person's religious practices absent a compelling interest and a showing that the government is using the least restrictive means); Rasul, 512 F.3d at 651. *See also* Holy Land Found. For Relief and Dev. v. Ashcroft, 333 F.3d 156, 166-68 (D.C. Cir. 2003) (holding that the RFRA applies to the actions of the U.S. government and stating "Congress in enacting RFRA only sought to provide process and standards for the protection of religious exercise").

[87] *Rasul*, 512 F.3d at 650.

[88] *Id.*

Afghanistan, the U.S. government transported Rasul to the detention facility at the Guantanamo Bay Naval Base in early 2002, where he remained until his 2004 release.[89]

During his interrogation at the hands of U.S. intelligence and military officials at Guantanamo, Rasul alleged he was systematically tortured:

> These allegations assert various forms of torture, which include hooding, forced nakedness, housing in cages, deprivation of food, forced body cavity searches, subjection to extremes of heat and cold, harassment in the practice of [his] religion, forced shaving of religious beards, placing the Koran in the toilet, placement in stress positions, beatings with rifle butts, and the use of unmuzzled dogs for intimidation.[90]

Rasul also claimed that, even after the Department of Defense revoked authorization for certain aggressive interrogation techniques in 2003, he continued to suffer the maltreatment alleged above, and additionally, he was subjected to prolonged shackling leading to wounds and permanent scarring and had unknown substances injected into his body.[91] If true, these conditions would likely meet the definition of torture found in the TVPA as codified in federal common law.[92]

Rasul's suit met with no success at the D.C. District Court and U.S. Circuit Court of Appeals for the District of Columbia.[93] His claims under the ATS for violations of international law and the Geneva Conventions were first restyled as claims under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act)[94] because the court

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[89] *Id.*

[90] Rasul v. Rumsfeld, 414 F.Supp.2d 26, 27 (D.D.C. 2006).

[91] *See id.* at 28-29; Rasul 512 F.3d at 650 (noting that from Dec. 2, 2002 to Apr. 2003, Secretary of Defense Rumsfeld "approved for use at Guantanamo interrogation techniques such as the use of stress positions, intimidation by the use of dogs, twenty-hour interrogation sessions, shaving of detainees' facial hair, isolation in darkness and silence and the use of 'mild non-injurious physical contact.'").

[92] *See supra* text accompanying notes 13-15. *But cf.* Boehm, *supra* note 13, at 18 (arguing that stress positions, isolation, and deprivation of light, "while cruel, do not rise to the level of 'systematic beating' envisioned by the anti-torture statute's drafters" and also arguing that waterboarding is not torture under the TVPA).

[93] *See* Rasul, 512 F.3d at 649.

[94] 28 U.S.C. § 2679 (d)(1) (2012) provides in relevant part:

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

found that the government officials named in the suit were acting within the scope of employment when they authorized the aggressive techniques employed against Rasul.[95] Based on this finding,[96] the court then substituted the United States as the defendant and dismissed the first four counts for plaintiff's failure to exhaust agency administrative remedies.[97]

Rasul's *Bivens* action claiming that his Fifth and Eighth Amendment rights were violated was also dismissed.[98] In dismissing these claims, the court granted qualified immunity to the defendants, holding that because the question of the application of the Constitution to Guantanamo Bay generally—and to detainees specifically—was an unsettled area of law at the time, "defendants cannot be said to have been 'plainly incompetent' or to have 'knowingly violated the law,' . . . ."[99]

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[95] *Rasul*, 414 F.Supp.2d at 31.

[96] *Id.* at 34-36 (holding that "torture is a foreseeable consequence of the military's detention of suspected enemy combatants" and that other elements of the scope of employment argument were satisfied by defendants). *But see Rasul*, 512 F.3d at 660 (holding that "serious crimes" may depart from what servants in a lawful occupation are expected to do); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (holding that the Eighth Amendment forbids punishments of torture); Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974) (holding that punishments like stress positions violate the Eighth Amendment); Br. for International Law Scholars et al. and Human Rights Organizations as Amici Curiae Supporting Pls.-Appellants at 4, 7-12, Rasul v. Myers, 563 F.3d 527, 533 (D.C. Cir. 2009) (No. 06-5209, -5222) http://ccrjustice.org/sites/default/files/assets/Rasul_InternationalLawScholarsAmici.pdf (last visited Jul. 12, 2018) (arguing that torture can never be an official act of state and therefore government officials who authorize torture should not receive official acts immunity).

