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Kyle McConnell

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THE JOHN MARSHALL LAW REVIEW

**Torture by the U.S.A.:
How Congress Can Ensure
Our Human Rights Credibility**

Kyle McConnell

TORTURE BY THE U.S.A.: HOW CONGRESS CAN ENSURE OUR HUMAN RIGHTS CREDIBILITY

KYLE MCCONNELL*

INTRODUCTION

Torture: “One such incident would be an isolated transgression; two would be a serious problem; a dozen of them is policy.”¹

Since the attacks of September 11, 2001, the United States has faced a challenging road to discovering the best way to conduct the war on terror against unconventional terrorist groups. Unfortunately, part of this road has seen violations of human and constitutional rights when the executive branch authorized federal and military officials to use techniques constituting torture as part of interrogation policies for those suspected of having terrorist ties.²

However, the executive branch expanding its interpretation of its war powers under the Constitution is not unique to the current “war on terror.”³ What is unprecedented is the slew of lawsuits⁴ for torture⁵ and other abuses committed pursuant to interrogation

1. HINA SHAMSI, *COMMAND’S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN* (2006), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/06221-etn-hrf-dic-rep-web.pdf> (quoting John D. Hutson, Rear Admiral (Ret.), JAGC, USN).

2. See generally Kermit Roosevelt III, *Detention and Interrogation in the Post-9/11 World*, 42 SUFFOLK U. L. REV. 1 (2008) (discussing in depth the actions taken by the executive branch in developing its interrogation and detention policies after 9/11).

3. See generally Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006) (discussing the correlations between the Japanese internment in World War II and the expansive detention policies of the Bush administration after September 11, 2001).

4. See *infra* note 10 (providing a list of cases brought by detainees seeking compensation for injuries sustained during interrogation and detention).

5. For the purposes of this Comment, the definition of torture is that found in the Federal Criminal Torture Act, 18 U.S.C. § 2340 (2004):

- (1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) “severe mental pain or suffering” means the prolonged mental harm

and detention policies authorized at the highest levels of the executive branch.

The inevitable questions that have arisen are whether these allegations should be entertained by the courts; if so, who should be held responsible; and finally, what legal framework should be employed for adjudicating the claims?

Part II of this Comment briefly describes the widespread allegations of torture against federal and military officials since 2001 and the causes of action that plaintiffs have attempted to plead for relief. It then explains how courts have dismissed most of these complaints at the pleading stage and concludes with a discussion of the state secrets doctrine. Part III argues that the executive branch's expansive interpretation of its war powers after 9/11 was faulty and that Congress has appropriately exercised its constitutional authority to govern detainee treatment previously. It then argues that Congress should provide a private cause of action for torture by federal officials that addresses not only the protection of fundamental rights but also the concerns of national security. Finally, Part IV proposes legislation for adjudicating civil claims alleging torture by federal or military officials.

TORTURE AND THE COURTS' TREATMENT OF PLAINTIFFS' CLAIMS FOR RELIEF

As early as 2002, the FBI began complaining to the Department of Defense ("DoD") about the abusive tactics being employed at Guantanamo Bay.⁶ In fact, over 230 soldiers and officers have faced repercussions for torture and other acts of abuse, and the Army has investigated more than 600 allegations of detainee mistreatment.⁷ DoD documents have classified thirty four detainee deaths as homicides taking place while in U.S. custody;

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 person 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.

Id.

6. Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1264-65 (2006). In particular, the FBI complained about sexual humiliation, use of dogs, and detainees being left naked in frigid temperatures without access to bathrooms. *Id.*

7. *Id.* at 1258.

at least eight of these men were tortured to death.⁸ Rather than blaming low-level individuals who have failed to follow known standards, former Secretary of Defense James Schlesinger placed the responsibility for these abuses at a much higher level.⁹

As a result, the United States legal system has seen numerous cases by both citizens and aliens seeking relief for the injuries suffered during their interrogation and detention.¹⁰ Many of the allegations in these cases are shocking. Subjecting detainees to electrical shocks, hanging detainees by chains upside-down while dogs grab at their arms, being sexually assaulted by soldiers, and even being placed in a cage of live lions are illustrative examples.¹¹ Common allegations throughout many of the cases include sleep deprivation, exposure to prolonged temperature extremes, and beatings.¹² Existing legal remedies for torture and other abuses of U.S. citizen and alien detainees by the United States during detention and interrogation have been discussed and analyzed at length.¹³

8. SHAMSI, *supra* note 1, at 1.

9. See JAMES R. SCHLESINGER, HAROLD BROWN, TILLIE K. FOWLER & CHARLES A. HORNER, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS, 5 (Aug. 24, 2004), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=cab359a3-9328-19cc-a1d2-8023e646b22c&lng=en&id=10157> (click on "Download." link for .pdf version) (reporting that the widespread abuses were "not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels").

10. *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (6th Cir. 2012); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, (D.C. Cir. 2010); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir.2009); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *cert. granted, judgment vacated*, 555 U.S. 1083 (2008); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007), *aff'd sub nom.*, *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

11. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 88-89.

12. *Vance*, 653 F.3d at 597; *Doe*, 683 F.3d at 692; *Al-Zahrani*, 684 F. Supp. 2d at 106.

13. See generally Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004) (outlining the executive branch's attempts to prevent human rights litigation in U.S. courts); Roosevelt, *supra* note 2 (discussing the actions of the executive branch and the responses from the judiciary and legislative branches); Pearlstein, *supra* note 6 (discussing possible constraints on the executive branch's interpretation of its war powers); Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715 (2006) (analyzing the treatment of torture as a tort in U.S. courts); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004) (comparing and contrasting the U.S. response to 9/11 with that of our allies); George D. Brown, "Counter-Counter-Terrorism via Lawsuit"—the Bivens Impasse, 82 S. CAL. L. REV. 841 (2009) (contending that Congress should act to strike the balance between individual liberty and

Existing Legal Remedies Sought By Plaintiffs for Torture

In a nutshell, plaintiffs seeking to recover for torture inflicted by government or military officials have difficulty surviving the pleading stage¹⁴ and have attempted numerous causes of action.¹⁵ The most common cause of action torture claimants have pled stems from the landmark case, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁶ In *Bivens*, the Supreme Court allowed a claim for damages to go forward against federal officials for violating the plaintiff's Fourth Amendment rights.¹⁷ The Court recognized the long-standing rule that courts will adjust their remedies to grant necessary relief where citizens' federally protected rights have been invaded.¹⁸ Thus, *Bivens* created a private cause of action to recover damages against federal officials for constitutional violations.¹⁹

Since *Bivens*, many attempts have been made to extend its

national security).

