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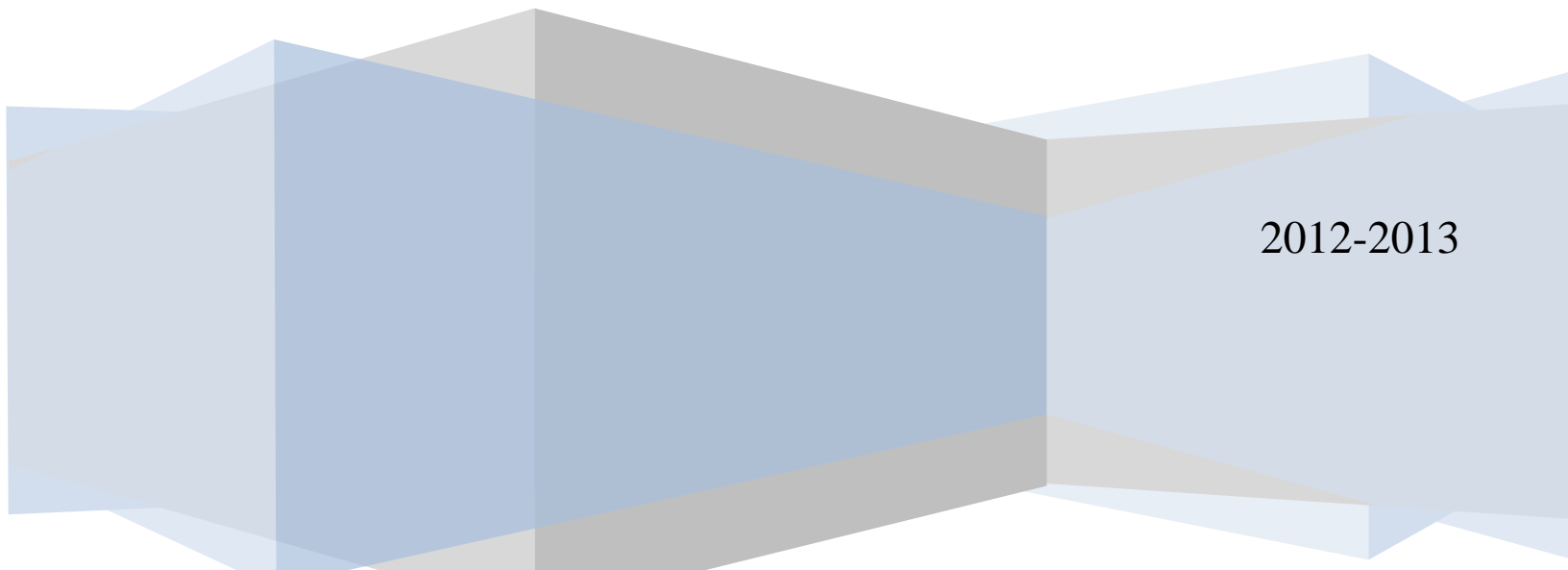
Obligations and Obstacles: Holding North Carolina Accountable for Extraordinary Rendition and Torture

Prepared By:

Andrea Davis, Jennifer Jiang, Derek Loh, and Theresa Viera

Faculty Advisor:

Professor Deborah Weissman



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Executive Summary

Following the attacks of September 11, 2001, the United States dramatically expanded the use of extraordinary rendition, an intelligence-gathering program through which individuals suspected of terrorism were abducted and transported beyond the reach of the law, held incommunicado and interrogated by torture. Detained for years, many victims of the extraordinary rendition program were never formally charged with any crime, never given the opportunity to contact their families or an attorney, and were eventually just discarded once the CIA realized that these individuals had nothing to do with the actual terrorist threat against the United States. These acts of kidnapping and torture occurred despite international treaties, federal statutes, and judicial precedents that prohibit such acts under any and all circumstances. Although the victims have sought redress in the federal courts of the United States for the harms they have suffered, they have been denied their day in court.

North Carolina is a hub for extraordinary rendition. In a report released in January 2012 and endorsed by international human rights experts, the ways in which North Carolina, its political subdivisions, and Aero, a corporation based in Johnston County, NC were directly and indirectly responsible for carrying out the kidnapping and torture have been demonstrated.

This policy brief builds on the January 2012 report. Part One of this report establishes the legal basis for North Carolina's obligation to investigate Aero Contractors and for its own accountability for facilitating extraordinary rendition:

- In addition to the U.S. federal government's complicity in the extraordinary rendition program and the torture, North Carolina, as well as Aero Contractors should and can be held liable for either involvement in or the facilitation of the CIA extraordinary rendition program.
- It reviews the applicable laws, including binding international treaty provisions, federal constitutional and statutory principles, as well as laws that operate at the state and local levels that provide the basis for holding North Carolina and Aero responsible.
- It identifies the directives issued by the Executive Branch of the United States that make clear that states and localities are not preempted from preventing, investigating, and seeking accountability for torture, and more, that they are obligated to do so.
- It reviews North Carolina's refusal to investigate Aero's involvement in extraordinary rendition and demonstrate the lack of legal basis for such refusal.
- In light of North Carolina's legal obligations, Part One offers recommendations to improve accountability outcomes including
 - Expanding opportunities for local implementation of human rights obligations
 - Pursuing state criminal and civil remedies
 - Establishing a Citizens' Commission of Inquiry

Part Two demonstrates that although international, federal, and state laws require a mechanism of accountability for extraordinary rendition and torture, the federal government's invocation of the State Secrets Doctrine has effectively barred victims of torture and the extraordinary rendition program from obtaining any form of judicial redress through the U.S. court system.

- It reviews the historical development of the Totten bar and the Reynolds evidentiary privilege which form the basis for the U.S. government's invocation of the State Secrets Doctrine.
- It reviews the contemporary use of the Totten bar and the Reynolds and demonstrates that the current use and application of the State Secrets doctrine violates the basic right of access to the courts, binding U.S. Supreme Court precedent, and international law.
- It examines new developments with regard to the State Secrets Doctrine including a revised policy issued by the Department of Justice, international condemnation of the misuse of the State Secrets Doctrine, and other legal developments that affect the status of the doctrine.
- It offers recommendations toward achieving accountability including
 - Proposed legislative changes to the use of the State Secrets Doctrine
 - Judicial processes that would allow litigation to continue without jeopardizing legitimate state secrets.
 - The issuance of a public apology
 - Use of international and regional human rights tribunals

- Establishing a Citizens' Commission of Inquiry

In the course of writing this policy brief, the authors conducted numerous interviews over a three-month period to get the perspectives of various officials from different levels of the government. From the interviews and research, this policy brief urges that all levels of government can and must assume responsibility for the extraordinary rendition program and the torture inflicted upon innocent victims. By taking responsibility, the various levels of the government can hold the correct parties accountable for their crimes and can move forward and beyond this tragic period in U.S. history with dignity and respect.

Calling upon the government to take responsibility, however, does not take away the responsibility and duty of individual citizens to also seek accountability and justice. No entity shall be above the law, and when the government ignores this mandate, it is up to the citizens to demand justice. This policy brief therefore emphasizes the call to all citizens to strive for justice through the creation of a Citizens' Commission of Inquiry.

Introduction

Following the attacks on New York, Pennsylvania, and the Pentagon on September 11, 2001, the United States began a number of programs aimed at preventing further attacks and bringing to justice those responsible for the attacks. One example is the CIA's extraordinary rendition program. The means by which this program was implemented represent a blemish on the United States' human rights record. In January of 2012, the North Carolina School of Law's Immigration and Human Rights Policy Clinic released a report entitled *The North Carolina Connection to Extraordinary Rendition and Torture*.¹ That report set out a factual record about Aero Contractors, Ltd. ("Aero"), a North Carolina company, and its involvement in the CIA's program of extraordinary rendition. As the owner and operator of several aircraft used to transport individuals identified by the federal government as high-value detainees, Aero was complicit in the extraordinary rendition program. Because of this involvement, Aero is criminally and civilly liable to the individuals extraordinarily rendered through the use of their aircraft and personnel.

This policy paper identifies the laws that Aero has violated and the causes of action that the individuals rendered have against Aero. This policy paper also identifies the major obstacles that the rendered individuals must overcome in order to litigate their claims successfully in a United States court of law, either at the federal or state level. The first part of this policy paper deals with the three main sources of law that Aero's

¹ DEBORAH M. WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *THE NORTH CAROLINA CONNECTION TO EXTRAORDINARY RENDITION AND TORTURE* 4 (2012).

involvement in the extraordinary rendition program violates. The first source includes international human rights laws and treaties and the ways in which the United States federal government has codified them. These international laws include the International Covenant on Civil and Political Rights (ICCPR),² the Convention Against Torture (CAT),³ and the Universal Declaration on Human Rights (UDHR).⁴ The extraordinary rendition program and, by extension, Aero's activities clearly violate these laws. Furthermore, because of their failure to investigate and remedy activities associated with the rendition program, the United States and North Carolina governments have derogated from their duties under international law. Despite arguments to the contrary, customary international law and U.S. federal court jurisprudence also hold North Carolina and its political subdivisions accountable under these international instruments.

The second and third sources of law are North Carolina criminal law and North Carolina civil law. Under theories of criminal and civil conspiracy, Aero's actions rise to the level of criminal activity and civil torts. Given the state's unwillingness to investigate Aero's activities, holding North Carolina and Aero accountable in a criminal court will be a difficult task. This paper identifies the various civil claims that the rendered individuals have against Aero, and identifies ways in which their treatment and consequential states of mind might toll the relevant statutes of limitations that might otherwise interfere with victims' abilities to pursue justice.

² International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter International Covenant on Civil and Political Rights].

³ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

⁴ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights].

However, as a practical matter, by far the greatest obstacle that the rendered individuals must overcome whether they seek accountability from a state government, the federal government, corporations or private individuals is intervention by the federal government. The second part of this policy paper is devoted to the State Secret Doctrine. Under the State Secrets Doctrine, the United States government has stopped litigation—against itself and third parties—for claims involving extraordinary rendition. The Doctrine is based on privileges related to national security, and it has effectively allowed the U.S. government to bar claims of human rights violations against itself. This part of the policy paper discusses the history of the State Secrets Doctrine and its egregious and erroneous application to current claims involving extraordinary rendition. It also analyzes recent case law and notes the ways in which each of these cases misinterpret and misapply the State Secrets Doctrine. Furthermore, the invocation and existence of the State Secrets Doctrine violates international human rights laws.

The policy paper also discusses new developments that may impact the application of the Doctrine, including executive branch limitations and the response from the international community. Finally, this paper explores the remedies that are currently available for victims of extraordinary rendition, highlighting that none of them are fully sufficient to provide the investigation and remedy for victims of torture as required under international law. It concludes by recommending that the most likely avenue for developing a mechanism of accountability for the role of the state of North Carolina, its political subdivisions, and Aero is through the establishment of a Citizens' Commission of Inquiry.

PART ONE

The Legal Application of International Treaties to State and Local Governments: International Human Rights and Remedies

INTRODUCTION

From 2001 to 2006, Aero Contractors, Ltd. (“Aero”), a North Carolina company providing privately chartered aircraft, engaged in illegal acts of extraordinary rendition, cruel and degrading treatment, torture, and conspiracy. These acts violated federal domestic law, international human rights treaty law, and North Carolina state law. This Policy Brief discusses the application of these international human rights treaties to individual U.S. states, and the obligation of individual states as well as private entities to abide by the international treaty requirements. Specifically, this Policy Brief uses the facts revealed in the North Carolina Connection to Extraordinary Rendition and Torture Report (“Rendition Report”) to illustrate why North Carolina should provide a remedy to the victims of Aero’s human rights violations. The Rendition Report provides a detailed explanation and documentation of Aero’s involvement in the CIA-affiliated extraordinary rendition program from 2001 to 2006 and specifically chronicles the capture and rendition of five innocent individuals: Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah.⁵

⁵ WEISSMAN ET AL., *supra* note 1, at 4. The Report, which was prepared by Professor Deborah M. Weissman and several students at the University of North Carolina School of Law, has been widely disseminated among state and federal officials, reporters, and academics.

The chronology of the separate human rights violations committed against each of these five individuals is as follows. First, local foreign officials in countries such as Pakistan and Macedonia arrested each of these men.⁶ Once the individual was detained, and in the process subjected to cruel and degrading treatment, an Aero-operated plane transferred the individual to another country where he was subsequently tortured and interrogated.⁷ During their ordeals, some of the men had already been tortured and interrogated immediately after their arrest before being subjected to additional cruel and

degrading treatment in the process of being transferred to another torture site.⁸

From 2001 to 2006, Aero Contractors, Ltd., a North Carolina company providing privately chartered aircrafts, engaged in illegal acts of extraordinary rendition, cruel and degrading treatment, torture, and conspiracy.

The details of the cruel and degrading treatment and torture are as follows. Before being transferred, most of the men were handcuffed and blindfolded before being forced onto the Aero aircraft that would extraordinarily render them to a secret interrogation site.⁹ Aero provided the air transportation to kidnap and “transfer” these people to foreign detention facilities and “black sites.”¹⁰ To prepare for the rendition,

the men were stripped of their clothes and photographed. Then, a body cavity check was conducted, suppositories were inserted, and the men were forced to wear a diaper

⁶ *Id.* at 18–26.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 11.

and tracksuit. To deprive them of their senses, the men were blindfolded and forced to wear earphones. They were then shackled and transferred to the airport and tied down to an Aero-operated plane.¹¹ Once they were at the black sites, the men were interrogated and held against their will.¹²

Bashmilah, a Yemeni citizen who was seized in Jordan, was subject to horrific treatment. In many regards, Bashmilah exemplifies the experiences of those who were extraordinarily rendered on Aero flights. Before being transferred by an Aero-operated plane, Bashmilah was brutally beaten, anally probed by men dressed in black attire, and forced to wear a diaper and headphones.¹³ He was then hooded, chained, and strapped to the Aero-operated airplane. Once he was taken to another detention site in Kabul, Afghanistan, he was held in solitary confinement for about seven months.¹⁴ Afterwards, Bashmilah was taken to another detention facility in Eastern Europe where he was detained for another year, but not before he was again forced to wear a diaper and was again blindfolded, shackled, and forced to wear headphones in “preparation” for his travel.¹⁵ Neither Bashmilah nor any of the other four men documented in the Rendition Report were ever formally charged with a crime.

The comprehensive Rendition Report demonstrates that Aero acted on behalf of the CIA to extraordinarily render these five innocent individuals. The Rendition Report also shows that Aero committed acts of conspiracy and kidnapping in violation of international treaties and thus, federal law under the Supremacy Clause. North Carolina

¹¹ *Id.* at 11–12.

¹² *Id.*

¹³ *Id.* at 26.

¹⁴ *Id.*

¹⁵ *Id.*

learned of these crimes in the early 2000s¹⁶ and certainly now knows of these crimes as a result of the Rendition Report and cannot turn a blind eye.¹⁷

Before answering the question of whether North Carolina and Aero are legally bound by international human rights treaties, we must first clarify the connection between North Carolina and Aero, and how that connection leads to the accountability of North Carolina to the victims of the Aero extraordinary rendition flights. Aero, which is incorporated in Delaware, is listed as a “Contract aviation services” business in the Business Corporation Annual Report, which is filed with the North Carolina Department of the Secretary of State.¹⁸ The company is

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registered in North Carolina and operates out of the Johnston County Airport in Smithfield, North Carolina.¹⁹ In the 1990s, the Johnston County Airport Authority, a state government office, leased several spaces to registered agents of Aero.²⁰ The leases specifically stated that the “Lessee shall make no unlawful use of said space If so,

¹⁶ *Id.* at 28.

¹⁷ The Rendition Report has been distributed to several state officials, including Mark Davis, the General Counsel to Governor Bev Perdue. *See also infra* note 26 and accompanying text.

¹⁸ WEISSMAN ET AL., *supra* note 1, at 9.

¹⁹ *Id.* at 9–10.

²⁰ *Id.* at 8.

this lease may be terminated by Lessor.”²¹ Furthermore, the Rendition Report shows that Aero’s officeholders and employees were North Carolina residents.²²

Aero flights flew to and from the Johnston County Airport on “numerous occasions between 2001 and 2004” and frequently stopped at Washington Dulles Airport between flights to international cities.²³ The Rendition Report details the following:

Many of the individuals who were subject to extraordinary rendition were first arrested by local country officials. Capture took place when the individual was transferred to CIA custody, at which point a routine set of events occurred. Aero-operated aircraft were used to pick up persons who had been arrested and captured. Usually, a small number of Aero personnel would fly the plane from North Carolina (either Kinston or Smithfield) to Dulles Airport, where it would pick up a “rendition team” made up of approximately 12 U.S. officials. Four to six of these officials would be dressed all in black with their faces covered, and would prepare the individual for rendition in the method described below. Once the Aero-operated plane landed at the destination country, CIA officials would prepare the individual for transfer on the Aero plane by using a standardized procedure intended to put the individual in a state of total immobility and sensory deprivation. This procedure for preparation to rendition involved removing the individual’s clothes, taking photographs of the naked individual, conducting a body cavity check, and inserting suppositories. The individual would then be forced to wear a diaper and a tracksuit. Blindfolds and earphones were used for sensory deprivation. The individual would then be shackled and transferred to the airport and loaded onto the Aero-operated rendition plane while forced to remain in diapers and deprived of sight, sound, and the ability to move. On the Aero flight, the individual was not allowed to use the toilet or to communicate.²⁴

Aero, as a private party, committed heinous acts that contravened international treaties and federal law. But Aero is not the only party bound by international laws, nor

²¹ *Id.*

²² *Id.* at 10.

²³ *Id.* at 11.

²⁴ *Id.* at 11–12 (citations omitted).

is it the only party responsible for these crimes against humanity. Under the Supremacy Clause, domestic and international human rights laws bind private actors, as well as the

This procedure for preparation to rendition involved removing the individual's clothes, taking photographs of the naked individual, conducting a body cavity check, and inserting suppositories.

state of North Carolina. While it is true that the human rights violations against the five known men, who were subjected to the Aero extraordinary rendition flights and subsequently tortured, occurred outside the United States, the fact remains that Aero would not have been able to conduct these flights without state government resources and authorization. State-approved leases for “aircraft hangar” or “storage of aircraft” space provided the state-sanctioned means through

which Aero was able to conduct its “business.”²⁵

The North Carolina government contends that the actions of Aero and the extraordinary rendition and torture of the five individuals documented in the Rendition Report deals with a matter outside their jurisdiction and has stated that an inquiry into these illegal acts is a federal matter.²⁶ While it is true that the illegal actions of Aero should be dealt with on a federal level, it does not mean that an affirmation of federal accountability absolves local governments from their own responsibility to promote

²⁵ *Id.* at 8 (citations omitted).

²⁶ On January 19, 2012, the authors attended a meeting with Mark Davis, General Counsel to the Governor, at Governor Bev Perdue’s office in Raleigh, N.C. Two other individuals in attendance were David Elliot (Director, Victims and Citizens Services, North Carolina Department of Justice) and Steven Watt (Senior Staff Attorney, ACLU Human Rights Program) who represents Khaled El-Masri in *El-Masri v. Tenet*, one of the five documented victims in the Rendition Report. The meeting was held to discuss the contents of the Rendition Report and possible remedies.

human rights and abide by federal laws and international treaties. Because North Carolina has knowledge of these events, the state is required under international and federal law to investigate and to try to provide a remedy for these crimes against human nature. While Aero and North Carolina are separate entities, they are both subject to the same human rights laws, regardless of whether the laws are based on domestic law or international treaties, and both entities should both be held accountable. Aero must be held accountable by the state and federal government²⁷ for its violations against human dignity, international treaties, and federal law, and North Carolina must be held responsible for its passivity and acquiescence to allow these terrible events to occur. The following sections in this Policy Brief will provide the legal analysis for the case of why international human rights treaties and federal laws criminalizing cruel and degrading treatment and torture apply to both Aero and North Carolina.

I. International Human Rights Treaties and Principles

A. International Treaties and Declarations

Under international law, the United States and its political subdivisions have a legal obligation to refrain from the practice of extraordinary rendition. The three most important instruments that impose this obligation are the International Covenant on Civil and Political Rights (“ICCPR”),²⁸ the Convention Against Torture (“CAT”),²⁹ and the Universal Declaration on Human Rights (“UDHR”).³⁰ The following overview examines these instruments to the extent that they are applicable to political subdivisions of member states.

²⁷ While Aero should be held responsible at both the state and federal levels, this Policy Brief will focus on North Carolina’s legal obligations.

²⁸ International Covenant on Civil and Political Rights, *supra* note 2, at art. 7.

²⁹ Convention Against Torture, *supra* note 3, at preamble.

³⁰ Universal Declaration of Human Rights, *supra* note 4, at arts. 3–5.

1. The UDHR

Drafted in 1948, the UDHR established the theoretical framework not only for the ICCPR and CAT, but also for many other international treaties. Shortly after the creation of the United Nations, the international community created the UDHR in an effort to prevent crimes and abuses that came to light during World War II. The drafters of the UDHR incorporated various human rights norms, and the document became the source for the principles and fundamentals of customary international human rights law.³¹

With respect to extraordinary rendition, a number of the UDHR's articles are relevant. Article 3 of the UDHR guarantees the "right to life, liberty and security of

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person." With its use of capture, detention, and torture, the United States' program of extraordinary rendition clearly violates Article 3. Furthermore, Article 5 specifically prohibits torture and "cruel, inhuman or degrading treatment or punishment," the same language used in ICCPR Art. 7.³² Articles 6, 8, 10, and 11 of the UDHR consider due process violations. For example, Article 6 asserts that "everyone has

³¹ Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* 8 (Istituto Per Gli Studi Di Politica Internazionala (ISPI), Working Paper 7, 2006), available at http://www.ispionline.it/it/documents/wp_7_2006.pdf.

³² International Covenant on Civil and Political Rights, *supra* note 2, at art. 7; Universal Declaration of Human Rights, *supra* note 4, at art. 5.

the right to recognition everywhere as a person before the law” and Article 8 guarantees “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.”³³

The program of extraordinary rendition compromises these rights.³⁴ Once rendered to another country and detained, individuals are often denied access to the recognized judicial procedures of that country, as well as access to counsel or the aid of their Embassy.³⁵ Finally, the function of extraordinary rendition to deliver individuals to other countries for the purpose of interrogation and torture is clearly a violation of Article 14 of the UDHR, which guarantees “the right to seek and to enjoy in other countries asylum from persecution.”³⁶

It is important to note that the UDHR is not a binding treaty; rather, it is a resolution of the United Nations General assembly. The United States has created no mechanism by which the UDHR has binding effect on it or its subdivisions. Nonetheless, many legal scholars, human rights bodies, and

It is important to note that the UDHR is not a binding treaty; rather, it is a resolution of the United Nations General assembly. The United States has created no mechanism by which the UDHR has binding effect on it or its subdivisions. Nonetheless, many legal scholars, human rights bodies, and international jurists understand its provisions to reflect customary international law.

³³ Universal Declaration of Human Rights, *supra* note 4, at arts. 6, 8.

³⁴ David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 131 (2006).

³⁵ *Id.*

³⁶ *Id.* at 132.

international jurists understand its provisions to reflect customary international law.³⁷ To this effect, the Human Rights Commission of the U.N. Economic and Social Council has stated that “the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial” have reached the status of customary international law and thus “cannot be open to challenge by any State as they are indispensable for the functioning of an international community based on the rule of law and respect for human rights and fundamental freedoms.”³⁸ The UDHR, as a “common statement of mutual aspirations,”³⁹ represents a commitment to give effect to the espoused protections and foundational principles. At the International Conference on Human Rights held in Teheran in 1968, it was proclaimed that “[t]he Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.”⁴⁰

Despite the skepticism with which the United States views the authority of international law, its role as the lead drafter of the UDHR and statements by U.S. political leaders suggest that the United States understands and respects the authority of the Declaration. For example, the U.S. Department of State recognizes that “a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in

³⁷ MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., *RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE* 21 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>; Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1996).

³⁸ U.N. Econ. & Soc. Council, Comm. on Human Rights, *Preliminary Report by the Special Representative of the Commission, Mr. Andrés Aguilar*, ¶¶ 14–15, U.N. Doc. E/CN.4/1985/20 (Feb. 1, 1985), available at http://iranhrdc.org/files/pdf_en/UN_Reports/Andres%20Aguilar/E.CN.4.1885.20--Aguilar's%20Report%201985.pdf.

³⁹ *United Nations Priority: Universal Declaration of Human Rights*, UNITED NATIONS, www.un.org/rights/HRToday/declar.htm (last visited May 8, 2012).

⁴⁰ Int’l Conference on Human Rights, Apr. 22–May 13, 1968, *Final Act of the International Conference of Human Rights: Part II—Proclamation of Teheran*, ¶ 2, U.N. Doc. A/CONF.32/41, available at http://untreaty.un.org/cod/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf.

the Universal Declaration of Human Rights.”⁴¹ Similarly, Senator Dick Durbin has stated the following:

We take our treaty obligations seriously because it is who we are. The United States is a government of laws, not people, and we take our legal commitments very seriously. Complying with our treaty obligations also enhances our efforts to advocate for human rights around the world. The reality is that the Universal Declaration of Human Rights remains an unfulfilled promise for many, from rape victims in Eastern Congo and Bosnia, to child soldiers in Burma and Colombia, and from the oil fields in the Niger Delta and Ecuador to the internet cafes in Beijing and Havana. But with leadership from the United States, we can make universal human rights a reality—both close to home, and around the world.⁴²

2. The ICCPR

Using the UDHR as a primer of international human rights doctrine, the U.N. General assembly adopted and ratified the ICCPR in 1966; the ICCPR entered force in 1976. The ICCPR, the UDHR, and the International Covenant on Economic Social and Cultural Rights make up the International Bill of Human Rights. The ICCPR requires state parties to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth . . . in the present Covenant.”⁴³ Articles 2 and 7 of the ICCPR are relevant to extraordinary rendition. Article 7 of the ICCR states that “[no] one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁴ Though Article 7 makes no express mention of extraordinary rendition or

⁴¹ *Human Rights*, U.S. DEP’T OF STATE, www.state.gov/g/drl/hr/ (last visited May 3, 2012).

⁴² *The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the Subcomm. on Human Rights and the Law of the Comm. on the Judiciary U.S. Senate*, 111th Cong. 180 (2009) (Statement of Senator Richard J. Durbin), available at <http://www.gpo.gov/fdsys/search/pagedetails.action;jsessionid=F1D8T2PTJpQ2bH2PGX7M11LXmyJK80QGMsSPY2pSh5KfDx10B45z!728675249!-1958630928?sr=7&originalSearch=&st=doing+the+right+thing&ps=10&na=&se=&sb=re&timeFrame=&dateBrowse=&collection=&historical=false&granuleId=CHRG-111shrg57909&packageId=CHRG-111shrg57909>.

⁴³ International Covenant on Civil and Political Rights, *supra* note 2, at art. 3.

⁴⁴ *Id.* at art. 7.

comparable programs, the Human Rights Committee, the authoritative body on ICCPR interpretation, understands Article 7 to prohibit the extradition of individuals to other countries in order to be tortured or suffer cruel, inhuman, or degrading treatment.⁴⁵

The ICCPR requires state parties to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth . . . in the present Covenant.”

More specifically, the Committee interprets the ICCPR to require that state parties “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁴⁶ Article 2 requires signatories “to respect and to ensure to all individuals within its territory and subject to its

jurisdiction the rights recognized” by the Covenant.⁴⁷ This Article 2 language of territory and jurisdiction gives rise to the central question of ICCPR applicability to extraordinary rendition.⁴⁸

3. The CAT

The third international instrument relevant to North Carolina’s involvement in the federal government’s extraordinary rendition program is the Convention Against Torture

⁴⁵ THE COMM. ON INT’L HUMAN RIGHTS OF THE ASSOC. OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 55 (2004) [hereinafter TORTURE BY PROXY], available at <http://www.chrgj.org/docs/TortureByProxy.pdf>.

⁴⁶ U.N. Human Rights Comm., *General Comment No. 20*, ¶ 9, U.N. Doc. A/47/40 (1992).

⁴⁷ International Covenant on Civil and Political Rights, *supra* note 2, at art. 2; TORTURE BY PROXY, *supra* note 45, at 55.

⁴⁸ Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1363 (2007).

and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁴⁹ Ratified in 1984 and entered into force in 1987, CAT combines a declaration of international ethical norms and a system of legal obligations with respect to torture and other forms of cruel, inhuman, or degrading treatment.⁵⁰

The Preamble to CAT asserts that “recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “those rights derive from the inherent dignity of the human person.”⁵¹ The Preamble also mandates Member States “to promote universal respect for, and observance of, human rights and fundamental freedoms.”⁵² The ultimate goal

The Preamble to CAT asserts that “recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “those rights derive from the inherent dignity of the human person.” The Preamble also mandates Member States “to promote universal respect for, and observance of, human rights and fundamental freedoms.”

⁴⁹ *Treaty Collection*, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en. (last visited May 8, 2012).

⁵⁰ *Id.*

⁵¹ See generally *Convention Against Torture*, *supra* note 3 (quoting the Preamble to the Convention Against Torture).

⁵² *Id.*

of CAT is stated as follows: “Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”⁵³

The Preamble also makes clear that CAT coexists, and indeed, relies upon the following declarations and treaties: The U.N. Charter, the UDHR, the ICCPR, and the Declaration

In addition to its expansive Preamble, CAT does the following: defines the acts it forbids; creates affirmative obligations for legislative reforms; creates an administrative and dispute resolution structure to support the Treaty; and creates an oversight committee to ensure its implementation.

on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As an expansive network of protections that are due to every individual, CAT and these other treaties and declarations affirm that CAT does not operate in isolation. In other words, should a question as to whether or not a particular practice falls within the ambit of CAT arise, that practice might still be forbidden by CAT by reference to other international agreements.

In addition to its expansive Preamble, CAT does the following: defines the acts it forbids; creates affirmative obligations for legislative reforms; creates an administrative and dispute resolution structure to support the Treaty; and creates an oversight committee to ensure its implementation. The definition of “torture” in Part 1, Article 1 of CAT has three aspects: (1) a triggering act against an individual, (2) performed for particular

⁵³ *Id.*

purpose, (3) performed by a particular individual. A triggering act is “defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted” on a subject for particular purposes.⁵⁴ The Treaty gives four examples of when the triggering act would certainly constitute torture: when “for such purposes as” (1) obtaining “information or a confession” from the subject or a third party, (2) punishing the suspect or a third party for an act he is known or suspected to have committed, (3) “intimidating or coercing” the subject or a third person, or (4) “for any reason based on discrimination of any kind.”⁵⁵ Additionally, the torturous treatment must be inflicted by a public official or person acting in an official capacity, or must be done by the consent or acquiescence of such a person.

Part I of CAT also lays out the basic requirements upon Member States in two ways: by prohibiting three specific acts—torture (Article 2), refoulement (Article 3), and cruel, inhuman and degrading treatment (Article 16)—and also by defining what legislative reform States must undertake to bring their criminal legal systems into compliance.⁵⁶ Article 2 requires that a member state “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”⁵⁷ Article 2 is non-derogable: it cannot be limited, annulled or destroyed by any contingency, excuse, or defense.⁵⁸ Article 2 asserts that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political

⁵⁴ *Id.* at art. 1.

⁵⁵ *Id.*

⁵⁶ *Id.* at arts. 2–3, 16.

⁵⁷ *Id.* at art. 2(1).

⁵⁸ Jillian Button, *Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 FLA. J. INT’L L. 531, 546 (2007).

instability or any other public emergency, may be invoked as a justification of torture.”⁵⁹

CAT also destroys any chain-of-command excuse by stating that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”⁶⁰

Article 3 provides a non-refoulement obligation. It states 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.”⁶¹ According to the Committee on Torture’s analysis, “substantial grounds” does not require that torture is “highly probable” in the receiving country, but requires more than a “mere theory or suspicion” of possible torture.⁶² Furthermore, the Committee believes that Article 3 prohibits both “direct and indirect removal . . . meaning that a state cannot remove a person to a third country when it knows he would be subsequently removed to a country where he would likely face torture.”⁶³ In determining the existence of substantial grounds, party states “shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁶⁴ The Committee on Torture explains that “substantial grounds” does not require that torture is “highly probable” in the receiving country, but requires more than a “mere theory or suspicion” that someone

⁵⁹ Convention Against Torture, *supra* note 3, at art. 2(2).

⁶⁰ *Id.* at art. 2(3).

⁶¹ *Id.* at art. 3.

⁶² Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 321 (2006) (citing the U.N. Comm. Against Torture, Report of the Committee Against Torture, Annex IX, U.N. Doc. A/53/44 (Sept. 16, 1998)).

⁶³ MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 4 (2004) (citing the U.N. Office of the High Commissioner for Human Rights, Committee Against Torture, Implementation of Article 3 of the Convention in the Context of Article 22, CAT General Comment 1, at ¶ 2 (Nov. 21, 1997)), available at <http://fpc.state.gov/documents/organization/31351.pdf>.