[97] *Rasul*, 414 F.Supp.2d at 31 & n.4, 39 (the court also noted that there is no private right to enforce Geneva Conventions violations). *See also* 28 U.S.C. § 2675(a) (2012) (the FTCA) which provides:

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . .*" (emphasis added).

See also Fassbender *supra* note 80, at 361 (arguing that presenting such a claim would have been "a futile effort.").

[98] *Rasul*, 414 F.Supp.2d at 44.

[99] *Rasul*, 414 F.Supp.2d at 44 (citing Hunter v. Bryant, 502 U.S. 224, 229 (1991)). If the court had found that Rasul was entitled to constitutional protections, the stress positions inflicted on Rasul were likely prima facie Eighth Amendment violations. *See* Hope v. Pelzer, 536 U.S. 730, 737-38, 741-42 (2002) (holding generally that the unnecessary and wanton infliction of pain violates the Eighth Amendment and finding that handcuffing an inmate to a bar which required him to keep his hands above shoulder level for seven hours violated the Eighth Amendment); *Gates*, 501 F.2d at 1306 (holding that punishments which violate the Eighth Amendment include ''handcuffing inmates to the fence and to cells for long periods

Finally, the district court allowed Rasul's claim under the RFRA to go forward, holding that "such activities, if true, constitute a direct affront to one of this nation's most cherished constitutional traditions."[100] On appeal, however, the D.C. Circuit Court of Appeals dismissed this final claim, holding that because the plaintiffs were aliens held outside of the United States, they did not fall within the definition of "person" in the statute.[101] The court of appeals also affirmed the district court's dismissal of Rasul's claims of constitutional rights violations, Geneva Conventions violations, and violations under the Alien Tort statute, agreeing with the lower court that he had failed to exhaust his remedies under the Federal Tort Claims Act.[102]

In a rare moment of good fortune for Rasul, the Supreme Court granted certiorari and vacated the opinion of the court of appeals, remanding it for further consideration in light of its recent ruling in *Boumediene v. Bush*.[103] *Boumediene*, however, was ultimately no help to Rasul, as the court of appeals merely affirmed its earlier dismissal of Rasul's claims.[104] In affirming the dismissal of the other claims on the grounds cited in *Rasul I*, the court stated "We do not believe *Boumediene* changes the outcome in *Rasul I*. We therefore reinstate our judgment, but on a more limited basis."[105] The court additionally held on remand that Rasul and his co-plaintiffs had no constitutionally protected rights because they were aliens abroad with no significant voluntary connection to the United States.[106]

B. *Binyam Mohamed*

Binyam Mohamed faced an altogether different, yet equally effective, legal obstacle. Mohamed was an Ethiopian citizen and resident of the United Kingdom when he was arrested in Pakistan in 2002.[107] After he was allegedly flown to Morocco via the United States' extraordinary rendition

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of time, . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods.'').

[100] Rasul v. Rumsfeld, 433 F.Supp.2d 58, 71 (D.D.C. 2006).

[101] *Rasul*, 512 F.3d at 671-72.

[102] *Id.* at 661-63, 667.

[103] *See* Boumediene v. Bush, 553 U.S. 723, 771, 793-95 (2008) (holding that "Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay," and that the Military Commissions Act suspension of the writ of habeas corpus was unconstitutional, giving detainees at Guantanamo Bay the protection of the writ).

[104] Rasul v. Myers, 563 F.3d 527, 533 (D.C. Cir. 2009) (Rasul II).

[105] *Id.* at 528.

[106] *See id.* at 531.