14. See generally Seamon, *supra* note 13 (analyzing the liability under domestic law for torture by U.S. officials and concluding that current law is inadequate); Stephens, *supra* note 13 (discussing the Bush administration's efforts to limit human rights litigation in U.S. courts); John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 856 (2007) (noting the lower federal courts' deference to asserted national security concerns in detention and interrogation cases).

15. See, e.g., *Padilla*, 633 F. Supp. 2d 1005 (pleading causes of action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Detainee Treatment Act, 42 U.S.C.A. § 2000dd (2006)); *Lebron*, 764 F. Supp. 2d 795 (pleading cause of action under *Bivens*); *Al-Zahrani*, 684 F. Supp. 2d 103 (pleading causes of action under *Bivens* and the Alien Tort Statute, 28 U.S.C. § 1350 (2000)); *Arar*, 585 F.3d 559 (pleading causes of action under *Bivens* and the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as Note to 28 U.S.C. § 1350)); *Rasul*, 512 F.3d at 649 (pleading causes of action under *Bivens*, the Alien Tort Statute, 28 U.S.C.A. § 1350 (2000), and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq.); *El-Masri*, 479 F.3d at 300 (pleading cause of action under *Bivens* and the Alien Tort Statute); *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d at 91 (arguing that the Geneva Conventions are self-executing).

16. 403 U.S. 388.

17. *Id.* at 397. Specifically, the Court recognized that

[the Fourth Amendment] guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Id. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

18. *Id.* at 392. The Court also recognized that an agent acting in the name of the United States "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.*

19. See *Carlson v. Green*, 446 U.S. 14, 18 (1980) (holding that *Bivens* established a right to recover damages against an official in federal court even in the absence of a statute conferring such a right).

context to other constitutional violations.²⁰ The Supreme Court has continuously narrowed its application, however, and the last seven attempts to extend it to new contexts have failed.²¹ A *Bivens* cause of action can be defeated in two situations.²² The first situation is when a court finds there are “special factors counseling hesitation in the absence of affirmative action by Congress.”²³ The second situation is when Congress has provided an alternative remedy that it expressly provides as a substitute for recovery under the Constitution and is viewed as equally effective.²⁴

Until recently, plaintiffs seeking a *Bivens* action for torture have found courts unreceptive primarily due to the “special factors counseling hesitation” exception.²⁵ This exception to *Bivens*

20. See *Wilkie v. Robbins*, 551 U.S. 537, 567 (2007) (denying *Bivens* relief for alleged violations of Takings Clause of Fifth Amendment by employees of Bureau of Land Management); *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (denying *Bivens* relief for damages against private entities acting under color of federal law for alleged constitutional violations); *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994) (holding that plaintiff could not bring *Bivens* action against a federal agency); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (refusing to extend *Bivens* to termination of social security benefits in violation of claimant’s Fifth Amendment rights); *United States v. Stanley*, 483 U.S. 669, 686 (1987) (denying availability of *Bivens* action to servicemen who claimed they had been given LSD unknowingly); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (denying *Bivens* action for First Amendment violations); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (holding that superior officers could not be sued for racial discrimination); *Carlson*, 446 U.S. at 16 (alleging a violation of Eighth Amendment rights); *Davis v. Passman*, 442 U.S. 228, 228 (1979) (alleging a violation of due process under Fifth Amendment).

21. See *Wilkie*, 551 U.S. at 567 (refusing to extend *Bivens* action to violations of Takings Clause of Fifth Amendment); *Malesko*, 534 U.S. at 74 (refusing to extend *Bivens* action to private parties who violate constitutional rights under color of federal law); *Meyer*, 510 U.S. at 486 (refusing to extend *Bivens* action to plaintiff’s action against a federal agency); *Chilicky*, 487 U.S. at 414 (refusing to extend *Bivens* action to termination of social security benefits that violate Fifth Amendment rights); *Stanley*, 483 U.S. at 686 (refusing to extend *Bivens* action to servicemen seeking recovery for allegations they were given LSD without their consent); *Lucas*, 462 U.S. at 390 (refusing to extend *Bivens* action to First Amendment violations); *Wallace*, 462 U.S. at 305 (refusing to allow recovery under *Bivens* action for racial discrimination by superior officers); but see *Passman*, 442 U.S. at 248 (allowing *Bivens* action for violation of due process under Fifth Amendment); *Carlson*, 446 U.S. at 24-25 (allowing *Bivens* action for alleged violation of Eighth Amendment rights).

22. *Carlson*, 446 U.S. at 18; see also *Brown*, *supra* note 13, at 849 (discussing the two exceptions to the *Bivens* doctrine); see generally Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006) (discussing at length the defense of qualified immunity).

23. *Carlson*, 446 U.S. at 18.