⁶⁴ Convention Against Torture, *supra* note 3, at art. 3.

will be tortured.⁶⁵ The non-refoulement obligation is also non-derogable.⁶⁶ Article 2 of CAT expressly states that “no extraordinary circumstances whatsoever” can justify torture or rendition to torture.⁶⁷ Likewise, an “an order from a superior officer or a public authority . . . [cannot] be invoked as a justification of torture.”⁶⁸ Also, the UN Special Rapporteur on Torture has said that the ban on refoulement is non-derogable as “an inherent part of the overall absolute and imperative nature of the prohibition of torture and forms of ill-treatment.”⁶⁹

Article 16 requires a member state to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”⁷⁰ Article 16 parallels the definition of torture in Article 1, and requires states to prevent the acts when “committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁷¹ Article 16, therefore, clearly implicates North Carolina’s political subdivisions as violators of CAT.

CAT also describes a support structure of laws and practices each party state must take to bring its government in compliance with CAT. If needed, the party states must pass laws or administrative regulations to ensure that the procedures are being followed. To begin, each Member State is required to bring its system of laws into compliance with

⁶⁵ Sadat, *supra* note 62, at 321 (citing the U.N. Comm. Against Torture, Report of the Committee Against Torture, Annex IX, U.N. Doc. A/53/44 (Sept. 16, 1998)).

⁶⁶ Button, *supra* note 58, at 546.

⁶⁷ Convention Against Torture, *supra* note 3, at art. 2(2).

⁶⁸ *Id.* at art. 2(3).

⁶⁹ Button, *supra* note 58, at 548 (quoting the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 28, delivered to the Security Council and the General Assembly, U.N. Doc. A/59/324 (Aug. 23, 2004)).

⁷⁰ Convention Against Torture, *supra* note 3, at art. 16.

⁷¹ *Id.* at art. 16(1).

its obligation to prevent torture. The legislative reform is based on the requirement to criminalize “all acts of torture,” “an attempt to commit torture,” and “an act by any person which constitutes complicity or participation in torture.”⁷² The state must set “appropriate penalties which take into account [the] grave nature” of the crimes.⁷³ To ensure its ability to prosecute for torture, the state must take all necessary measures “to establish its jurisdiction” over torture, attempted torture, or complicity to torture in three cases: (1) when the acts “are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;” (2) “[w]hen the alleged offender is a national of that State;” and (3) “[w]hen the victim was a national of that State if that State considers it appropriate.”⁷⁴ Furthermore, any statement made as a result of torture may not be invoked as evidence against the victim of the alleged torture.⁷⁵

With respect to both torture and cruel, inhuman and degrading treatment, state parties are required: to train any civil or military officer who might have a role in custody or interrogation about these offenses;⁷⁶ to continue to review detention and interrogation methods “in any territory under its jurisdiction” to prevent these offenses;⁷⁷ to ensure prompt and impartial investigations where there is reasonable ground to believe such offenses have been committed “in any territory under its jurisdiction;”⁷⁸ and ensure that a

⁷² *Id.* at art. 4(1).

⁷³ *Id.* at art. 4(2).

⁷⁴ *Id.* at art. 5(2).

⁷⁵ *Id.* at art. 15.

⁷⁶ *Id.* at art. 10.

⁷⁷ *Id.* at art. 11.

⁷⁸ *Id.* at art. 12.

victim of such offenses has a right to complain and will have his case promptly and impartially heard.⁷⁹

B. Self-Executing and Non-Self-Executing Treaties

As discussed above, the UDHR is not a treaty, but rather a declaration. Therefore, signatories have no concrete legal obligation to abide by its provisions. However, it is widely accepted that the UDHR represents customary international law, a classification

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that, nonetheless, imposes upon member states a duty to respect and enforce its contents. Most other international agreements, however, can be classified as either self-executing or non-self-executing. The difference between these two types of treaties relates to the steps—if any—that party states must take in order for the treaty to become law at the national level. Self-executing treaties become law at the national level once a state signs onto the agreement. On the other hand, non-self-executing treaties become law after the party state implements laws at the national level that enforce the

⁷⁹ *Id.* at art. 13.

provisions of the treaty.⁸⁰ The ICCPR and CAT are both non-self-executing treaties. In its implementation of both the ICCPR and CAT, the United States has taken—at best—a piecemeal approach, codifying only certain portions of each agreement. Despite its efforts to limit the authority of these international laws, the United States is still bound by them and had no legal basis for limiting their scope.

1. Implementation of the ICCPR in the United States

The United States has taken no steps at the national level to codify the content of the ICCPR. This inaction in itself is a violation of the Vienna Convention on the Law of Treaties, which says that a party state has an obligation “to refrain from acts which would defeat the object and purpose of a treaty.”⁸¹ Even though the United States is not a party to the Vienna Convention, it has accepted the Vienna Convention as customary international law.⁸² Therefore, the United States has not met its duties to implement the ICCPR under international law and international customary law.

⁸⁰ *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (defining a “self-executing” treaty as one for which “no domestic legislation is required to give [it] the force of law in the United States”).

⁸¹ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁸² U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States parties Due in 2003—United States of America*, U.N. Doc. CCPR/C/USA/Q/3/Annex 1 (Oct. 21, 2005) (containing the second and third periodic reports of the United States), available at <http://www.unhcr.org/refworld/publisher,HRC,USA,441699ad4,0.html>.

Furthermore, when the United States signed onto the ICCPR, it did so with reservations, understandings, and declarations, also known as RUDs. Most importantly, the United States conditionally signed the ICCPR, noting that Article 7, discussed above, would only apply “to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”⁸³ The effect of this RUD is that the United States has tailored its obligations under Article 7 to its own pre-ICCPR domestic law. In other words, the United States has refused to accept the international norms that inform Article 7. While the Vienna Convention allows for RUDs to a certain degree, it prohibits RUDs that contradict a treaty’s object and purpose.⁸⁴ The effect is that the United States, because of the mandates of the Vienna Convention, is still bound by the full scope of the ICCPR.

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Furthermore, the United States undermines its already weak argument in favor of RUDs by complying with the United Nation’s reporting requirements under the ICCPR.

⁸³ U.S. Reservations, Declarations, and Understandings, ICCPR, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

⁸⁴ Vienna Convention, *supra* note 81, at art. 19.

For example, in the *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* (“Fourth Periodic Report”), the U.S. Department of State acknowledged the breadth of obligations required by the ICCPR. In the Fourth Periodic Report, the Department of State noted the importance of treaty reporting, saying that it was a means by

which the Government of the United States can inform its citizens and the international community of its efforts to ensure the implementation of those obligations it has assumed, while at the same time holding itself to the public scrutiny of the international community and civil society. As Secretary of State Hillary Clinton has stated, “Human rights are universal, but their experience is local. This is why we are committed to holding everyone to the same standard, including ourselves.” In implementing its treaty obligation under ICCPR Article 40, the United States has taken this opportunity to engage in a process of stock-taking and self-examination. The United States hopes to use this process to improve its human rights performance. Thus, this report is not an end in itself, but an important tool in the continuing development of practical and effective human rights strategies by the U.S. Government. As President Obama has stated, “Despite the real gains that we’ve made, there are still laws to change and there are still hearts to open.”⁸⁵

2. Implementation of CAT in the United States

The United States has taken affirmative steps to implement CAT at the national level. Primarily, this was done through the Federal Torture Statute.⁸⁶ While the Senate largely found that new laws were unnecessary due to the fact the U.S. law already had

⁸⁵ *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* ¶ 1 (Dec. 30, 2011) [hereinafter *Fourth Periodic Report*], available at http://www.humanrights.gov/wp-content/uploads/2011/12/ICCPR_Fourth_Periodic_Report.pdf.

⁸⁶ 18 U.S.C. § 2340A (2006).

prohibited torture, the Federal Torture Statute was enacted to expand U.S. jurisdiction over torture cases to those crimes that were committed outside of the United States.

The U.S. Senate declared that it did not need to enact new criminal provisions to criminalize torture because “it was presumed that such acts would ‘be covered by existing applicable federal and state statutes,’ such as those criminalizing assault, manslaughter, and murder.”⁸⁷ However, the United States enacted the Federal Torture Statute (“FTS”) to comply with Article 5 and Article 6 requirements to establish jurisdiction over acts of torture committed outside the United States and to provide appropriate punishments for the crime.

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The FTS begins by defining torture, drawing its definition directly from Article 1,⁸⁸ and then criminalizes torture, attempted torture, and conspiracy to commit torture.⁸⁹ If anyone commits or attempts to commit torture outside the United States, that individual can be fined and/or punished for up to 20 years, and can face life imprisonment or death

⁸⁷ MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., *The U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques* 7 (2009), available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf>.

⁸⁸ Weissbrodt & Bergquist, *supra* note 34, at 604.

⁸⁹ 18 U.S.C. § 2340A (2006).

if the victim dies from the torture.⁹⁰ The FTS establishes jurisdiction over torture committed outside the United States where: “(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.”⁹¹ “The Senate Report strongly suggests that the Senate intended the geographic scope of jurisdiction to be all-encompassing.”⁹² Importantly, the FTS also leaves room for enforcement by individual states, declaring that “[n]othing in this chapter shall be construed as precluding the application of State or local laws on the same subject.”⁹³ The United States believes that the statute “[does] not appear to preclude the United States from removing a person to a country where he may suffer injury not rising to the level of torture.”⁹⁴ To date, the FTS has never been used to prosecute any individual for torture. However, since the FTS clearly gives U.S. criminal courts the ability to prosecute even the conspiracy to commit torture when the alleged offender is present within the United States, a U.S. official who took any part in torture occurring overseas could be brought to court using this statute

In light of its signing of CAT, the United States also passed the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).⁹⁵ FARRA has two main provisions; it accepts Article 3 as a policy of the United States, and directs government agencies to make regulations to uphold this policy subject to the Senate’s reservations to CAT.

FARRA states that:

⁹⁰ § 2340A(a),(c). A conspirator faces the same punishments as the principal actors, but cannot be put to death. *Id.*

⁹¹ § 2340A(b).

⁹² Weissbrodt & Bergquist, *supra* note 34, at 604.

⁹³ § 2340B.

⁹⁴ GARCIA, *supra* note 63, at 17.

⁹⁵ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681–822 (1998) (codified at 8 U.S.C. § 1231 note (2006)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.⁹⁶

First, agreements like the ICCPR, CAT, and UDHR set international human rights norms and standards against which member states' actions should be judged. Second, these treaties and declarations give signatories a mandate; that is, they require member states not only to abide by international human rights standards, but also to implement legislation and policies at the national and subnational levels to ensure the enforcement of such norms and, in the event of a violation, to ensure accountability.

So far, only the Departments of Homeland

Security, Justice, and State have passed regulations to comply with FARRA.

Significantly, the Department of Defense, the FBI, and the CIA have not passed any such regulations.⁹⁷ This policy is mainly used to prevent removal where undocumented residents claim asylum or refugee status.

Others, including United States courts, have interpreted FARRA as being limited to the removal setting so that it would not apply to undocumented residents who assert fear of extraordinary rendition as the basis for an asylum claim.⁹⁸ However, FARRA is still relevant here as an explicit acceptance of the non-refoulement policy. Furthermore, no

statute or regulation has excluded the departments and agencies who manage the

⁹⁶ *Id.* at § 2242(a).

⁹⁷ Satterthwaite, *supra* note 48, at 1377.

⁹⁸ Weissbrodt & Bergquist, *supra* note 34, at 608.

extraordinary rendition program from their obligations to implement procedures to comply with FARRA.

The international principles and treaties outlined above have two purposes. First, agreements like the ICCPR, CAT, and UDHR set international human rights norms and standards against which member states' actions should be judged. Second, these treaties and declarations give signatories a mandate; that is, they require member states not only to abide by international human rights standards, but also to implement legislation and policies at the national and subnational levels to ensure the enforcement of such norms and, in the event of a violation, to ensure accountability. Despite the hesitancy and lack of commitment with which the United States has signed onto these agreements, the UDHR, ICCPR, and CAT apply fully to the United States and its political subdivisions, including North Carolina.

II. Why Do These Principles Apply to North Carolina; its Subdivisions; and Aero?: Addressing International Law and the U.S. Federal System

A. International Law and the U.S. Federal System

The following section discusses the intersection of international law, U.S. federalism, and federal statutes as a way to understand why the international legal principles described above are binding on local governments and entities. The U.S. Constitution provides the federal government with the power to make and adopt treaties.⁹⁹ Although states and local governments do not have the same power to adopt treaties, localities *do* have the power, through legislation, to support international human

⁹⁹ U.S. CONST. art. II, §2, cl. 2 (providing that the President “shall have Power, by and with the Advice and Consent of the Senate to make treaties, provided two thirds of the Senators present concur”).

rights within their local laws.¹⁰⁰ Although a majority of the discussion will focus on North Carolina’s legal obligations under international and federal law, this section of the Policy Brief will also address Aero’s legal obligations under international and federal law.

1. Role of the Federal U.S. Supremacy Clause

This section answers the question of how the Supremacy Clause requires North Carolina’s state, local officials and administrators, and Aero to submit to international treaties. The second clause of the Constitution, commonly known as the “Supremacy Clause,” states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁰¹ Through the Supremacy Clause, ratified treaties become “equivalent in legal stature to enacted federal statutes.”¹⁰² Therefore, international treaties bind state constitutions, state laws, and state courts (“the Judges in every state”). More importantly, the Supreme Court has held that the Supremacy Clause also binds state and local officials.¹⁰³

Theoretically, this means that the state of North Carolina, its subdivisions, and the local officials and administrators who provide resources and permits for Aero are constitutionally bound by international human rights treaties and instruments, including

¹⁰⁰ The Constitution prevents state governments from making treaties without Congressional consent. U.S. CONST. art. I, §10, cl. 3.

¹⁰¹ U.S. CONST. art. VI, cl. 2.

¹⁰² U.N. Comm. Against Torture, *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum, United States of America*, ¶ 55, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

¹⁰³ For one of the more recent cases where the Supreme Court held that state officials are bound by the Supremacy Clause, see *Missouri v. Jenkins*, 495 U.S. 33, 56–57 (1990).

the Convention Against Torture (“CAT”), International Covenant on Civil and Political Rights (“ICCPR”), and Universal Declaration of Human Rights (“UDHR”).

The CAT is particularly relevant here. Under CAT, the United States, as a party to the treaty, is “require[d] [to] take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction and that no state that is a party to it may expel, return, *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.*”¹⁰⁴ Therefore, it does not matter that the individuals transported by Aero were

not tortured and subject to cruel treatment

within a U.S. state’s borders, but rather, the

United States has a responsibility, if feasible,

to ensure that no state, including one of its

own, extradites a person to another country

where the detainee could be tortured.

Because international treaties are binding to

the United States and its individual states

under the Supremacy Clause, it follows that

North Carolina has a legal responsibility to ensure that proper measures are taken to

prevent acts of torture, whether or not those acts actually occurred or are occurring within

its borders.

Through the Supremacy Clause, ratified treaties become “equivalent in legal stature to enacted federal statutes.”

¹⁰⁴ Richard P. Shafer, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385, 285 (2003) (italics added).

The CAT specifically notes that states must take “administrative” measures to prevent torture within their jurisdictions. While North Carolina may not be able to administratively or judicially control what goes on outside its borders, it has a responsibility under CAT to accomplish what it can to prevent acts of torture.¹⁰⁵ In this specific situation, there are several actions that North Carolina can take to fulfill its federal obligations under CAT. Now that North Carolina’s administrators and legal advisors have been notified of Aero’s illegal activity, the state and its political subdivisions should be required to revoke or at least refuse to renew Aero’s flying permits, licenses, and leases.¹⁰⁶

As the Rendition Report specifically concludes: “Aero Contractors, as a North Carolina-based corporation . . . could not have carried out its role in extraordinary rendition without the support of the state and its political subdivisions, as well as private businesses in North Carolina.”¹⁰⁷ Even if North Carolina was not aware of the type of business operations it had licensed Aero to conduct when the company first established its presence in the state, state and local officials now know the truth, and have been informed of the illegal nature of the flights departing from Johnston County Airport. There is already enough basic information available to the North Carolina government for it to investigate Aero’s potential crimes.¹⁰⁸

¹⁰⁵ See *infra* Part V(B)(3).

¹⁰⁶ In fact, the space leased to Aero by the Johnston County Airport Authority has a clause that says that the “Lessee shall make no unlawful use of said space If so, this lease may be terminated by Lessor.” WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1, at 8.

¹⁰⁷ *Id.* at 27.

¹⁰⁸ PAULA KWESKIN, TAIYYABA QURESHI & MARIANNE TWU, UNIV. OF N.C. SCH. OF LAW, IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, THE INTERNATIONAL LEGAL LANDSCAPE OF EXTRAORDINARY RENDITION: U.S. OBLIGATIONS UNDER ICCPR, CAT, AND THE NUREMBERG PRINCIPLES 58 (2010).

Of course, the Supremacy Clause does not just bind government entities. As a private entity, Aero is also bound to follow international treaties because of the

The Supremacy Clause specifically states that international treaties are the “supreme Law of the Land.”

Supremacy Clause. The Supremacy Clause specifically states that international treaties are the “supreme Law of the Land.”¹⁰⁹ This means that all of the private individuals and entities that are subject to the U.S. Constitution and U.S. federal laws and regulations must also adhere to the laws created through the ratification of

international treaties. Aero, as a private entity and a government contractor, is similarly responsible for the crimes against human rights that the company and its employees committed in violation of international human rights treaties, and effectively, federal law.

B. Federal Law

1. Federal Statutes

As already discussed, one does not even have to go so far as to look at international treaties to determine what human rights laws bind the states. While it is true that international treaties are considered federal law, the United States has also enacted domestic federal laws that denounce the violation of human rights, regardless of the physical or geographical location of the torture or the detainee’s nationality. Moreover, one does not even have to look at a federal statute to know that torture is illegal—the U.S. Constitution already denounces torture. The Eighth Amendment of the U.S. Constitution says “[e]xcessive bail shall not be required, nor excessive fines imposed, nor

¹⁰⁹ U.S. CONST. art. VI, cl. 2.

cruel and unusual punishments inflicted.”¹¹⁰ On the most basic level, the founding fathers of the United States espoused these moral ideals, and inscribed them into the Constitution to ensure their fulfillment. This is the moral compass that guides the legislation of the federal statutes prohibiting torture and the cruel and degrading treatment discussed below.¹¹¹

a. Detainee Treatment Act of 2005

Several U.S. statutes prohibit the use of torture, specifically “cruel, inhuman, or degrading treatment.”¹¹² Section 1003(a) of the Detainee Treatment Act of 2005 (“DTA”) states 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.”¹¹³ The DTA continues to state that “[n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.”¹¹⁴

According to the Rendition Report, U.S. agents and “private actors acting on behalf of the CIA” captured and interrogated “high-value detainees” at remote

¹¹⁰ U.S. CONST. amend. VIII (emphasis added).

¹¹¹ Overall, the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution have all been stipulated by the United States as the manner to which it is bound to the Convention Against Torture (CAT). U.N. CCPR Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Initial Reports of States Due in 1993 (Addendum)—United States of America*, ¶ 138, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) [hereinafter *First Periodic Report*].

¹¹² See, e.g., Detainee Treatment Act of 2005, § 1003(a) (codified at 42 U.S.C. § 2000dd (2006)).

¹¹³ *Id.* “Cruel, inhuman, or degrading treatment or punishment” is defined as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” § 1003(d) (codified at 42 U.S.C. § 2000dd(d) (2006)).

¹¹⁴ § 1003(b).

international sites known as “black sites.”¹¹⁵ These detainees were transported to these “black sites” via Aero-operated planes.¹¹⁶ Under the DTA, government actors are prohibited from torturing such detainees, but in fact, the Aero-transported detainees *were* subjected to this type of cruel and inhuman treatment.¹¹⁷ The fact that the detainees were not U.S. citizens or the fact that the black sites were on international soil does not matter. The DTA specifically states that the Act applies “regardless of nationality or physical location.”¹¹⁸ Under the Supremacy Clause, North Carolina is bound to the DTA, because the DTA is federal law. Therefore, North Carolina is required to uphold the rules under the DTA, which prohibits “cruel, inhuman, or degrading treatment or punishment under this section,” regardless of physical or geographic location.¹¹⁹ By refusing to publicly acknowledge the suffering of the five known victims of the Aero flights, or taking affirmative steps to investigate these acts, North Carolina is violating the DTA.

¹¹⁵ WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1 at 3, 5.

¹¹⁶ *Id.* at 5.

¹¹⁷ *Id.* at 6. The detainees were subjected to “forced nudity, continuous exposure to ‘white noise/loud sounds’ and light, sleep deprivation, ‘dietary manipulation,’ waterboarding, and psychological and physical ‘corrective techniques’ such as attention grasp, walling, facial hold, facial slap, abdominal slap, wall standing, stress positions, and water dousing.” *Id.* at 6 (quoting Human Rights Council Report: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism [A/HRC/13/42] p. 3, Jan. 6, 2010, *available at* http://www.humansecuritygateway.com/documents/HRC_AHRC1342_JointStudy_SecretDetentionInTheContextOfCounteringTerrorism.pdf).

¹¹⁸ Detainee Treatment Act of 2005, § 1003(a) (codified at 42 U.S.C. § 2000dd (2006)).

¹¹⁹ § 1003(b).

Aero must also be held responsible for violating the DTA. By knowingly committing acts of “cruel, inhuman, or degrading treatment,”¹²⁰ such as tying the innocent, blindfolded victims to the floor of the Aero planes and forcing the individuals to wear diapers, Aero has violated the DTA, as well as many other federal statutes, which will be discussed later in this section.¹²¹ As an essential actor in the CIA-operated extraordinary rendition, Aero and its employees have knowingly and willfully violated federal law and they must be held responsible for their crimes.

Therefore, North Carolina is required to uphold the rules under the DTA, which prohibits “cruel, inhuman, or degrading treatment or punishment under this section,” regardless of physical or geographic location.

b. Federal Torture Statute: 18 U.S.C. § 2340A

The most direct anti-torture statute is 18 U.S.C. § 2340A, which makes torture committed outside of the United States a punishable crime. The Torture Convention Implementation Act, known as the “Federal Torture Statute,” was codified at 18 U.S.C. § 2340A, and gives effect to the United States’ obligations under CAT. 18 U.S.C. § 2340A(a) of the statute says:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this

¹²⁰ See, e.g., § 1003(a).

¹²¹ See *infra* notes 122–226 and accompanying text.

subsection, shall be punished by death or imprisoned for any term of years or for life.¹²²

Subsection (b) of the statute permits jurisdiction over any offender who is a “national of the United States” or is “present in the United States, irrespective of the nationality of the victim or alleged offender” who has committed any of the crimes prohibited in subsection (a).¹²³ And lastly, subsection (c) subjects anyone who conspires to commit the offenses listed under 18 U.S.C. § 2340A to the same penalties listed in subsection (a), except for the penalty of death.¹²⁴

Under the Supremacy Clause, 18 U.S.C. § 2340A is binding on North Carolina. Subsection (a) makes it very clear that it does not matter that the acts of torture against the five men occurred outside the United States. The statute makes it clear that as long as the perpetrators of the torture are present in the United States, the United States has jurisdiction to prosecute the individual(s) for their crimes.

The law stipulated in 18 U.S.C. § 2340A means that Aero has also committed a domestic federal crime, regardless of the fact that the torture, which was only made possible by Aero’s assistance, occurred overseas. Since Aero, and the individuals working for Aero, are within the United States, North Carolina has the proper jurisdiction to adjudicate these individuals. Under the Supremacy Clause, North Carolina is required to uphold 18 U.S.C. § 2340A. North Carolina cannot properly uphold this federal statute and abide by the Constitution if it does not investigate the crimes committed by Aero.

¹²² 18 U.S.C. § 2340A(a) (2006).

¹²³ § 2340A(b).

¹²⁴ § 2340A(c).

Most importantly, the statute implicates Aero for its acts of conspiracy that

This means that Aero, as a party who has conspired to commit torturous offenses, has blatantly violated 18 U.S.C. § 2340A and should be held responsible for its crimes.

allowed the five individuals to be tortured. The methods by which the five men were transported—stripped naked, body cavity checks conducted, forced to wear diapers, blindfolded, etc.—is cruel and degrading, and is torture.

Aero assisted in these acts and conspired with the human rights abusers to allow these crimes to occur. 18 U.S.C. § 2340A says that “anyone who conspires to commit the offenses under 18 U.S.C. § 2340A” is subject to its penalties. This

means that Aero, as a party who has conspired to commit torturous offenses, has blatantly violated 18 U.S.C. § 2340A and should be held responsible.

c. Other Federal Statutes

U.S. domestic laws strictly prohibit torture at both the federal and state levels, regardless of whether the torture is performed within or outside of the United States.¹²⁵ One of the United States’ oldest statutes is the Alien Tort Statute, 28 U.S.C. § 1350.¹²⁶ Passed in 1789, the Alien Tort Statute gives U.S. federal district courts original jurisdiction “of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.”¹²⁷ The U.S. Supreme Court noted in *Sosa*

¹²⁵ See *First Period Report*, *supra* note 111, at ¶ 149–87.

¹²⁶ Judiciary Act of 1789, Alien Tort Statute, 28 U.S.C. § 1350 (2006).

¹²⁷ *Id.*

v. Alvarez-Machain,¹²⁸ that the Alien Tort Statute allows federal courts to “hear claims in a very limited category defined by the law of nations and recognized at common law.”¹²⁹ In a Second Circuit case called *Filartiga v. Pena-Irala*,¹³⁰ the United States included in its amicus curiae brief a statement that said that the Alien Tort Statute could be used to enforce “an individual’s fundamental human rights” in domestic courts, and acknowledged that acts of torture are “actionable under the Alien Tort Statute.”¹³¹ As a result of these recent court decisions, violations against human rights and torture can be considered a “tort committed in violation of the law of nations.” This will be discussed in more detail later in Part II(B)(2)(ii).

Under the same concept as the Alien Tort Statute, the Torture Victim Protection Act (“TVPA”),¹³² which was enacted in 1992, creates a cause of action for any individuals (regardless of citizenship or nationality) in federal court against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation” that has committed a crime of torture against the plaintiff.¹³³ On April 18, 2012, the Supreme Court ruled in *Mohamad v. Palestinian Authority*,¹³⁴ that an organization is not an “individual” for purposes of the TVPA.¹³⁵ *Mohamad* was a result of a lawsuit filed by the family of Azzam Rahim, a U.S. citizen, who was taken prisoner by PLO agents in Palestinian territory.¹³⁶ Under PLO custody, Rahim was alleged, by his family

¹²⁸ 542 U.S. 692 (2004).

¹²⁹ *Id.* at 692.

¹³⁰ 630 F.2d 876 (2d Cir. 1980).

¹³¹ *Fourth Periodic Report*, *supra* note 85, at ¶ 185.

¹³² 28 U.S.C. § 1350, note § 2(a) (2006).

¹³³ *Id.*; *see also Fourth Periodic Report*, *supra* note 85, at ¶ 186 (discussing the Torture Victim Protection Act).

¹³⁴ *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011), *rev’d sub nom.* *Mohamad v. Palestinian Authority*, No. 11-88 (U.S. Sup. Ct. Oct. 18, 2011).

¹³⁵ *Id.* at 608.

¹³⁶ *Id.* at 606.

and other survivors of the kidnapping, to have been tortured and killed.¹³⁷ There is a ten-year statute of limitations on the TVPA.¹³⁸ This statute will be further discussed in Part II(B)(2)(ii).

In 1996, Congress passed the War Crimes Act (“WCA”).¹³⁹ The WCA criminalizes war crimes such as torture (including “severe physical or mental pain or suffering”), cruel or inhuman treatment, intentionally causing serious bodily injury, and etc., regardless of whether the acts have been committed inside or outside the United States.¹⁴⁰ The statute defines war crimes as “a grave breach if in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party,”¹⁴¹ which include the crimes listed in the previous sentence.

The WCA criminalizes war crimes such as torture (including “severe physical or mental pain or suffering”), cruel or inhuman treatment, intentionally causing serious bodily injury, and etc., regardless of whether the acts have been committed inside or outside the United States.

¹³⁷ *Id.* at 605–06

¹³⁸ 28 U.S.C. § 1350, note § 2(c) (2006).

¹³⁹ 18 U.S.C. § 2441 (2006).

¹⁴⁰ § 2441(a), § 2441(d)(1)(A)–(I).

¹⁴¹ § 2441(c)(1).

In 1998, Congress also passed the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”).¹⁴² FARRA accepts Article 3 of CAT as official U.S. policy and directs government agencies to uphold this policy.¹⁴³

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.¹⁴⁴

The following government agencies have passed FARRA regulations: Department of Homeland Security, Department of Justice, and Department of State. However, as noted above, the following agencies have not created regulations that comply with FARRA: Department of Defense, the FBI, and the CIA.¹⁴⁵

In 2009, the Military Commissions Act of 2009 provided for revisions to the military commission procedures. The revisions now prohibit the “admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment in military commission proceedings, except as against a person accused of torture or such treatment as evidence that the statement was made.”¹⁴⁶ By cutting off the ability to use these “fruits of torture and interrogation,” the United States is again sending a message to the states that torture should not be allowed, and any illusions that torture can be politically or militarily beneficial have been publicly denounced by the government.

¹⁴² Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681–822 (1998) (codified at 8 U.S.C. § 1231 note (2006)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

¹⁴³ *See supra* note 96 and accompanying text.

¹⁴⁴ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681–822 (1998) (codified at 8 U.S.C. § 1231 note (2006)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

¹⁴⁵ Satterthwaite, *supra* note 48, at 1377.

¹⁴⁶ 10 U.S.C. § 948r (2006); *Fourth Periodic Report*, *supra* note 85, at ¶ 177.

d. Proposed Legislation

There have also been recent developments in government actions and federal legislation regarding the human rights conduct of private contractors. The Civilian Extraterritorial Jurisdiction Act (“CEJA”), which was catalyzed by the 2007 Blackwater tragedy in Baghdad, Iraq,¹⁴⁷ is a piece of legislation that is currently being considered.¹⁴⁸ This statute would allow the United States to “prosecute government contractors and employees” for specific crimes committed outside the United States.¹⁴⁹ Specifically, the goals of the CEJA are to:

[e]xpand criminal jurisdiction over certain serious crimes committed by United States employees and contractors overseas without impacting the conduct of U.S. intelligence agencies abroad; direct the Justice Department to dedicate resources to investigate, arrest and prosecute contractors and employees who commit serious crimes overseas; [and] [r]equire the Attorney General to report annually to Congress about the offenses prosecuted under the statute and the use of new investigative resources.¹⁵⁰

The congressional passage of CEJA would be most relevant and applicable to Aero. This legislation, if passed, would allow the prosecution of government contractors, such as

¹⁴⁷ Five guards employed by Blackwater, a government contractor working in Baghdad, Iraq, were accused of shooting seventeen unarmed Iraqi civilians in September 2007. *Iraq to Blackwater: Get Out*, CBSNEWS (Feb. 10, 2010, 4:26 PM), http://www.cbsnews.com/2100-202_162-6194703.html. The charges were later dismissed by a federal judge, much to the disappointment of the U.S. Justice Department, who had hoped that the Blackwater guards would be prosecuted to the full extent. Coincidentally, Blackwater is based in North Carolina. Matt Apuzzo, *Blackwater Shooting Charges All Dismissed by Judge*, HUFFINGTON POST (Dec. 31, 2009, 9:20 PM), http://www.huffingtonpost.com/2009/12/31/blackwater-shooting-charg_n_408604.html. CEJA was introduced to avoid these sorts of situations, and to create “clear jurisdiction and trained investigative and prosecutorial task forces able to hold wrongdoers accountable.” *Press Release, Senate Judiciary Committee Reports Leahy-Authored Civilian Extraterritorial Jurisdiction Act*, PATRICK LEAHY (June 23, 2011), http://www.leahy.senate.gov/press/press_releases/release/?id=c769b4ca-4c2f-4d9c-a493-72ff207cb023.

¹⁴⁸ *Press Release, supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Aero, for committing any of the crimes listed within the statute.¹⁵¹ The most pertinent crimes listed in the CEJA that would apply to Aero would be kidnapping, sexual abuse, and torture.¹⁵² The CEJA also outlines the responsibility of the U.S. government in investigating and prosecuting government contractors who have committed such crimes overseas.¹⁵³

2. Case Law

a. Supreme Court Jurisprudence: International Treaties and States' Rights

After laying out the structure of the U.S federal system in the beginning of Part II, it is important to see how the courts have applied the constitutional principle of the Supremacy Clause. The Supreme Court has addressed the issue of enforcement of international treaties at the state level, while being cognizant of states' rights. There is a constant tension between Congress's powers conferred through the Constitution, such as the Commerce Clause;¹⁵⁴ Necessary and Proper Clause;¹⁵⁵ and the Supremacy Clause,¹⁵⁶ and federalism-based state powers conferred through the Tenth Amendment.¹⁵⁷ The following section illustrates how the Supreme Court has addressed this problem.

¹⁵¹ H.R. 2136, 112th Cong. § 2 (2011).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁵⁵ U.S. CONST. art. I, § 8, cl. 18.

¹⁵⁶ U.S. CONST. art. VI, cl. 2.