[107] Mohamed v. Jeppesen Dataplan Inc., 614 F.3d 1070, 1074 (9th Cir. 2010) (en banc). *See also Profile: Binyam Mohamed*, BBC NEWS (Feb. 23, 2009), http://news.bbc.co.uk/2/hi/uk_news/7870387.stm (last visited on Jul. 19, 2018).

program, he claimed he suffered "severe physical and psychological torture" at the hands of Moroccan authorities, including beatings, broken bones, and being cut with a scalpel all over his body.[108] After 18 months in Morocco, Mohamed found himself in American custody in Afghanistan.[109] During this time, he claims he was kept in "near permanent darkness"[110] and was not provided adequate food, leading to a loss of 40 to 60 pounds in four months.[111] He was ultimately moved to Guantanamo Bay, where he spent five years before being released in 2009.[112] Defendant Jeppesen Dataplan Inc. was a flight logistics company that Mohamed claimed flew him to the sites where he was tortured, providing direct support to the clandestine U.S. extraordinary rendition program.[113] Mohamed further claimed that this support was integral to the program and was provided with Jeppesen's actual or constructive knowledge that he would be detained and tortured by foreign and U.S. government officials.[114] Mohamed sued Jeppesen under the ATS[115] alleging direct liability for his forced disappearance.[116] He also alleged conspiracy, aiding and abetting, and direct liability for "torture and other cruel, inhuman or degrading treatment."[117] Mohamed's allegations of his treatment in Morocco and Afghanistan, if true, would likely constitute torture under the TVPA.[118]

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[108] *Mohamed*, 614 F.3d at 1074-75. *See also* Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213, 260 (2006):They took the scalpel to my right chest. It was only a small cut. Maybe an inch. At first I just screamed . . . I was just shocked, I wasn't expecting . . . Then they cut my left chest. This time I didn't want to scream because I knew it was coming. One of them took my penis in his hand and began to make cuts. He did it once, and they stood still for maybe a minute, watching my reaction. I was in agony. They must have done this 20 to 30 times, in maybe two hours. There was blood all over. "I told you I was going to teach you who's the man," [one] eventually said.

[109] *Mohamed*, 614 F.3d at 1074. *See also* Hawkins, *supra* note 108, at 260 ("[A] female MP took pictures. She was one of the few Americans who ever showed me any sympathy. When she saw the injuries I had she gasped.").

[110] *Author's note*: Because he states he was kept in near permanent darkness at a site in Afghanistan, Mohamed may well have been held at Site Cobalt. *See* SENATE TORTURE REPORT, *supra* note 64, at 61.

[111] *Mohamed*, 614 F.3d at 1074.

[112] *Id.*

[113] *Id.* at 1075.

[114] *Id.*

[115] 28 U.S.C.A. § 1350. (West 2018). *See also supra* text accompanying note 84.

[116] *See Mohamed*, 614 F. 3d at 1076.

[117] *Id.* at 1075.

[118] *See supra* text accompanying notes 13-15. *But cf.* Boehm, *supra* note 13, at 18 (arguing that stress positions, isolation, and deprivation of light, "while cruel, do not rise to

Before Jeppesen answered, the United States intervened in the district court and succeeded in having the complaint dismissed by invoking the state secrets doctrine or "Totten Bar."[119] This doctrine, which arose out of an 1876 Supreme Court case involving a Civil War contract for espionage, requires the court to dismiss a civil case if the government can prove that the very subject matter of the suit itself is a state secret.[120]

Mohamed appealed, and the court of appeals upheld the dismissal, but on the narrower grounds of the "Reynolds evidentiary privilege."[121] This government privilege arose out of a 1953 civil suit against the U.S. Air Force by widows of civilians killed in a 1948 plane crash.[122] If sustained, the privilege requires the court to evaluate the evidence offered by the parties and remove any classified information.[123] Once the evidence is removed, the suit can proceed, but the parties cannot rely on the classified evidence.[124]

In his suit, Mohamed relied on "hundreds of pages" of public documents, which he claimed would link Jeppesen to the extraordinary rendition program.[125] While acknowledging the existence of the rendition program was not a state secret, the court held that even if Mohamed could make his case with public documents, Jeppesen would likely have to mount a defense using classified information.[126] Thus, the court invoked the Reynolds

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the level of 'systematic beating' envisioned by the anti-torture statute's drafters" and also arguing that waterboarding is not torture under the TVPA).

[119] *Mohamed*, 614 F.3d at 1076, 1084.