24. *Id.*

25. *Vance*, 701 F.3d at 200; *Lebron*, 764 F. Supp. 2d at 787; *Ali*, 649 F.3d at 774; *Al-Zahrani*, 684 F. Supp. 2d at 112; *Arar*, 585 F.3d at 573; *Rasul*, 512 F.3d at 672 (Brown, J., concurring); *El-Masri*, 479 F.3d at 311; see also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and*

“relate[s] not to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided.”²⁶

One court faced with torture allegations has explained the special factors exception as meaning that a new, non-statutory remedy should not be created “when doing so would be ‘plainly inconsistent’ with authority constitutionally reserved for the political branches.”²⁷ Because the claims arise in the course of ongoing military campaigns, the courts have determined the judicial branch should not encroach upon the realm of Congress due to national security concerns.²⁸ Consequently, various special factors counseling hesitation related to national security have been identified in dismissing *Bivens* complaints.²⁹

Recently, two courts allowed two U.S. citizens to proceed with their *Bivens* claims against high-ranking government officials for torture but were ultimately reversed.³⁰ The courts distinguished these claims from other unsuccessful *Bivens* actions for torture on the basis that U.S. citizens brought the claims rather than

Constitutional Adjudication, 98 GEO. L.J. 117, 125 (2009) (acknowledging the lower federal courts’ refusal to recognize a *Bivens* remedy for claims stemming from detention and extraordinary rendition).

26. *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 103 (internal quotation marks and citations omitted); see generally Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 269-75 (2010) (arguing “that poorly defined ‘national security’ concerns” have surfaced as their own special factor counseling hesitation in post-September 11th damages litigation).

27. *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 103 (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)). The court also noted that “even when authority is not constitutionally reserved for the political branches, there nevertheless might be reasons that favor allowing Congress, rather than the judiciary, to prescribe the scope of relief available to the plaintiffs.” *Id.*

28. *Id.* at 105.

The hazard of such multifarious pronouncements-combined with the constitutional commitment of military and foreign affairs to the political branches and the Court’s previously express concerns about hindering our military’s ability to act unhesitatingly and decisively- warrant leaving to Congress the determination whether a damages remedy should be available under the circumstances presented here.

Id. at 107.

29. See *Lebron*, 764 F.Supp.2d at 800 (holding these factors include the impact on the nation’s military affairs, foreign affairs, intelligence, and national security and the likely burden of such litigation on the government’s resources in these essential areas); see also Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 219 (2010) (arguing the Court has overcompensated in its handling of *Bivens* actions, resulting in bias against plaintiffs).

30. *Vance*, 653 F.3d 591, *rev’d en banc*, 701 F.3d 193; *Doe*, 800 F.Supp.2d 94, *rev’d*, 683 F.3d 390.

aliens.³¹ The reversal of these decisions effectively shut the door on *Bivens* as a viable remedy.

Existing Statutes Do Not Provide A Cause of Action

Several other statutes along with the Geneva Conventions have also been the source of claims by plaintiffs seeking relief for torture. These include the Alien Tort Statute³² (“ATS”), the Detainee Treatment Act³³ (“DTA”), and the Torture Victim Protection Act (“TVPA”).³⁴ In *Sosa v. Alvarez-Machain*, the Supreme Court held that “the ATS is a jurisdictional statute creating no new causes of action.”³⁵ This decision has prevented plaintiffs from gaining relief under the ATS for torture allegations.³⁶

In 2005, Congress enacted the Detainee Treatment Act in response to public pressure regarding widespread torture allegations.³⁷ The DTA provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”³⁸ Plaintiffs have attempted to use the DTA as a

31. See *Vance*, 653 F.3d 591, *rev'd en banc*, 701 F.3d 193 (holding other courts’ denial of *Bivens* remedies to aliens are readily distinguishable due to the different circumstances of aliens and U.S. citizens); *Doe*, 800 F.Supp.2d at 110, *rev'd*, 683 F.3d 390 (holding that because *Doe* is a United States citizen the fear of “allowing enemy aliens to engage domestic courts in continuing hostilities is not present here”).

32. 28 U.S.C.A. § 1350 (2000). “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.” *Id.* “The statute is referred to by courts interchangeably as the Alien Tort Claims Act, the Alien Tort Statute, or the Alien Tort Act.” 14A Fed. Prac. & Proc. Juris. § 3661.1 (3d ed.).

33. 42 U.S.C.A. § 2000dd (2006). “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” *Id.* The statute defines such treatment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.” *Id.*

34. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)).

35. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004.) In *Ali v. Rumsfeld*, the D.C. Circuit applied that Supreme Court holding. 649 F.3d at 776-77.

36. *Ali*, 649 F.3d at 776 (holding that “nothing in the ATS imposes any obligations or duties of care upon the defendants”) (internal quotation marks and citations omitted).

37. 42 U.S.C.A. § 2000dd; See Pearlstein, *supra* note 6, at 1287 (discussing the public pressure that played a “pivotal role in securing Senator McCain’s public engagement on the question of torture, and the eventual overwhelming passage of McCain’s amendment to ban cruel, inhuman, or degrading treatment wherever U.S. officials operate”).

38. 42 U.S.C. § 2000dd(a).

source of relief for actions violating its language.³⁹ However, because the statute does not expressly provide a right of action, courts have rejected the invitation to imply a private cause of action under the Act.⁴⁰ Similarly, the Geneva Conventions have not been found to provide plaintiffs with a private cause of action for torture based on the interpretation that it is not a self-executing treaty.⁴¹

The Torture Victim Protection Act has also failed to provide torture victims with a remedy.⁴² For example, in a challenge to extraordinary rendition, the Second Circuit held that the TVPA's requirement that the official must have acted under the authority or color of law of a foreign nation does not provide an action against U.S. officials alleged to have conducted torture.⁴³

The State Secrets Privilege

The state secrets privilege, more than the lack of a viable cause of action, has proven to be the most damaging blow to plaintiffs seeking relief for torture.⁴⁴ The privilege was first recognized by the Supreme Court in 1953.⁴⁵ This privilege allows the government to prevent "the disclosure of information in a judicial proceeding if 'there is a reasonable danger' that such disclosure 'will expose military matters which, in the interest of national security, should not be divulged.'"⁴⁶

39. *Doe*, 800 F. Supp. 3d at 104-05.

40. *See Id.* (holding "it is for Congress to create private rights of action to enforce federal statutes" (citing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001))).

41. *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 117 (explaining that "because Geneva Convention IV manifests an intent to be enforced through legislation or diplomacy," it does not provide a private cause of action for plaintiffs to sue defendants for money damages).