¹⁵⁷ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

One of the main cases dealing with this issue is *Missouri v. Holland*,¹⁵⁸ which held that treaties have the ability to override state powers, as well as certain state rights created under the Tenth Amendment.¹⁵⁹ *Holland* dealt with Missouri's ability to regulate the killing and sale of birds protected by an international treaty, the Migratory Bird

Treaty Act of July 3, 1918 ("MBTA").¹⁶⁰

In his opinion, Justice Holmes wrote: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."

The Supreme Court concluded that Missouri was required to abide by the international treaty's protection of the birds over its own state preferences to disregard the treaty.¹⁶¹ In his opinion, Justice Holmes wrote: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the

Government."¹⁶² Assuming the holding in

Holland would not be distinguished on its facts and could be used as persuasive authority in a different, but similar set of facts, Holmes's opinion in *Holland* would suggest that any valid treaty, including treaties that contained human rights and anti-torture provisions, would need to be carried out by the states.

¹⁵⁸ 252 U.S. 416 (1920).

¹⁵⁹ *Holland*, 252 U.S. at 434. ("Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.'" (quoting *Baldwin v. Franks*, 120 U.S. 678, 683 (1887))).

¹⁶⁰ *Id.* at 430.

¹⁶¹ *Id.* at 432.

¹⁶² *Id.*

Since *Holland* has been relied upon for the proposition that states have a legal obligation to comply with treaty obligations, *Holland* should dictate North Carolina's actions concerning Aero. The facts are analogous. In *Holland*, there was an international treaty protecting migratory birds. Instead of adhering to the treaty, Missouri tried to pass a bill to prevent the enforcement of that treaty.¹⁶³ Analogously, in the Aero case, international human rights treaties require North Carolina to protect people from torture. Instead, North Carolina and its political subdivisions have facilitated Aero's operations by licensing Aero's business and providing permits to Aero. North Carolina has refused to acknowledge its responsibilities and has refused to investigate Aero's actions as required by treaty obligations and federal law. Although North Carolina has not gone so far as to legislatively oppose the protection of extraordinarily rendered individuals from torture—its refusal to affirmatively act in accord with the human rights requirements in treaties such as CAT and the ICCPR have essentially the same effect.

Some might argue that the obligations of state and local administrative officials in North Carolina are insufficiently analogous to Missouri's obligations in *Holland*. For example, it could be argued that the analogous question is not whether North Carolina is acting contrary to an international treaty, but whether North Carolina is obligated to control the actions of private individuals of a private business conducting illegal operations overseas in violation of numerous international treaties. Those in support of this argument might contend that if *Holland* were to apply to North Carolina, that it would be the equivalent of saying that Missouri is responsible for individuals who illegally killed protected birds outside of Missouri, using guns that were legally and

¹⁶³ *Id.* at 430.

properly licensed by Missouri and sold to Missouri residents who were breaking the law outside of Missouri's jurisdiction. Critics may argue that the comparison between *Holland* and North Carolina's obligation to remedy or control what Aero does beyond its borders is somewhat attenuated, and arguably, not within North Carolina's jurisdiction.

However, in *Holland*, any violators of the MBTA, regardless of where they were located in the United States, were subject to penalties in accordance with the MBTA.¹⁶⁴ The Supremacy Clause binds all states in the United States to treaties such as the MBTA. In the analogy, if Missouri knew that a Missouri resident was using a Missouri-licensed gun to kill protected migratory birds, then Missouri would be required to protect the birds by revoking the gun license, regardless of where the birds were being killed. The same remedy should be applied within North Carolina. North Carolina should prohibit Aero's ability to conduct business in North Carolina by revoking all of Aero's state-issued licenses and leases. This would prevent Aero from violating human rights in the future. Regardless of whether the torture occurred within North Carolina, the fact remains that North Carolina should do what it can to prevent or rectify any acts of torture that are being or have been facilitated by the state's allocation of resources to Aero.

In addition, there were other illegal acts that occurred in North Carolina that led to the extraordinary rendition and torture of the five individuals, such as conspiracy. These acts of conspiracy *did* occur in North Carolina, regardless of whether the torture itself occurred within the state. Revoking Aero's licenses would be the first step for North Carolina to take in rectifying Aero's illegal acts, since prohibiting Aero from conducting

¹⁶⁴ Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755 (1918) (codified at 16 U.S.C. §§ 707–712 (2006)).

Revoking Aero's licenses would be the first step for North Carolina to take in rectifying Aero's illegal acts, since prohibiting Aero from conducting business is one way to properly adhere to the various international human rights treaties as required under the Supremacy Clause.

business is one way to properly adhere to the various international human rights treaties as required under the Supremacy Clause.

Although *Holland* on its face is helpful in answering the question of whether international treaties apply to the states, there is still a question of whether “the anticommandeering doctrine, which prohibits Congress from conscripting state legislators or officers to enforce federal law, applies to the treaty power.”¹⁶⁵ Congress frequently uses the idea of “deference to states’ rights” as a reason for its inability to fully comply with

international human rights standards,¹⁶⁶ and there is some case law that supports this position. While *Holland* has never been overruled, there is some recent jurisprudence that suggests that Congress may not fully hold the power to regulate traditionally local matters.¹⁶⁷ However, the remainder of this section will show that despite the fact that Congress cannot always force states officials to engage in certain conduct, the Aero case is factually and legally distinguishable from the Supreme Court cases that have struck down Congressional powers to control state actions.

¹⁶⁵ Catherine Powell, Symposium, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law In the United States*, U. PA. L. REV. 245, 265 n.82, 267 (2001).

¹⁶⁶ *Id.* at 267.

¹⁶⁷ *See id.* at 266–67.

For example, in *Printz v. U.S.*,¹⁶⁸ the Supreme Court held that a requirement for chief law enforcement officers to conduct background checks under the Brady Handgun Violence Prevention Act for prospective handgun buyers was unconstitutional.¹⁶⁹ In its decision, the Court, basing its decision upon Constitutional federalist principles, announced an anti-commandeering doctrine preventing Congress “from imposing duties on state and local government officials”¹⁷⁰ and held that “press[ing] [state officers] into federal service, and . . . congressional action compelling state officers to execute federal laws is unconstitutional.”¹⁷¹ Although the Court held in *Printz* that Congress could not control whether local governments conducted a “national instant background-check,”¹⁷² this does not mean that the holding and the anti-commandeering doctrine espoused in *Printz* also applies to the state and local conduct required under international treaties. In particular, *Printz* involved the “forced participation of the States’ executive in the actual administration of a federal program,”¹⁷³ and the Court specifically noted “that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”¹⁷⁴

International treaties in this case are not considered “federal regulatory programs,” since international treaties such as CAT and the ICCPR are not used for the

¹⁶⁸ 521 U.S. 898 (1997).

¹⁶⁹ *Printz*, 521 U.S. at 902, 935.

¹⁷⁰ Ann Althouse, *The Vigor of the Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1232 (2004). *Printz* considered the constitutionality of the Brady Handgun Violence Prevention Act, which required the performance of background checks on purchasers of handguns at the state and local level. *Printz v. United States*, 521 U.S. 898, 903–05 (1997). For more cases reflecting a trend in Supreme Court jurisprudence favoring states’ rights over federal powers, see also, for example, *United States v. Lopez*, 514 U.S. 549, 600–01 (1995) (holding the Gun-Free School Zones Act of 1990 invalid because Congress acted beyond its Commerce Clause powers) and *New York v. United States*, 505 U.S. 144, 189 (1992) (declaring the Low-level Radioactive Waste Policy Amendments Act of 1985 unconstitutional).

¹⁷¹ *Printz*, 521 U.S. at 905.

¹⁷² *Id.* at 902.

¹⁷³ *Id.* at 918.

¹⁷⁴ *Id.* at 925.

purpose of regulating government actions that have been designated as a Congressional responsibility, such as interstate commerce. Rather, human rights international treaties provide a standard by which all political subdivisions within the United States must abide. This is the specific distinction between *Printz* and the current Aero case.

International treaties such as CAT and the ICCPR do not involve government regulation, much less the enforcement or implementation of a federal program. The CAT and the ICCPR are, through the Supremacy Clause, considered federal law, and Congress did not ratify these treaties for the purpose of

regulating state actions. Rather, Congress ratified these treaties for the purpose of protecting human rights within the United States and its states, such as North Carolina.

Therefore, the anti-commandeering doctrine does not apply to the Aero case and cannot be invoked by North Carolina to oppose state action against Aero.

Rather, human rights international treaties provide a standard to which all political subdivisions within the United States must abide.

Even if North Carolina were able to make a colorable argument that the holding in *Printz* means that North Carolina does not have a duty to investigate the crimes of Aero, this argument would fail. First of all, the federal government is not trying to compel North Carolina to act or to investigate Aero for its crimes. This is different from *Printz*, where the federal government *was* compelling state actors to execute a regulatory scheme. In fact, North Carolina is attempting to wash its hands of the Aero case and contending that the documented extraordinary rendition and torture assisted by Aero is a

federal issue. Therefore, *Printz* is not even applicable, because the federal government is not trying to compel the State to act in any way, especially not for a federal regulatory program. Instead, North Carolina is claiming that Aero's illegal acts are simply not its responsibility to investigate. There is no contention by North Carolina that the federal government is interfering with the actions of state officials. Moreover, North Carolina's obligations are derived directly from treaty laws and federal statutory obligations, as well as its own state laws. Therefore, *Printz* is inapplicable to the case at hand.

b. Alien Tort Statute and Torture Victim Protection Act

One very important case that was decided in 1980 on the Second Circuit was *Filartiga v. Pena-Irala*.¹⁷⁵ In *Filartiga*, a Paraguayan woman who lived in Washington, D.C. invoked the Alien Tort Statute and sued for the wrongful death of her brother.¹⁷⁶ Dolly Filartiga, the plaintiff, alleged that Americo Pena-Irala, another Paraguayan citizen and Inspector General of Police, had tortured her brother to death for political reasons.¹⁷⁷ Recognizing the importance of human rights in the international community and “the right to be free from torture,” the Second Circuit agreed that under the Alien Tort Statute, the court had jurisdiction to hear the wrongful death action.¹⁷⁸ Despite the fact that the Alien Tort Statute had not been commonly used to invoke jurisdiction in the past, the court stated that this was “undeniably an action by an alien, for a tort only, committed in violation of the law of nations.”¹⁷⁹ Although *Filartiga* was somewhat of a landmark

¹⁷⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

¹⁷⁶ *Id.* at 878–79.

¹⁷⁷ *Id.* at 878.

¹⁷⁸ *Id.* at 890.

¹⁷⁹ *Id.* at 887 (noting that the “Alien Tort Statute has rarely been the basis for jurisdiction during its long history”).

decision for human rights activists, its holding has not been readily followed in other circuits.

The Second Circuit affirmed its *Filartiga* decision in 1995 in *Kadic v. Karadzic*.¹⁸⁰ In *Kadic*, citizens of Bosnia-Herzegovina who were victims of war crimes, sued the “leader of the insurgent Bosnian-Serb forces” in the Southern District of New York, claiming that the Alien Tort Statute created federal jurisdiction for the torts committed by Karadzic.¹⁸¹ The brutal acts allegedly committed by Karadzic included rape, cruel and degrading treatment, and torture.¹⁸² The court analyzed the case under

*The TVPA creates liability on “an individual who, under actual or apparent authority, or color of law, of any foreign nation subject an individual to torture shall, in a civil action, be liable for damages to that individual.”*¹⁸³

both the Alien Tort Statute and the Torture Victim Protection Act (“TVPA”). The TVPA says: “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”¹⁸³

In its analysis of subject matter jurisdiction under the Alien Tort Statute, the court affirmed the rule established in *Filartiga*. To achieve federal subject matter

jurisdiction under the Alien Tort Statute in *Filartiga*, the three conditions to satisfy

¹⁸⁰ 70 F.3d 232 (1995).

¹⁸¹ *Kadic*, 70 F.3d at 236.

¹⁸² *Id.* at 236–37. Karadzic, the defendant, was served in New York after being invited to the United Nations. *Id.* at 237.

¹⁸³ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

subject matter jurisdiction were: “(1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations (i.e., international law).”¹⁸⁴ Finding the first two factors sufficiently satisfied, the court turned to the third requirement.¹⁸⁵ The court held that under the Alien Tort Statute, Karadzic had violated the “law of nations” and found in favor of the plaintiff’s claim for subject matter jurisdiction.¹⁸⁶ The court stated that the “law of nations” did not just apply to state action, but to private individuals as well.¹⁸⁷

However, in its second analysis concerning whether the TVPA could be a means of obtaining jurisdiction, the Second Circuit decided that the TVPA was not a jurisdictional statute. The court stated that

[t]hough the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331.¹⁸⁸

Therefore, unless plaintiffs can secure jurisdiction through the Alien Tort Statute or general federal question jurisdiction, litigants invoking only the TVPA may be limited.¹⁸⁹

In 2004, the Supreme Court came down with a landmark decision addressing the Alien Tort Statute in *Sosa v. Alvarez-Machain*.¹⁹⁰ In *Sosa*, a Drug Enforcement

¹⁸⁴ *Kadic*, 70 F.3d at 238.

¹⁸⁵ *Id.* at 238.

¹⁸⁶ *Id.* at 240.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 246.

¹⁸⁹ Brad Emmons, *Tortured Language: “Individuals,” Corporate Liability, and the Torture Victim Protection Act*, MINN. L. REV. 675, 680 n.106 (2011).

¹⁹⁰ 542 U.S. 692 (2004).

Administration (DEA) agent was captured, tortured, and murdered in Mexico.¹⁹¹

Alvarez-Machain, a doctor, was alleged to have prolonged Camarena-Salazar's life in order to allow the torture to continue.¹⁹² After a grand jury indicted Alvarez-Machain for his crimes, the DEA hired Mexican nationals to capture Alvarez-Machain in order to put him on trial in the United States.¹⁹³ Subsequently, Alvarez-Machain brought a civil tort action under the Alien Tort Statute against the DEA agents and Mexican nationals who formulated and executed his abduction for damages arising from "false arrest."¹⁹⁴

The Court referenced the Second Circuit's decision in *Filartiga*, and held that the Alien Tort Statute was a jurisdictional statute that allowed private parties to bring suit in federal courts for violations of the law of nations.¹⁹⁵ However, the Court reversed the Ninth Circuit *Filartiga* decision below, and found that there was no federal jurisdiction because an "arbitrary arrest" did not amount to a violation of the "law of nations" within its originally intended meaning.¹⁹⁶ The Court limited violations of the "law of nations" to "violations of any international law norm . . . accept[ed] among civilized nations . . . [in] the 18th century" when the Alien Tort Statute was enacted, including "violation of

¹⁹¹ *Sosa*, 542 U.S. at 697.

¹⁹² *Id.*

¹⁹³ *Id.* at 697–98.

¹⁹⁴ *Id.* at 698. Alvarez-Machain cited Article 9 of the ICCPR which states that "[n]o one shall be subjected to arbitrary arrest or detention." *Id.* at 734–35. To this, the Court wrote that "[a]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.* at 734–35. While this statement may initially seem to diminish the argument in this Policy Brief that the ICCPR has binding legal authority on the United States and private parties, it does not. Although the Supreme Court ultimately found that "arbitrary arrest" did not rise to the level of violating the "law of nations," the Court hinted that Congress had created a "clear mandate" through the TVPA, and that violations of international law included torture. *See id.* at 728; *see also* Emmons, *supra* note 189, at 682 ("[T]he Court conceded that Congress had recently provided 'a clear mandate' that torture and extrajudicial killings be considered violations of the law of nations—in other words, the kind of violations covered by the ATS.").

¹⁹⁵ *Sosa*, 542 U.S. at 724.

¹⁹⁶ *Id.* at 763.

safe conducts, infringement of the rights of ambassadors, and piracy.”¹⁹⁷ Although it was unwilling to expand the concept of “law of nations” in *Sosa*, the Court did acknowledge that Congress had “clear[ly] mandate[d]” a “new and debatable violation of the law of nations” through the TVPA, which provides the authority establishing “ ‘an unambiguous and modern basis for’ federal claims of torture.”¹⁹⁸

Although the *Sosa* Court has noted the “mandate” of Congress through the TVPA, the Supreme Court also recently limited the application of the TVPA. The TVPA states that if “[a]n individual . . . of any foreign nation subjects an individual to torture[, they] shall, in a civil action, be liable for damages to that individual.” In April 2012, the Court held in *Mohamad v. Palestinian Authority* that the categorical word “individual” in the context of the TVPA only referred to “natural persons,” and did not include organizations that have engaged in human rights violations.¹⁹⁹ The facts of the case were as follows: Assam Rahim, a U.S. citizen, was allegedly taken, imprisoned, tortured, and killed by “Palestinian Authority intelligence officers.” Rahim’s family members “sued the Palestinian Authority and Palestinian Liberation Organization under the Torture Victim Protection Act of 1991.”²⁰⁰

Before reaching the Supreme Court, the United States Court of Appeals for the District of Columbia affirmed the District Court’s ruling that the word “individual” only extended liability to natural persons.²⁰¹ The Supreme Court affirmed and noted that Congress had given no indication that it intended to expand the meaning of “individual”

¹⁹⁷ *Id.* at 715.

¹⁹⁸ *Id.* at 728.

¹⁹⁹ *Mohamad v. Rajoub*, 634 F.3d 604, 609 (D.C. Cir. 2011), *rev’d sub nom.* *Mohamad v. Palestinian Authority*, No. 11-88, at 2–11 (U.S. Sup. Ct. Oct. 18, 2011).

²⁰⁰ *Id.* at 605.

²⁰¹ *Id.*

from its ordinary dictionary definition under the TVPA.²⁰² The court also reasoned that the TVPA

uses the word ‘individual’ five times in the same sentence; once to refer to the perpetrator and four times to refer to the victim. Since only a natural person can be a victim of torture or extrajudicial killing, it is difficult to conclude that Congress used “individual” four times in the same sentence to refer to a natural person and once to refer to a natural person and any non-sovereign organization.²⁰³

The Court noted that the word “person” can include non-natural persons, but that the word “individual” only referred to natural persons.²⁰⁴

1) Applying *Filartiga*, *Sosa*, and *Mohamad*

Presumably, because it has not been overturned, federal jurisdiction can still be obtained in the Second Circuit under the Alien Tort Statute. If a lawsuit were brought in the Second Circuit by one of the five victims of the Aero-supported extraordinary rendition flights or their families, the following would be the legal analysis required to obtain federal jurisdiction. Using the test outlined in *Filartiga*, federal jurisdiction can be obtained if: “(1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations.”²⁰⁵

²⁰² *Id.* at 608.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Kadic v. Karadzic*, 70 F.3d 232, 238 (1995).

If any of the five victims were to claim jurisdiction under the Alien Tort Statute, this would satisfy the first element, because all of the victims are foreign nationals. The second element of the rule would be also satisfied, because cruel and degrading treatment and torture is considered a “tort.” Third, the cruel and degrading acts and torture committed by Aero and its conspirators were “committed in violation of the law of nations”—as confirmed in *Filartiga*—because torture and cruel and degrading treatment is considered a violation of international law in the Second Circuit.²⁰⁶ North Carolina could also be implicated as aiding and abetting Aero’s violations against international law.²⁰⁷ Once jurisdiction is established, the plaintiff(s) would then be required to prove their case.

Using the test outlined in Filartiga, federal jurisdiction can be obtained if: “(1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations.”

If the plaintiffs were able to obtain jurisdiction under this analysis of *Filartiga*, it would be a big step forward in obtaining justice for these five individuals and other people who have been subject to the same cruel and degrading treatment. Although the merits of the tort claims would be a separate inquiry from the Alien Tort Statute analysis, it would be a victory to even get a federal court to hear the case. So far, a large majority of the opposition that the five victims have had to deal with is the inability to convince a court or government entity to hear their stories and to evaluate the crimes that have been

²⁰⁶ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (1980) (noting that the international community had “the right to be free from torture”).

²⁰⁷ See *supra* note 223 and accompanying text.

committed against them. Obtaining federal jurisdiction would be an excellent “first step” in moving forward to see that justice is given to these victims.

Since the Supreme Court has tacitly accepted the Second Circuit’s paradigm of the Alien Tort Statute in *Sosa*, it seems that an application of the rule set forth in *Filartiga* could also be viable in other Circuits as well. Although the Supreme Court did not directly endorse the test outlined in *Filartiga*, the Court has seemingly left the door open for other jurisdictions to decide their own tests for how the Alien Tort Statute can be used to obtain federal jurisdiction. Although the Supreme Court has limited the application of what constitutes a violation of the “law of nations,” the Supreme Court has acknowledged that torture, as espoused by Congress through the TVPA, could be considered a violation under the Alien Tort Statute. There seem to be a multitude of legal inquiries that have not yet been explored or answered by the federal courts. Thus, it would not hurt for the five men who were emotionally and physically abused to try to bring a claim under the Alien Tort Statute.

As for the TVPA and application of *Mohamad*, there seems to be a possible route to litigation for the five victims. Despite the fact that *Mohamad* limited liability under the TVPA only to natural persons, any of the five victims of Aero’s flights can still sue the individual employees and people who conducted their extraordinary rendition, physical assault, and torture. While *Mohamad* prevents the victims from suing Aero, the U.S. government, or any other nation that was involved in the extraordinary rendition and torture of the victims (e.g. Pakistan and Morocco), the Court has not barred these victims from suing the specific individuals who conducted these illegal operations. In addition to

bringing a claim under the Alien Tort Statute, the five victims could also bring a suit under the TVPA.

2) Corporate Liability Under the Alien Tort Statute

Recently, there have been legal developments pertaining to the potential for corporate liability under the Alien Tort Statute. In a recent case, *Kiobel v. Royal Dutch Petroleum Co.*,²⁰⁸ the Second Circuit held that corporations could not be held liable for violations against the “law of nations” under the Alien Tort Statute.²⁰⁹ In *Kiobel*, the plaintiffs, who were residents of Nigeria, brought suit against Royal Dutch Petroleum Company and Shell Transport and Trading Company.²¹⁰ The plaintiffs alleged that the companies, through a subsidiary, “aided and abetted the Nigerian government in committing human rights abuses directed at plaintiffs.”²¹¹ The plaintiffs claimed that the Nigerian government had suppressed a movement by residents of the Ogoni region of Nigeria to “protest the environmental effects of oil exploration.”²¹² The alleged human rights abuses included the beating, rape, and arrest of residents.²¹³

In its reasoning for why corporations cannot be held liable for human rights violations under the Alien Tort Statute, the court wrote that “[t]here is no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations for violations of human rights.”²¹⁴ Similar to *Sosa*, the plaintiffs in *Kiobel* were unable to make a case that the alleged human rights violations constituted

²⁰⁸ 621 F.3d 111 (2010).

²⁰⁹ *Id.* at 148–49.

²¹⁰ *Id.* at 123.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 139.

violations specifically against the “law of nations.” The court claimed that “corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the [Alien Tort Statute].”²¹⁵ The court was, however, careful to note that its opinion did not prevent Alien Tort Statute suits against a corporation’s employees, managers, etc., nor did the opinion “foreclose corporate liability under any body of law *other than the Alien Tort Statute*.”²¹⁶

But the Second Circuit holding in *Kiobel* is not the end of the story. In 2011, the Supreme Court granted cert,²¹⁷ and oral arguments commenced on February 28, 2012.²¹⁸ In a surprise announcement, the Supreme Court announced in early March 2012 that it would be carrying *Kiobel* over to the next term in October 2012.²¹⁹ The Court has “ordered lawyers to come back with an expanded argument on the scope of [the Alien Tort Statute]” and asked that the lawyers submit new legal briefs to address the specific question of “[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”²²⁰ This means that the Supreme Court has decided that answering the question of whether corporations

²¹⁵ *Id.* at 148–49.

²¹⁶ *Id.* at 149.

²¹⁷ Tyler Giannini & Susan Farbstien, *Supreme Court Grants Cert in Kiobel, Deciding To Hear Corporate ATS Case*, HUM. RTS. PROGRAM HARV. L. SCH. (Oct. 17, 2011), <http://harvardhumanrights.wordpress.com/2011/10/17/supreme-court-grants-cert-in-kiobel-deciding-to-hear-corporate-ats-case/>.

²¹⁸ See generally Oral Argument at *Kiobel v. Royal Dutch Petroleum, Co.*, 621 F.3d 111 (No. 10-1491), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf (providing the oral arguments for *Kiobel v. Royal Dutch Petroleum, Co.*).

²¹⁹ Lyle Denniston, *Kiobel to be Expanded and Reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>.

²²⁰ *Id.*

can be held liable under the Alien Tort Statute is not enough.²²¹ By broadening the question, the Supreme Court may be trying to avoid legal uncertainty as to whether entities other than corporations can be sued under the Alien Tort Statute once they decide *Kiobel*.²²²

The Court might also be considered answering the question of whether a party can be sued for “aiding and abetting” someone else’s human rights violations under the Alien Tort Statute.²²³ The final outcome of *Kiobel* could be monumental, depending on the holding of the case. If the Supreme Court holds that the Alien Tort Statute does allow U.S. courts to hear “violations of the law of nations occurring within the territory of a sovereign other than the United States” and finds that corporations can be held liable under the Alien Tort Statute, then Aero, as a corporation, could be held liable for its human rights violations against the five victims documented in the Rendition Report. Additionally, if the Court also finds that a party can be held liable for “aiding and abetting” a tort violating the “law of nations” under the Alien Tort Statute, this could provide the means for holding Aero accountable for conspiracy to abuse and transfer the victims to the black sites, and North Carolina could also be held liable. North Carolina could be held liable for aiding and abetting torture under the Alien Tort Statute because of its allowance for Aero to conduct business in North Carolina, leasing property to Aero, and failing to affirmatively act to ensure that Aero is no longer performing these human rights violations.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

If the Supreme Court does not address this issue, the door could be open for a civil suit to be brought under the Alien Tort Statute against Aero's managers and employees, such as the pilots, who actively participated or aided and abetted the company's violations of human rights and ultimately, the "law of nations."

Another possibility is to hold the managers and employees of Aero who supported and engaged in these human rights violations liable under the Alien Tort Statute. The Second Circuit specifically noted in *Kiobel* that the holding does not preclude a claim against these types of individuals. If the Supreme Court does not address this issue, the door could be open for a civil suit to be brought under the Alien Tort Statute against Aero's managers and employees, such as the pilots, who actively participated or aided and abetted the company's violations of human rights and ultimately, the "law of nations." The Supreme Court's decision in *Kiobel* will be a truly landmark case in international human rights law, and its

decision could open many doors for human rights litigation and provide hope for those who are seeking justice, such as the five men who were victims of Aero's extraordinary rendition flights.

c. Additional Federal Case Law

In addition to U.S. Supreme Court jurisprudence, other federal case law provides some guidance as to how international treaties have been used as persuasive authority in federal courts. A U.S. government report on the application of CAT to the U.S. says that "[a] number of federal courts have also recognized that the right to be free from torture

and cruel, inhuman or degrading treatment or punishment is an accepted norm of customary international law.”²²⁴ Courts rely on CAT as an international treaty to provide direction when forming an opinion on whether the prohibition of torture and cruel and inhuman treatment is a “customary international legal norm.”²²⁵ These courts have decided that CAT was indeed “illustrative of the general agreement among states that such practices are unlawful.”²²⁶

III. Executive Branch Directives: States and Localities

A. ICCPR Report

The International Covenant on Civil and Political Rights (“ICCPR”) was adopted by the United Nations in December 1966, and became enforceable on March 23, 1976.²²⁷ Article 7 of the treaty states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²²⁸ Since then, the United States has issued four “periodic reports” to the United Nations providing an overview of its efforts to abide by the ICCPR.²²⁹ The periodic reports provide an overview of how the United States has implemented the principles and federal and local obligations required under the ICCPR.²³⁰ The U.S. government uses these reports not only to hold itself and its citizens

²²⁴ U.N. Comm. Against Torture, *supra* note 102, at ¶ 62; *see, e.g.*, *Abebe-Jira v. Negero*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830, 117 S.Ct. 961 (1996); *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985).

²²⁵ U.N. Comm. Against Torture, *supra* note 102, at ¶ 63.

²²⁶ *Id.*

²²⁷ *International Covenant on Civil and Political Rights*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/ccpr.htm>.

²²⁸ *International Covenant on Civil and Political Rights*, *supra* note 2, at art. 7.

²²⁹ The Reports are drafted by the U.S. Department of State, who is also responsible for responding and appearing before the Human Rights Committee. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <http://www.aclu.org/human-rights/faq-covenant-civil-political-rights-iccpr> (last visited May 5, 2012) [hereinafter FAQ].

²³⁰ *Fourth Periodic Report*, *supra* note 85, at ¶ 1.

accountable, but also to educate U.S. citizens and international entities about the effort it has taken to execute its treaty obligations.²³¹

However, the ICCPR does not only apply to the federal government. While the ICCPR, as already discussed, does apply to

“all government entities and agents, including all state and local governments in the United States,” the ICCPR also “applies to private contractors who carry out government functions.”²³² This is precisely the definition of the role that Aero has played in the extraordinary rendition and torture of the five men. Aero is a private party who contracted with the U.S. Government to extraordinarily render and torture five innocent men. Therefore, Aero has violated

While the ICCPR, as already discussed, does apply to “all government entities and agents, including all state and local governments in the United States,” the ICCPR also “applies to private contractors who carry out government functions.

the ICCPR, and effectively, federal law under the Supremacy Clause. Having violated these human rights, Aero must be held accountable for its crimes. There is no question that the ICCPR applies to Aero, as well as North Carolina. The fact that Aero is not a government entity is irrelevant. As a private contractor to the U.S. Government, Aero is just as liable as any government entity that has violated the ICCPR.

²³¹ *Id.* at ¶ 2.

²³² *FAQ*, *supra* note 229.

1. First U.S. Periodic Report

The U.S. government issued its first “Periodic Report” (“First Periodic Report”) on the ICCPR on August 24, 1994.²³³ Having been released many years before September 11, 2001 and before the current state of U.S. national security, the First Periodic Report does not provide much commentary at that point on Article 7 of the ICCPR. Article 7 of the report states:

U.S. law prohibits torture at both the federal and state levels. As this report is being prepared, the U.S. is completing the process of ratifying the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture has always been prohibited by the Eighth Amendment to the U.S. Constitution. As a consequence, torture is unlawful in every jurisdiction of the United States.”²³⁴

The fact that the United States at this time was just completing the processes of ratifying CAT is a testament to how preliminary U.S. policy was on international human rights and torture in the mid-1990s.

Yet, this gradual effort reflects a slow but steady improvement in U.S. policy towards human rights. At that time, the United States was committing itself to more official human rights policies. By officially stating that the “U.S. law prohibits torture at *both* the federal and state levels,” the United States makes clear that the federal government is not the only level of U.S. government required to combat inhumane acts. In this sentence, the United States is also holding state governments responsible for ensuring that acts of torture do not occur. In the ratification of the ICCPR by the U.S. Senate, Congress acknowledged U.S. federalism, and “specifically stated that the treaty ‘shall be implemented by the Federal Government’ ” and “ ‘otherwise by the state and

²³³ See generally *First Periodic Report*, *supra* note 111 (issuing the first report on August 24, 1994).

²³⁴ *Id.* at ¶ 149.

local governments’ . . . with support from the Federal Government for the fulfillment of the Covenant.”²³⁵ Therefore, the ratification of the ICCPR specifically bound local and state governments, including counties, such as Johnston County, N.C., where Aero operates its business from the Johnston County Airport.²³⁶

Therefore, the ratification of the ICCPR specifically bound local and state governments, including counties, such as Johnston County, N.C., where Aero operates its business from the Johnston County Airport.

government entity responsible for investigating the crimes against humanity committed by Aero against five innocent human beings. The state of North Carolina and Johnston County, N.C. are also required to investigate the crimes committed by Aero, which is operated by North Carolina residents who gained access to the public airways through *state* government-sanctioned leases and licenses. Aero, as discussed above, was (and perhaps still is) a private contractor to the

U.S. Government. Therefore, Aero is also responsible for its own crimes against humanity and violating the ICCPR. As the First Period Report stipulates, “violations of the prohibition on torture or cruel, inhuman, or degrading treatment or punishment” include “aggravated assault or battery or mayhem . . . kidnapping; false imprisonment or abduction; . . . sodomy or molestation; or as part of an attempt, a conspiracy or criminal

²³⁵ *FAQ*, *supra* note 229.

²³⁶ *Id.*

violation of an individual's civil rights.²³⁷ Aero, as we know from the Rendition Report, has committed or assisted in all of these listed crimes against the five men.

The U.S. Government, North Carolina, Johnston County, N.C., and Aero, have all violated the ICCPR, and should *all* be held responsible for their human rights crimes. The First Period Report specifically states that “[c]ivil actions may also be brought in federal or state court under the federal civil rights statute, 42 U.S.C. § 1983, directly against state or local officials for money damages or injunctive relief.” The government and private parties that have violated the ICCPR must be held accountable under 42 U.S.C. § 1983.

2. Fourth U.S. Periodic Report

The U.S. government recently released its fourth Periodic Report (“Fourth Periodic Report”) on the ICCPR to the U.N. Human Rights Committee.²³⁸ This report clearly sets out that state and local governments are responsible for implementing the ICCPR, as well as “other human rights treaties.”²³⁹ If there is any question whether the ICCPR applies to localities such as North Carolina and its subdivisions, the Fourth Periodic Report has already noted that it does. Indeed, Secretary of

Indeed, Secretary of State Hillary Clinton has said that “Human rights are universal, but their experience is local. . . . we are committed to holding everyone to the same standard, including ourselves.”