[120] *See* Totten v. United States, 92 U.S. 105, 107 (1875) (holding "as a general principle . . . 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"); United States v. Reynolds, 345 U.S. 1 at 11 n. 26 (1953) (holding that if the subject matter of the suit is a state secret the suit may be dismissed at the pleading stage "because it is so obvious that the action should never prevail over the privilege"); Tenet v. Doe, 544 U.S. 1, 7 n. 4 (2005) (holding that the Totten ban is "designed not merely to defeat the asserted claims, but to preclude judicial enquiry").

[121] *See Mohamed*, 614 F.3d at 1087.

[122] *See Reynolds,* 345 U.S. at 1.

[123] *See id.*

[124] *See id.* at 4, 9 (upholding the Secretary of the Air Force's claim of privilege due to the fact that the aircraft and personnel aboard were "engaged in a highly secret mission of the Air Force" and allowing the suit to proceed but without reference to the classified electronic components aboard). *See also* El-Masri v. U.S., 479 F.3d 296, 304 (4th Cir. 2007) (holding that the Reynolds privilege belongs solely to the Government, the privilege request must be lodged by the department head who has control over the matter, the department head must have given personal consideration to the matter, and concluding that the state secrets privilege is "not to be lightly invoked").

[125] *Mohamed*, 614 F.3d at 1089-90.

[126] *Id.* at 1090.

privilege prospectively to dismiss the case, having received no classified evidence, but rather deducing that any defense would necessarily require classified evidence which would then allow the defendant to successfully invoke the privilege and require dismissal of the claims.[127, 128]

C. *Maher Arar*

Maher Arar is a dual citizen of Syria and Canada who immigrated to Canada as a teenager with his family.[129] Arar was transiting through the United States on his way home to his residence in Canada when U.S. officials detained him at New York's John F. Kennedy International Airport in September 2002.[130] During subsequent questioning by the FBI, Arar admitted to knowing certain individuals with alleged terrorist ties, but denied any terrorist affiliation himself.[131] As Arar's detention and questioning stretched out over multiple days in New York, he retained a lawyer and requested deportation to Canada, his home.[132]

Unbeknownst to Arar, however, the Immigration and Naturalization Service (INS) had ordered his removal to Syria, on the basis of a finding that he was a member of Al-Qaeda, and barred his readmission to the U.S.

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[127] *See id. at* 1087-8, 1089 (stating that "if the privilege deprives the defendant of the information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant" (quoting Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998)) and finding that the Reynolds privilege here was not invoked to "avoid embarrassment or to escape scrutiny of [the Government's] recent controversial transfer and interrogation policies, rather to protect legitimate national security concerns").

[128] Relying on newly declassified information, the *Reynolds* case returned to the court in the 21st century in a suit brought by a surviving widow and other heirs of the civilians killed in the 1948 plane crash. The plaintiffs alleged that, contrary to the assertions made by the Secretary of the Air Force, the documents that were subject to privilege in 1953 did not actually reveal anything of a classified nature. Plaintiffs claimed that this was a fraud on the court and asked for the difference between the settlement amount and the damages sought in the original suit. In dismissing this case, the court held that even though the documents revealed only basic information about the mission (altitude, basic mission parameters, and the name of the Air Force squadron involved), the Secretary's assertions about the information were subject to "an obviously reasonable truthful interpretation." Herring v. U.S., 424 F.3d 384, (3rd Cir. 2005). *See also* John Ames, *Secrets and Lies: Reynold's Partial Bar to Discovery and the Future of the State Secret Privilege*, 39 N. C. J. INT'L. L. &COM. REG., Issue 4, 1064 (Summer 2014) (discussing in detail the evolution of the Totten and Reynolds doctrines and arguing for a more "plaintiff-friendly" evidentiary standard which would require judicial review of all evidence during discovery, unless the judge determines at the outset of the case that the Totten bar is met).

[129] *See* Arar v. Ashcroft, 414 F.Supp.2d 250, 252 (E.D.N.Y. 2006).

[130] Arar v. Ashcroft, 585 F.3d 559, 565 (2nd Cir. 2009).