42. Pub. L. No. 102-256, 106 Stat. 73.

43. *Arar*, 585 F.3d at 568. Extraordinary rendition has been defined as "the transfer of an individual, with the involvement of the United States or its agents, to a foreign state where there are substantial grounds for believing the person would be in danger of being subjected to torture." 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, 360 (2007) (internal quotation marks and citation omitted).

44. *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) (analyzing the central role the state secrets privilege has played in civil litigation regarding the executive branch's counterterrorism policies); *see also* David Aronofsky & Matthew Cooper, *The War on Terror and International Human Rights: Does Europe Get It Right?*, 37 DENV. J. INT'L L. & POL'Y 567, 580 (2009) (discussing the difficulty of overcoming an invocation of the state secrets doctrine and resulting consequence of cases almost always being dismissed).

45. *United States v. Reynolds*, 345 U.S. 1 (1953).

46. *El-Masri*, 479 F.3d at 302 (citing *Reynolds*, 345 U.S. at 10); *see also* Chesney, *supra* note 44, at 1254-63 (conducting an in-depth analysis of the

A three-part analysis is used to resolve a state secrets privilege claim.⁴⁷ First, a court must determine whether the procedural requirements for invoking the privilege are satisfied.⁴⁸ Second, a court must determine if “the information sought to be protected qualifies as privileged under the state secrets doctrine.”⁴⁹ If the first two parts are satisfied, the final question is whether the case can proceed in light of the successful privilege claim and, if so, in what manner.⁵⁰

Since 9/11, one of the most prominent examples of the effect the state secrets privilege can have on torture complaints is *El-Masri v. U.S.*⁵¹ El-Masri, a German citizen, alleged that CIA Director George Tenet, among others, authorized his illegal detention and torture in an extraordinary rendition operation before, and for several months after, the government realized he was not the person they were looking for.⁵² Although the court recognized dismissal would leave El-Masri without a remedy, it ruled that virtually any response to his allegations would disclose privileged information.⁵³ Therefore, the court upheld the lower court’s dismissal.⁵⁴

In sum, plaintiffs who have sought to recover damages for abuse constituting torture have thus far found the judicial realm inhospitable to their claims due to the lack of a private cause of action combined with the readily available state secrets privilege.

THE CONSTITUTION GIVES CONGRESS THE POWER TO REGULATE THE DETENTION AND TREATMENT OF DETAINEES

The first part of this Comment demonstrated the problem of official torture and the resulting litigation seeking relief. Although many statutes, along with *Bivens*, on their face appear to deal with the issue, courts have consistently declined these attempts to state a private cause of action for the reasons discussed above.

Part A of the next section of this Comment examines the Executive Branch’s constitutional argument that no other branch of government has the ability to regulate its treatment of detainees in the war on terror. Part B argues not only that the

government’s reliance on the state secrets privilege in defending against El-Masri’s allegations).

47. *El-Masri*, 479 F.3d at 304.

48. *Id.*

49. *Id.*

50. *Id.*

51. 479 F.3d 296.

52. *Id.* at 299-300.

53. *Id.* at 310.

54. *Id.* at 308 (noting that a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure).

Constitution explicitly grants Congress the power to check the executive branch's treatment of detainees, but also that the judicial branch has recognized this authority over the course of its jurisprudence regarding this issue. Part C points out the deficiency of the *Bivens* doctrine as a remedy. Part D then argues that although Congress can and should act, it must adequately address the issue of protecting national security by reforming the state secrets privilege in the process of creating a remedy for victims of official torture.

The Executive Branch's Expansive Interpretation of Its Exclusive Power after 9/11

In the years immediately following 9/11, the executive branch began to interpret any limits on its power to manage the global war on terror as unconstitutional.⁵⁵ Much discussed memos by the Office of Legal Counsel for then-President Bush's administration did not mince words in arguing that statutes concerning torture, such as the Federal Criminal Torture Statute,⁵⁶ cannot be constitutional if they apply to the executive branch.⁵⁷ Although it should be noted that eventually these memos were withdrawn, it has been pointed out that many of the "most brutal atrocities" at Guantanamo and Abu Ghraib occurred while the memos were in

55. Memorandum from John C. Yoo, Deputy Asst. Att'y General, to Deputy Counsel for the President, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 32 (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm> [hereinafter "Yoo Memorandum"] (finding that Congress may not "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response" and that "[t]hese decisions, under our Constitution, are for the President alone to make").

56. 18 U.S.C. § 2340A (2001).

57. Yoo Memorandum, *supra* note 55, at 31-32; see also Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A*, 34-35 (Aug. 1, 2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf> [hereinafter "Bybee Memorandum"] (concluding that "to respect the President's inherent constitutional authority to manage a military campaign[,] . . . Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority"). The Bybee Memorandum goes on to state that Congress does not have the authority "under Article I to set the terms and conditions under which the President may exercise his authority . . . Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield." See also Shayana Kadidal, *Does Congress Have the Power to Limit the President's Conduct of Detentions, Interrogations and Surveillance in the Context of War?*, 11 N.Y. CITY L. REV. 23 (2007) (analyzing memos by Office of Legal Counsel that expanded the interpretation of the executive branch's exclusive authority).

full effect.⁵⁸

As Dean Chemerinsky puts it, “[t]he key from a separation of powers perspective is the consistent claim of unchecked and uncheckable executive authority. The Bush administration over and over again argued that it alone could decide whether a person was to be held or released.”⁵⁹ He notes the other major example of the Bush administration’s expansive view of presidential authority is the argument found in the “torture memos” written by Office of Legal Counsel Officials John Yoo and Jay Bybee.⁶⁰ These officials essentially ignored the role of Congress and the courts when they argued that the president was not bound to obey the treaty and federal statute prohibiting torture.⁶¹

The President certainly has the authority to respond to attacks without Congressional approval.⁶² However, the argument that this authority extends to complete and exclusive power to control an ongoing conflict struggles to find explicit or implied support in the Constitution.

Congress has the constitutional authority to enact a statute governing the executive branch’s treatment of detainees.