²³⁷ *First Period Report*, *supra* note 111, ¶ 173.

²³⁸ *Fourth Periodic Report*, *supra* note 85, at ¶ 1.

²³⁹ *Id.* at ¶ 4.

The condonation of such acts of torture and conspiracy by North Carolina and state officials simply because the kidnappings and the heinous acts were done overseas would completely undermine the purpose of the treaty, these periodic reports, and international goodwill.

State Hillary Clinton has said that “Human rights are universal, but their experience is local. . . . we are committed to holding everyone to the same standard, including ourselves.”²⁴⁰ While the U.S. government is aware that its protection of human rights is not perfect, it has, through its most recent report, chosen a standard to which it must abide.

In the past, some have argued that the United States is not responsible for the kidnap and torture of individuals who were transferred to secret detention sites outside the United States. However, paragraph 530 of the Fourth Periodic Report specifically repudiates that argument and

states that U.S. personnel are prohibited from engaging in acts of torture or cruel, inhuman or degrading treatment of people in its custody, “either within or *outside U.S. territory*.”²⁴¹ Regardless of whether the acts of torture were performed on U.S. soil, the U.S. government, publically and through its periodic reports, has held itself to the human rights standards of the ICCPR.

The condonation of such acts of torture and conspiracy by North Carolina and state officials²⁴² simply because the kidnappings and the heinous acts were done overseas would completely undermine the purpose of the treaty, these periodic reports, and

²⁴⁰ *Id.* at ¶ 2.

²⁴¹ *Id.* at ¶ 530 (emphasis added).

²⁴² See *infra* Part V(B)(2).

international goodwill. In fact, the Fourth Periodic Report references additional possible grounds available at the state and federal level for prosecution in addition to violations of the “prohibition against torture or cruel, inhuman or degrading treatment or punishment”; “aggravated assault or battery or mayhem; homicide, murder or manslaughter; kidnapping; false imprisonment or abduction; rape, sodomy or molestation; or as part of an attempt, a conspiracy.”²⁴³ These are just a few of the options available to prosecute Aero for its human rights crimes, which will be discussed later in this policy brief.²⁴⁴

B. Universal Periodic Review Process: U.S. Implementation of Accepted Recommendations

The United States has engaged in the process known as the Universal Periodic Review with the U.N. Human Rights Council with regard to its obligations under various human rights treaties. As part of this process, the United States has issued its “Accepted Universal Periodic Review Recommendations” (“Accepted UPR Recommendations”), which are “recommendations that the United States received during the U.N. Human Rights Council Universal Periodic Review process and [has] accepted, either in whole or in part.”²⁴⁵

²⁴³ *Fourth Periodic Report*, *supra* note 85, at ¶ 173

²⁴⁴ *See infra* Part V(B)(2).

²⁴⁵ U.S. Dep’t of State, *Universal Periodic Review Process: Accepted UPR Recommendations* 1 (2010).

Under the “National Security”²⁴⁶

section of the Accepted UPR

Recommendations, the United States pledges to make all “domestic anti-terrorism legislation and action with human rights standards” consistent, and enact a “federal crime of torture” that is consistent with CAT (which the United States has already done) which includes prohibiting “enhanced interrogation techniques.”²⁴⁷ Most importantly, the Accepted UPR Recommendations says that the United States supports measures to “ban[] torture and other ill-treatment in its detention facilities at home and abroad”²⁴⁸ and “eradicate all forms of torture . . . in any

Most importantly, the Accepted UPR Recommendations says that the United States supports measures to “ban[] torture and other ill-treatment in its detention facilities at home and abroad” and “eradicate all forms of torture . . . in any territory of jurisdiction, and that any such acts be thoroughly investigated.”

territory of jurisdiction, and that any such acts be thoroughly investigated.”²⁴⁹ Here, on point, the Accepted UPR Recommendations denounces torture and states that a thorough investigation is expected in order to achieve the goal of preventing all forms of torture.

This means that North Carolina is required to conduct a thorough investigation of Aero’s

²⁴⁶ The “working groups” that have been designated to oversee the National Security part of the Accepted UPR Recommendations process are the agencies of the Department of Justice, Department of Defense, and Department of State. See generally U.S. Dep’t of State, *Universal Periodic Review Process: United States Implementation of Accepted Recommendations* (2010) (providing an overview of the working groups).

²⁴⁷ U.S. Dep’t of State, *supra* note 245, at ¶ 58, ¶ 66.

²⁴⁸ *Id.* at ¶ 150.

²⁴⁹ *Id.* at ¶ 139.

activities documented in the Rendition Report, and to prosecute if in fact the state finds that Aero committed these crimes.

In the “Domestic Implementation of Human Rights” section of the Accepted UPR Recommendations, it says that the “U.S. supports review [of] its laws at the Federal and State levels with a view to bringing them in line with its international human rights obligations.”²⁵⁰ The section also supported creating a federal human rights institution to “ensure implementation of human rights in all states.”²⁵¹ Based on the Accepted UPR Recommendations, the United States has affirmed in writing its commitment to implementing human rights laws not just at the federal level, but at state and local levels as well.

Used in conjunction with the Fourth Periodic Report, which requires treaty compliance by states and localities, the overview within the Accepted UPR Recommendations requires that states and localities must investigate and hold accountable the individuals who facilitate extraordinary rendition and torture. This would mean that under the Supremacy Clause, North Carolina has a duty to investigate Aero and hold Aero accountable for its crimes.

IV. Addressing North Carolina’s Refusal to Implement Human Rights Obligations

All of the connections between North Carolina and Aero discussed throughout this policy brief are enough to hold the North Carolina state government accountable for its effective licensure for Aero to conduct these operations. Although the state government truly may not have been aware of Aero’s intentions and activities in the

²⁵⁰ *Id.* at ¶ 65.

²⁵¹ *Id.* at ¶ 74.

beginning, the state has now been put on notice of the company's illegal actions. Additionally, the state government should be concerned about Aero's blatant disregard for the lease terms that stated that the leased space should not be used for illegal purposes. North Carolina's government and administration allowed Aero to be an essential part of the CIA's extraordinary rendition program, therefore, both North Carolina and Aero should be held responsible for facilitating and executing these acts of torture. An examination of the justifications offered by the state for its failure to act reveals a weakness in North Carolina's arguments that it cannot overcome

North Carolina has argued that the state does not have the authority to become involved in Aero's extraordinary rendition case, because it is a foreign policy matter.

A. North Carolina's Refusal to Act: State versus Federal Matter

There are competing views on whether states have the authority to make foreign relations and policy decisions. North Carolina has argued that the state does not have the authority to become involved in Aero's extraordinary rendition case, because it is a foreign policy matter. The U.S. Constitution gives the foreign relations powers to the executive branch of the federal government.²⁵² In the past, some state governments have attempted to engage in foreign policy, but the Supreme Court has struck down these actions either by holding that federal law preempts state law²⁵³ or concluding that the

²⁵² U.S. CONST. art. II, § 2, cl. 2.

²⁵³ Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000) ("The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or

policies and laws in question involved “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution [which recognizes] the President’s ‘vast share of responsibility for the conduct of our foreign relations.’ ”²⁵⁴ The North Carolina government has suggested that this is one of the reasons why the state considers the extraordinary rendition and torture of individuals by Aero, a company that is licensed to fly planes in and out of North Carolina, a federal matter.

However, there is an inherent flaw in North Carolina’s claim. Torture and violations against human rights are prohibited by international and federal law, and thus cannot constitute foreign policy. Foreign policy encompasses the strategies and goals of a country to protect its national interests within the international political arena.²⁵⁵ Aero’s acts of extraordinary rendition, kidnapping, and conspiracy are federal crimes, and do not fall within the definition of what can be considered foreign policy. Under U.S. federal law, no individual or political entity is allowed to extraordinarily render a person for the purpose of torture. Therefore, Aero’s illegal acts deal with the question of whether a crime has been committed, and if North Carolina were to investigate Aero’s acts or provide a remedy, the state would simply be enforcing criminal sanctions which have nothing to do with foreign policy.

Even if North Carolina continued to claim that Aero’s actions were considered foreign policy, prior case law would not support North Carolina’s claims. In the instances where the Supreme Court has held that it is unconstitutional for states to

services from companies doing business with Burma, is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.”).

²⁵⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952).

²⁵⁵ Merriam-Webster Dictionary defines “foreign policy” as the “policy of a sovereign state in its interactions with other sovereign states.” *Foreign Policy*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/foreign%20policy> (last visited May 4, 2012).

become involved in foreign issues, the cases involved: 1) the constitutionality of foreign policy legislation passed by state legislatures and 2) state statutes that were preempted by federal law or trumped as a “traditional foreign policy matter.”²⁵⁶ The actions taken by Aero to extraordinarily render and torture kidnapped individuals does not involve any state legislation dealing with foreign policy, nor does the issue involve state policies or statutes that could be preempted by federal law. In fact, because international treaties are considered federal law under the Supremacy Clause,²⁵⁷ the state government, which is also bound by treaties to which the United States is a party, would be adhering to, not preempting, federal law if it chose to investigate these illegal actions against the five victims. As previously discussed, under CAT, the United States *must* take “effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction and that [] state that is a party to it may expel, return, 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.”²⁵⁸ Moreover, by the content of its Fourth Periodic Report to the ICCPR and its Accepted Recommendations, the federal government has signaled that investigating and punishing acts of torture are the responsibilities at all levels of government. If North Carolina opened an investigation into Aero’s extraordinary rendition flights, the state would be properly executing its legal duties under CAT as well as other international human rights treaties, and would not be acting against any Supreme Court precedent.

²⁵⁶ Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 377 (2005).

²⁵⁷ See *supra* Part IV(A).

²⁵⁸ Shafer, *supra* note 104, at 285.

B. North Carolina's Refusal to Investigate

One of the other arguments made against creating a state inquiry into Aero's activities is that the state cannot control or police state licensed air transportation, just as the state cannot police every car that drives on the state's public highways to ferret out crime.²⁵⁹ This argument is also logically flawed. It is true that it would be inefficient and poor public policy to investigate the presence of illegal activity in every car that drives on the road, or every airplane that leaves the airport. However, once state law enforcement is put on notice that there is a vehicle engaged in illegal activity, such as kidnapping, human trafficking, etc., law enforcement will, absent extenuating circumstances, make all efforts to track down the vehicle that is illegally transporting a human being. The police would also likely flag the license plate and car type for future surveillance.

The same concept should be applied to airplanes that are using public airways and government leased property to operate illegal activities. To provide an adequate analogy, envision that the police discovered that a North Carolina registered car was exclusively being used by a North Carolina resident to transport kidnapped individuals to Mexico for purposes of illegal torture. The state would not only have the right to revoke the registration of the vehicle and the criminal's driver's license, but the state would also be able to (and should) investigate the perpetrator's crimes.

Aero is still in operation, and regardless of whether there have been any more extraordinary rendition flights in addition to the five documented in the Rendition Report, the Johnston County Airport Authority, as a government entity, should revoke all leases

²⁵⁹ See *supra* note 26 and accompanying text.

and licenses for Aero to operate their business in North Carolina. Next, North Carolina should open a commission of inquiry into the events detailed in the Rendition Report. Even if no additional information is uncovered, at least the state will have conducted its due diligence in the matter.

Aero also has an obligation to comply with any investigations of their illegal activities and any requests for information given by the local, state, or federal governments. The company has committed multiple crimes against humanity, and is not entitled to keep its crimes a secret. The fact that they were a government contractor should not give Aero any kind of immunity. The fact that Congress has considered legislation, such as the Civilian Extraterritorial Jurisdiction Act (“CEJA”),²⁶⁰ which would hold government contractors liable for crimes against humanity means that the U.S. federal government believes that allowing government contractors to violate international treaties and federal law is morally wrong. This should send a message to Aero and its employees, who robbed at least five men of their dignity and livelihoods, that their actions and crimes will not be tolerated by the American public nor its political representatives.

²⁶⁰ See *supra* notes 147–53 and accompanying text.

V. Remedies

The following section discusses possible ways to increase the implementation of

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human rights laws at the state and local level without encountering federalism problems. To begin with, it would be an immensely positive gesture for North Carolina, both at the state and local levels, to publically apologize to the victims of these flights. Anna Pighizzini, the wife of Abou ElKassim Britel (one of the victims of the Aero flights) wrote: “these practices leave terrible scars that make it very hard to keep on living.”²⁶¹ She has stated that while nothing in the world can take away the suffering that her husband has endured—just knowing that there is sympathy for the victims and receiving apology letters from the community is very helpful in the healing process.²⁶² While a public apology will never

fully take away the suffering imposed on the torture victims of the extraordinary rendition flights flown by Aero, it would at the very least send a message that assisting in acts of torture, regardless of the perpetrator’s identity, will not be tolerated. The victims are owed that much.

²⁶¹ E-mail from Anna Pighizzini, Wife of Abou ElKassim Britel, to Christina Cowger, N.C. Stop Torture Now Member (Jan. 31, 2012) (on file with author).

²⁶² Conversation with Anna Pighizzini, Wife of Abou ElKassim Britel (Mar. 20, 2012).

A. Increasing State and Local implementation of Human Rights Laws

One way to ensure that international treaties are followed is to treat ratified treaties as federal law, instead of thinking of treaties as “international treaties that we have ratified.” Though ratified treaties have been confirmed to be just as binding as any other federal laws,²⁶³ there is a disconnect between the treatment of international treaties, which are laws that are ratified by a two-thirds Senate vote and signed by the President,²⁶⁴ and “regular” federal laws that are signed into law through more traditional forms of legislation, such as bills that pass the House and Senate and are signed into law by the President.²⁶⁵ Unless this bias against international treaties, which is based on a simple semantic distinction, is removed, international human rights treaties will not be followed as constitutionally required.

Perhaps by increasing public awareness about issues that are governed by international treaties, such as extraordinary rendition, state and local governments might be more inclined to recognize the federal laws that bind them. Studies show that the “general public is disengaged from the primary processes through which human rights law is incorporated at the national level.”²⁶⁶ But, with the increase of modern technology and social media spreading news faster than ever before, constituents have become more informed on incidents of injustice, and have been able to lobby for victims who might otherwise have gone unnoticed.²⁶⁷ The circulation of the Rendition Report has been a

²⁶³ See *supra* Part II(A)(1).

²⁶⁴ U.S. CONST. art. II, §2, cl. 2 (“[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

²⁶⁵ Powell, *supra* note 165, at 268 (“The omission of the House from the treaty-ratification process is a factor that may undermine further the democratic legitimacy of international human rights treaty law.”).

²⁶⁶ *Id.* at 268 (citations omitted).

²⁶⁷ Mari Fagel, *The Power of Social Media in the Trayvon Martin Case*, HUFFINGTON POST (Mar. 23, 2012, 11:32 AM), http://www.huffingtonpost.com/mari-fagel/the-power-of-social-media_2_b_1372594.html.

good starting point to raise public awareness and to begin the social dialogue on the role of Aero and North Carolina in the extraordinary rendition and torture of the five victims.

Some scholars have suggested that “state and local involvement in implementing human rights standards” might be the answer to ensuring that human rights standards are upheld at the local level.²⁶⁸ The Fourth Periodic Report even writes: “The United States Government has also reached out to state, local, tribal, and territorial governments to seek information from their human rights entities on their programs and activities, which play an important part in implementing the Covenant and other human rights treaties.”²⁶⁹ Even though the Constitution has explicitly delegated the powers of treaty making and foreign affairs to the President,²⁷⁰ this does not mean that states are not involved in the implementation of these treaties. Because the Supremacy Clause binds states to treaties, states are, regardless of whether the Fourth Periodic Report specifically mentions it, required to adhere to these treaties. The fact that the Fourth Periodic Report *does* specifically mention the involvement of states and localities simply reaffirms state and local obligations to the treaty. In addition to states’ responsibilities under the Supremacy Clause, the Supreme Court has also held that ratified international treaties bind state and local officials.²⁷¹

At first it seems odd that states and localities are bound by laws that they had no involvement in legislating, yet, this concept is one of the major tenets of U.S. federalism. What seems to make international treaties particularly difficult to execute within states

²⁶⁸ Powell, *supra* note 165, at 268. The author goes on to note that “[s]ubnational participation in incorporating human rights laws strengthens democratic deliberation of these laws.” *Id.*

²⁶⁹ *Fourth Periodic Report*, *supra* note 85, at ¶ 4.

²⁷⁰ U.S. CONST. art. II, § 2.

²⁷¹ See *supra* Part II(B)(2)(a).

and localities is its two-step removal from the “legislative” process. Not only are local officials uninvolved in the ratification of international treaties, but local officials are removed even further from the process because the officials are unable to relate to treaties originating in a nebulous meeting in a foreign country.

Perhaps one way to encourage state and local participation in the facilitation of human rights standards without violating the Constitution or Supreme Court precedent would be to create a “Human Rights Convention for Governors” or provide for a similar meeting coordinated by the National Governors Association (“NGA”), a bipartisan organization.²⁷² Through the NGA, governors throughout the country have convened to help shape foreign policy. The NGA’s collective goal is to “influence federal laws and regulations.”²⁷³ Some of the issues discussed by the organization include environmental, economic, and health-related topics—but the topic of human rights is not currently listed on the agenda.²⁷⁴ This needs to change. In light of 9/11 and the coinciding U.S. national security issues that have surfaced in the last decade, human rights has become a very important topic in legislative and political discussion.²⁷⁵

²⁷² *About*, NAT’L GOVERNORS ASS’N, <http://www.nga.org/cms/about> (last visited May 4, 2012).

²⁷³ *Federal Relations*, NAT’L GOVERNORS ASS’N, <http://www.nga.org/cms/federalrelations> (last visited May 4, 2012). The full mission statement of the NGA Office of Federal Relations states that: “The mission of the National Governors Association (NGA) Office of Federal Relations is to ensure that the Governors’ views are represented in the shaping of federal policy. NGA policy positions, reflecting the Governors principles on priority issues, guide the association’s endeavors to influence federal laws and regulations.” *Id.*

²⁷⁴ *NGA Center for Best Practices*, NAT’L GOVERNORS ASS’N, <http://www.nga.org/cms/home/nga-center-for-best-practices/center-issues.html?begin=0&pagesize=100> (last visited May 4, 2012).

²⁷⁵ See *supra* Part III.

Knowing that U.S. companies such as Aero, a North Carolina-registered company, are facilitating acts of extraordinary rendition and torture should be enough to prompt the NGA to add human rights to their agenda. As mentioned before, the Accepted UPR Recommendations reflects the United States' support for the "domestic implementation of human rights." Specifically, the Accepted UPR Recommendations says that the "U.S. supports review[ing] its laws at the federal and state levels with a view to bringing them in line with its international human rights obligations"²⁷⁶ and the Fourth Periodic Report encourages states and localities to become involved in implementing human rights protections. Since the NGA is an organization of state political leaders that

Specifically, the Accepted UPR Recommendations says that the "U.S. supports review[ing] its laws at the federal and state levels with a view to bringing them in line with its international human rights obligations"

helps shape federal laws and regulations, the NGA would be the ideal political liaison between the states and the federal government to help the United States move forward with these goals. The Accepted UPR Recommendations also notes that the United States supports "continu[ing] consultations with non-governmental organizations and civil society" in order to ensure that "domestic implementation of human rights."²⁷⁷ This statement supports the idea

that the NGA should add the topic of protecting human rights to their political discussions. Even though the NGA is comprised of state governors, it is a non-

²⁷⁶ U.S. Dep't. of State, *supra* note 245, at ¶ 65.

²⁷⁷ *Id.* at ¶ 225.

governmental entity that engages in civil society discussions. Therefore, the NGA would be an excellent organization to help execute the goals of the Accepted UPR Recommendations.

If companies registered in North Carolina are conducting extraordinary rendition flights,²⁷⁸ other states should be equally concerned that businesses in their own states may be conducting similar illegal missions. If the NGA added human rights to their list of priorities, perhaps this would rectify the problem of states and localities feeling too far removed from the “legislation” of international human rights treaties. If state governors became more knowledgeable about federal human rights obligations and acted as a collective advisory group to the federal government on human rights issues, then human rights would be more likely to be protected at the state and local levels. The Fourth Periodic Report and Accepted UPR Recommendations, among other authorities, also provide the political and authoritative support and recommendations necessary to achieve these goals.

²⁷⁸ See *supra* note 19 and accompanying text.

B. Pursuing Violations of North Carolina Criminal and Civil Law

Aero's activities in North Carolina give rise to a number of civil claims. A successful claim against Aero by the victims of the extraordinary rendition program will not directly provide government accountability, but it will provide a remedy to the victims and their families in a two ways. First, a successful claim—or perhaps even an unsuccessful one—will bring attention to this issue and may provide the public support necessary to compel official state action in any number of forms, including, but not limited to, an official apology, proactive legislation, a government-mandated commission of inquiry, and criminal charges. Second, a successful civil suit will provide damages to the victims and their families for the very real injuries—both physical, emotional, and monetary—that they have suffered. A civil suit is also an attractive remedial measure because of North Carolina's refusal to charge Aero and its employees under the state's criminal statutes.

Aero as a corporation is civilly liable for torts against the detainees in the rendition program primarily because of laws against conspiracy. Likewise, Aero's pilots, directors, and anyone else with knowledge of the company's involvement in extraordinary rendition may be liable, not only civilly, but

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criminally, as well. This section proceeds as follows: first, provides a review of the facts established in Rendition Report; second, it addresses the crimes that Aero has violated; third, it addresses the civil claims that may be brought against Aero and its employees by the victims of the extraordinary rendition program and their spouses; fourth, it discusses the procedural hurdles—namely the applicable statutes of limitations—that must, and can, be overcome by the plaintiff-victims of the extraordinary rendition program.

1. Facts of the Extraordinary Rendition Program

As stated in the Rendition Report, Aero's operations involved transporting Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah to CIA black sites.²⁷⁹ These five men were kidnapped from their homes and were extraordinarily rendered to secret detention locations where they were tortured.²⁸⁰ These men were transferred on planes owned and operated by Aero.²⁸¹ During their transport aboard the Aero-owned aircraft, these men were shackled, blindfolded, hooded, and then transferred to CIA black sites and/or other countries for secret detention and interrogation through torture.²⁸² At these sites, the men were subjected to forced nudity, waterboarding, continuous exposure to noises and lights, sleep deprivation, stress positions, and/or other techniques identified as torture by the United Nations, the European Parliament, and the International Committee of the Red Cross.²⁸³

²⁷⁹ WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1, at 11.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

2. Crimes Committed by Aero

Based on the facts in the section above, the crime committed by Aero and its employees is criminal conspiracy, which in North Carolina is a common law offense and is defined as “an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.”²⁸⁴ In order to be convicted of a North Carolina conspiracy offense, a defendant must be shown to have “entered into an unlawful confederation for the criminal purposes alleged.”²⁸⁵ There are three elements of the conspiracy offense under North Carolina law: (1) “that the defendant and [another] entered into an agreement”; (2) “that the agreement was to commit [a crime]”; and (3) “that the defendant and [his co-conspirator(s)] intended that the agreement be carried out at the time it was made.”²⁸⁶ The relationship and agreement between Aero and the CIA satisfy all three prongs of the criminal conspiracy test. As established in the Rendition Report, Aero flew at the direction of

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²⁸⁴ State v. Gibbs, 436 S.E.2d 321, 347 (N.C. 1993).

²⁸⁵ State v. Massey, 334 S.E.2d 71, 72 (N.C. Ct. App. 1985).

²⁸⁶ United States v. White, 571 F.3d 365, 368 (4th Cir. 2009).

the CIA and had knowledge of the illegal purpose of the flights it operated.²⁸⁷ The third prong is satisfied simply by Aero's operation of the flights.

The unlawful acts involved in the CIA's program and Aero's operations primarily include kidnapping and assault. North Carolina's laws on criminal conspiracy make Aero criminally liable for kidnapping and assault even though Aero was not the principal

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actor in the perpetuation of these crimes.

Section 14-32.4 of the North Carolina General Statutes criminalizes assault inflicting serious bodily harm and defines "serious bodily injury" as "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization."²⁸⁸ The torture and interrogation techniques used by the CIA included acts at satisfy this definition, namely

acts that cause protracted conditions, such as stress positions and waterboarding that cause extreme pain.

²⁸⁷ WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1, at 16.

²⁸⁸ N.C. GEN. STAT. § 14-32.4(a) (2011).

Section 14-29 of the North Carolina General Statutes criminalizes kidnapping and defined kidnappers as persons or entities who “confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . if such confinement, restraint or removal is for the purpose of . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.”²⁸⁹ The CIA’s extraordinary rendition program, therefore falls within the reach of North Carolina’s kidnapping statute, and Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah, are, therefore, victims of kidnapping under North Carolina law. However, due to North Carolina’s unwillingness to investigate—let alone prosecute—Aero’s involvement in the extraordinary rendition program, criminal charges are an unlikely— although appropriate—remedy for the men rendered with the aid of Aero’s aircraft and pilots. Unfortunately, the United States Supreme Court in *Castle Rock v. Gonzalez* refused to recognize an individual’s right to enforcement of law, thereby precluding an action to compel investigation and prosecution of Aero.²⁹⁰

²⁸⁹ *Id.* at § 14-29.

²⁹⁰ *Castle Rock v. Gonzalez*, 545 U.S. 748, 768 (2005).

3. Civil Claims Against Aero

With criminal prosecution against Aero highly unlikely, North Carolina’s civil courts provide for the victims and their families a better venue for judicial remedies. Fortunately, North Carolina recognizes a civil claim for conspiracy similar to the criminal claim discussed above. In North Carolina, “[a]

civil conspiracy claim consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff.”²⁹¹ In order to present a conspiracy claim, the evidence offered at trial may be circumstantial, but also it is necessary that “sufficient evidence of the agreement must exist ‘to create more than a suspicion or conjecture in order to justify submission of the issue to a jury.’”²⁹²

With criminal prosecution against Aero highly unlikely, North Carolina’s civil courts provide for the victims and their families a better venue for judicial remedies.

Furthermore, under North Carolina civil law, civil conspiracy does not exist as an independent cause of action; the claim for conspiracy must be brought in conjunction with another claim involving an “unlawful act” or a “lawful act [done] in an unlawful way.”²⁹³ Here, like in the section above, the unlawful acts include kidnapping and assault, but also extend to the civil torts. Based on the facts outlined in the Rendition Report, Aero and its employees are liable to the five individuals—Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri, Bisher Al-Rawi, and Mohamed Farag Ahmad

²⁹¹ *Boyd v. Drum*, 501 S.E.2d 91, 96 (1998), *aff’d* 511 S.E.2d 304 (1999).

²⁹² *Boyd*, S.E.2d at 96 (quoting *Dickens v. Puryear*, 276 S.E.2d 325, 337 (1981)).

²⁹³ *Toomer v. Garrett*, 574 S.E.2d 76, 92 (2002); *Boyd*, S.E.2d at 96 (1998).

Bashmilah—known to have been transported to CIA black sites by Aero. These torts include assault and battery, intentional infliction of mental distress, and false imprisonment. The spouses of these five individuals also have a claim against Aero and its employees for loss of consortium.²⁹⁴

a. Assault and Battery

North Carolina follows common law principles governing assault and battery. An assault involves an offer to show violence to another without striking him. Battery involves the carrying out of the threat into effect by the infliction of a physical strike.²⁹⁵ The purpose of the prohibition against battery is “freedom from intentional and unpermitted contact with a person’s body.”²⁹⁶ Similarly, the public policy that supports the prohibition of assault is “the interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one’s person.”²⁹⁷ With regards to assault, the apprehension created by the alleged tortfeasor must be one of an immediate harmful or offensive contact, as opposed to future contact.²⁹⁸ More specifically, assault in North Carolina requires “an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some *immediate* physical injury to the person of another.”²⁹⁹ Note, however, that the requirement of “immediate physical injury”³⁰⁰ does not mean that the threatened contact must be instantaneous; rather, it means that

²⁹⁴ It should be noted that North Carolina’s long-arm statute gives the states courts jurisdiction over cases involving these torts. North Carolina General Statute § 1-75.4 gives North Carolina courts jurisdiction “[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party: . . . Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.” N.C. GEN. STAT. § 1-75.4 (2011).

²⁹⁵ Ormond v. Crampton, 191 S.E.2d 405, 410 (1972); Hayes v. Lancaster, 156 S.E. 530, 531 (1931).

²⁹⁶ Dickens v. Puryear, 302 N.C. 437, 445 (1981).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ State v. Ingram, 74 S.E.2d 532, 535 (1953).

³⁰⁰ *Id.*

“there will be no significant delay” in contact.³⁰¹ North Carolina law also makes it clear that mere threats, unaccompanied by offers or attempts to show violence, do not constitute assault.³⁰² The treatment of the men rendered rise to the level of assault and battery under North Carolina tort law. Torture and interrogation techniques like waterboarding, forcing the men’s bodies into stress positions, blindfolding, beatings, and anal cavity searches satisfy the standard. Mohamed Farag Ahmad Bashmilah, for example, described having been “beaten and anally probed at the airport by men clothed head to toe in black. He was dressed in a diaper, blue shirt and pants. Blindfolded and wearing headphones, he was then chained and hooded and strapped to a gurney in an airplane.”³⁰³ In North Carolina, the statute of limitations for an assault and battery claim is three years.³⁰⁴

b. Intentional Infliction of Emotional Distress

North Carolina also recognizes the tort of intentional infliction of emotional distress.³⁰⁵ [L]iability arises under this tort when a defendant’s ‘conduct exceeds all bounds usually tolerated by decent society’ and the conduct ‘causes mental distress of a very serious kind.’ ”³⁰⁶ In *Stanback*, the court made it clear the physical contact is not a required element of intentional infliction of emotional distress. In that case, the plaintiff asserted that the defendant breached a separation agreement between the parties. The plaintiff alleged “that defendant’s conduct in breaching the contract was ‘willful, malicious, calculated, deliberate and purposeful’ . . . [and] that ‘she has suffered great

³⁰¹ RESTATEMENT (SECOND) OF TORTS, § 29(1) cmt. (1965).

³⁰² *State v. Daniel*, 48 S.E. 544, 554 (1904); *State v. Milsaps*, 82 N.C. 549, 551 (1880).

³⁰³ WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1, at 35.

³⁰⁴ N.C. GEN. STAT. § 1-51(19) (2011).

³⁰⁵ *Stanback v. Stanback*, 254 S.E.2d 611, 621–22 (1979).

³⁰⁶ *Id.*

mental anguish and anxiety . . .’ as a result of defendant’s conduct in breaching the agreement. . . . [and] that defendant acted recklessly and irresponsibly and ‘with full knowledge of the consequences which would result.’ ”³⁰⁷ Under North Carolina tort law, these facts were “sufficient to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress.”³⁰⁸

In light of unclear case law regarding the requirement of physical harm to claim the tort of intentional infliction of emotional distress, the North Carolina Supreme Court has made it clear that physical harm is not a requirement.³⁰⁹ While some cases have held that physical injury is a requirement, others reasoned that

The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when ‘out of tune’ cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful [sic] or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs.³¹⁰

In *Dickens*, the North Carolina Supreme Court adopted this theory and clarified the law in the state: physical injury is *not* a requirement for intentional infliction of emotional distress: “we are satisfied that the *dictum* in *Stanback* was not necessary to the holding and in some respects actually conflicts with the holding. We now disapprove it.”³¹¹

³⁰⁷ *Id.* at 622–23.

³⁰⁸ *Id.* at 621–22.

³⁰⁹ In *Stanback*, for example, there was dicta that said recovery for intentional infliction of emotional distress required “physical injury resulting from the emotional disturbance caused by defendant’s alleged conduct” and further that the harms, both physical and mental, were a “foreseeable result” of the alleged tortfeasor’s actions. *Id.* at 623.

³¹⁰ *Kimberly v. Howland*, 55 S.E. 778, 780 (1906).

³¹¹ *Dickens v. Puryear*, 302 N.C. 437, 448 (1981).

The emotional distress experienced by the men rendered with the aid of Aero's airplanes has left all of them with mental distress of a very serious kind. Unable to hold jobs, participate actively in society, or make decisions for themselves, these victims have become charges of their families and cannot live active lives. While a civil award for their emotional distress will not necessarily enable them to return to their pre-rendition lifestyles, damages would serve as important symbolic restitution and accountability. An award by a North Carolina court and jury would hold even greater symbolic significance as it was from North Carolina airports and through a North Carolina corporation that the infliction of their emotional distress began.