[131] *Id.*

[132] *Id.*

for five years.[133] The INS also made a declaration consistent with Article 3 of the UNCAT, which provides 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."[134] In accordance with the removal order, the U.S. government flew Arar to Jordan, and Arar was delivered to Syrian authorities by the Jordanian government soon thereafter.[135]

Arar alleged that, upon his arrival in Syria, he was interrogated for twelve days and "in that period was beaten on his palms, hips, and lower back with a two-inch-thick electric cable and with bare hands."[136] Arar also alleged that, during his year in Syrian prison, he spent ten months confined in an underground cell measuring six feet by three feet and seven feet tall.[137] Arar alleged that this damp and cold cell was rat-infested and that he was routinely urinated on by cats through an aperture in the ceiling.[138] He was not allowed to exercise and was provided "barely edible" food.[139] Arar alleged he lost 40 pounds over the course of ten months.[140] He also alleged that he was threatened with being placed in a chair that would break his spine and that he was able to hear the screams of other prisoners being tortured.[141] As a result of this treatment, Arar confessed to the crimes he was accused of, but predictably provided no intelligence.[142] Moreover, if

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[133] *Id.* at 565-6. *See also* 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2012) providing that any alien who is a member of a terrorist organization is inadmissible for entry into the United States.

[134] UNCAT, *supra* note 11, Art. 3. This section of the UNCAT was implemented by the Foreign Affairs Reform and Restructuring Act of 1988 (''FARRA''), Pub.L. No. 105–277, div. G, Title XXII, § 2242, 112 Stat. 2681– 822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231) which provides at § 2242(a) that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . . ." *See also* 18 U.S.C. § 2340A (2012) which criminalizes torture and applies this prohibition against U.S. officials, but creates no private cause of action. *But cf.* Hawkins, *supra* note 108, at 261 ("In relation to Arar's case, [Vincent] Cannistraro [the former head of the CIA's counterrorism division] later told Knight-Ridder that, 'You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary.'").

[135] *Arar*, 585 F.3d at 566.

[136] *Id.*

[137] *Id.*

[138] *Arar*, 414 F.Supp.2d at 254.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 255.

[142] *See* Bell, *supra* note 2, at 341. *See also supra* notes 57 and 58. *See also*, Sadat, *supra* note 6, at 74 (after his release, "[a] Canadian omission [sic] of inquiry cleared Arar of any connections to terrorism or terrorist crimes . . . .").

accurately described, Arar's detention conditions and interrogation in Syria would likely constitute torture under the TVPA.[143]

On October 5, 2003, after nearly a year in Syrian custody, Arar was released to Canadian officials and flew to Ottawa the next day.[144]

In January 2004, Arar filed a four count suit in federal court against Attorney General John Ashcroft and other federal officials claiming violations of the TVPA and the Fifth Amendment to the Constitution.[145] In his complaint, Arar alleged that the U.S. government "orchestrated [his] ordeal by sending him to Syria for the express purpose of being confined and questioned there under torture."[146] He also alleged that his subsequent torture and questioning was "coordinated and planned by U.S. officials," citing as evidence the similarity of the questions put to him in New York and Syria.[147] The district court dismissed all but one of Arar's claims, and Arar appealed to the court of appeals.[148]

With respect to the TVPA claim, the court of appeals first pointed out that TVPA allegations require a plaintiff to show that defendants acted under color of foreign law.[149] In this case, Arar would have to show that U.S. officials "possessed power under Syrian law, and that the offending actions (i.e., Arar's removal to Syria and subsequent torture) derived from an exercise of that power."[150] The court affirmed the dismissal of the TVPA claim, holding that defendants were alleged to have acted under color of U.S. federal law, not Syrian law.[151]

The court moved next to Arar's *Bivens* action, which alleged claims of substantive due process violations under the Fifth Amendment based on his torture and detention in Syria.[152] Taking note of the Supreme Court's holding that the *Bivens* remedy is an "extraordinary thing that should rarely

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[143] *See supra* text accompanying notes 13-15. *But cf.* Boehm, *supra* note 13, at 18 (arguing that stress positions, isolation, and deprivation of light, "while cruel, do not rise to the level of 'systematic beating' envisioned by the anti-torture statute's drafters" and also arguing that waterboarding is not torture under the TVPA).

[144] *Arar*, 585 F. 3d at 566-67.