The arguments discussed above that attempted to redefine the executive branch’s authority in conducting the war on terror as inherent and exclusive fail under an examination of the Constitution along with the Supreme Court’s interpretation of the relevant provisions of the Constitution. For example, Congress is vested with not only the power “[t]o make Rules for the Government and Regulation of the land and naval Forces[,]”⁶³ but

58. See Kadidal, *supra* note 57, at 48 (pointing out that Jack Goldsmith of the Office of Legal Counsel instructed the Department of Defense not to rely on these memos).

59. Erwin Chemerinsky, *Restoring Separation of Powers*, ABA HUM. RTS. MAGAZINE, Vol. 35 No. 4, 6-7 (Fall 2008), available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_fall2008/hr_fall08_chemerinsky.html.

60. *Id.* at 7.

61. *Id.* See generally Scheppele, *supra* note 13, at 1051 (arguing that the most pronounced change in the executive branch’s response to terrorism was the Bush administration’s effort to bring the war on terrorism under the executive branch’s sole authority and “minimize the influence of both Congress and the courts”).

62. The Brig Amy Warwick, et al., 67 U.S. 635, 668 (1862) (holding that “[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority”); see also Commonwealth of Mass. v. Laird, 451 F.2d 26, 31 (1st Cir. 1971) (holding that “[t]he executive may without Congressional participation repel attack”).

63. U.S. CONST. art. I, § 8, cl. 14.

also to “make Rules concerning Captures on Land and Water.”⁶⁴

The Supreme Court has interpreted that the authority to make rules for the military supports Congress’ plenary control over the framework of the military establishment.⁶⁵ Recently, in fact, the Court has noted the overlapping war power authority given to the executive and legislative branches by the Constitution, specifically Congress’ power to make rules concerning captures.⁶⁶

Additionally, courts have repeatedly stated that Congress should intervene in matters involving foreign policy and make the determination as to whether a remedy should exist.⁶⁷ For example, the Supreme Court in *Egan* succinctly stated its position on when the judiciary should involve itself in reviewing actions by the executive branch: “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”⁶⁸

The combination of the enumerated powers vested in Congress by the Constitution along with the extensive history of the courts holding that Congress has the power to authorize judicial review on military and national security matters leaves little doubt about the fallacy of the executive branch’s contention that Congress would be outside its authority in regulating the treatment of detainees in the war on terror.

64. U.S. CONST. art. I, § 8, cl. 11.

65. *Chappell*, 462 U.S. at 301 (holding that “it is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline”).

66. *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006) (examining the interplay between U.S. CONST. art. II, § 2, cl. 1 and U.S. CONST. art. I, § 8, cl. 11).

67. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (recognizing that matters concerning national security are areas “in which courts have long been hesitant to intrude” absent congressional authorization); *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting that “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *Arar*, 585 F.3d at 576 (holding that “[a]bsent clear congressional authorization, the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country’s foreign policy”); *Ali*, 649 F.3d at 774 (declining to allow a *Bivens* claim, citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985), which held that “the danger of foreign citizens’ using the courts . . . to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist”).

68. *Egan*, 484 U.S. at 530.

The Failure of Bivens to Provide a Remedy

The failure of plaintiffs seeking relief under *Bivens* to advance past the pleading stage sends a clear message that the war on terror will continue to be seen as a “special factor counseling hesitation” precluding relief under the doctrine.⁶⁹ Furthermore, the overshadowed holding by the Supreme Court in *Ashcroft v. Iqbal*⁷⁰, due to the case’s impact on the pleading standard, rejected the availability of supervisory liability under *Bivens*.⁷¹ Considering that the discussion of supervisory liability was unnecessary to the holding, it seems to indicate the Court’s position on *Bivens* claims in this context.⁷² Forcing a plaintiff to hold one particular official liable, and a low-level official to be specific, does not provide an effective deterrent for torture.⁷³

Additionally, the Court’s continuous refusal over the past several decades to extend *Bivens* to new contexts demonstrates the important role Congress plays in providing relief for torture.⁷⁴ Indeed, the consistent holding of the courts is that plaintiffs should look to Congress, rather than the courts via *Bivens*, for providing a remedy.⁷⁵

69. See *Arar*, 585 F.3d at 574-76, 581 (explaining the national security concerns that qualify as special factors counseling hesitation and holding that until Congress provides a remedy particular to these situations, courts should not enter the arena of balancing individual rights against those national security concerns).

70. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

71. *Id.* (holding that in a *Bivens* action, the term supervisory liability is a misnomer and that absent vicarious liability, each Government official is only liable for his or her own misconduct).

72. *Vladeck*, *supra* note 27, at 268 (pointing out that because the petitioners had conceded that officers could be subject to *Bivens* liability as supervisors and the holding on pleading standards making the conclusion on supervisory liability unnecessary, the Court’s discussion of *Bivens* seems to signal a much larger point, “either about *Bivens* in general, or about its specific application to cases such as *Iqbal*.”).

73. *Seamon*, *supra* note 13, at 802 (explaining that the “systemic nature of official torture” makes it difficult to hold a particular official responsible under *Bivens*).

74. *Id.* at 779 (reasoning that this disinclination to extend *Bivens* along with the fact Congress has created remedies for the victims of official torture inflicted under color of a foreign country’s law but not U.S. law leads to the conclusion that *Bivens* is an unlikely answer to resolving torture claims); see also *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (noting the Court, since 1980, has consistently refused to extend *Bivens*).

75. See *Vladeck*, *supra* note 26, at 275 (arguing the consistent language of opinions denying *Bivens* relief makes it hard to imagine how “a post-September 11th detainee could ever state a viable *Bivens* claim”); see also *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 107 (holding that the other branches might arrive at a different conclusion than the judiciary about where an interrogation technique falls). Therefore, this possibility combined with the commitment of military and foreign affairs to the political branches by the Constitution warrant leaving to Congress the determination whether a

Protecting National Security

The conclusion that Congress has the power to enact statutes governing the treatment of detainees does not necessarily lead to the conclusion that Congress should enact such statutes without paying great heed to the consequences of such a statute. One of the most important considerations in this calculation is the effect such a statute would have on national security.