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Though the North Carolina legislature has not expressly codified the applicable statute of limitations, the state's courts have held that a three-year statute of limitations applies to claims for intentional infliction of emotional distress. Subdivision (5) of section 1-52 of the North Carolina General Statutes applies a three year statute of limitations "[f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter

enumerated.”³¹² In *Dickens v. Puryear*, the North Carolina Supreme Court stated that “[n]o statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations . . .”³¹³ of subdivision (5). More recently, the North Carolina Appellate Court in *King v. Cape Fear Memorial Hospital* also found that the intentional infliction of emotional distress falls within the ambit of subdivision (5) of section 1-52: “Because it is not specifically denominated under any limitation statute, a cause of action for emotional distress falls under the general three-year provision of subdivision (5) of this section.”³¹⁴

c. False Imprisonment

In North Carolina, the tort of false imprisonment is defined broadly as an illegal restraint of a person by any other person against his or her will.³¹⁵ A more detailed and elaborate definition comes from *Riley v. Stone*,³¹⁶ in which the North Carolina Supreme Court refined what level of force is necessary to bring a claim of false imprisonment.

Force is essential only in the sense of imposing restraint. . . . The essence of personal coercion is the effect of the alleged wrongful conduct on the will of plaintiff. There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched.³¹⁷

Furthermore, the “force” may consist of

threats, as well as by actual [physical] force, and the threats may be by conduct or by words. If the words or conduct are such as to induce a

³¹² N.C. GEN. STAT. § 1-51(5) (2011).

³¹³ *Dickens*, 302 N.C. at 444.

³¹⁴ *King v. Cape Fear Mem’l Hosp.*, 385 S.E.2d 812, 814 (1989).

³¹⁵ *Parrish v. Mfg. Co.*, 188 S.E. 817, 820 (1936); *Martin v. Houck*, 54 S.E. 291, 293 (1906).

³¹⁶ 94 S.E. 434 (1917).

³¹⁷ *Id.* at 441.

reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.³¹⁸

North Carolina's laws against false imprisonment are the common law analogue to the state's criminal laws against kidnapping. As in the criminal law context, Aero also is liable to the rendered men due to the CIA's actions. In North Carolina, the statute of limitations for false imprisonment is three years.³¹⁹

d. Loss of Consortium

The spouses of the extraordinary rendition program's victims also can bring suit against Aero under North Carolina's civil laws providing a claim for loss of consortium. While North Carolina recognizes the tort of loss of consortium, the state's courts have struggled to define it clearly. The lack of clarity relates mostly to the historical basis for the tort, which is rooted in antiquated notions of wives as property of their husbands. Broadly, the North Carolina Supreme Court has said that though "consortium is difficult to define, we believe . . . it embraces service, society, companionship, sexual gratification and affection, and we so hold today. We do so in recognition of the many tangible and intangible benefits resulting from the loving bond of the marital relationship."³²⁰ One clear requirement for loss of consortium under North Carolina law is joinder of one spouse's loss of consortium with the other spouse's injury claim.³²¹ Requiring such joinder achieves two goals: first, it prevents double recovery; second, "it recognizes that, in a very real sense, the injury involved is to the marriage as an entity."³²² Therefore, any

³¹⁸ *Id.*

³¹⁹ N.C. GEN. STAT. § 1-51(19) (2011).

³²⁰ *Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 300 N.C. 295 (1980).

³²¹ *Id.* at 303.

³²² *Id.* The *Nicholson* court cites Maryland case law to justify its position: "[B]ecause these marital interests [in sexual congress and progeny] are in reality so interdependent, because injury to these interests is so

tort claim brought by a spouse that infringes upon his or her spouse's consortium, as defined above, also gives the spouse a claim of loss of consortium. Anna Pighizzini, the wife of one of the men rendered, has stated that her husband is no longer the same person he was before rendition. He cannot work and his contributions to their marriage—financial, emotional, and otherwise—have been significantly and permanently altered. While some argue that loss of consortium claims are antiquated and out of step with modern ideas of women's autonomy within the marriage unit, they are important in rendition context in two ways. First, a loss of consortium claim allows the spouses of the rendition victims to recover losses that, short of government retribution or financial settlements, cannot be recovered through any means other than those in civil litigation. Second, a successful loss of consortium claim would show symbolically the far-reaching effects of the rendition program: not only does the program affect those rendered, but it also affects their communities and families and casts those responsible for rendition in a negative light.

North Carolina has not codified the applicable statute of limitations for loss of consortium. However, because North Carolina requires loss of consortium to be derivative, the statute of limitations for loss of consortium is constrained by the statute of limitations for the primary injury.³²³ Therefore, in the context the torts listed above—assault and battery, false imprisonment, and intentional infliction of emotional distress—the applicable statute of limitations for loss of consortium is three years.

essentially incapable of separate evaluation as to the husband and wife . . . the conception of the joint action seems . . . a fair and practical juridical development." *Deems v. W. Md. Ry.*, 231 A.2d 514, 522 (1967).

³²³ See generally R. V. W., Jr., "Loss of Consortium: The Applicable Statute of Limitations", 48 VA. L. REV. 1414, 1417 (1961) (explaining that courts reasoning that joinder is required because the injury stems from the other spouse's physical or emotional injury).

4. Statutes of Limitations in Civil Actions in North Carolina Generally

a. Accrual of Action: When the Statute Runs

Statutes of limitations present a significant procedural hurdle that the victims of the rendition program must overcome in order to survive summary judgment in North Carolina. Three years have passed since the men have either been released by the CIA or been placed in a position enabling them to bring suit against Aero. Therefore, defendant Aero could have grounds to seek summary judgment in their favor. A analysis of North Carolina civil procedure, however, reveals that the victim-plaintiffs can survive a motion for summary judgment.

Regardless of whether the civil claim involves assault and battery, false imprisonment, intentional infliction of emotional distress, or loss of consortium, the same general principles determine when the statute begins to run in North Carolina. North Carolina courts have held that, usually, “the period of the statute of limitations begins to run when the plaintiff’s right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even if the injured party did not then know the wrong had been committed.”³²⁴ Claims involving fraud and mistake are the only exception to this general rule.³²⁵ When the cause of action involves continuing or recurring damages, the statute runs when damages are sustained initially. The theoretical basis for this interpretation is that the subsequent injuries are merely aggravations of the

³²⁴ *Wilson v. Dev. Co.*, 171 S.E.2d 873, 884 (1970). It follows that “[i]n general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises.” 54 C.J.S. LIMITATIONS OF ACTIONS § 109 (2005).

³²⁵ “The only exception, as pointed out in *Lewis v. Shaver*, 73 S.E.2d 320, (1952), relates to actions grounded on allegations of fraud and mistake.” *Shearin v. Lloyd*, 98 S.E.2d 508, 514 (1957).

original damages and are, therefore, nonessential to the cause of action.³²⁶ Notably, the North Carolina Appellate Court has held that imprisonment does not toll the statute.³²⁷

b. Tolling the Statute and Feasibility of Civil Actions

As mentioned above in Part V(B)(3), a three-year statute of limitations applies to the torts for which Aero and its employees are responsible. Importantly, these statutes are tolled under the following circumstances:

A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited [by the North Carolina General Statutes]..., after the disability is removed...within three years next after the removal of the disability, and at no time thereafter...[A] person is under a disability if the person meets one or more of the following conditions:...The person is incompetent as defined in G.S. 35(A)-1101(7). . . .³²⁸

Furthermore, “[w]hen two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they are all removed.”³²⁹ North Carolina General Statute 35(A)-1101(7) defines incompetency as follows:

“Incompetent adult” means an adult or emancipated minor who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.³³⁰

³²⁶ *Matthieu v. Piedmont Natural Gas Co.*, 152 S.E.2d 336, 340 (1967).

³²⁷ *Small v. Britt*, 307 S.E.2d 771, 773 (1983). The facts of this case are distinguishable from those outlined in the Extraordinary Rendition Report because the rendition victims were held without due process in foreign prisons.

³²⁸ N.C. GEN. STAT. § 1-17(a) (2011).

³²⁹ *Id.* § 1-19.

³³⁰ *Id.* § 35(A)-1101(7).

North Carolina case law has refined the definition of incompetency for the purposes of tolling the statute of limitations. The test for finding incompetency in an adult is “mental competence to manage one’s own affairs.”³³¹ In *State Farm Fire v. Darsie*, the court held that despite an adult’s substantial physical injuries and heavy use of painkillers, an adult was not incompetent when, for example, she was able to hire an attorney to handle her affairs in an insurance dispute.³³² Similarly, though a plaintiff suffered some degree of personal injury and was not capable of understanding her legal rights fully, the fact that she “arranged for places to live, signed leases, cooked, went shopping, held several jobs, attended college at two institutions, obtained and renewed driver’s licenses from three states, drove vehicles, owned farmland, traveled and lived in foreign countries, produced a ballet, and created music” precluded a finding of incompetence.³³³

The courts have found a litigant incompetent when, for example, the litigant “suffered several mental breakdowns . . . [and] was diagnosed with post traumatic stress disorder.”³³⁴ In another case on this issue, North Carolina affirmed that post traumatic stress disorder tolls the statute of limitations: “Plaintiff’s repression of memories and post-traumatic stress syndrome suffered as a result of her grandmother’s alleged sexual, physical, and emotional abuse rendered plaintiff ‘incompetent,’ thereby tolling the statute of limitations so that summary judgment for defendant was improper.”³³⁵ It is possible,

³³¹ *State Farm Fire & Cas. Co. v. Darsie*, 589 S.E.2d 391, 399 (2003).

³³² *Id.*

³³³ *Soderlund v. Kuch*, 546 S.E.2d 632, 640 (2001).

³³⁴ *Soderlund v. N.C. Sch. of Arts*, 481 S.E.2d 336, 338–39 (1997).

³³⁵ *Leonard v. England*, 445 S.E.2d 50, 52 (1994).

that for the men rendered by the CIA, their current mental states suggest that they are disabled for the purposes North Carolina's statutes of limitations.

Notwithstanding disabilities endured as a result of extraordinary rendition and torture, Khaled El Masri's circumstances exemplify the challenges posed by the statute of limitations. While the post-rendition experiences of Khaled El Masri speak to the importance of providing the victims of the rendition program a remedy, particularly because he was detained due to misidentification, they also reveal that overcoming the statutes of the limitations for North Carolina civil suits will difficult – though not necessarily impossible – for the five men known to have been rendered with Aero's cooperation. As described in the preceding paragraphs, the relevant statute of limitations is three years. That limit may be tolled, however, if the plaintiff is deemed incompetent. Certainly, under North Carolina's standard, Mr. El Masri qualifies as incompetent.

While the post-rendition experiences of Khaled El Masri speak to the importance of providing the victims of the rendition program a remedy, particularly because he was detained due to misidentification, they also reveal that overcoming the statutes of the limitations for North Carolina civil suits will difficult – though not necessarily impossible – for the five men known to have been rendered with Aero's cooperation.

Mr. El Masri was released from detention in May of 2004,³³⁶ at which point the statute of limitations began to run. However, some three years later in May of 2007, Mr. El Masri attempted to set fire to a small grocery store in Germany following a dispute involving a defective electronic device.³³⁷ Charged with arson, Mr. El Masri testified at trial that he believed the store clerk was an agent of the U.S. government who had been charged with provoking and intimidating Mr. El Masri.³³⁸ Psychiatrists who have worked with and treated Mr. El Masri have concluded that this outburst, along with others,³³⁹ is directly attributable to “the trauma he experience as a consequence of his ‘extraordinary rendition’ and torture.”³⁴⁰ For the purposes of North Carolina’s rules of civil procedure, this chronology is helpful because it suggests that prior to the outburst in May of 2007, Mr. El Masri had already been in a state of post traumatic stress: he could not have spontaneously succumbed to post traumatic stress disorder in the grocery store in May of 2007. This fact shows that Mr. El Masri’s incompetence tolled the three year statute of limitations.

However, as a litigant in claims against the United States government, Mr. El Masri will have difficulty asserting that the statute of limitations was tolled due to his continued, unbroken incompetency from his release from detention until the present. North Carolina case law has held that the ability to name an attorney to assist one in his or her legal matters prevents a showing of “competent evidence that her [or his] injury

³³⁶ Letter from Steven M. Watt, Senior Staff Att’y, ACLU Human Rights Program, to Dr. Santiago Canton, Exec. Sec’y, Inter-American Comm’n on Human Rights (July 27, 2010) (on file with author).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ In 2009, Mr. El Masri also accused workmen of being CIA agents, as well as his own son. In the same year, he was also admitted to a psychiatric hospital in Germany for treatment. On September 11, 2009, he attacked the mayor of his town in Germany and was subsequently sentenced to two years in prison for assault. *Id.*

³⁴⁰ *Id.*

made her incapable of managing her [or his] own affairs to allow a disability tolling of the...statute of limitations.”³⁴¹ Therefore, as a person who had an attorney, Mr. El Masri faces challenges if he were to assert a tolling of the statute based on incapacity in a North Carolina civil court.

While this possible roadblock suggests that a commission of inquiry may be the best means for holding Aero accountable, it does not mean, however, that all civil court remedies are closed to those rendered by Aero. A number of victims have been identified and represented by attorneys in lawsuits; however, each one must have his circumstances scrutinized to determine

Moreover, it is highly probably that there are men who were rendered and whose identities are unknown. Given their lack of representation and assuming that they have suffered a disabling injury, North Carolina’s courts may remain a feasible venue for holding Aero accountable.

whether the statute of limitations tolls his state claim against North Carolina. Moreover, it is highly probably that there are men who were rendered and whose identities are unknown. Given their lack of representation and assuming that they have suffered a disabling injury, North Carolina’s courts may remain a feasible venue for holding Aero accountable.

³⁴¹ State Farm Fire & Cas. Co. v. Darsie, 589 S.E.2d 391, 400 (2003).

C. Commission of Inquiry

Commissions of inquiry provide an alternative remedy to court-imposed awards. Because the U.S. federal government has stymied litigation over the rendition program by invoking the State Secrets Doctrine,³⁴² commissions of inquiry represent the best means of achieving some form of accountability. In the United States, commissions of inquiry have generally taken one of three forms: a commission authorized and directed by the executive branch of the government; a commission authorized and directed by the legislative branch of the government; or a commission created by private citizens. Both the executive and legislative branches of North Carolina's government, as well as administrative agencies and law enforcement, have failed to inquire into Aero's operations involving the CIA's extraordinary rendition program and have failed to call the state of North Carolina and its political subdivisions into account for their direct and indirect support of Aero. Given the political climate in North Carolina, it seems that action from a state entity or employee is unlikely. For these reasons, a commission of inquiry created by private citizens may be the best model for achieving some accountability and acknowledgement of North Carolina's involvement in the extraordinary rendition program and torture.³⁴³

³⁴² See *infra* Part TWO.

³⁴³ See ALLISON L. WHITEMAN, DUKE UNIV., TOWARD A NORTH CAROLINA COMMISSION OF INQUIRY ON TORTURE 4 (2011), available at <http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/3398/Allison%20Whiteman%20MP%20Final%204-12-11.pdf?sequence=1>.

In comparison to executive or legislative commissions, a private commission is politically feasible in that its organizers would not have to bow to political concerns that could compromise the thoroughness of a government-mandated inquiry. With this feasibility in mind, NC Stop Torture declared its intent to form a commission of inquiry.³⁴⁴ The North Carolina Commission of Inquiry on Torture (NCCIT) released its findings in a January 2012 report.³⁴⁵ The report has received coverage in both local and national print media, as well as coverage on television and in new media.³⁴⁶ However, politicians at both the state and federal level have thus far failed to take action in response to the report.³⁴⁷ Their inaction highlights a significant weakness of the private commission model: without public support or a government mandate, a commission of inquiry may struggle to evoke the

desired government response. Furthermore, their inaction highlights the importance of a citizens commission. Though a citizens commission lacks the power of the state government and its associated air of legitimacy and authority, a citizens commission can—and, in the case of NC Stop Torture’s efforts, has—collect documents, record

Though a citizens commission lacks the power of the state government and its associated air of legitimacy and authority, a citizens commission can—and, in the case of NC Stop Torture’s efforts, has—collect documents, record testimony, and include the opinions and endorsements of experts, victims, and citizens to create a historical record and achieve some accountability.

³⁴⁴ See *Declaration of Intent*, N.C. COMM’N OF INQUIRY ON TORTURE, <http://accountabilityfortorturenc.org/intent.php> (last visited May 4, 2012).

³⁴⁵ See generally WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1 (discussing the release).

³⁴⁶ See Appendix C.

³⁴⁷ See Appendix A.

testimony, and include the opinions and endorsements of experts, victims, and citizens to create a historical record and achieve some accountability.

VI. Conclusion to PART ONE

There have been strong statements made on the floor of the Congress relating to the obligations of the United States and its subdivisions not to torture. Although these comments have been made in the federal forum, these congressmen represent their local constituents, and their comments should be regarded as sentiment that is persuasive within the states that they represent—a call to act. Senator John McCain, a decorated war veteran, has specifically denounced the use of torture for the purpose of intellectual gathering.³⁴⁸ During a Senate debate, Senator McCain stated: “I believe [torture] practices . . . are and should be prohibited in a nation that is exceptional in its defense and advocacy of human rights.”³⁴⁹ Throughout his argument, McCain stands firm against the use of torture in any form or for any purpose, and clarifies the false reports that information obtained from torture led to the capture and death of Osama bin Laden.³⁵⁰

³⁴⁸ 157 CONG. REC. S2897 (May 12, 2011) (statement of Sen. McCain).

³⁴⁹ *Id.*

³⁵⁰ *Id.* In his arguments against the use of torture, McCain also discusses the problem of misinformation obtained from torture, as well as the importance of American values and being a moral compass for the international community. *Id.* (“We are America, and we hold ourselves to a higher standard. That is what is at stake.”).

In November 2005, Senator Patrick Leahy, the second most senior U.S. Senator and Chairman of the Senate Judiciary Committee,³⁵¹ commented on the abuse of foreign detainees, specifically on the practice of extraordinary rendition.³⁵² He stated that the United States must “prohibit the use of so-called extraordinary renditions to send people to other countries where they will be subject to torture.”³⁵³ In a targeted statement against the Bush administration, Leahy highlights CAT and says the following:

The Bush administration says that it does not condone torture, but transferring detainees to other countries where they will be tortured does not absolve our Government of responsibility. By outsourcing torture to these countries, we diminish our own values as a nation and lose our credibility as an advocate of human rights around the world.³⁵⁴

During a senate debate, Senator McCain stated: “I believe [torture] practices . . . are and should be prohibited in a nation that is exceptional in its defense and advocacy of human rights.”

The congressional records also document similar comments by Senator Richard “Dick” Durbin, who stated in May 2011 that although denouncing the use of torture may not be the “popular view,”³⁵⁵ that torture should not be used if the United States is “going to stand for

³⁵¹ *About Senator Leahy*, PATRICK LEAHY: UNITED STATES SENATOR FOR VERMONT, <http://www.leahy.senate.gov/biography/> (last visited May 4, 2012).

³⁵² 151 CONG. REC. S12520 (Nov. 8, 2011) (statement of Sen. Leahy).

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ In fact, some members of congress openly support the use of “enhanced interrogation techniques.” In February 2010, Congressman Burton stated that: “We are in a war against terrorism and within bounds we should use every enhanced technique we can come up with to elicit information from these terrorists before they kill Americans.” 156 CONG. REC. H526 (Feb. 3, 2010) (statement of Rep. Burton). While it is debated whether these techniques rise to the level of “torture,” the comments by Congressman Burton reflect a common sentiment among the public—that the use of physical stress or coercion against possible terrorists justified for the sake of national security.

humane treatment [and] sensible treatment of detainees.”³⁵⁶

The extraordinary rendition and torture of individuals in foreign countries was not a secret. The Bush administration held executive office from 2001 to 2009, and these years coincide with the years that Aero was involved in the CIA rendition program from 2001 to 2006.³⁵⁷ While the U.S. government

claimed that its policy did not include sending detainees to foreign countries to be tortured, the government also claimed ignorance.

Attorney General Alberto Gonzales stated that the United States did not send captives to foreign countries where the United States knew the captives would be tortured, but he

“acknowledged that [the United States] ‘can’t fully control’ what other nations do.”³⁵⁸ The

The failure of the federal government to take responsibility for these intentional and negligent violations of international human rights can no longer be allowed.

failure of the federal government to take responsibility for these intentional and negligent violations of international human rights can no longer be allowed. The federal government’s failure to “lead by example” hurts our international credibility and goodwill, and creates an unsatisfactory standard of human rights for the rest of the nation.

The United States of America is built on the concept of federalism, created by the U.S. Constitution. Every few years, voters from the across the nation in every county and every state vote for their Senators and House Representatives. These elected men and

³⁵⁶ 157 CONG. REC. S2900 (May 12, 2011) (statement of Sen. Durbin).

³⁵⁷ WEISSMAN ET AL., UNIV. OF N.C. SCH. OF LAW, *supra* note 1, at 4.

³⁵⁸ 151 CONG. REC. S12520 (Nov. 8, 2011) (statement of Sen. Leahy).

women represent the United States as a whole for the years to come. The words of these elected representatives should not be taken lightly. The representatives in both the House and Senate provide a voice for the many private individuals who, under the U.S. Constitution, have the right to be heard. While the Congressional Record is not federal law, it records the ideas and debates that have been exchanged within Congress. From these words we are able to glean congressional intent behind statutes.

The congressional intent reflected within the Congressional Record as shown by the remarks of respected national leaders and politicians is found in the international treaties (ICCPR, CAT, and UDHR) that we have adopted, the federal laws we have

These positions reflect a deep consensus that extraordinary rendition and torture are illegal and morally impermissible and that those who engage in it must be held accountable.

enacted, and the decisions by our federal courts. These positions reflect a deep consensus that extraordinary rendition and torture are illegal and morally impermissible and that those who engage in it must be held accountable. These principles are not just applicable at the federal level, but they apply to the state and its political subdivisions and private entities as well. Because of North Carolina's obligation to follow these

principles and laws under the Supremacy Clause and federal case law, it is time for North Carolina to act, and to investigate Aero's crimes and civil violations.

Aero committed heinous acts that contravened international treaties and federal law. North Carolina also violated international treaties and federal law. Aero would not

have been able to conduct its extraordinary rendition flights without state government resources and authorization. State-approved licenses and leases allowed Aero to conduct its illegal business. Because North Carolina has knowledge of these events, the state is required under international and federal law to investigate Aero and provide a remedy to the victims. While Aero and North Carolina are separate entities, they are both subject to the same human rights laws under the Supremacy Clause. They must both be held accountable under international treaties and federal law for the immoral crimes that took away the dignity of five innocent men. This policy brief has presented the case for why Aero and North Carolina must be held accountable for the extraordinary rendition of five innocent individuals. This policy brief has also provided the legal support, legal tools, and legal reasoning necessary to affirm why North Carolina is obligated to execute its duty to investigate Aero for its crimes and why North Carolina is also obligated to provide sufficient legal remedies and a public apology to the victims.

Part TWO

Failure to take Responsibility for Human Rights: State Secrets

I. Introduction

As detailed in Part I of this policy brief, localities such as North Carolina and its political subdivisions have an obligation to execute and enforce international principles of human rights.³⁵⁹

These localities should therefore be required to investigate and provide remedy for the torture which has resulted from the CIA's extraordinary rendition program. What may seem like an inevitability, however, is often easier said than done. Under what has become known as the State Secrets Doctrine, the United States government finds itself at the wheel of a vehicle capable of

stopping litigation – against itself and third parties – for claims involving extraordinary rendition. Claiming a privilege of national security, the government has, over the last decade, increasingly seen fit to invoke this doctrine, effectively barring *any* claims of human rights violations against itself.

Claiming a privilege of national security, the government has, over the last decade, increasingly seen fit to invoke the State Secrets doctrine, effectively barring any claims of human rights violations against itself.

³⁵⁹ See *supra* Part ONE.

This part of the policy brief first outlines the judicial history of the State Secrets Doctrine, tracing its foundational roots in the United States Supreme Court, through its egregiously expanded application towards current claims. Next, this brief focuses on the recent cases of *El-Masri v. United States*, and *Mohammed v. Jeppesen Dataplan*, dissecting their analyses and highlighting the ways in which each of these cases misinterprets and misapplies the State Secrets Doctrine, as intended by Supreme Court precedent. This brief furthermore posits that, pursuant to the treaty obligations of both federal and local governments, the State Secrets Doctrine is itself a violation of international law. After thoroughly exploring the present state of the Doctrine as it exists in the judicial sphere, this brief then discusses new developments on other fronts which may impact how that doctrine is applied, including limitations by the executive branch and response from the international community.

Finally, this brief explores the remedies that are currently available for victims of extraordinary rendition, highlighting that none of them are fully sufficient to provide the investigation and remedy for victims of torture as required under international law.

In conclusion, this brief will show that the State Secrets Doctrine, coupled with the United States' historical apathy towards recognizing its complicity in human rights violations, presents a significant roadblock to those hoping to force the hand of localities such as North Carolina and its political subdivisions into

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taking the reins on accountability for torture. What was intended by the Supreme Court as a sword against unjustifiable litigation has, over time, transformed into an impenetrable shield against valid civil liberties claims. Only through transformation of the Doctrine can victims of extraordinary rendition begin to receive the justice they are due under the United States' international obligations.

II. Historical Background

The State Secrets Doctrine is embodied by two applications: (1) the *Totten* bar and (2) the *Reynolds* privilege. The premise behind the doctrine is to protect secrets of the United States government that, if revealed, “might compromise . . . our government in its public duties, or endanger” individuals furthering the government’s military and foreign goals.³⁶⁰ This section sets forth the basic propositions of both the *Totten* bar and the *Reynolds* evidentiary privilege and their recent developments. Sections IV and V below will further examine how these doctrines have been confused and misapplied in ways that have obstructed access to justice about claims involving torture and extraordinary rendition, both acts prohibited by international, national, and state law.³⁶¹

A. The *Totten* Bar

In 1875, the United States Supreme Court was first presented with a question of whether to keep alleged state secrets out of the courtroom in *Totten v. United States*.³⁶² In this case, William A. Lloyd brought suit for a contract violation due to unpaid compensation for services. He claimed that he was under a contract with President Lincoln to provide certain services as a secret agent. In return, he was to receive \$200 a

³⁶⁰ *Totten v. United States*, 92 U.S. 105, 106 (1876).

³⁶¹ See *supra* Part ONE.

³⁶² 92 U.S. 105 (1876).

month. In its holding, the Court stated, “Our objection is not to the contract, but to the action upon it in the Court of Claims.”³⁶³ The Court reasoned that because this was a contract for espionage, and by its very nature meant to be kept confidential by all parties involved, the mere fact that bringing the case to the courts for a public hearing regarding its provisions would necessarily breach the contract.³⁶⁴ Because of the confidential nature of the contract, litigation surrounding this subject-matter would necessarily expose information to the detriment of the government, secret agents, or the public as a whole.³⁶⁵ The Court held that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated,”³⁶⁶ similar to the confidential confidences that may not be discussed in court, such as “communications by a client to his counsel for professional advice.”³⁶⁷ Therefore, when a state secret is the very issue of a case, the *Totten* bar prevents adjudication.

The subject-matter bar, or *Totten* bar, was applied by the U.S. Supreme Court in *De Arnaud v. United States*³⁶⁸ in 1894. In a similar fact pattern as *Totten*, the case involved a petition by Charles de Arnaud demanding payment for secret services rendered to the government.³⁶⁹ The Court held that the various defenses suggested by De

³⁶³ *Id.* at 106

³⁶⁴ *Id.* at 107.

³⁶⁵ *Id.* at 106.

³⁶⁶ *Id.* at 107.

³⁶⁷ *Id.*

³⁶⁸ 151 U.S. 483 (1894).

³⁶⁹ *Id.*

Arnaud against the State Secrets Doctrine, or more specifically the *Totten* bar, did not override this privilege by the government.³⁷⁰ The Court reiterated the fact:

[A]s commander-in-chief of the armies of the United States [the President] was undoubtedly authorized to employ secret agents to enter the rebel lines and obtain information respecting the strength and movements of the enemy . . . [But] the service stipulated for in the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed.³⁷¹

Therefore, because De Arnaud was considered to have a private contract with the government to perform secret services, this suit for unpaid compensation must be dismissed due to the *Totten* bar.³⁷²

In 1981, the U.S. Supreme Court next revisited the *Totten* bar's application in a case, the subject matter of which was also determined to involve states secrets and national security. Plaintiffs in *Weinberger v. Catholic Action* challenged the government for its failure to comply with the National Environmental Policy Act in determining where to store nuclear weapons.³⁷³ The Court held that "the Navy can neither admit nor deny that it proposes to store nuclear weapons" at a certain location.³⁷⁴ Because the location of nuclear weapons was deemed a valid state secret, the Court determined that "whether or not the Navy has complied with [the National Environmental Policy Act] 'to the fullest extent possible' is beyond judicial scrutiny."³⁷⁵ The Court reiterated the existence of limitations placed on judicial review because "public policy forbids the

³⁷⁰ *Id.*

³⁷¹ *Id.* at 483–93.

³⁷² *Id.* at 496.

³⁷³ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 140–42 (1981).

³⁷⁴ *Id.* at 146.

³⁷⁵ *Id.*

maintenance of any suit . . . which would inevitably lead to the disclosure of matters which the law itself regards as confidential.”³⁷⁶

In 2005, the *Totten* bar was again applied in *Tenet v. Doe* where a couple was seeking reimbursement for espionage services they performed on behalf of the U.S. government.³⁷⁷ The U.S. Supreme Court stressed that any “lawsuit premised on alleged espionage agreements are altogether forbidden” pursuant to the *Totten* bar.³⁷⁸ The Court pointed out that “requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs.”³⁷⁹ Therefore, a total bar to such claims must be honored in all circumstances.

The *Totten* bar labels certain state secrets cases as nonjusticiable because the very subject matter is a state secret. This is differentiated from the evidentiary privilege established in *United States v. Reynolds*.³⁸⁰

³⁷⁶ *Id.* at 146–47 (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)).

³⁷⁷ *Tenet v. John Doe*, 544 U.S. 1, 3 (2005).

³⁷⁸ *Id.* at 9.

³⁷⁹ *Id.* at 11.

³⁸⁰ 345 U.S. 1 (1953).

B. The *Reynolds* Evidentiary Privilege

In *United States v. Reynolds*, in 1952, the U.S. Supreme Court was presented with an issue as to the application of the state secrets privilege to specific documents during the discovery phase of a civil suit. This case arose from an action brought under the Federal Tort Claims Act³⁸¹ brought by the widows of three deceased civilian observers aboard an aircraft which had taken flight to test secret electronic equipment.³⁸² The *Totten* bar did not apply because there was no claim by the Air Force that the subject matter of the suit was confidential; more specifically, there was no claim by the U.S. Air Force that a plane in which the civilians were riding did not in fact crash nor was the presence of the civilians in the plane confidential. Instead, the Air Force sought to protect its official accident investigation report from being released during the discovery stage of the proceedings. The Court recognized the overarching privilege of the government to protect military and state secrets. Therefore, it clearly defined an additional evidentiary privilege, now known as the *Reynolds* evidentiary privilege, in addition to the *Totten* bar.

...it is important to note the existence of two distinct forms of the State Secrets Doctrine: (1) the Totten bar which is based on the subject-matter of a case and (2) the Reynolds privilege which is based on specific pieces of evidence sought to be protected as state secrets by the government.

³⁸¹ 28 U.S.C. §§ 1346, 2674 (2006).

³⁸² *Reynolds*, 345 U.S. at 3.

The court laid out a 3-prong analysis of when to apply the *Reynolds* evidentiary privilege:

1. “The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”³⁸³

2. “The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”

3. The Court then decides on how to proceed with the case.

In balancing the interests of the Air Force to protect military secrets and the interests of the widows in seeking relief for the civilian deaths from the plane crash, the *Reynolds* Court found that the existence of an alternative to the Air Force investigation report weakened the showing of necessity for releasing the report on behalf of the widows. Because an alternative was available and the military secrets posed a risk to national security if exposed, the Court held that the report could be excluded based on an evidentiary privilege protecting state secrets. Therefore, it is important to note the existence of two distinct forms of the State Secrets Doctrine: (1) the *Totten* bar which is based on the subject-matter of a case and (2) the *Reynolds* privilege which is based on specific pieces of evidence sought to be protected as state secrets by the government.

III. Current Application of the *Totten* Bar and the *Reynolds* Privilege

A. Claims Under Both *Totten* and *Reynolds*

In the cases since *Totten* and *Reynolds*, the U.S. government has continuously tried to claim protection under both doctrines. State secrets have been protected under the *Totten* bar due to subject matter considerations and particular pieces of evidence have

³⁸³ *Id.* at 7–8.

been kept confidential under the *Reynolds* privilege. Within the past few decades, however, the distinct line between the *Totten* subject matter bar and the *Reynolds* evidentiary privilege have been blurred, and this has led to confusion as to the application of the State Secrets Doctrine in general. Furthermore, lower courts have added to both the *Totten* bar and the *Reynolds* privilege creating unnecessary confusion within the legal system and framework of applying the State Secrets Doctrine.