[145] *Id.* at 567; *see also* the TVPA § 2 (providing in relevant part, "An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . . ."); *Arar*, 414 F. Supp. 2d at 263 (noting that based on legislative history, the TVPA likely provides a cause of action to U.S. citizens only).

[146] *Arar*, 414 F. Supp. 2d at 262.

[147] *Id.* at 255.

[148] *Arar*, 585 F.3d at 567.

[149] *Id.* at 568; *see also supra* note 145.

[150] *Arar*, 585 F.3d at 568.

[151] *Id.*

[152] *Id.* at 571.

if ever be applied in 'new contexts,'"[153] the court stated that the context of this case was "extraordinary rendition," which would most assuredly be a "new" application of *Bivens*.[154] The court made an extensive review of the possible dangers of extending *Bivens* to this new context, including: 1) judicial interference in foreign policy, 2) likely reliance on classified evidence which would necessitate closed court proceedings, 3) the possibility of embarrassing revelations about U.S. and other nations' foreign policy coming to light, and 4) the possibility of future plaintiffs filing suits to blackmail the government into settling on the basis of the threat of classified information being revealed.[155] It then dismissed Arar's *Bivens* claim of substantive due process violations.[156]

V. RECOMMENDATIONS.

Given that torture is illegal under international and U.S. domestic law and given that it has been shown to produce no actionable intelligence—or, at a minimum, intelligence that could have been gained by non-coercive means—it should be a goal of the U.S. legal regime to eliminate its incidence and provide civil remedies for victims. The availability of individual civil sanctions will likely deter future would-be torturers.[157] It is also arguable that individual civil sanctions are the most effective way to end the practice.[158]

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[153] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) as quoted in *Arar*, 585 F.3d at 571.

[154] *Arar*, 585 F.3d at 572. *But see Malesko*, 534 U.S. at 70, *quoted in In re* South African Apartheid Litigation, 15 F. Supp. 3d 454, 464 (S.D.N.Y. 2014) ("[T]he core purpose of Bivens is to *deter individual officers* from committing constitutional violations.") (emphasis in original).

[155] *Arar*, 585 F.3d at 578-79, 582.

[156] *Id.* at 563, 582.

[157] *See* Fassbender, *supra* note 80, at 363 ("[t]o hold them [civilly] accountable may also operate as a useful general deterrent from abusing posts of responsibility" quoting Tomuschat). *See also Malesko,* 534 U.S. at 70 on the deterrence principle embodied in *Bivens*. *But cf.* Pines, *supra* note 18, at 149 ("It is difficult to believe that the possibility of a lawsuit in the future would provide the catalyst for good behavior that these other factors would not.").

[158] *See* Fassbender, *supra* note 80, at 362 (arguing that punitive damages "punish and deter"). *See generally* Filartiga v. Pena-Irala, 577 F. Supp. 560, 565-66 (E.D.N.Y. 1984) (finding that "it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture . . . ." and opining that the punitive damages imposed may have a general deterrent effect).

A. *In order to ensure individual civil liability, the courts should not allow "scope of employment" to include torture.*

As the 2016 NDAA codifies the restriction on interrogations to techniques found in the Army Field Manual 2-22.3, no U.S. government employee should be able to claim that torture falls within her current scope of employment.[159] Furthermore, no employee should be allowed to reasonably rely on an OLC opinion that condones torture, as that opinion would be clearly and objectively unreasonable.[160] As discussed above, courts are not bound by OLC opinions and are thus free to disregard the conclusions found therein and impose liability on government employees who claim they were acting in reliance on a flawed OLC opinion.[161] Even if an OLC opinion purports to explicitly certify a given activity as within the scope of employment, the court can still review such a certification.[162] Thus, if a government official acts in reliance on an OLC opinion that contains flawed legal reasoning and purports to include acts of torture in the scope of employment, the courts most likely have the power to impose civil liability on that official.

Given that torture is an egregious violation of international law,[163] and given that the original purpose of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act) was to confer immunity merely for "garden variety state law torts," the Westfall Act should not confer immunity in cases which allege torture.[164] Absent the

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[159] *See* Jordan J. Paust, *Civil Liability of Bush, Cheney, et al., For Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L., 359, 375-76 (2009) (arguing that no lawful authority can delegate authority to commit international crimes like torture, and therefore a federal employee who commits torture cannot be acting within the scope of his duties). *See also* Pines, *supra* note 18, at 147 ("One should not be immune from engaging in a knowingly unlawful action merely because an unreasonable Attorney General opinion asserts otherwise.").