The state secrets privilege is the primary mechanism used by the executive branch to avoid civil litigation involving the war on terror.⁷⁶ Since 9/11, the state secrets privilege has been used to avoid legal rulings on entire policies that have been widely criticized.⁷⁷ Although the state secrets privilege is necessary to protect national security, the poorly defined nature and requirements of the privilege should be revised.

By treating the privilege as a rule of evidence, rather than a concept of justiciability as initially conceived, the state secret privilege can be revised to protect national security without automatically sounding the death knell for a plaintiff's recovery.⁷⁸ Additionally, it would prevent the executive branch from violating separation of powers because the Constitution provides Congress almost exclusive power to determine the jurisdiction of federal courts.⁷⁹

The possibility of dismissal after the government has invoked the state secrets privilege has always existed.⁸⁰ However,

damages remedy should exist. *Id.*

76. Justin Florence & Matthew Gerke, *National Security Issues in Civil Litigation: A Blueprint for Reform*, in LEGISLATING THE WAR ON TERROR, 253 (Benjamin Wittes ed. 2009) (explaining that “[u]nder current doctrine, the government may assert the “state secrets privilege” to ask that courts dismiss a case, prevent the use of evidence in it, or both” and that it has become the courts’ primary method of handling civil lawsuits that are related to national security information); see also Chesney, *supra* note 45, at 1250 (recognizing the central role that the privilege has played in the Justice Department’s handling of post-9/11 civil litigation).

77. Florence & Gerke, *supra* note 76, at 259 (noting that the Bush administration avoided legal rulings on its rendition, interrogation, and electronic surveillance programs that have been widely criticized).

78. See *id.* at 254 (treating state secrets privilege as rule of evidence would “prevent courts from dismissing cases until they have had a chance to assess the privilege claim and see other available, nonprivileged evidence that might bear on its adjudication”).

79. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1932 (2007) (arguing that when the state secrets privilege is invoked to dismiss whole categories of cases, the executive branch “intrudes not just on the power of courts and the rights of individuals, but on the jurisdiction-conferring authority of the legislature as well”). The author further argues that by seeking dismissal, the executive also prevents Congress from working in conjunction with the judiciary to curb executive power. *Id.*

80. Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 637 (2010) (acknowledging that critics of the state

dismissal usually has occurred because the plaintiff could not establish a prima facie case without the evidence subject to the privilege.⁸¹ Instead, government officials have begun to assert the privilege with the argument that the subject matter of the litigation is a state secret and should be dismissed even where plaintiffs could proceed with unprivileged information.⁸²

Several additional reasons have been put forth supporting the reform of the state secrets privilege.⁸³ These include: the current doctrine prevents the parties involved from knowing what their rights are in advance; judges currently lack clear standards to evaluate the claims; and the privilege currently fails to protect litigants from being unfairly denied relevant evidence.⁸⁴

Indeed, both the House of Representatives and the Senate have offered versions of a bill to reform the state secrets privilege.⁸⁵ Both versions proposed to reform the privilege so that it cannot constitute grounds for dismissal of a case or claim until a hearing on the claim is conducted.⁸⁶ By preventing motions to dismiss or summary judgment motions from being granted until parties have an adequate opportunity to complete non-privileged discovery, government officials are held more accountable on evidence and issues that are not covered by the privilege.⁸⁷

secrets privilege point to cases being dismissed prior to the discovery process as a flaw of the current state secrets privilege).

81. *Id.*; see also *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (holding that the state secrets privilege can have three effects: 1) by invoking the privilege over particular evidence, that evidence is removed from the case and the case proceeds based on evidence not covered by the privilege; 2) if the privilege deprives the defendant of information needed to have a valid defense, the court may grant summary judgment to the defendant; and 3) if the subject matter of the action is a state secret, the case should be dismissed based solely on the successful invocation of the privilege).

82. See *Wells*, *supra* note 80, at 637 n. 62 (noting recent cases that were dismissed on a subject matter theory).

83. See *Florence & Gerke*, *supra* note 76, at 255 (including other reasons such as the potential for abuse by the executive branch allowing it to avoid accountability and failing to provide judges with clear standards to evaluate state secrets claims). The authors also note that a subsequent consequence of the latter reason is that if the executive branch continues to use the privilege to avoid judicial review of its most controversial programs, a federal judge may at some point consider a privilege claim as “the boy who cried wolf” and allow genuinely important national security secrets to become public.

84. *Id.*

85. State Secrets Protection Act, S. 417, 111th Cong., 1st Sess. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong., 1st Session (2009); see also *Florence & Gerke*, *supra* note 76, at 253 (noting that the bills were initially introduced in 2008 and both passed through their respective committees). However, action on the bills was postponed due to a veto threat by President Bush. *Id.*

86. S. 417; H.R. 984.

87. See *Wells*, *supra* note 80, at 650 (supporting the positive effects the proposed reform could have on the privilege).

Therefore, secrecy is still maintained while increasing government accountability.

Both bills also proposed that the hearings on the privilege be conducted in camera and that the court, upon request by the government, may require counsel to obtain security clearance before participation in the hearing.⁸⁸ Although these bills have stalled in their respective chambers, they represent a legitimate attempt to reform the state secrets privilege while appropriately protecting national security interests underlying the privilege.

By not providing a private cause of action, or any other means for relief, the United States does itself great harm when it presents the war on terror to the world as a necessary conflict.⁸⁹ Allowing torture to become operating procedure in interrogation policy produces propaganda for those we seek to stop and helps produce future members of the terrorist groups we seek to disable. Operating outside the rule of law also damages our relations with allies.⁹⁰ If Congress provides a private cause of action allowing relief to those who have been subjected to techniques constituting torture, the United States would effectively be putting its money where its mouth is when it advocates to the world that the United States stands for human, not just American, rights.⁹¹

However, any cause of action must accomplish two competing interests at the same time: restraining but also empowering the executive branch.⁹² The following section proposes the framework

88. S. 417; H.R. 984. Other relevant provisions that appear in both versions are: 1) allowing the Government to assert the privilege in connection with any claim in a civil action, either where it is a party or where it intervenes; 2) requiring the government to provide the court with an affidavit signed by the head of the executive branch agency with control over the information asserted to be privileged; 3) allowing for an interlocutory appeal upon disposition of the privilege; 4) in ruling on the validity of the privilege, the court should make an assessment of whether the harm identified by the government is reasonably likely to occur if the privilege is not upheld. *Id.*

89. BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR*, 147 (2008) (drawing the conclusion that because the United States has championed the Geneva Conventions along with other international commitments, enormous harm is caused when it presents the war on terrorism as being in conflict with those commitments).