It is possible for a court to review both the *Totten* bar and the *Reynolds* privilege were they to be both raised in a single case. *Al-Haramain Islamic Foundation, Inc. v. Bush*³⁸⁴ stands as such an example. In that case, in 2007 the U.S. Court of Appeals for the Ninth Circuit had to address both doctrines in a claim of illegal warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act.³⁸⁵ The court noted that the Terrorist Surveillance Program, (TSP), was a publicly acknowledged program by the Bush administration, and that Al-Haramain was officially declared by the government to be a “Specially Designated Global Terrorist” due to its purported ties to Al Qaeda.³⁸⁶ Due to these unclassified facts, the government’s claim to the *Totten* bar could not be applied in this situation.³⁸⁷ The court then moved on to apply the *Reynolds* privilege in reference to the “Sealed Document” which had mistakenly been turned over to Al-Haramain by the U.S. government. This document was meant to be kept secret by the government. However, when released, Al-Haramain found that the document contained information of illegal warrantless electronic surveillances. The court reviewed the information in the documents and concluded that the *Reynolds* privilege applied to these

³⁸⁴ 507 F.3d 1190 (9th Cir. 2007).

³⁸⁵ *Id.* at 1193.

³⁸⁶ *Id.* at 1198.

³⁸⁷ *Id.*

[C]ourts have been dismissing cases even if the subject-matter is not a state secret and even if the court is not presented with specific pieces of evidence the government seeks to protect.

specific documents because of the state secrets contained therein.³⁸⁸ Despite the mistaken release of the documents, the fact that these documents were no longer secret did not bar the application of the privilege to the document's contents.

In the final prong of applying the *Reynolds* privilege, the court found that the only evidence upon which the plaintiff could assert a claim, and therefore establish

standing, was the now excluded document. Due to this fact, the court held that Al-Haramain could not establish that it suffered injury in fact and therefore the case was dismissed.³⁸⁹ Of noteworthy importance, the court did not dismiss this claim based on the *Totten* bar; instead, the court excluded only this specific document from evidence based on the State Secrets Doctrine through the *Reynolds* privilege. Only then did the court determine that based on the remaining evidence, the plaintiff no longer had sufficient evidence to support a claim, and dismissed the claim based on a basis separate and distinct from the State Secrets Doctrine.

Since *Al-Haramain*, the courts have blurred the line between the *Totten* subject matter bar and the *Reynolds* evidentiary privilege by failing to follow the strict analysis set forth by the U.S. Supreme Court. Recent cases courts have applied the State Secrets

³⁸⁸ *Id.* at 1203.

³⁸⁹ *Id.* at 1205.

Doctrine to bar litigation without a determination that the *Totten* bar requires dismissal of the case due to its subject matter and without a determination that the *Reynolds* evidentiary privilege bars the admissibility of specific critical evidence such that the case is dismissed for lack of proof. Instead, courts have been dismissing cases even if the subject-matter is not a state secret and even if the court is not presented with specific pieces of evidence the government seeks to protect. As a result, a number of cases particularly with regard to extraordinary rendition and torture have been barred from moving forward in litigation. These cases, particularly the case of *El-Masri* and the *Jeppesen* case discussed below demonstrate the courts movement away from the original purpose and parameters of the State Secrets Doctrine in ways that have prevented human rights abuses from being litigated and for victims of such violations from obtaining justice.

B. *El-Masri* Misinterprets and Misapplies the State Secrets Doctrine defined by U.S. Supreme Court Precedent

1. Background

In 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal in *El-Masri v. United States* on behalf of the U.S. government which invoked the State Secrets Doctrine in support of its efforts to prohibit the case from going forward. Khaled El-Masri filed a civil action against former Director of Central Intelligence George Tenet, three corporate defendants, ten unnamed employees of the Central Intelligence Agency (CIA), and ten unnamed employees of the defendant corporations.³⁹⁰ In his complaint, El-Masri asserted that he was a victim of torture and the extraordinary rendition program

³⁹⁰ *El-Masri v. United States*, 479 F.3d 296, 299 (2007).

run by the U.S. government. El-Masri, a German citizen of Lebanese descent, alleged that while traveling in Macedonia, he was detained by Macedonian law enforcement officials on December 31, 2003, and was handed over to the CIA.³⁹¹ He was then flown to a detention facility near Kabul, Afghanistan, where he remained until May 28, 2004.³⁹² He was then transported to Albania, released in a remote area, picked up by Albanian officials, taken to the airport in Tirana, Albania, from which he travelled back home to Germany.³⁹³ He also alleged that while detained, he was mistreated by being beaten, drugged, bound, and subjected to other forms of torture.³⁹⁴ This complaint alleged three separate causes of action:

1. The first cause of action was against Director Tenet and the unknown CIA employees for violations of El-Masri's Fifth Amendment right to Due Process, which protected him from being subjected to treatment that shocks the conscience or depriving him of liberty in the absence of legal process.³⁹⁵
2. The second cause of action was based on the Alien Tort Statute, and it alleged that each defendant had contravened the international legal norm against prolonged arbitrary detention.³⁹⁶
3. The third cause of action was also based on the Alien Tort Statute, and it alleged that each defendant had violated international legal norms prohibiting cruel, inhuman, or degrading treatment.³⁹⁷

In response, the United States filed a Statement of Interest which asserted the State Secrets Doctrine. Porter Gross, who at that time was Director of the CIA, then submitted two sworn declarations, one public and the other confidential, to the U.S. District Court for the Northern District of California in support of the state secrets

³⁹¹ *Id.* at 300.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 300–01.

³⁹⁷ *Id.* at 300.

claim.³⁹⁸ Because the suit was brought against Director Tenet and ten unnamed CIA employees in their individual capacities, the United States itself was not officially a party to the suit. However, the United States formally intervened, became a party in the suit, and then moved to dismiss the complaint because it posed “an unreasonable risk that privileged state secrets would be disclosed.”³⁹⁹ El-Masri responded that the doctrine did not necessitate the dismissal of his complaint primarily because the CIA extraordinary rendition programs had been discussed in public forums by government officials, including the Secretary of State Condoleezza Rice, White House Press Secretary Scott McClellan, and Directors Tenet and Gross.⁴⁰⁰ After reviewing the arguments, the district

court concluded that the State Secrets Doctrine applied and dismissed the case.⁴⁰¹

President Bush, although not revealing operational details, locations, or other circumstances of confinement, publically disclosed the existence of the CIA program.

During the period after the district court dismissal and the appeal, the Council of Europe released a draft report on the alleged United States renditions and detentions.⁴⁰² This report concluded that El-Masri’s account of his rendition and confinement was substantially accurate.⁴⁰³ Also during this

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 299–300.

⁴⁰⁰ *Id.* at 300.

⁴⁰¹ *Id.* at 302.

⁴⁰² *Id.* at 302.

⁴⁰³ *Id.*

time, President Bush, although not revealing operational details, locations, or other circumstances of confinement, publically disclosed the existence of the CIA program.⁴⁰⁴

On appeal, El-Masri claimed that the district court misapplied the State Secrets Doctrine. Although he acknowledged that some information important to his claims would be privileged, he challenged the court's determination that the state secrets were so central to this matter that any attempt at further litigation would threaten their disclosure. However, the U.S. Court of Appeals for the Fourth Circuit agreed with the district court and affirmed the dismissal of the complaint. In its rationale, the court points out that the United States may prevent disclosure of information in a judicial proceeding under the Reynolds evidentiary privilege.⁴⁰⁵ The court goes through a constitutional analysis to support the general idea that there should be judicial discretion given to the "the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."⁴⁰⁶ This acknowledgement of importance of the State Secrets Doctrine, however, does not override the ultimate judicial authority in determining the admissibility of evidence the Executive branch seeks to protect as well as the admissibility of a case that may threaten the exposure of purported state secrets.⁴⁰⁷ The Judiciary, and not the Executive, is the final decision-maker as to the application of the doctrine.⁴⁰⁸ The court went on to note that the Judiciary should only demand what is necessary to make a determination while weighing the necessity to resolve the plaintiff's claim against the government's need to maintain secrecy.⁴⁰⁹ Once the needs of the

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 303.

⁴⁰⁶ *Id.* at 303–04.

⁴⁰⁷ *Id.* at 305.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

adverse parties are weighed, if a court determines that the application of the State Secrets Doctrine applies and in order to create an all-encompassing effect, the court stated that “[a]fter information has been determined to be privileged under the State Secrets Doctrine, it is absolutely protected from disclosure.”⁴¹⁰ This expresses the court’s strong desire to keep confidential any information covered by the doctrine.

When moving beyond the history of the doctrine and the court’s interest in protecting U.S. government confidential and secret information, the court’s analysis moves backward from application of the *Reynolds* evidentiary privilege, which it discusses early in its opinion, to a skewed interpretation of the *Totten* bar. The court states that El-Masri “misapprehends the nature of our assessment of a dismissal on state secrets grounds.”⁴¹¹ The “controlling inquiry” the court points out:

is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets. Thus, for purpose of the state secrets analysis, the ‘central facts’ and ‘very subject matter’ of an action are those facts that are essential.⁴¹²

From this basis, the court applies a *Reynolds*-like and *Totten*-like analysis that led to the ultimate decision by the court to find that the State Secrets Doctrine bars El-Masri’s suit from moving forward. The court’s finding has only led to a breakdown of the distinct line drawn by precedent between the *Totten* bar and the *Reynolds* evidentiary privilege, and ultimately has contributed to confusion and denial of access to courts and justice.

2. Erosion of Distinction between *Totten* and *Reynolds*

⁴¹⁰ *Id.* at 306.

⁴¹¹ *Id.* at 308.

⁴¹² *Id.*

The court's rationale and holding in *El-Masri* erodes the distinctions made clear in judicial precedent delineating the line between the *Totten* bar and the *Reynolds* privilege. The court states, "[t]he controlling inquiry is . . . an action can be *litigated* without threatening the disclosure of such state secrets."⁴¹³ In this manner, the court expands the application of a *Totten* bar to include more than just the "subject matter" but also to include the "central facts" that stem from El-Masri's situation.⁴¹⁴ The court specifically points out that proceeding with El-Masri's case would invariably identify the purported roles of the defendants, which the court deems as a valid state secret.⁴¹⁵ Therefore, although the subject-matter of this case, that is, the existence of the extraordinary rendition program, was neither confidential nor secret, and although El-Masri was able to connect his detention to the program through public information, the court states that the *Totten* bar can be applied beyond the issue of "subject matter." The court explained that through litigation, El-Masri would have to show how the defendants were involved "in his detention and interrogation" which could only be shown through evidence that "exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations."⁴¹⁶ Furthermore, El-Masri would "have to demonstrate the existence and details of CIA espionage contracts" which is categorically bared by *Totten* and *Tenet v. Doe*. He would also have to bring in witnesses of the extraordinary rendition program, "whose identities . . . must remain confidential in the interest of national

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 308–09.

⁴¹⁶ *Id.* at 309.

security.”⁴¹⁷ Simply stated, the court in *El-Masri* “explicitly equates the very subject matter and central facts of a lawsuit.”⁴¹⁸

The threat of exposure of “central facts” stemming from the extraordinary rendition program combined with the fact that the defendants would be unable to defend themselves⁴¹⁹ without access to confidential information led the court to find that the State Secrets Doctrine applied and that the case could not proceed. However, the court’s rationale rejects the traditional application of the *Totten* bar through strict consideration of only the subject matter. If the subject matter of the extraordinary rendition program is not confidential, which is shown by the public acknowledge of the program by government officials including then President Bush, the State Secrets Doctrine through judicial precedent required that only the *Reynolds* evidentiary privilege could apply to El-Masri’s case. When the *Reynolds* evidentiary privilege applies, the court must look at specific documents and claims of privilege, as opposed to broad categories of information such as the general organization of personnel in the CIA, supervision procedures, etc. This differentiation is made clear when looking at how the court acted in *Reynolds*.⁴²⁰ In *Reynolds*, the court did not dismiss the asserted claim by the widows because the litigation could reveal how the Air Force tested secret equipment or how the Air Force conducted investigations.⁴²¹ Instead, the court looked at the specific piece of evidence

⁴¹⁷ *Id.*

⁴¹⁸ Steve C. Posner, Commentary, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007): *The State Secrets Doctrine and Extraordinary Rendition* (2008), available at LexisNexis.com.

⁴¹⁹ *El-Masri v. United States*, 479 F.3d 296, 309 (2007).

⁴²⁰ See generally *United States v. Reynolds*, 345 U.S. 1 (1953) (looking at the specific Air Force investigations report to determine its admissibility under the State Secrets doctrine, rather than looking at the general nature of the Air Force’s program or actions).

⁴²¹ *Id.* at 3.

which contained secret information, and barred this document from entering evidence only.⁴²²

The court seems to follow the *Reynolds* line of inquiry as it looked at the types of evidence needed by El-Masri to prove his claim. This evidence included the processes surrounding CIA detentions and interrogations, the names of individuals and companies involved, and the perspective roles of the

El-Masri was not simply deprived of a paycheck. He was tortured. He was kidnapped. He was deprived of freedom and dignity.

individuals and companies within the extraordinary rendition program. However, the court never acknowledged specific documents to be protected, as was done by the court in *Reynolds*, nor did it categorically distinguish between different types of evidence. Rather than strictly following the *Reynolds* evidentiary privilege by looking at each piece of evidence and determining its admissibility, the court made an overarching decision due to the general character of this evidence characterized as “central facts.” This over-encompassing decision expanded the *Totten* bar and the *Reynolds* privilege, blurred the distinct line between these two separate parts of the State Secrets Doctrine, and effectively denied El-Masri’s access to the court system and justice.

3. Determining When a Risk to Exposure of Privileged Information is Considered “Acceptable” or “Unreasonable”

Once the United States formally intervened in *El-Masri*, it claimed that the case against CIA employees and independent contractors could not proceed because it posed

⁴²² *Id.* at 7–11.

“an unreasonable risk that privileged state secrets would be disclosed.”⁴²³ The district court then agreed with this position and dismissed the case. On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed this dismissal based on the confusing and unsubstantiated rationale described above. The Appeals Court ignored the need to define the parameters of what constitutes an “unreasonable risk” to disclosure of privileged information.

In *Totten*, the Court weighed the need to protect the identity of secret agents and the contracts by which the U.S. government enters into to conduct its secret affairs against the need for payment of a purported salary due to the terms of a secret contract.⁴²⁴ However, El-Masri was not simply deprived of a paycheck. He was tortured. He was kidnapped. He was deprived of freedom and dignity. Beyond the unjustified detention in Macedonia, he was transported from Macedonia, to Afghanistan, and then to Albania against his will.⁴²⁵ In his complaint, El-Masri stated that:

He “had not only been held against his will, but had also been mistreated in a number of other ways during his detention, including being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government.”⁴²⁶

⁴²³ *El-Masri*, 479 F.3d at 299–300.

⁴²⁴ *Totten*, 92 U.S. 105, 106–07 (1876).

⁴²⁵ *El-Masri*, 479 F.3d at 300.

⁴²⁶ *Id.*

El-Masri adds “central facts” in addition to the “subject matter” as protected by the Totten bar. Such revisions to the State Secrets Doctrine demonstrate that the doctrine is now fraught with unnecessary confusion and that the exceptions to litigating significant human rights abuses have been limited by the misapplication of the law.

These acts underscore the reality that El-Masri was a victim of torture and the extraordinary rendition program. It is unthinkable to compare deprivation of freedom and torture with deprivation of a paycheck in assessing the reasonableness of the risk of disclosure of facts the government might prefer to remain hidden. El-Masri’s case stands for a proposition quite distinct from Totten’s pay check claim. If ever there was a case presented before the court which demonstrated the reasonableness or acceptability of risk to exposure of privileged information in order to find justice, El-Masri’s efforts to seek remedy as a victim of torture, one of the most egregious crimes imaginable, clears the bar. If the U.S. government is to take seriously the legal norms to which it has bound

itself, there must be circumstances where the courts will accept a risk to exposure of privileged information. There must be a case when a government’s actions cannot hide behind the State Secrets Doctrine so that the true meaning of torture prohibitions and freedom from egregious human rights abuses can be heard within the United States justice system.

4. What *El-Masri* add to *Totten* and *Reynolds*

Despite the parameters of the *Totten* bar and the *Reynolds* evidentiary privilege as established by the U.S. Supreme Court, the court in *El-Masri* expanded the circumstances in which a case must be dismissed once the court has determined that the State Secrets Doctrine applies through the *Reynolds* evidentiary privilege:

1. Plaintiff no longer has evidence necessary to support a claim.⁴²⁷
2. Defendants are unable to defend themselves without use of the privileged information.⁴²⁸
3. The circumstances surrounding the case make clear that “privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”⁴²⁹

Furthermore, *El-Masri* adds “central facts” in addition to the “subject matter” as protected by the *Totten* bar. Such revisions to the State Secrets Doctrine demonstrate that the doctrine is now fraught with unnecessary confusion and that the exceptions to litigating significant human rights abuses have been limited by the misapplication of the law.

C. The State Secrets Doctrine Under *Jeppesen* Fails to Follow U.S. Supreme Court Precedent

Jeppesen too is a case in which the State Secrets Doctrine has been mishandled and misinterpreted, both by failing to adhere to the evidentiary nature of the *Reynolds* privilege, and by applying the *Totten* bar in the first place. Even permitting *Jeppesen* did correctly interpret the doctrine, such interpretation was misapplied. By its own language, *Jeppesen* deems the State Secrets Doctrine to protect “legitimate national security interests”, and to bar actions which create an “unjustifiable risk of divulging state

⁴²⁷ *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007).

⁴²⁸ *El-Masri*, 479 F.3d at 309.

⁴²⁹ *Id.* at 308.

secrets.”⁴³⁰ An illegal act of torture - in violation of both domestic and international law—is a secret which, by its very nature, could never be legitimate. Furthermore, it is difficult to imagine what could be more justifiable a risk than exposing the magnitude of such atrocities. Given the improper decision in *Jeppesen* to dismiss an entire claim at the pleading state and leave the victim without remedy, the State Secrets Doctrine as a *whole* presents itself as a violation of international law.

1. Background

In 2010, the U.S. Court of Appeals for the Ninth Circuit determined the applicability of the State Secrets Doctrine in *Mohamed v. Jeppesen Dataplan, Inc.*⁴³¹ in reference to a claim under the Alien Tort Statute.⁴³² The plaintiffs, a number of foreign nationals, filed suit under the Alien Tort Statute alleging illegal involvement by Jeppesen Dataplan, Inc., a private contractor, by supporting the CIA extraordinary rendition program and its activities which included torture. The plaintiffs asserted that the defendant, Jeppesen, “provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture.”⁴³³ The plaintiffs outlined their theories of liability under two claims: “forced disappearance” and “torture and other cruel, inhuman or degrading treatment.”⁴³⁴ In its factual background, the court points out that “the Central Intelligence Agency (“CIA”) . . . operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign

⁴³⁰ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 (9th Cir. 2010).

⁴³¹ *Id.* at 1070.

⁴³² 28 U.S.C. § 1350 (2006).

⁴³³ *Jeppesen*, 614 F.3d at 1075.

⁴³⁴ *Id.*

countries for detention and interrogation.”⁴³⁵ This program, the plaintiffs contend, led to the implementation of “interrogation methods that would [otherwise have been] prohibited under federal or international law.”⁴³⁶

Although neither the CIA nor the U.S. government was named as a party in the complaint filed by the plaintiffs, the United States through the CIA moved to intervene and to dismiss the complaint alleging applicability of the State Secrets Doctrine before Jeppesen was able to answer the complaint.⁴³⁷ General Michael Hayden, then Director of the Central Intelligence Agency General Hayden invoked the state secrets doctrine, stating that although there was a general disclosure by government officials as to the existence of an extraordinary rendition program and the disclosure of a few names of detained individuals, he asserted that specific details involved in *Mohamed v. Jeppesen Dataplan, Inc.* remained protected by the doctrine. These details included specifically:

1. The issue of whether Jeppesen assisted the CIA with any of the alleged detention or interrogation described by the plaintiffs. The CIA did not disclose whether Jeppesen, or any private entity, assisted the CIA in conducting the program.⁴³⁸
2. The issue of whether the CIA cooperated with particular foreign governments in the conduct of alleged clandestine intelligence activities.⁴³⁹
3. Other issues pertaining to the operational details of the CIA’s terrorist detention and interrogation program.⁴⁴⁰

Gen. Hayden’s assertion of the State Secrets Doctrine was made available to the general public. However, he submitted a second written formal claim that was reviewed in

⁴³⁵ *Id.* at 1073.

⁴³⁶ *Id.* at 1074.

⁴³⁷ *Id.* at 1076.

⁴³⁸ Formal Claim of State Secrets and Statutory Privileges, General Michael V. Hayden, Dir. of Central Intelligence Agency 14–15 (Oct. 18, 2007) (on file with author).

⁴³⁹ *Id.* at 15.

⁴⁴⁰ *Id.* at 16.

camera by the judges presiding over the case. The district court granted the motion to intervene and then to dismiss the case based on the State Secrets Doctrine.⁴⁴¹

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court decision to dismiss this case based on the *Reynolds* privilege, but not on the *Totten* bar. Although the court does not describe the nature of the state secrets to be protected, the court determined that some of the matters asserted to be protected under the State Secrets Doctrine “are valid state secrets.”⁴⁴² Once the court made the decision to apply the State Secrets Doctrine, the court decided to dismiss the case in its entirety. The court did not base its decision to dismiss based on a specific finding that the plaintiff no longer could support any of their claims nor because Jeppesen’s ability to defend itself would necessarily reveal state secrets; rather, the court held that dismissal is required “under *Reynolds* because there is no feasible way to litigate Jeppesen’s alleged liability *without creating an unjustifiable risk of divulging state secrets*.”⁴⁴³ This line of reasoning parallels the finding of the court in *El-Masri* wherein it held that a case must be dismissed, after determination that the Reynolds privilege applies to information alleged to be protected by the State Secrets Doctrine, if there is the risk that “any attempt to proceed [in litigation] will threaten the information’s disclosure.” However, both *El-Masri* and *Jeppesen* misapply the State Secrets Doctrine and the rationale of the courts in both cases has led to unnecessary and greater confusion when legally invoking the doctrine.

⁴⁴¹ *Jeppesen*, 614 F.3d at 1076.

⁴⁴² *Id.* at 1086.

⁴⁴³ *Id.* at 1087.

2. *Jeppesen* Misinterprets the State Secrets Doctrine

It has always been the intent of the Supreme Court that the State Secrets Doctrine not be “lightly invoked.”⁴⁴⁴ Therefore, it is imperative that any claim in which the doctrine is invoked fall squarely within the confines of that doctrine. Before the final ruling in *Jeppesen*, the topography of state secrets was relatively straightforward and predictable to apply, limited in application to two discrete types of cases. First, as noted above, are

It has always been the intent of the Supreme Court that the State Secrets Doctrine not be “lightly invoked.”

cases subject to the *Totten* bar, in which the subject matter is such that “the law itself regards as confidential.”⁴⁴⁵ For cases in which the *Totten* bar applies, the issue has been deemed to be non-justiciable, due to a “public policy [that] forbids the maintenance of any suit in a court of

justice.”⁴⁴⁶ This has traditionally been limited to cases which involve secret government contracts.⁴⁴⁷ The second set of scenarios involve cases in which specific evidence is deemed a “state secret”, and that evidence is then forbidden from admission.⁴⁴⁸ These are the cases subject to the *Reynolds* privilege.⁴⁴⁹ Before *Jeppesen*, the State Secrets Doctrine had been used to dismiss entire claims only in limited instances: “(1) if the very subject matter of the action is a state secret; (2) if the invocation of the privilege deprives

⁴⁴⁴ *United States v. Reynolds*, 345 U.S. 1, 2–12 (1953).

⁴⁴⁵ *Totten v. United States*, 92 U.S. 105, 107 (1875); *see also* *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (affirming the generalization in *Totten*).

⁴⁴⁶ *Totten*, 92 U.S. at 107.

⁴⁴⁷ Janelle Smith, *Jeppesen Dataplan: Redefining the State-Secrets Doctrine in the Global War on Terror*, 45 U.S.F. L. REV. 1073, 1079 (2011).

⁴⁴⁸ *See generally Reynolds*, 345 U.S. (holding that in each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate).

⁴⁴⁹ *See infra* Section II.B.

a plaintiff of [specific] evidence necessary to prove a *prima facie* case; [or] (3) if the invocation of the privilege deprives a defendant of [specific] information necessary to raise a valid defense.”⁴⁵⁰ The first instance encompasses claims which fall under *Totten*. The last two fall under *Reynolds*.

As can be clearly seen, these two scenarios are mutually exclusive. The *Totten* rule provides a broad, categorical bar in a very narrow set of circumstances.⁴⁵¹ In contrast, the *Reynolds* privilege provides for a narrow bar on specific evidence, but in a much broader set of claims.⁴⁵² As noted above, the plaintiffs in *Jeppesen* rightly argued that a case must fall under *either Totten or Reynolds*, but not both.⁴⁵³ However, the District Court, and the en banc Ninth Circuit panel somehow managed to merge *Totten* with *Reynolds*, creating a judicial Frankenstein’s monster that is disconcertingly more powerful than the sum of its parts. As will be demonstrated below, the claim in *Jeppesen* was dismissible neither under *Totten* nor *Reynolds*. It is therefore unfathomable that the court should cobble them together into a version of the State Secrets Doctrine which, while appearing whole, is merely a shell of its former self.

3. The *Totten* Bar Does Not Apply to the Claims in *Jeppesen*

For purposes of understanding why the *Totten* bar does not apply it is useful to review the development of *Totten* as explained above. The court in *Totten* chose to

⁴⁵⁰ Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 951 (9th Cir. 2009).

⁴⁵¹ Brief of the Constitution Project as Amicus Curiae in Support of Petitioners, Mohammed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (2010) (No. 10-778), 2011 WL 119350 at *6.

⁴⁵² *Id.*

⁴⁵³ “Thus, this suit falls either under the rule of *Totten*, in which case it is categorically nonjusticiable irrespective of the evidence needed to litigate it, or under the state secrets privilege, in which case it may be dismissed only if successful invocation of the privilege deprives plaintiffs of evidence necessary to make out a *prima facie* case, or defendant of evidence indispensable to a valid defense.” Reply Brief of Plaintiffs-Appellants on Rehearing En Banc, Mohammed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693), 2009 WL 6635971 at *10.

dismiss a claim on the principle that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.”⁴⁵⁴ This is the “Totten bar”, which renders disputes over espionage contracts nonjusticiable.⁴⁵⁵

This proposition has been reinforced most recently in *Tenet v. Doe*, in which the court affirmed the concern in *Totten* that “the possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: ‘Even a small chance that some court will order disclosure of a source’s identity could well impair intelligence gathering and cause sources to ‘close up like a clam.’”⁴⁵⁶

Tenet highlighted that the *Totten* bar is separate and distinct from the *Reynolds* privilege. This distinction has been acknowledged in a 2011 Congressional Research Service Report, which states that “by limiting *Totten* to its facts, the Supreme Court arguably affirmed the distinction between the *Totten* bar and the *Reynolds* privilege. Therefore, disputes over contracts for espionage appear to remain a special category of cases over which the courts have no jurisdiction, and therefore must be “dismissed on the pleadings without ever reaching the question of evidence.”⁴⁵⁷

⁴⁵⁴ *Totten v. United States*, 92 U.S. 105, 107 (1875).

⁴⁵⁵ TODD GARVEY & EDWARD C. LIU, CONG. RESEARCH SERV., THE STATE SECRETS PRIVILEGE: PREVENTING THE DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION 7 (2011), available at <http://www.fas.org/sgp/crs/secretary/R41741.pdf>.

⁴⁵⁶ *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985)).

⁴⁵⁷ GARVEY & LIU, *supra* note 455, at 7.

It should be noted that *Totten* has been applied in cases which do not categorically involve espionage contracts, but are nonjusticiable using a similar rationale. As discussed above,⁴⁵⁸ the court in *Weinberger* cited *Totten* in its rationale that “due to national security reasons... the Navy can neither admit nor deny that it proposes to store nuclear weapons [at the facility].”⁴⁵⁹ While this represents a departure from the applicability of the bar to espionage contracts, the reasoning is analogous. The location of the military’s weapons cache is necessarily a matter “which the law itself regards as confidential.”⁴⁶⁰ Similarly, neither *Totten* nor *Weinberger* involved acts that were illegal in and of themselves. Government involvement in negotiating espionage contracts and housing nuclear weapons is, standing independently, completely permissible under the law. Government involvement in torturing victims under the extraordinary rendition program, however, is not.

As scholars have noted,⁴⁶¹ *Tenet* and *Weinberger* represent the two discrete instances in which the *Totten* bar can be applied: “(1) where the plaintiff is a party to a

Government involvement in negotiating espionage contracts and housing nuclear weapons is, standing independently, completely permissible under the law. Government involvement in torturing victims under the extraordinary rendition program, however, is not.

⁴⁵⁸ See *infra* Section II.A.

⁴⁵⁹ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146 (1981).

⁴⁶⁰ *Totten v. United States*, 92 U.S. 105, 107 (1875).

⁴⁶¹ See Jessica Slattery Karich, *Restoring Balance to Checks and Balances: Checking the Executive’s Power Under the State Secrets Doctrine*, *Mohamed v. Jeppesen Dataplan, Inc.*, 114 W. VA. L. REV. 759, 766 (2012); Smith, *supra* note 447, at 1081.

secret government agreement and the litigation would, necessarily, require the government to admit or deny the existence of such an agreement; and (2) in a suit against the government seeking to solicit secret information, where the government can neither admit nor deny the allegations without compromising national security.”⁴⁶² The bar should not be applied unless one of these two requirements has been met.

The claims in *Jeppesen* did not involve either of these scenarios. The first situation is irrelevant, as the claims had absolutely nothing to do with espionage or any other legitimate government contract.⁴⁶³ The second situation is similarly irrelevant, because the extraordinary rendition program is already public knowledge and has been admitted to by Presidents Bush and Obama.⁴⁶⁴ *Weinberger* permits the *Totten* bar to

The existence of the program itself is no longer confidential, and therefore not a danger to national security. The claims in Jeppesen therefore do not satisfy the Weinberger test, and should not be barred under Totten.

protect the government when admission or denial of a program’s existence would by its nature violate national security. The government cannot argue that there is a danger in admitting the existence of the program when it has already done so. While an argument *could* be made that specific site locations, or particular details of the program should be barred on national security grounds, it is an argument which should fall under the specific evidentiary privilege in *Reynolds*. The existence of the program itself is no longer

⁴⁶² Smith, *supra* note 447, at 1081.

⁴⁶³ See *infra* Section IV.C.1 (illustrating that extraordinary rendition is illegal and therefore not a legitimate secret worthy of protection from litigation).

⁴⁶⁴ *Bush Admits CIA “Black Sites”*, SPIEGEL ONLINE (Sept. 7, 2006), <http://www.spiegel.de/international/0,1518,435736,00.html>.

confidential, and therefore not a danger to national security. The claims in *Jeppesen* therefore do not satisfy the *Weinberger* test, and should not be barred under *Totten*.

Furthermore, as argued below, the extraordinary rendition program itself is a harm to national security.⁴⁶⁵ To keep the details a secret, and not publically condemn past acts of torture, presents real concerns to our defense strategy. This being the case, the United States government has drawn itself into quite the corner if it is a danger to national security to both to admit *and* to deny the existence of the program. If this quagmire indeed exists, and the government *is* faced with a danger to national security no matter what it does, it should err on the side of human rights and provide a remedy to the true victims of the program. In this way, at least someone would benefit from the unfortunate circumstance of extraordinary rendition having unequivocally harmed national security.

Where a claim is neither involving a confidential government contract, nor an instance where the government can neither admit nor deny the claim without compromising national security, the *Totten* bar does not apply. As the claims in *Jeppesen* do not satisfy either of these requirements, the court should not have dismissed them as nonjusticiable.

⁴⁶⁵ See *infra* Section IV.C.1.

The Supreme Court has clearly spoken on the evidentiary nature of the privilege, therefore prohibiting the use of Totten-like rationale to dismiss a case under Reynolds.

4. The *Reynolds* Privilege Should Not Dismiss the Claim at the Pleading Stage

Despite what appears to be the clear intent of the Supreme Court to root the State Secrets Doctrine in common law,⁴⁶⁶ recent troubling developments in lower courts have resulted in a conflation of the *Totten* bar with the *Reynolds* privilege, citing constitutional foundations.⁴⁶⁷ The Supreme Court has

clearly spoken on the evidentiary nature of the privilege, therefore prohibiting the use of *Totten*-like rationale to dismiss a case under *Reynolds*. With that rationale being impermissible, it is posited that a claim in which such privilege is invoked should never be dismissed at the pleadings stage, thereby denying the plaintiff an opportunity to plead his case without the privileged evidence.

a. The *Reynolds* Privilege is a common law evidentiary privilege, not a constitutional doctrine

As set forth above, in the relatively recent case of *El-Masri v. US*, the Fourth Circuit held that a rendition victim's claim was non-justiciable under both *Totten* and *Reynolds*. The court in *El-Masri*, correctly, first identifies the *Reynolds* privilege as an evidentiary one.⁴⁶⁸ However, it then goes on to confuse *Reynolds* with *Totten*: "[A] proceeding in which the state secrets privilege is successfully interposed must be

⁴⁶⁶ *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (saying that the *Reynolds* privilege is "a privilege which is well established in the law of evidence").

⁴⁶⁷ GARVEY & LIU, *supra* note 455, at 7.

⁴⁶⁸ *El-Masri v. United States*, 479 F.3d 296, 307–08 (4th Cir. 2007) ("[E]vidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged.").