[160] *See* Pines, *supra* note 18, at n. 222 ("If the [Bybee memorandum] does in fact authorize torture, i.e., authorize a government employee to purposefully and knowingly violate the anti-torture statute, I would find such a determination to be unreasonable on its face . . ."), 145 (arguing that a poorly argued or concluded OLC opinion should be a shield to liability "[u]nless that opinion appears unreasonable on its face.").

[161] *See supra* text accompanying note 45.

[162] *See* Pines, *supra* note 18, at 119.

[163] *See supra* text accompanying note 48.

[164] *See* Karen Lin, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1745-48 (2008) (arguing that the legislative history of the Westfall Act should create an exception for egregious misconduct, to include violations of international law like torture, and the act should not confer immunity in these cases). *See also* Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 851 ("Ergo, the Westfall Act was designed to protect government employees when they

immunity provided by the Westfall Act, government employees could be sued in their personal capacity and held individually civilly liable for acts of torture, in the same way that law enforcement officials are currently individually liable for constitutional violations under *Bivens* actions. Moreover, imposing this individual liability is arguably an obligation of states party to the torture conventions.[165] Imposing this liability would also ensure the individual punishment and deterrent effect of punitive damages.[166]

Finally, the prohibition against torture is considered a *jus cogens* norm.[167] Because of that designation "it can never be considered an official act of state," and courts should therefore not allow acts of torture to fall within the scope of government employment.[168] Because the FTCA provides a cause of action for civil claims against the U.S. government by torture victims,[169] eliminating scope of employment immunity (and thus removing the U.S. government as a defendant in FTCA claims) is key to holding torturers individually civilly liable and providing compensation to victims. This individual civil liability will likely have a strong deterrent effect.[170]

B. *The TVPA should be amended to include acts by U.S. officials.*

Arar's claims were dismissed in part because he did not show that his torture was due to U.S. officials acting under color of law of a foreign nation, a requirement to maintain an action under the TVPA.[171] This element of the statute requires that the torturer "acts together with state

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act negligently within the scope of their employment, but not to provide shelter for intentional torts or criminal acts.").

[165] *See* Fassbender, *supra* note 80, at 363 (arguing that excluding individual liability for acts of torture runs counter to the treaty obligations of states to prosecute and punish individuals who commit acts of torture).

[166] *See id.*, at 362.

[167] *Jus Cogens*, Wex Legal Dictionary, https://www.law.cornell.edu/wex/jus_cogens (last visited Jul. 17, 2018) (defining *jus cogens* as "certain fundamental, overriding principles of international law, from which no derogation is ever permitted."). *See also* Brief of Amici Curiae, *supra* note 96, at 3.

[168] Brief of Amici Curiae, *supra* note 96, at 3.

[169] *See* Seamon, *supra* note 81, at 719 and 722.

[170] *See supra* text accompanying note 157.

[171] *See Arar*, 585 F.3d at 568, holding:

> [a]ccordingly, to state a claim under the TVPA, Arar must adequately allege that the defendants possessed power under Syrian law, and that the offending actions (i.e., Arar's removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power. The complaint contains no such allegation.

officials or with significant state aid."[172]

This provision of the TVPA is ripe for legislative reconsideration. It is inconsistent and unfair to give U.S. courts jurisdiction for acts of torture committed under color of law of a foreign nation while denying the same to victims of torture perpetrated by U.S. officials acting under color of U.S. law.[173] The TVPA should be amended to include acts by a U.S. official under color of U.S. law.

C. *The definition of "person" in the RFRA should include aliens.*

Rasul's action under the RFRA was dismissed because he was not a "person" for purposes of the act.[174] This narrow definition of "person" is at odds with the plain meaning of the term and is an inaccurate reading of the statute.[175] As evidenced in the legislative history, the intent of the RFRA was to provide broad protections for religious liberty from government actions.[176] A narrow reading of the term "person" runs counter to the legislative intent and recent Supreme Court jurisprudence, which confirmed that the broad definition of "person" found in the RFRA includes even artificial persons.[177]

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[172] Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).