90. Roosevelt III, *supra* note 2, at 37 n. 248 (noting that Italy and Germany issued warrants for the arrest of CIA agents involved in the abduction of suspects in their respective countries as part of the extraordinary rendition program and concluding that cooperation between intelligence agencies is more difficult when our agents are wanted criminals).

91. *See generally* SHAMSI, *supra* note 1, at 3 (quoting David R. Irvine, Brig. Gen. (Ret.) as stating, “[t]he Army exists, not just to win America’s wars, but to defend America’s values. The policy and practice of torture without accountability has jeopardized both”).

92. WITTES, *supra* note 89, at 149 (2008) (arguing the law must restrain the executive from actions we do not want it to take but also authorize the president to take bold actions).

for this legislation by providing a remedy for torture while still providing the executive with ample protection of state secrets.

CONGRESS SHOULD ENACT LEGISLATION THAT PROVIDES A REMEDY
FOR INNOCENT PARTIES SUBJECTED TO TORTURE BY THE UNITED
STATES

As explained above, Congress possesses the concurrent power to also impose its will in the area of detention and interrogation. In order to help prevent the recurrence of acts constituting torture while conducting a war, Congress must be the branch to act decisively in providing a legitimate remedy for those who suffer such acts.

This Section proposes the legislation that would accomplish this goal. First, this section will outline the proposed legislation. Then, it will discuss the legislation in light of the two primary considerations underlying it: protecting national security while providing a legal remedy to those who endure acts constituting torture. Finally, it will conduct hypothetical applications of the law to two cases.

The Torture Remedy Act

Section 1.

1. Every person who, under color of any statute, regulation, or other valid authority of the United States, subjects, causes to be subjected, or authorizes any citizen of the United States or other person not found guilty of a crime against the United States in a court of law to an act or acts that constitute torture as defined in 18 U.S.C. 2340,⁹³ shall be liable to the injured party in an action at law for redress.⁹⁴
2. The United States shall also be liable for damages resulting from violations of this Act.
 - a. Nothing in this Act shall be construed to prevent the United States from intervening in an action under this Act to which it is not a party for the purpose of stating a claim for state secrets privilege in accordance with the provisions of section 3 of this Act.
3. Any person who alleges a violation of this Act may bring an action at law for redress so long as they have not been found guilty of a crime against the United

93. See *supra* note 4 (quoting the definition of “torture” from the statute).

94. The language in this section is inspired by and partly tailored after 42 U.S.C. § 1983. See Seamon, *supra* note 11, at 758-59 (proposing that the U.S. government be held liable for torture just as local governments would be held liable for civil rights violations under § 1983).

States or one of its agents.

4. Damages. A party found to have violated this Act may be subjected to a finding of compensatory and/or exemplary damages.

Section 2. Protection of State Secrets.

1. State Secrets Privilege. Nothing in this Act shall be construed to prevent the United States from claiming a privilege to refuse to give information and to prevent any person from giving information that would be reasonably likely to cause significant harm to the defense or the diplomatic relations of the United States.⁹⁵
 - a. The Government's claim of privilege in actions arising under this Act shall be subject to the procedures in Section 3 of this Act.

Section 3. State Secrets Privilege⁹⁶

1. In General. The court shall take steps to protect sensitive information that comes before the court in connection with proceedings under this Act. These steps may include reviewing evidence or pleadings and hearing arguments *ex parte*, issuing protective orders, requiring security clearance for parties or counsel, placing material under seal, and applying security procedures established under the Classified Information Procedures Act for classified information to protect the sensitive information.
2. Assertion of the Privilege.
 - a. The Government may assert the privilege in connection with any claim in a civil action to which it is a party or may intervene in a civil action to which it is not a party in order to protect information it believes may be subject to the privilege.
 - b. If the Government asserts the privilege, the Government shall provide the court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the information asserted to be subject to the privilege. In the affidavit, the head of the agency shall explain the factual basis for the claim of privilege. The Government shall make public an unclassified version of the affidavit.

95. H.R. 984.

96. Section 3 of the Act is based on a compilation of legislation proposed by the Senate and the House of Representatives in 2009. S. 417; H.R. 984.

3. In Camera Proceedings. All hearings and other proceedings under this Act may be conducted in camera, as needed to protect information that may be subject to the privilege.
4. Attorney Security Clearances.
 - a. In general. A Federal court shall, at the request of the United States, limit participation in hearings conducted under this chapter, or access to motions or affidavits submitted under this chapter, to attorneys with appropriate security clearances, if the court determines that limiting participation in that manner would serve the interests of national security. The court may also appoint a guardian ad litem with the necessary security clearances to represent any party for the purpose of adjudicating privilege claims under this Section.
 - b. Court oversight. If the United States fails to provide a security clearance necessary to conduct a hearing under this chapter in a reasonable period of time, the court may review in camera and ex parte the reasons of the United States for denying or delaying the clearance to ensure that the United States is not withholding a security clearance from a particular attorney or class of attorneys for any reason other than protection of national security.
5. Procedures for Answering a Complaint.
 - a. Impermissible as Grounds for Dismissal Prior to Hearings. The state secrets privilege shall not constitute grounds for dismissal of a case or claim. Furthermore, the court shall not resolve any issue or claim and shall not grant a motion to dismiss or motion for summary judgment based on the state secrets privilege until the party adversely affected by the privilege has had a full opportunity to complete nonprivileged discovery and to litigate the issue or claim to which the privileged information is relevant without regard to that privileged information.
 - b. Pleading State Secrets. In answering a complaint, if the United States or an officer or agency of the United States is a party to the litigation, the United States may plead the

state secrets privilege in response to any allegation in any individual claim or counterclaim if the admission or denial of that allegation in that individual claim or counterclaim would itself divulge a state secret to another party or the public. If the United States has intervened in a civil action, it may assert the state secrets privilege in response to any allegation in any individual claim or counterclaim if the admission or denial by a party of that allegation in that individual claim or counterclaim would itself divulge a state secret to another party or the public. No adverse inference or admission shall be drawn from a pleading of state secrets in an answer to an allegation in a complaint.