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.”⁴⁶⁹

The court’s reasoning for this conflation rests in its assertion that the State Secrets Doctrine “performs a function of constitutional significance” in that it “allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”⁴⁷⁰ Prior to this case, no courts had ever characterized the State Secrets Doctrine as one rooted in the Constitution.⁴⁷¹

In *Jeppesen*, the Ninth Circuit takes a similar, but less overt, position that the privilege is somehow tied to the Constitution: “In evaluating the need for secrecy, “we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.””⁴⁷² This appears to be in concert with the government’s assertion that the state secrets privilege is “essential to the President's Article II powers to conduct foreign affairs and provide for the national defense.”⁴⁷³ The Ninth Circuit appears to qualify the extent of deference to the Executive branch, noting that “that an executive decision to *classify* information is insufficient to establish that the information is privileged.”⁴⁷⁴ It then quickly proceeds to ignore that qualification, and Ninth Circuit precedent, revealing a heretofore undiscovered species of the State Secrets Doctrine previously unknown to

⁴⁶⁹ *Id.* at 308.

⁴⁷⁰ *Id.* at 303.

⁴⁷¹ GARVEY & LIU, *supra* note 455, at 9.

⁴⁷² *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081–82 (9th Cir. 2010) (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007)).

⁴⁷³ Government’s Memorandum in Support of Motion to Dismiss at District Level, *Mohammed v. Jeppesen Dataplan, Inc.*, 539 F.Supp.2d 1128 (N.D.Cal. 2008) (No. C-07-02798-JW), 2007 WL 3223297 at *6.

⁴⁷⁴ *Jeppesen*, 614 F.3d at 1082.

legal scholars.⁴⁷⁵ Appearing to recognize a third category of claims in which “the *Reynolds* privilege converges with the *Totten* bar”, the Ninth Circuit held that “even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an

unacceptable risk of disclosing state secrets.”⁴⁷⁶

Furthermore, Justice Scalia expressed concern that the State Secrets Doctrine is in danger of being unreasonably expanded.

With all this talk of the constitutional roots of the state secrets privilege, one might be forgiven for believing that is actually the case. However, the Supreme Court has unequivocally, and repeatedly, said in no uncertain terms that the *Reynolds* privilege

is an evidentiary one.⁴⁷⁷ Most recently in *General Dynamics*, the court touched upon the nature of the privilege, seeming to contest any ideas about its constitutional foundations: “*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes

⁴⁷⁵ See *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) (stating that “the state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets”).

⁴⁷⁶ *Jeppesen*, 614 F.3d at 1083.

⁴⁷⁷ *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (noting that the *Reynolds* privilege is “a privilege which is well established in the law of evidence”).

on without it.”⁴⁷⁸ Furthermore, Justice Scalia expressed concern that the State Secrets Doctrine is in danger of being unreasonably expanded:

In *Reynolds*, we warned that the state-secrets evidentiary privilege “is not to be lightly invoked.” It is the option of last resort, available in a very narrow set of circumstances. Our decision today clarifies the consequences of its use only where it precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment.⁴⁷⁹

Where the Supreme Court has made clear that the *Reynolds* privilege is simply an evidentiary one, it is apparent that the court in *Jeppesen*, or any court, should not dismiss a claim based on any constitutional rationale. It was improper for the Ninth Circuit to find a point at which *Totten* and *Reynolds* merge, particularly because the Supreme Court said that they do not. As argued by constitutional law scholars and academics in their amicus brief in support of the plaintiffs in *Jeppesen*, the result of that conflation “risks converting the privilege from a narrow evidentiary rule to be applied in extraordinary circumstances into a generalized principle of non-justiciability that would preclude virtually all litigation remotely implicating amorphous “foreign policy and national security”

It was improper for the Ninth Circuit to find a point at which Totten and Reynolds merge, particularly because the Supreme Court said that they do not.

⁴⁷⁸ Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1906 (2011).

⁴⁷⁹ *Id.* at 1910.

interests.”⁴⁸⁰ The convergence of *Totten* and *Reynolds* in *Jeppesen*, based on imagined constitutional foundations, was illogical and improper. Therefore, the case should not have been dismissed.

b. The *Reynolds* Privilege should not bar this claim at the pleading stage

Now that it has been established that *Reynolds* is a purely evidentiary privilege, it can be demonstrated that such a privilege should not have permitted dismissal of a claim at the pleadings stage. As scholars,⁴⁸¹ and the dissent in *Jeppesen*,⁴⁸² have noted, a complete dismissal under *Reynolds* is akin to dismissal under F.R.C.P. 12(b)(6),⁴⁸³ or failure to state a claim. When assessing such a motion to dismiss, a court is “required to assume that the well-pleaded allegations of the complaint are *true*, and that we “construe the complaint in the light most favorable to the plaintiff[s].”⁴⁸⁴ An example of how this procedure can properly lead to a dismissal at an early stage can be seen in *Kasza v. Browner*.⁴⁸⁵ In this case, it was determined that the discovery required to prove the prima facie elements of the plaintiff’s claim would necessarily expose secrets imperative to national security. The court in that case held that “no protective procedure can salvage [the] suit. Therefore, as the very subject matter of [the] action is a state secret, we agree with the district court that [the] action must be dismissed.”⁴⁸⁶

⁴⁸⁰ Brief of Professors of Constitutional Law, Federal Jurisdiction and Foreign Relations Law as Amici Curiae in Support of Mohamed and Urging Reversal, *Mohammed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (2009) (No. 08-15693), 2008 WL 6042363 at *6.

⁴⁸¹ Smith, *supra* note 447, at 1095.

⁴⁸² *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1095 (9th Cir. 2010) (Hawkins, J., dissenting).

⁴⁸³ FED. R. CIV. P. 12(b)(6).

⁴⁸⁴ *Jeppesen*, 614 F.3d at 1095 (Hawkins, J., dissenting) (quoting *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005)).

⁴⁸⁵ 133 F.3d 1159 (9th Cir. 1998).

⁴⁸⁶ *Id.* at 1170 (“The information covered by the privilege is at the core of [the plaintiff’s] claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information.”).

While this is an example of how a claim may be dismissed at the pleadings state under *Reynolds*, it is not so analogous that the court in *Jeppesen* should have followed its reasoning. Because the privilege is an evidentiary one, it attaches only to specific pieces of evidence which the court, thorough independent verification, identifies as posing a danger to national security. So while the privilege may be invoked, and attached, at any stage including during pleadings, it should have no procedural effect on the ability of a plaintiff to allege most cases. This is particularly the case where the plaintiff, as in *Jeppesen*, has every intention of proving his allegations through the use of non-privileged evidence. Again, it is worth quoting the Supreme Court in *General Dynamics*, which

So while the privilege may be invoked, and attached, at any stage including during pleadings, it should have no procedural effect on the ability of a plaintiff to allege most cases.

highlights the egregious error in dismissing a claim entirely: “Reynolds was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it.”⁴⁸⁷

⁴⁸⁷ Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1906 (2011).

The erroneousness of dismissal in *Jeppesen* is further noted by the dissent in that case. It is pointed out that it is impossible for the majority to determine that “there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets.”⁴⁸⁸ This is because defendant Jeppesen had yet to answer the complaint, thereby leaving the majority to guess at what defenses might be hampered by the exclusion of privileged evidence. Similarly, the dissent notes that the majority simply ignored the “voluminous publicly available evidence” available to support the plaintiff’s claims.⁴⁸⁹

The Ninth Circuit’s decision to dismiss at the pleading stage is troubling for several reasons. First, it is procedurally without legal support. As previously stated, it is the clear intent of the Supreme Court that the privilege is a common law evidentiary one, “not to be lightly invoked.” Furthermore, “making assumptions about the contours of future litigation involves mere speculation, and doing so flies straight in the face of long standing principles of Rule 12 law by extending the inquiry to what might be divulged in future litigation.”⁴⁹⁰ The court bases that decision on the proposition that it became “convinced that at least some of the matters it seeks to

“Reynolds was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it.”

⁴⁸⁸ *Jeppesen*, 614 F.3d at 1087.

⁴⁸⁹ *Id.* at 1096 (Hawkins, J., dissenting).

⁴⁹⁰ *Id.* at 1097.

protect from disclosure in this litigation are valid state secrets.”⁴⁹¹ But, as scholars have noted, how can an entire claim be dismissed when only some of the information is classified?⁴⁹² In dismissing an entire claim based on tangential attachment to – allegedly – privileged evidence, the Ninth Circuit has ignored established legal procedure, relinquishing its adjudicatory obligations and instead opting to defer to the unfettered determinations of the executive branch.

This leads to the second concern that the decision in *Jeppesen* illustrates: an erosion of this country’s long established separation of powers. The system of checks and balances has been recognized as fundamental since 1803, when *Marbury v. Madison* emphasized the distinction and autonomy of the judicial and executive branches.⁴⁹³ This separation of powers becomes particularly important in the face of such egregious human rights violations as extraordinary rendition and torture, and takes on an “especially important role in the context of secret Executive conduct.”⁴⁹⁴ The Supreme Court, and the international community,⁴⁹⁵ has repeatedly reiterated the imperative nature of checks and balances when civil liberties are at stake: “[I]t was ‘the central judgment of the Framers of the Constitution’ that ‘[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy

⁴⁹¹ *Id.* at 1086.

⁴⁹² Smith, *supra* note 447, at 1096.

⁴⁹³ See generally *Marbury v. Madison*, 5 U.S. 137 (1803) (defining the boundary between the executive and judicial branches).

⁴⁹⁴ *Jeppesen*, 579 F.3d at 957.

⁴⁹⁵ Dick Marty, Switz., Alliance of Democrats & Liberals for Europe, Council of Europe, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations* 7 (2011) (“The principles of separation of power and “checks and balances” must not only be quoted in nice speeches; they must above all be implemented!”).

organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”⁴⁹⁶

As has been evidenced, the State Secrets Doctrine is a common law privilege, not a constitutional one. Its foundations, therefore, rest entirely with the judiciary branch. The Supreme Court has made clear that deference to the executive branch’s classification of information as “secret” is to be exercised in rare occasions. *Reynolds*, with its narrow

The Supreme Court did not intend to let the question of state secrets rest with a single branch.

evidentiary privilege and requirement for *in*

camera review, retains with the judiciary a

very specific power of oversight. The

Supreme Court did not intend to let the

question of state secrets rest with a single

branch. Truly, the power would rest with

single individuals – the director of the agency

required to invoke the privilege, upon approval by the Attorney General.⁴⁹⁷ Permitting

the court to review specific evidence, barring privileged information from discovery,

Reynolds and its progeny permit the judicial branch to act as a check for the executive

branch when it exercises the state secrets privilege. If the Supreme Court *had* intended

complete deference to the executive branch, it would have founded the privilege in the

President’s Article II powers, as was suggested by the government. It quite precisely has

not. In *Jeppesen*, the Ninth Circuit’s complete deference to the government’s claim of

privilege acts as an unjustified and illogical abdication of power, thus shifting the system

⁴⁹⁶ *Jeppesen*, 579 F.3d at 956 (quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989)).

⁴⁹⁷ *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (“There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”); *see also infra* Section VI.A (discussing new procedures requiring agencies that wish to invoke the privilege to submit such intent to the Department of Justice for review).

of checks and balances unfavorably away from itself. It was therefore highly improper for the Ninth Circuit to decide the claim could not proceed based on the assertions of the government alone, particularly when there was no attempt to permit the plaintiff to prove his allegations without the excluded evidence.


D. *Jeppesen* Misapplies the State Secrets Doctrine

Let us for a moment assume that the Ninth Circuit’s chimera is a correct and completely rational interpretation of the State Secrets Doctrine; that a case should be dismissed entirely when there is “no feasible way to litigate... alleged liability without

creating an unjustifiable risk of divulging state secrets” and that litigation would “seriously harm legitimate national security interests.”⁴⁹⁸

Permitting that this is the standard, no court should dismiss the case brought in *Jeppesen* for two reasons. First, the existence of the extraordinary rendition program is not a

legitimate national security interest. It cannot be claimed that actions in violation of international law are legitimate.⁴⁹⁹ Furthermore, what could possibly be a more justifiable reason for the judiciary to wield its specifically retained power in exposing state secrets than providing the victims of those atrocities with an appropriate remedy?



The State Secrets Doctrine protects “legitimate” state secrets.

⁴⁹⁸ *Jeppesen*, 614 F.3d at 1086–87.

⁴⁹⁹ See *infra* Part ONE.

1. Under *Jeppesen*, the State Secrets Doctrine Protects Only “Legitimate” State Secrets

It can be justifiably argued that there must be some deference to the executive branch in the determination of what is and what is not a state secret. After all, they are in the best position to make that determination based on experience and access to information to which other branches are not privy. However, deference becomes a concern when the government is permitted to use the State Secrets Doctrine to “prevent or block judicial or [legislative] inquiries set up to establish the truth about unlawful acts committed by agents of the executive.”⁵⁰⁰ The State Secrets Doctrine protects “legitimate” state secrets. The necessary question, therefore, is “What secrets are legitimate?”

A recent report from the Council of Europe attempts to answer this question.⁵⁰¹ Special Rapporteur Dick Marty with the Council of Europe, author of the report, acknowledges that pinning down a definition of “legitimate” which encompasses all potential categories of information would be a next to impossible task.⁵⁰² He therefore

It could never be argued that it was the intention of the founding fathers to permit one branch of government to be the arbiter of its own excesses.

proposes a negative definition which allies nicely with the focus of this brief: “A ‘negative’ definition is therefore sufficient: secrets not ‘worthy of protection’ are those which in reality relate to information pertaining to the personal or political responsibility

⁵⁰⁰ Marty, *supra* note 495, at 7.

⁵⁰¹ *Id.* at 7.

⁵⁰² *Id.*

for criminal acts.”⁵⁰³ This definition makes much sense, particularly when viewed through the lens of the United States’ system of checks and balances. Some deference is given to the executive branch in planning and executing a national security policy. However, when that policy crosses a threshold into encompassing illegal and immoral activities, it is precisely the role of the judiciary to remedy those abuses. It could never be argued that it was the intention of the founding fathers to permit one branch of government to be the arbiter of its own excesses. As the Council of Europe so aptly states: “It must therefore be possible for the criminal and civil courts and parliamentary

While regaining a balance between national security and individual liberties raises concerns about the unforeseen exposure of state secrets which are legitimate, the report proposes methods by which a functional government can effectively serve both masters.

committees of oversight to investigate serious allegations of crimes and human rights violations without being prevented from doing so through the unilateral and apodictical reliance, by the very agencies being investigated.”⁵⁰⁴ While regaining a balance between national security and individual liberties raises concerns about the unforeseen exposure of state secrets which *are* legitimate, the report proposes methods by which a functional government can effectively serve both masters.⁵⁰⁵

⁵⁰³ For descriptions of international attempts of judicial scrutiny of alleged illegal activities by a government, see generally *id.*

⁵⁰⁴ *Id.* at 20.

⁵⁰⁵ *Id.* at 21.

On a similar note, it can be argued that the extraordinary rendition program, and its details, cannot represent a legitimate national security policy because torture has been shown to be ineffective. Matthew Alexander, a former United States interrogator in Iraq, claims that our policy of torturing detainees is actually a detriment to national security for several reasons.⁵⁰⁶ First, that the policies of violent interrogations at sites like Abu Ghraib and Guantanamo is actually inciting terrorists to fight American troops. Second, the policy encourages supporters of groups like Al Qaida to finance those groups in protest against the US. Third, it makes detainees *less* likely to cooperate with interrogators:

I know from having conducted hundreds of interrogations of high ranking Al Qaida members and supervising more than one thousand, that when a captured Al Qaida member sees us live up to our stated principles they are more willing to negotiate and cooperate with us. When we torture or abuse them, it hardens their resolve and reaffirms why they picked up arms.⁵⁰⁷

Alexander details how coercive tactics led to the exposure of minimal information that was “downward or lateral indirection.” This meant that although detainees gave up details about other terrorists, it never led to the downfall of an organization. In contrast, when interrogators used “relationship-building approaches, [and] leveraged the best of our American culture (tolerance, cultural understanding, and intellect), we ultimately found the head of Al Qaida in Iraq by being smarter, not harsher.”⁵⁰⁸ It can be seen, then, that torture is not only ineffective, but a harm to the national security interests of the United States, actively inciting terrorists to take up arms in protest.⁵⁰⁹

⁵⁰⁶ Matthew Alexander, *Torture Doesn't Work*, DAILY BEAST (Apr. 20, 2009, 1:53 AM), <http://www.thedailybeast.com/articles/2009/04/20/torture-doesnt-work.html>.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ See *infra* Introduction.

Alexander is not the only witness to the ineffectiveness of the US's policy of torture.⁵¹⁰ Former Navy Judge Advocate General John Hutson has said "Fundamentally, those kinds of techniques are ineffective. If the goal is to gain actionable intelligence, and it is, and if that's important, and it is, then we have to use the techniques that are most effective. Torture is the technique of choice of the lazy, stupid and pseudo-tough."⁵¹¹ Former FBI interrogator Jack Cloonan says that not only does torture not help in intelligence gathering, but actually incites people to become terrorists.⁵¹² Statements against torture's efficacy have even come from surprising sources. Last May, Arizona Senator John McCain wrote an op-ed echoing Alexander's conclusion. McCain denounces the use of torture as an interrogation technique and warns that its continued use poses a serious risk to the security of our soldiers abroad:

I know from personal experience that the abuse of prisoners sometimes produces good intelligence but often produces bad intelligence because under torture a person will say anything he thinks his captors want to hear — true or false — if he believes it will relieve his suffering. Often, information provided to stop the torture is deliberately misleading. Mistreatment of enemy prisoners endangers our own troops, who might someday be held captive. While some enemies, and al-Qaeda surely, will never be bound by the principle of reciprocity, we should have concern for those Americans captured by more

It can be seen, then, that torture is not only ineffective, but a harm to the national security interests of the United States, actively inciting terrorists to take up arms in protest.

⁵¹⁰ *Id.*

⁵¹¹ Peter Finn, *Retired Officers Urge Obama to End Harsh Interrogations*, WASH. POST (Dec. 3, 2008, 6:30 AM), available at <http://www.chron.com/news/nation-world/article/Retired-officers-urge-Obama-to-end-harsh-1775419.php>.

⁵¹² Cory Doctorow, *FBI Interrogator: Torture Doesn't Work, Breeds Jjihad*, BOINGBOING (Mar. 10, 2008, 8:35 AM), <http://www.boingboing.net/2008/03/10/fbi-interrogator-tor.html>.

conventional enemies, if not in this war then in the next.⁵¹³

Extraordinary rendition, as a form of torture in and of itself, and as a process by which individuals are transferred for interrogation by torture, by its very nature, cannot be a legitimate national security interest: it is illegal, both under domestic and international law, and actively harms the security of American citizens, both at home and abroad.

Therefore, when the court in *Jeppesen* says that the claim should be dismissed as posing a

risk to a “legitimate national security interest”, it is clearly mistaken.

If exposing the magnitude of such atrocities presents a risk to national security that is not justifiable, one strains to imagine what could be.

2. Under *Jeppesen*, Only Claims Which Create an “Unjustifiable Risk” of Revealing State Secrets Should Be Barred

The majority opinion in *Jeppesen* repeatedly makes the point that a case must be dismissed in the event that litigation would create an “*unjustifiable risk*” of

state secrets being revealed.⁵¹⁴ It does not, however, make any reference to what might constitute a risk which *is* justifiable, or set out any legal test for determining the matter. This being the case, it seems that the Ninth Circuit has arbitrarily decided that the exposure of, and prosecution for, illegal acts of torture – among other human rights violations – and a desire to provide a remedy for their victims poses no such justification. Surely this conclusion does not fall in line with the intent of the framers to hold the

⁵¹³ John McCain, *Bin Laden’s Death and the Debate Over Torture*, WASH. POST (May 11, 2011), http://www.washingtonpost.com/opinions/bin-ladens-death-and-the-debate-over-torture/2011/05/11/AFd1mdsG_print.html.

⁵¹⁴ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 (9th Cir. 2010).

government responsible for its actions. If exposing the magnitude of such atrocities presents a risk to national security that is not justifiable, one strains to imagine what could be.

IV. The State Secrets Doctrine as a Whole Violates International law

It has been determined that the extraordinary rendition program is a human rights violation under international law.⁵¹⁵ This brief posits that in light of the current legal landscape, which forecloses both investigation and remedy for such atrocities, the State Secrets Doctrine *itself* violates international law.

To comply with its obligations under the Convention Against Torture, the United States is required both to investigate, and provide remedy for, acts of torture. The categorical bar instituted by *El-Masri* and *Jeppesen* precludes victims from seeking such investigation and remedy, thereby denying them their rights not only under domestic law, as illustrated above, but international law as well.

...in light of the current legal landscape, which forecloses both investigation and remedy for such atrocities, the State Secrets Doctrine itself violates international law.

As set forth above, in 1984, the United Nations General Assembly ratified the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).⁵¹⁶ The treaty serves to provide a series of ethical foundations to be applied regarding torture, as well as particular obligations upon the treaty's signatories.

⁵¹⁵ See *infra* Introduction.

⁵¹⁶ See generally *Convention Against Torture*, *supra* note 3.

As stated in the preamble, CAT “desir[es] to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” CAT was entered into force on June 26, 1987, signed by President Reagan on April 18, 1988, and ratified by the United States Senate on October 21, 1994, subject to eight reservations.⁵¹⁷ It is worth mentioning that one of the Senate’s reservations purported to “declare that the provisions of articles 1 through 16 of the Convention are not self-executing.”⁵¹⁸ This means that the reserved portions of the treaty have no effect domestically, unless Congress enacts legislation to implement those portions. However, the Senate *did* subsequently enact the Federal Tort Statute (FTS) to establish jurisdiction over acts of torture in which “(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.”⁵¹⁹ That reservation, therefore, has been rendered moot. Now afforded jurisdiction, the courts are obligated to adjudicate claims of torture by the government or private parties in a manner consistent with CAT.

Under Article 12 of CAT, “each State Party shall ensure that its competent authorities proceed to a **prompt** and **impartial investigation**, wherever there is **reasonable** ground to believe that an act of torture has been committed in any territory under its jurisdiction.”⁵²⁰ The categorical bar instituted by *Jeppesen* and *El-Masri* precludes any such investigation. Neither the Ninth Circuit, nor the court in any rendition case, has argued that there is not a reasonable ground to believe the victims’ claims. These cases have not been dismissed for failure to state claim, nor have they been

⁵¹⁷ See *infra* Part ONE(I)(A)(3).

⁵¹⁸ Convention Against Torture, *supra* note 3 (U.S. Reservations).

⁵¹⁹ 18 U.S.C § 2340A (2006).

⁵²⁰ Convention Against Torture, *supra* note 3, at art. 12.

permitted to proceed to a stage where a finder of fact determines those claims are unsupported by evidence. The current State Secrets Doctrine prohibits the finder of fact from even determining whether there is a reasonable ground to believe that an act of torture has been committed, let alone conduct an investigation of the alleged act. Restriction of access to evidence, or due process at all, necessarily prohibits an investigation of torturous acts in the name of national security. This is in direct violation of the United States' obligations under CAT to conduct an investigation of allegations of torture.⁵²¹ By instituting this categorical bar, which was not the intent of the Supreme Court in *Reynolds* or subsequent decisions, the Ninth Circuit has transformed the states secrets doctrine into an international law violation under Article 12 of CAT.

It is not merely the lack of investigation which makes the State Secrets Doctrine a violation of international law. Under Article 14 of CAT, “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. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.”⁵²² Under *Jeppesen*, when a claim is dismissed at the pleading state, the victims are left completely without remedy. No forum exists in which a victim may seek compensation, restitution, or acknowledgement of the wrongs instituted upon him. This is in direct violation of the United States' obligations under CAT to provide a remedy to victims of torture. The majority opinion in that case attempts to obscure this fact by

⁵²¹ *Id.*

⁵²² Convention Against Torture, *supra* note 3, at art. 14.

suggesting that other remedies exist for the plaintiff outside of the judicial system. These include: voluntary compensation by the executive branch, voluntary investigation of the executive branch by Congress, Congressional enacting a private bill, and Congressional legislation to create a right of action for plaintiffs in rendition cases. Not only has the court side-stepped the obligations of the judiciary, these “remedies” are either non-compulsory or presently non-existent. Their inadequacies will be further discussed below. For the purposes of current obligations under international law, there are presently no remedies to which plaintiffs are *entitled* under *Jeppesen* or *El-Masri*. To reiterate, by instituting this categorical bar, which was not the intent of the Supreme Court in *Reynolds* or subsequent decisions, the Ninth Circuit has transformed the state secrets doctrine into an international law violation under Article 14 of CAT.

In recent years, a disturbing trend has surfaced whereby the executive branch has attempted to further limit its international obligations. One Office of Legal Counsel (OAC) memo “states, flat out, that the President may simply ignore the law. Without any

“Tax advice this bad would be malpractice. Government lawyering this bad should be grounds for dismissal.”

authority, the opinion announces ex cathedra:

‘Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.’”⁵²³ As this brief has demonstrated,

the executive branch’s reliance on constitutional foundations to subvert judicial inquiry

⁵²³ Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT’L SECURITY L. & POL’Y 507, 514 (2012) (quoting the Memorandum of Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice for Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. § 2340-40A (Aug. 26, 2002)).

has been rebuked by the Supreme Court. Thankfully, scholars agree that recent OAC opinions in support of the executive are wholly without merit: “Tax advice this bad would be malpractice. Government lawyering this bad should be grounds for dismissal.”⁵²⁴ Although the Justice Department under the Obama Administration has made cursory attempts to reform the executive branch’s position on international obligations and the State Secrets Doctrine, there is still a long way to go to bring the United States back into compliance with CAT.⁵²⁵ As it stands under *Jeppesen* and *El-Masri*, the State Secrets Doctrine, inasmuch as it bars suits, is not only a violation of domestic law, but of international law as well.

V. New Developments

New developments may hold promise in some instances for reversing the inadequate application of the State Secrets Doctrine and for creating some opportunities for victims of torture and the extraordinary rendition program to obtain justice. But in other instances, these developments simply demonstrate the political indeterminacy of the U.S. government, and perhaps the courts, when deciding when to employ the State Secrets Doctrine. At the end of the day, more advocacy is required to create a social, political, and judicial change to ensure that victims get their day in court.

A. Executive Modification of Invoking the State Secrets Doctrine

On September 23, 2009, Attorney General Eric Holder released a new set of policies and administrative procedures governing the invocation of the State Secrets Privilege by the U.S. government. The memorandum specified that the Department of

⁵²⁴ *Id.* at 514.

⁵²⁵ See *infra* Section VII.A.

Justice will now “defend an assertion of the state secrets privilege in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations.”⁵²⁶ This memorandum sets forth procedures for invoking the State Secrets Doctrine, including the requirement of a submission by department heads to the Department of Justice. The submission requesting application of the state secrets privilege will then be reviewed by the Assistant Attorney General for the Division in the Department of Justice. According to the new procedures, the Assistant Attorney General upon review will then make a recommendation to the State Secrets Review Committee as to whether invocation of the privilege in litigation is warranted. The Review Committee will consult necessary department or agency heads. The Review Committee then makes a recommendation to the Deputy Attorney General, who shall in turn make a recommendation to the Attorney General. No department is allowed to defend an assertion of the privilege in litigation without the personal approval of the Attorney General.⁵²⁷

This new procedure may provide multiple checks and establishes an investigatory body to make a recommendation prior to asserting the State Secrets Doctrine. However, it is important to note that despite the existence of this new policy and procedure,

⁵²⁶ Memorandum from the Office of the Att’y Gen. to the Heads of Exec. Depts & Agencies Memorandum for the Heads of Dep’t Components 1 (Sept. 23, 2009), *available at* <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

⁵²⁷ *Id.*

however, no there has no discernible reduction in the use of the State Secrets Doctrine to protect government secrets.⁵²⁸

B. International Responses to the U.S. Extraordinary Rendition Program

1. Independent Investigations and Reports

The independent investigations conducted by regional and international human rights bodies into matters pertaining to extraordinary rendition and torture signal an important development, particularly as litigation in the U.S. court system seems to be barring victims a day in court due to the invocation of various privileges, especially the State Secrets Doctrine. Upon further inquiry by these regional and international bodies, plaintiffs and their families may hold out hope for new legal developments and international attention to the issue of extraordinary rendition and torture.

The United Nations has authorized a number of joint studies by Special Rapporteurs and working groups to investigate the circumstances of the CIA extraordinary rendition program. On 10 January 2008, the United Nations Human Rights Council released the report on Enforced or Involuntary Disappearances.⁵²⁹ Two years later, on 19 February 2010, this Council released the “Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism.”⁵³⁰ In 2007, the

⁵²⁸ Interview with Christopher H. Schroeder, Assistant Att’y Gen., U.S. Dep’t of Justice Office of Legal Policy, in Washington, D.C. (Mar. 22, 2012).

⁵²⁹ See generally U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Working Group on Enforced or Involuntary Disappearances*, U.N. Doc. A/HRC/7/2 (Jan. 10, 2008) (referencing the existence of this report as part of the international response to human rights abuses by the United States).

⁵³⁰ See generally U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, U.N. Doc.

International Committee of the Red Cross (ICRC) released a Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody.⁵³¹ This report, which comes after a number of attempted interventions and requests by the ICRC to gain information from the U.S. government, provides a description of the treatment and conditions of detainees.⁵³²

In 2006, Special Rapporteur Dick Marty with the Council of Europe released the report “Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States.”⁵³³ Rapporteur Marty released a second report on this topic in 2007.⁵³⁴ In 2007, a temporary committee headed by Special Rapporteur Giovanni Claudio Fava and set up through the European Parliament released the “Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners.”⁵³⁵ This same committee released a report on the flights operated by the CIA in Europe⁵³⁶ and a report on the companies linked to the CIA, aircraft used by

A/HRC/13/42 (Feb. 19, 2010) (referencing the existence of this report as part of the international response to human rights abuses by the United States).

⁵³¹ INT’L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY 1 (2007), available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

⁵³² *Id.* at 3–4.

⁵³³ See generally Council of Europe: Comm. on Legal Affairs & Human Rights, *Alleged Secret Detentions And Unlawful Inter-State Transfers Involving Council of Europe Member States*, AS/Jur (2006) 16 Part II (June 7, 2006), available at http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf (referencing the existence of this report as part of the international response to human rights abuses by the United States).

⁵³⁴ See generally Council of Europe: Comm. on Legal Affairs & Human Rights, *Alleged Secret Detentions And Unlawful Inter-State Transfers Involving Council of Europe Member States: Second Report*, Doc. 11302 rev. (June 11, 2007), available at assembly.coe.int/documents/workingdocs/doc07/edoc11302.pdf (referencing the existence of this report as part of the international response to human rights abuses by the United States).

⁵³⁵ See generally Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transp. & Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, 2006/2200(INI) (Jan. 30, 2007), available at <http://www.expose-the-war-profiters.org/archive/government/2007/20070130.pdf> (referencing the existence of this report as part of the international response to human rights abuses by the United States).

⁵³⁶ See generally Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transp. & Illegal Detention of Prisoners, *Working Document No. 4 on the Flights Operated by the CIA in Europe*, DT\617722EN.doc (June 1, 2006), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/617/617722/617722en.pdf (referencing

the CIA and the European countries in which CIA aircraft have made stopovers.⁵³⁷ These reports bring attention to and demand accountability for acts of extraordinary rendition and torture.

2. Accountability and Remedial Action on the International Front

Canada: As a result of the CIA

In January 2007, Canada agreed to issue a formal apology and a \$10 million settlement with Maher Arar due to Canada's participation in the U.S. decision to deport him to Syria, where he was tortured.

extraordinary rendition program which violates numerous international human rights norms, other foreign governments have acted to take responsibility and admit liability to participation and support for the program. In January 2007, Canada agreed to issue a formal apology and a \$10 million settlement with Maher Arar due to Canada's participation in the U.S. decision to deport him to Syria, where

he was tortured.⁵³⁸ Prior to this decision, Canadian authorities established a judicial inquiry into the case led by Justice Dennis O'Connor.⁵³⁹ In September 2006, Justice O'Connor released a report concluding that Arar had no terrorist links and that his

the existence of this report as part of the international response to human rights abuses by the United States).

⁵³⁷ See generally Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transp. & Illegal Detention of Prisoners, *Working Document No. 8 on the Companies Linked to the CIA, Aircraft Used by the CIA and the European Countries in which CIA Aircraft have Made Stopovers*, DT\641333EN.doc (Nov. 16, 2006), available at <http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf> (referencing the existence of this report as part of the international response to human rights abuses by the United States).

⁵³⁸ *Ottawa Reaches \$10M Settlement with Arar*, CBCNEWS (Jan. 25, 2007, 11:29 PM), <http://www.cbc.ca/news/canada/story/2007/01/25/arar-harper.html>.