[173] *See* Fassbender, *supra* note 80, at 364 (arguing "[i]t would be inconsistent with that rule allowing civil suits against officials of a foreign state who allegedly committed acts of torture or extrajudicial killing if the United States shielded its own officials against the same suits by conferring immunity upon them.").

[174] *See Rasul*, 512 F.3d at 672 (holding "[b]ecause the plaintiffs are aliens and were located outside sovereign United States territory at the time their alleged RFRA claim arose, they do not fall with the definition of 'person.'").

[175] *See Person,* MERRIAM-WEBSTER.COM Dictionary, https://www.merriam-webster.com/dictionary/person (last visited Jul. 17, 2018) (defining "person" as "human"); *Rasul*, 512 F.3d at 675 (Brown, J., concurring) (stating that "[w]hile 'the people' are merely a 'class of persons,' the relevant inquiry for RFRA purposes is 'who are "persons"?' The answer is obvious—'persons' are individual human beings, of whom the American people are just one class."); Dictionary Act, 1 U.S.C. § 1 (2012) (providing "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as *individuals*) (emphasis added); 42 U.S.C. § 2000bb–1(a)–(b), *supra* note 86.

[176] *See* S. REP. NO. 103-111, pt. 4, at 3 (1993) (stating that one purpose of the Act is to "provide a claim or defense to persons whose religious exercise is burdened by government"); *id.* at 14 (stating that the Act should be applied to *all cases* where "free exercise of religion is substantially burdened") (emphasis added); H.R. REP. NO. 103-88, at 6 (1993) (stating *"[a]ll government actions* which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill") (emphasis added); *id.* at 8 (stating that the Act will be subject to Article III standing requirements).

[177] *See* Burwell v. Hobby Lobby Stores, Inc., 134. S. Ct. 2751, 2768 (2014) (holding that the term "person" in the RFRA refers to natural and artificial persons like corporations).

If the term "person" were properly interpreted within the RFRA to include non-resident aliens, Rasul's (and other plaintiffs similarly situated) action would be allowed to continue on the merits.

D. *The state secrets doctrine should be modified to be more plaintiff-friendly.*

Mohammed's claims against Jeppesen Dataplan Inc. were defeated due to a prospective application of the Reynolds evidentiary privilege.[178] There, the court found that in order to mount a defense, the defendant would necessarily be required to use classified evidence. The court made this finding in the absence of having received any evidence, and in the absence of a finding that the Totten Bar was met.[179] In order to create a more plaintiff-friendly standard and give suits like Mohammed's a higher chance of being litigated on the merits, Congress should modify the state secrets privilege to require courts faced with government claims of classified evidence to conduct an *in-camera* review during discovery for purposes of determining if the Reynolds privilege applies.[180] Such a law would stop the courts from making prospective grants of the privilege and serve to curb government abuse of the privilege—for example, government claims of privilege merely to avoid embarrassment or liability.[181]

VI. CONCLUSION

In the aftermath of the 9-11 attacks, at detention sites around the world, United States government officials very likely authorized and committed acts of torture. While these officials relied on legal guidance provided by the Department of Justice, that guidance ran counter to established international and U.S. law. These actions, and any similar future actions amounting to torture, however well-intentioned, should give rise to individual civil liability. That liability will not only provide some solace to the victims, but also have a strong deterrent effect, keeping U.S. officials on the right side of the law and history's judgment.

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[178] *See Mohammed*, *supra* note 127, at 1087-8.

[179] *See id.*

[180] *See* Ames, *supra* note 128, at 1067. *See also El-Masri*, 479 F.3d at 305 (stating "In some situations, a court may conduct an *in camera* examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in Reynolds are fulfilled."). *See also* State Secrets Protection Act, S. 2533, 110th Cong. (2008) (which failed passage).

[181] *See supra* text accompanying note 128. *See also* Ames, *supra* note 128, at 1087 ("As Louis Fisher stated in an article relating to the state secrets privilege, '[b]y failing to examine the document, the Reynolds Court risked being fooled. As it turned out, it was.'").