6. Determination of Applicability of Privilege.
 - a. As to each item of evidence that the United States asserts is protected by the state secrets privilege, the court shall review the specific item of evidence to determine whether the claim of the United States is valid. An item of evidence is subject to the state secrets privilege if it contains a state secret, or there is no possible means of effectively segregating it from other evidence that contains a state secret.
 - b. Admissibility and disclosure.
 - i. Privileged evidence. If the court agrees that an item of evidence is subject to the state secrets privilege, that item shall not be disclosed or admissible as evidence.
 - ii. Non-privileged evidence. If the court determines that an item of evidence is not subject to the state secrets privilege, the state secrets privilege does not prohibit the disclosure of that item to the opposing party or the admission of that item at trial, subject to the Federal Rules of Civil Procedure and the Federal Rules of Evidence.
 - iii. Standard of review. The court shall give substantial weight to an assertion by the United States relating to why public disclosure of an item of evidence would be reasonably likely to

cause significant harm to the national defense or foreign relations of the United States. The court shall weigh the testimony of a Government expert in the same manner as the court weighs, and along with, any other expert testimony in the applicable case.

Providing an Adequate Remedy at Law While Protecting State Secrets

The two primary and competing goals of the Act are 1) to provide an adequate remedy at law for innocent parties subjected to acts constituting torture; and 2) to create a workable framework for litigating these claims that still provides strong protection of state secrets.

How the Torture Remedy Act Provides an Adequate Remedy at Law.

The Torture Remedy Act would explicitly enable plaintiffs to state a valid claim for torture under specific circumstances. First, a plaintiff must not have been convicted of a crime against the United States or one of its officials. This barrier to entry, so to speak, would help diminish the possibility that those seeking to harm the United States would be able to conduct what has been called “counter-counter-terrorism by lawsuit.”⁹⁷

Second, the Act would only allow recovery for acts that fit the definition already established by Congress in 18 U.S.C. § 2340.⁹⁸ This definition successfully furthers the competing interests of preventing severe techniques while not hampering interrogation efforts using less harsh, but still effective, interrogation and detention techniques. The definition limits acts constituting torture to those that cause or threaten severe pain or physical suffering, or threatens imminent death to that person or another person. For example, one of the most controversial and discussed interrogation techniques, waterboarding⁹⁹, would violate the Act because it threatens imminent death and would theoretically be prevented from reoccurring in the future should the executive

97. Brown, *supra* note 13, at 844 (citing Richard Klinger, *The Court, the Culture Wars, and Real War*, 30 A.B.A. NAT'L SECURITY L. REP., June 2008, at 1, 4).

98. *Supra* note 4.

99. Waterboarding is a procedure where “a person is forcibly seized and restrained. He or she is then immobilized, face up, with the head tilted downward. Water is then poured into the breathing passages.” Daniel Kanstroom, *On “Waterboarding”: Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT'L & COMP. L. REV. 203, 204 (2009).

branch reconsider its use.

Additionally, supervisory liability would be allowed upon a showing that the principal authorized the agent to commit the acts. Supervisory liability is critical to influencing policy in a manner that seeks to eliminate techniques constituting torture. By holding those in policy-making positions accountable for authorizing actions that clearly violate the Act, the interest of clearly delineating the appropriate actions and techniques for the servicemen and women who are charged with interrogating suspects would be furthered.¹⁰⁰

The Torture Remedy Act Would Reform the Procedure in Claiming State Secrets Privilege While Maintaining Strong Protection.

Section III of the Torture Remedy Act plays a vital role in the feasibility of implementing the Act as a check on the use of techniques constituting torture.¹⁰¹ Without strong protection of state secrets, soldiers and other government officials could be placed at risk, an unacceptable outcome. However, the manner in which the state secrets privilege is invoked and evaluated must be reformed in order to ensure that it does not result in sidestepping liability under the Act by its mere invocation.

A major change that Section III would implement is preventing claims under the Act from being dismissed before the adversely affected party has a full opportunity to complete non-privileged discovery and litigate the claim without the privileged information. This change would help ensure that claims that can progress without the privileged information will not be ended prematurely. On the other hand, the standard of review would be weighted in the government's favor to ensure that the government is able to secure the privilege where appropriate. By ensuring that the government is able to invoke the privilege where needed but preventing the privilege from acting as an absolute shield from claims under the Act, Section III appropriately reforms the state secrets privilege so that both interests are protected.

Although the most recent administration has issued an executive order¹⁰² that requires all interrogation techniques to comply with the United States obligations under laws regulating the treatment and interrogation of individuals detained in an armed conflict, the need to provide a concrete legal remedy to

100. See BROWN, FOLWER, HOMER & SCHLESINGER, *supra* note 9, at 5 (recognizing that high levels of institutional authority were partly responsible for the widespread abuses that have occurred during the early years of the war on terror). By allowing supervisory liability, those who craft the interrogation and detention techniques would theoretically start a trickle-down effect of responsible intelligence-gathering.

101. *Supra* note 96 and corresponding text.

102. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (January 22, 2009).

violations of these obligations remains a necessity. The Torture Remedy Act fulfills this need.

CONCLUSION

For the United States to remove the black eye of torture, Congress must act. The Torture Remedy Act would help ensure that torture becomes a tragedy of the past instead of policy for the future.