⁵³⁹ *Id.*

detention was predicated on misleading information.⁵⁴⁰ About three years later, the British government decided to pay former detainees at Guantánamo Bay “tens of millions of dollars in compensation and conduct an independent investigation” as to the mistreatment of the prisoners.⁵⁴¹ Among the detainees is Binyam Mohamed, an Ethiopian-born former detainee with a British right of residency who asserts kidnapping and torture at the hands of the U.S. government.⁵⁴²

Poland: In a notable and unique endeavor, Poland has charged the former head of Poland’s intelligence service with aiding the CIA in setting up a secret prison to detain suspected members of Al Qaeda in violation of the Polish Constitution.⁵⁴³ The prison or

Poland has charged the former head of Poland’s intelligence service with aiding the CIA in setting up a secret prison to detain suspected members of Al Qaeda in violation of the Polish Constitution.

“black site” was located about 100 miles north of Warsaw.⁵⁴⁴ Although the U.S. government has attempted to dissuade the Polish government from going forward with prosecution of these matters, Polish officials were determined to go forward, noting that there is “a great unease [in Poland] after decades of Soviet domination that the country is giving too much influence to a powerful

⁵⁴⁰ *Id.*

⁵⁴¹ Editorial, *Accountability for Torture (in Britain)*, N.Y. TIMES, Nov. 17, 2010, at A32, available at http://www.nytimes.com/2010/11/17/opinion/17wed2.html?_r=1&ref=maherararar#.

⁵⁴² *Id.*

⁵⁴³ Joanna Berendt & Nicholas Kulish, *Polish Ex-Official Charged With Aiding C.I.A.*, N.Y. TIMES, Mar. 28, 2012, at A9, available at <http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html?emc=eta1>.

⁵⁴⁴ *Id.*

ally.”⁵⁴⁵ Adam Bodnar, Vice President of the Helsinki Foundation for Human Rights, commented: “I remember the lessons of constitutionality given by the Americans in the early ‘90s, always saying to us, you have to create a new constitution and every action by state authorities must have limits. Poland has just learned this lesson well.”⁵⁴⁶

Italy: Although courts, for the most part, have remained silent when addressing the extraordinary rendition program, an Italian judge made the headlines when convicting a C.I.A. base chief and 22 other Americans, almost all C.I.A. operatives, of kidnapping a Muslim cleric, Abu Omar, from the streets of Milan in 2003.⁵⁴⁷

...an Italian judge made the headlines when convicting a C.I.A. base chief and 22 other Americans, almost all C.I.A. operatives, of kidnapping a Muslim cleric, Abu Omar, from the streets of Milan in 2003.

Prosecutors said that Omar was “snatched in broad daylight” then flown from an American air base in Italy to Germany and then to Egypt where he asserts that he was tortured.⁵⁴⁸ Prosecutors reconstructed the disappearance “using cellphone records traced to American agents. The operatives used false names but left a paper trail of unencrypted cellphone records and credit card bills at luxury hotels in Milan.”⁵⁴⁹ That a foreign government was successful in its efforts to hold C.I.A. operatives accountable for

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES, Nov. 5, 2009, at A15, available at <http://www.nytimes.com/2009/11/05/world/europe/05italy.html>.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

criminal activity under Italian law and also under international standards is of notable significance and may encourage other nations from taking similar actions.

C. *Richmor Aviation, Inc. v. Sportsflight Inc.*

Although it may seem counterintuitive, unearthing developments regarding the application of the State Secrets Doctrine may involve looking where the doctrine was

"I kept waiting for [the government] to contact me. No one ever did."

never applied at all... In 2011, a New York appellate court upheld a ruling for breach of contract between two aviation companies.⁵⁵⁰

Operating as an arm of the CIA, both Richmor and Sportsflight were involved in the transportation phase of extraordinary rendition flights.⁵⁵¹ However, when it came time for the

government to invoke the state secrets privilege, no such objection was raised. As a result, "the costs and itineraries of numerous CIA flights became part of the court record."⁵⁵² Attorneys for both sides of the case remarked that no one from the government ever contacted them in an effort to object to the release of the sensitive data.⁵⁵³ "I kept waiting for [the government] to contact me. No one ever did."⁵⁵⁴

Richmor is certainly an outlier in terms of invoking the state secrets privilege, but it remains to be seen exactly what this failure to invoke truly means. First, the most

⁵⁵⁰ *Richmor Aviation, Inc. v. Sportsflight Air, Inc.*, 82 A.D.3d 1423, 1426 (2011).

⁵⁵¹ Peter Finn & Julie Tate, *N.Y. Billing Dispute Reveals Details of Secret CIA Rendition Flights*, WASH. POST (Aug. 31, 2011), http://www.washingtonpost.com/world/national-security/ny-billing-dispute-reveals-details-of-secret-cia-rendition-flights/2011/08/30/gIQAbggXsJ_story.html.

⁵⁵² *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

obvious difference is that *Richmor*'s central issue was a contract dispute, not extraordinary rendition. With the Supreme Court's decision to grant certiorari in *General Dynamics*, but not torture cases such as *El-Masri* and *Jeppesen*, it could be argued that courts are more willing to hear cases not related to torture, and that when the public spotlight is not shining so brightly, the government is less concerned with the release of information that could implicate its liability. Furthermore, the government's failure to invoke at a state level, as opposed to federal, could indicate a reluctance to redirect the spotlight towards itself. Invocation of the privilege in a case where the federal government is not a named party *could* be perceived as an implied acknowledgement of complicity. Finally, and perhaps just as plausibly, failure to invoke could simply be evidence of oversight on the part of a bureaucratic and labyrinthine administration. While attorneys for *Richmor* and *Sportsflight* were never contacted by the government, it is unclear whether the government was ever notified of the case in the first place.

If *Richmor* is not a case of administrative oversight, the outcome of that case holds several implications for the future of the State Secrets Doctrine. First, it is the first time that documents referencing extraordinary rendition have been revealed in litigation. Second, a failure to invoke may demonstrate political selectivity in invoking the privilege. Third, failure to invoke shows that extraordinary rendition is not

All of these developments indicate a potential erosion of the ability to invoke the State Secrets Doctrine in the future, clearly weakening the government's argument that information regarding extraordinary rendition is a legitimate state secret.

covered by the *Totten* bar, as this was a case involving secret government contracts. Last, but not least, *Richmor* indicates that the government care more about market forces and profits related to contracts than it does human rights abuses. All of these developments indicate a potential erosion of the ability to invoke the State Secrets Doctrine in the future, clearly weakening the government's argument that information regarding extraordinary rendition is a legitimate state secret. Until more information is uncovered regarding the government's rationale behind not invoking the state secrets privilege, it remains to be seen whether *Richmor* represents a sea change or a statistical blip. Either way, the government isn't talking.

VI. Remedies

As the Supreme Court has recently declined to revisit the issue of state secrets in a case relating to torture, *Jeppesen* will continue to present substantial challenges to victims seeking a proper remedy for the crimes against them.⁵⁵⁵ Although the court in *Jeppesen* implied that victims were deserving of some remedy, albeit not through litigation, and identified several possibilities, the suggested remedies are wholly insufficient. There are, however, other suggested remedies which might be feasible in the wake of *Jeppesen*'s restrictions. Depending on the form of particular justice sought by each victim, such potential remedies include closed proceedings whereby these individuals will have their day in court, which may serve to provide monetary relief, and public apologies, which provide compensation of a more emotional nature. Both remedies have significant benefits and substantial drawbacks, which this part will further discuss.

⁵⁵⁵ See generally *Mohamed v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442 (2011) (denying certiorari).

A. Remedies Suggested by *Jeppesen* (and why none are fully appropriate)

Before identifying possible meaningful remedies, it is important to review the suggestions by the Court of Appeals in *Jeppesen* wherein it outlines further steps that might be taken to ameliorate the harm caused to victims of torture and extraordinary rendition. In anticipation of critics who would claim that the ruling in *Jeppesen* leaves plaintiffs wholly without remedy for human rights violations, the majority opinion suggests four remedies which “partially mitigate these concerns.”⁵⁵⁶ First, it is suggested that the executive branch “can determine whether plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy that national security demands.”⁵⁵⁷ What the majority ignores, however, is that this “remedy” is entirely at the whim of an administration that has already demonstrated an apathy verging on maliciousness towards these particular plaintiffs. It is hardly likely that the government would suddenly recognize the egregious nature of the very actions it has fought so valiantly to justify.⁵⁵⁸ A remedy which is not compulsory is no remedy at all. Furthermore, as the dissent points out, this approach “disregards the concept of checks and balances. Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter.”⁵⁵⁹

⁵⁵⁶ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1091 (9th Cir. 2010).

⁵⁵⁷ *Id.*

⁵⁵⁸ Shane, *supra* note 523, at 514.

⁵⁵⁹ *Jeppesen*, 614 F.3d at 1101 (Hawkins, J., dissenting).

The second remedy posited by the majority suggests that “Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch.”⁵⁶⁰

The problem is not whether these remedies could be available to a plaintiff, but whether they actually are. As of this brief, there are no mechanisms for a plaintiff to seek any of these suggested remedies, other than asking quite nicely and hoping for the best.

Third, “Congress also has the power to enact private bills.”⁵⁶¹ And lastly, “Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here.”⁵⁶² The problem with these suggested remedies represents a similar failure as the one above; none of them are compulsory or presently within existence. The court in *Jeppesen* is not wrong in its assertion that Congress *could* do all of these things, just as the executive branch *could* make reparations on its own accord. The problem is not whether

these remedies *could* be available to a plaintiff, but whether they actually *are*. As of this brief, there are no mechanisms for a plaintiff to seek any of these suggested remedies, other than asking quite nicely and hoping for the best. That is not the way our system of justice works in this nation.

Aside from the practical technicality that none of these remedies currently exists, they would not be sufficient even if they were available. Let us pretend that the government

⁵⁶⁰ *Id.* at 1091.

⁵⁶¹ *Id.*

⁵⁶² *Id.*

were to make reparations to the victim in *Jeppesen*. This would not be sufficient because the plaintiffs in that case were seeking redress from a private corporation in connection with government action. Some plaintiffs *have* sought reparations from the government, individually or in concert with private parties.⁵⁶³ However, when the sole defendant is a private party, as in *Jeppesen*, permitting the government to step in and provide compensation ignores two important aspects of civil liability: punishment and deterrence. As scholars have noted, “an appropriate alternative remedy must require that *Jeppesen*, not the U.S. government, pay damages to the plaintiffs. Turning to the government would absolve these complicit corporate actors from ever having to compensate those they harmed.”⁵⁶⁴ This is not to say that the government should escape liability for any complicity it has where it is not a named defendant; merely that it should be against public policy for the government to assume the liability of a private party. Furthermore, abdicating the resolution of the dispute to “a congressional investigation, private bill, or enacting of ‘remedial legislation,’ leaves to the legislative branch claims which the federal courts are better equipped to handle.”⁵⁶⁵

In cases where the government is the sole or co-defendant, permitting the executive branch alone to make reparations to a plaintiff again flies in the face of the system of checks and balances. Without the capable oversight of the judicial branch, who is to say whether such reparations are appropriate or adequate? It cannot be permitted for the

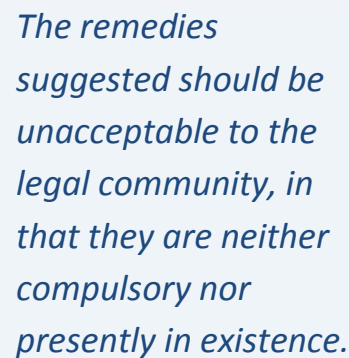
⁵⁶³ See generally *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (holding that an alien’s allegations regarding the conditions of his confinement in the United States prior to his removal to Syria and regarding the denial of his right of access to the courts were insufficient to state a claim against officials for violation of his substantive due process rights under the Fifth Amendment); *El-Masri v. United States*, 479 F.3d 296, (4th Cir. 2007) (holding that for purposes of the state secret analysis, the “central facts” and “very subject matter” of an action are those facts that are essential).

⁵⁶⁴ Benjamin Bernstein, *Over Before it Even Began: Mohammed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, 34 *FORDHAM INT’L L.J.* 1400, 1428–29 (2011).

⁵⁶⁵ *Jeppesen*, 614 F.3d at 1101 (Hawkins, J., dissenting).

government to run amok and then, as a child reared on progressive parenting, be allowed to decide what *he* thinks his punishment should be. As described above, the plaintiff would be presented with a remedy that is neither punitive, deterrent, nor compensatory. Lacking any of those characteristics, such a remedy is no remedy at all.

In summation, *Jeppesen* forecloses any remedy for plaintiffs seeking redress for extraordinary rendition or similar atrocities committed by, private corporations, the U.S. government, or their agents. The remedies suggested should be unacceptable to the legal community, in that they are neither compulsory nor presently in existence.



The remedies suggested should be unacceptable to the legal community, in that they are neither compulsory nor presently in existence.

Permitting that they *were* compulsory or existent, the suggested remedies ignore the fundamental principles of checks and balances, and the multiple purposes of civil liability. The Supreme Court having declined to re-examine the decision in *Jeppesen*, we are left to wonder what remedies *may* be found for plaintiffs daring to navigate the gauntlet of the State Secrets Doctrine in its present state.

B. Other Potential Domestic Remedies

To determine what constitutes a proper remedy for a particular plaintiff, one must first ascertain what it is that the victim hopes to accomplish. The proper route for a victim who wants compensatory damages may be quite different than the route for a victim who seeks acknowledgement of the wrongs done against him. What follows is a

discussion of potential avenues for remedies not precluded by the decisions in *El-Masri* and *Jeppesen*, and an analysis of their benefits and drawbacks.

1. Legislative Reform: The State Secrets Protection Act

In recent years, attempts have been made by Congress to address much-needed reforms to the state secrets privilege. In 2008 and 2009, both the House and Senate were introduced to the State Secrets Protection Act (SSPA), an expansive piece of legislation seeking to codify procedural and substantive guidelines for courts to follow when

The most immediate relief provided by the SSPA would be a prohibition on using the state secrets privilege as grounds for dismissing a case completely before discovery.

applying the State Secrets Doctrine.⁵⁶⁶ The most immediate relief provided by the SSPA would be a prohibition on using the state secrets privilege as grounds for dismissing a case completely before discovery.⁵⁶⁷ The bill also requires that the court review “each item of evidence that the United States asserts is protected by the state secrets privilege...to determine whether the claim of the United States is

valid.”⁵⁶⁸ If the evidence is deemed privileged, the court then determines whether it is possible to “craft a non-privileged substitute for that privileged evidence that provides a substantially equivalent opportunity to litigate the claim or defense as would that

⁵⁶⁶ State Secrets Protection Act of 2009, S. 417, 11th Cong. §1 (2009).

⁵⁶⁷ *Id.* at § 4053(b).

⁵⁶⁸ *Id.* at § 4054(e)1.

privileged evidence.”⁵⁶⁹ Finally, the legislation only permits dismissal of a claim if all of the three following criteria are met:

(1) it is impossible to create for privileged material evidence a non-privileged substitute ...; (2) dismissal of the claim or counterclaim would not harm national security; and (3) continuing with litigation of the claim or counterclaim in the absence of the privileged material evidence would substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim.⁵⁷⁰

Under the SSPA, a claim can only be dismissed after careful review of “privileged” evidence by the court, and a determination that said evidence is critical to the claim. The Act does not permit a claim to be dismissed if the plaintiff may plead his case on the basis of non-privileged evidence, an opportunity not afforded to the plaintiffs in *Jeppesen* or *El-Masri*.

Paralleling one of the proposed remedies set forth in *Jeppesen*, the SSPA seeks to readjust the scales in favor of human rights, while still recognizing legitimate national security interests.⁵⁷¹ If enacted, it would provide statutory guidelines for the court in line with the original intent of *Reynolds*. While this legislation would be a welcome turning of the tide for victims of extraordinary rendition, it is for now just a ghost of a good idea. The bills have not been enacted, and there has been no progression towards that end since 2009.

2. Closed Proceedings

As the Ninth Circuit noted in *Doe v. Tenet*, the courts currently have several options by which they can choose to restrict access to sensitive information, “including in

⁵⁶⁹ *Id.* at § 4054(f).

⁵⁷⁰ *Id.* at § 4055.

⁵⁷¹ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1091 (9th Cir. 2010).

camera review, closed proceedings, and sealed records.”⁵⁷² For a closed proceeding, the sensitive information is disclosed only to the parties at bar, and prevented from insertion into the public record. The parties can then be subject to a protective order by the court requiring that said information not be revealed.

The benefits of this procedure are evident. First, a closed proceeding permits all parties access to all evidence through discovery, even though it is deemed a “state secret.” The court can then hear the case with knowledge of all the facts. This allows it to properly assign damages, both compensatory and punitive, to the victim. The plaintiff therefore, in theory, can receive some amount of pecuniary redress, and there is potential for both punishment and deterrence towards the defendant, should the dollar amount be high enough. This scenario provides the investigation and redress that, as discussed above, is required by international law. It furthermore restores the proper checks and balances towards the judicial branch, which is in the best position to adjudicate such claims.

Such a remedy is not without drawbacks, however. Where the details of the case are sealed in a closed proceeding, the public would be denied a full accounting of the wrongs committed by its government. The victim would necessarily be foreclosed from receiving a public apology from the defendant. There is real concern, then, that such defendants, freed from potential future stigma from their actions, might factor compensatory and punitive damages into their “cost of doing business,” assessing that the benefits they derive from torture outweigh the inconvenience of an occasional lawsuit. Furthermore, a protective order is only as enforceable as the party subject to it wishes it

⁵⁷² Doe v. Tenet, 329 F.3d 1135, 1150 (9th Cir. 2003).

to be. While honest victims seeking redress, such as those in *Jeppesen*, may have no intention of leaking privileged information, there is some concern that actual terrorists may use this procedural availability to gain access to information they would normally be restricted from.⁵⁷³ Unenforceable protective orders are particularly concerning when parties are not US citizens and not subject to US law abroad. Finally, another drawback to this remedy is that it re-enforces the priority of national security over due process and civil liabilities.

Ultimately, this remedy would probably be best sought by victims who would be satisfied by taking a pecuniary amount and going on with their lives. Some victims, for example, are so traumatized by their experiences that subjecting them to a public forum would prove altogether too taxing. It might, therefore, be in their best interest to take some form of monetary compensation, which could then be used to try and make their future as stable as possible.

3. Public Apology

While the current legal remedies available to torture victims may appear inadequate or unattainable, there is actually much to be gained for those victims through a simple public apology. Many victims of

Many victims of extraordinary rendition say that which they want the most is a public recognition that what was done to them was wrong, not only for themselves, but for potential future victims.

⁵⁷³ Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (Cipa)*, 32 CARDOZO L. REV. 437, 452 (2010) (“But defendants in terrorism cases are not likely to know state secrets. If secrets are revealed to suspected terrorists in discovery or at trial, these secrets will inevitably make their way to other terrorists. Protective orders or other instructions from the court will not take care of all problems. A defendant who plotted to fly airplanes into buildings is not easily deterred.”).

extraordinary rendition say that which they want the most is a public recognition that what was done to them was wrong, not only for themselves, but for potential future victims. As discussed above, other countries have begun to issue public apologies and compensation for their complicity in extraordinary rendition.⁵⁷⁴ The United States, however, has yet to do so.

Such an apology need not be on a federal level, although that is preferable. Local groups, such as North Carolina Stop Torture Now, have initiated grass-roots initiatives, gathering signatures from citizens apologizing for their government's involvement with torture.⁵⁷⁵ They report that it heartens torture victims to know that there are people who recognize and apologize for the indignities they have suffered. While such apologies are a long way from an adequate remedy, they are a good start. The hope is that with enough publicity and education at a local level, such remorse would trickle upwards, inciting the President to make a public acknowledgement of extraordinary rendition's illegitimacy.

There are evident benefits from such an acknowledgement. Victims of torture would receive an acknowledgement from the United States of the wrongs done to them.

Furthermore, there is some potential for monetary reparations, as suggested by the court

Furthermore, the deterrent effect relies on the hope that domestic and international disapproval would shame the government enough to avoid such actions in the future.

⁵⁷⁴ See *infra* Section VII.B.

⁵⁷⁵ Home, N.C. STOP TORTURE NOW, <http://www.ncstoptorturennow.net/index.html> (last visited May 4, 2012).

in *Jeppesen*. Lastly, such an apology may bring enough attention to a public disapproval of the program to deter further violations in the future. The problem with this solution is that, without an investigation to uncover specifics of the crime, it would be impossible to calculate or provide for actual damages to the victim. Any relief provided would be at the whim of the government. Furthermore, the deterrent effect relies on the hope that domestic and international disapproval would shame the government enough to avoid such actions in the future.

In summation, none of these remedies alone is sufficient for victims of torture. While they are all beneficial in some way, they each have significant drawbacks rendering them ineffective individually. Operating in concert, however, these suggested remedies could work to alleviate some of the harm *El-Masri* and *Jeppesen* have done to the ability of torture victims to obtain due process. All possible strategies must be pursued in order to create an appropriate balance between national security and civil liberties and human rights including legislative reform, expanding access to civil remedies, and issuing a public acknowledgement and apology to the victims.

C. Use of Regional and International Human Rights Tribunals

When the domestic legal system does not provide any access to justice, international judicial forums may provide remedies. Although these forums, which include international human rights courts and commissions, do not have the same judicial and enforcement authority and tools of the U.S. domestic courts, they at least provide claimants with an opportunity to allege and bring attention to human rights violations. With the resources of the international community, these bodies can institute independent

investigations, seek apologies from national heads, and sort through other possible international remedies.

On March 19, 2012, the American Civil Liberties Union filed a petition⁵⁷⁶ against the United States with the Inter-American Commission on Human Rights (IAHCR) on behalf of three Afghans and three Iraqis who were purportedly tortured while in U.S. custody abroad.⁵⁷⁷ This petition seeks an investigation by this independent human rights body of the Organization of American States concerning human rights violations and an apology from the U.S. government.⁵⁷⁸ These men had unsuccessfully sought reparations through the U.S. court system by filing a case against then-Defense Secretary Donald Rumsfeld. The court in this case, *Ali v. Rumsfeld*, decided that the Westfall Act, which limited the liability of Government employees while “acting within the scope of their employment,” applied to this suit; therefore, the case was dismissed based on immunity grounds.⁵⁷⁹ These plaintiffs, human rights advocates, and the international community are encouraged by the possibility of an alternative forum and are hopeful for an outcome that will finally provide some type of justice.

⁵⁷⁶ Petition Alleging Violations of Human Rights of Thahe Mohammed Saber, Sherzad Kamal Khalid, Ali Hussein, Mehboob Ahmad, Said Nabi Siddiqi, and Hajji Abdul Rahman by the United States of America, available at http://www.aclu.org/files/assets/iachr_sabar_petition.pdf.

⁵⁷⁷ *Afghans & Iraqis Tortured by U.S. Military Bring Case Before International Human Rights Tribunal*, ACLU (Mar. 19, 2012), <http://www.aclu.org/human-rights/afghans-iraqis-tortured-us-military-bring-case-international-human-rights-tribunal>.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Ali v. Rumsfeld*, 649 F.3d 762, 787 (2011).

D. Citizens Commission of Inquiry

A commission of inquiry created by concerned citizens may be the most effective way to achieve accountability for North Carolina's involvement in the extraordinary rendition program and torture.

As noted above, a commission of inquiry created by concerned citizens may be the most effective way to achieve accountability for North Carolina's involvement in the extraordinary rendition program and torture. The commission would be charged with examining the state's role in the extraordinary rendition program; establishing a formal public record of North Carolina's role in extraordinary rendition; developing

recommendations for accountability of state and local governments; and working to implement these recommendations at the city, county and state level. Along with shining a spotlight on the practice of extraordinary rendition, the Commission of Inquiry would be a model for other states and regions around the world who owe it to victims and to citizens to uphold the mandates that prohibit torture.

VII. Conclusion to PART TWO

The State Secrets Doctrine has been increasingly misinterpreted and misapplied over the past decade, most recently in *El-Masri* and *Jeppesen*. This has effectively led to denial of a day in court to any person alleging human rights abuses, including acts of torture arising out of the CIA extraordinary rendition program. When the United States claims to respect human rights but denies access to its courts for those seeking justice for human rights abuses, it violates not only domestic and international law but also the very

bases of values and rights that serve as the foundation upon which the United States was built.

The United States has a history of responding to claims of human rights abuses by invoking the threats posed by a “state of war” and threats to national security as a way to avoid accountability. One of the most famous instances was addressed by the U.S.

Supreme Court in *Korematsu v. United States*.⁵⁸⁰ During World War II, Korematsu

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admitted to violating Exclusion Order No. 34

which excluded individuals of Japanese

ancestry from remaining in a “Military Area”

of the West Coast of the United States due to

concerns for national security.⁵⁸¹ However,

Korematsu contended that these orders were

illegal because he was being unjustly

imprisoned in a concentration camp due to his

Japanese ancestry.⁵⁸² Despite a lack of

showing of disloyalty by Korematsu,⁵⁸³ the

court reasoned that “exclusion of those of Japanese origin was deemed necessary because

. . . it was impossible to bring about an immediate segregation of the disloyal from the

loyal.”⁵⁸⁴ This exclusion order was deemed necessary for the “protection against

espionage and against sabotage.”⁵⁸⁵ The court stated that it was “unjustifiable to call

⁵⁸⁰ 323 U.S. 214 (1944).

⁵⁸¹ *Id.* at 216–17.

⁵⁸² *Id.* at 223.

⁵⁸³ *Id.* at 216.

⁵⁸⁴ *Id.* at 218–19.

⁵⁸⁵ *Id.* at 217.

[these centers] concentration camps”⁵⁸⁶ and that the court is “dealing specifically with nothing but an exclusion order.”⁵⁸⁷ The court therefore held that the exclusion order was legal and that Korematsu committed a criminal offense by violating the exclusion order.

Any notable form of relief for Korematsu did not come until 1984 when the United States District Court for the Northern District of California vacated his criminal conviction on the grounds of governmental misconduct by granting a writ of *coram nobis*.⁵⁸⁸ The court noted how the government was trying to avoid any confession of wrongdoing or error,⁵⁸⁹ but also brought attention to the Congressional creation of a Commission on Wartime Relocation and Internment of Civilians established in 1980.⁵⁹⁰ The Commission “found that military necessity did not warrant the exclusion and detention of ethnic Japanese.”⁵⁹¹ Based on these considerations, the court granted the writ of *coram nobis* to reverse the conviction.⁵⁹² In its conclusion, the court notes that although *Korematsu* remains on the books:

as historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.⁵⁹³

⁵⁸⁶ *Id.* at 223.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (1984).

⁵⁸⁹ *Id.* at 1413.

⁵⁹⁰ *Id.* at 1416.

⁵⁹¹ *Id.*

⁵⁹² *Id.* at 1420.

⁵⁹³ *Id.* at 1420.

Much can be learned from Korematsu's case and story which brings to light a human rights abuse of governmental power during a threat to national security. When analogizing this situation to the extraordinary rendition program, there exists the possibility that the U.S. government has blatantly ignored this court's warning. It is possible that one day another U.S. court may find itself in a similar position entrusted to reverse the injustice done to innocent victims because of the "fears and prejudices" that the U.S. government has acted upon in the name of the War on Terror.

It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.

This cautionary warning by the U.S. courts has been ignored when the Executive branch has claimed secrecy and the courts have improperly applied the State Secrets Doctrine. To push the courts into rethinking its current application of the State Secrets Doctrine and to force the Executive branch into recognizing its complicity in human rights abuses requires public action. The simple reality is that the United States has been involved in human rights abuses, and hiding behind the State Secrets Doctrine does not protect any intrinsic values of the U.S. political system, nor does it enhance national security. If the courts will not provide relief, if the Executive branch will not acknowledge the human rights abuses, and if Congress does not address these concerns and abuses through legislative action, then public action through the creation of a Citizen Commission of Inquiry may be the only tool left to ensure justice to the victims of torture and the CIA extraordinary rendition program.

Conclusion

Each weekday morning, after our children have been ushered through the doors of their schools, they say a pledge. “With liberty and justice for all,” they repeat. We instruct them in the words and lead them in the pledge because the words are supposed to mean something. We say this pledge with the hopes that the words will inform our actions and the actions of our fellow citizens a representative statement of the world we live in. As illustrated by this policy brief, the laws to which we are beholden – both domestic and international – have generally respected this pledge, while those in charge of enforcing them are failing miserably.

The state of North Carolina, its subdivisions, and the local officials and administrators who provide resources and permits for Aero are constitutionally bound by international human rights treaties and instruments - including CAT, ICCPR, and UDHR - which require them to provide accountability to victims of extraordinary rendition and torture. These treaties and declarations require that member states not only abide by international human rights standards and a commitment not to torture, but also to implement legislation and policies at the national and subnational levels to ensure the enforcement of such norms and, in the event of a violation, to ensure accountability. Instead, North Carolina and its political subdivisions have facilitated Aero’s operations by licensing its business and providing permits. North Carolina has refused to acknowledge its responsibilities, and has refused to investigate Aero’s actions. Aero itself is bound to these same domestic and international obligations, but has similarly refused to cooperate with any attempt to investigate or remedy its own complicity in the

extraordinary rendition program. It is clear that while the legal framework exists for North Carolina's accountability to investigate and provide remedy to victims of torture, this framework is at best being ignored and at worst being disintegrated. Although the legal framework to provide accountability is clearly constructed – via international treaties, federal statutes, case law and executive branch action – application of that framework becomes skewed when in reference to acts of torture and rendition. Over the past decade, federal circuit courts have consistently, and increasingly, relied on the State Secrets Doctrine to avoid adjudicating claims of extraordinary rendition and torture. As demonstrated in *El-Masri* and *Jeppesen*, the courts misinterpret and misapply the privilege, rendering it into something that would be almost unrecognizable to the Supreme Court which conceived of it. Not only does this refusal to adjudicate fly in the face of our domestic system of checks and balances, but inasmuch as the State Secrets Doctrine forecloses both investigation and any remedy for atrocities such as rendition and torture, the privilege *itself* violates international law to which we have bound ourselves. While recent developments, such as procedural modifications under the current administration for invoking the privilege, provide for some light at the end of the tunnel, it remains to be seen whether there will be any discernible reduction in the use of the State Secrets

It is clear that while the legal framework exists for North Carolina's accountability to investigate and provide remedy to victims of torture, this framework is at best being ignored and at worst being disintegrated.

Doctrine to protect government secrets. As of this brief, there has not. The historical reluctance of the United States to account for human rights abuses, coupled with the willingness the courts to inflate the State Secrets Doctrine into something big enough to hide behind has resulted in a lack of justice that is simply without excuse.

Presently, the words of the pledge of allegiance fall short. The “all” for whom justice is pledged does not include Binyam Mohamed. It does not include Abou Elkassim Britel, Khaled El-Masri, Bisher Al-Rawi or Mohamed Farag Ahmad Bashmilah. It is the ethical and legal responsibility of the government – all branches and all levels – to provide that justice; or so we require our children to incant. What, then, is one to do when faced with such a disappointingly chronic defiance of that pledge by the very government that requires it?

First and foremost, this policy brief recommends that all branches of government assume responsibility for the extraordinary rendition program and seek accountability. The framework exists for them to do so, and the habitual passing of the buck from one branch to the other is without moral or legal support. Specifically, North Carolina should take action in the form of a formal investigation against Aero and any other actors determined to be in violation of international and domestic law. So far, the appropriate parties within North Carolina’s

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government have refused to act, either by ignoring the problem completely or shifting the responsibility to someone else.⁵⁹⁴

When the government will not act, the burden of justice falls upon its citizens. In light of the ongoing refusal to act, and until such time as North Carolina becomes willing to assume accountability, it is the recommendation of this policy brief that the citizens of North Carolina implement a Commission of Inquiry on Torture. Though a citizens' commission lacks the power and authority of the state government, a citizens' commission can collect documents, record testimony, and include the opinions and endorsements of experts, victims, and citizens to create a historical record and achieve some accountability. Through actions by North Carolina citizens, a record will be

So far, the appropriate parties within North Carolina's government have refused to act, either by ignoring the problem completely or shifting the responsibility to someone else.

developed, testimony will illuminate the acts, and some measure of accountability may be satisfied. Although not a wholly sufficient remedy, and North Carolina should issue a public apology to the five victims, stating that while the state may not have been aware of Aero's actions at the time the extraordinary rendition and torture took place, the state acknowledges the atrocity, and its citizens are sorry for the victims' harrowing experiences.

⁵⁹⁴ See Appendix A.

It has been said that the only thing required for “evil to flourish is for good men to do nothing.”⁵⁹⁵ The federal and state governments have at their fingertips a legal

framework to provide accountability for extraordinary rendition and torture victims, and

yet those obligations have been largely

undermined and ignored. While a Commission of

Inquiry would be a long way from providing an

adequate remedy to the victims, at the least it

would be an example of “good men” doing

something. With enough effort and education,

there may be a point in the future when the words

we make our children say each morning will again

become an accurate reflection of the world.

Through actions by North Carolina citizens, a record will be developed, testimony will illuminate the acts, and some measure of accountability may be satisfied.

⁵⁹⁵ This quote has often been attributed to Edmund Burke, but recently that has come into dispute.

Appendix A

IHRPC Correspondence with Government Officials and Agents

In February of 2012, the Immigration and Human Rights Policy Clinic (IHRPC) at the University of North Carolina School of Law initiated contact with various political and law enforcement officials requesting meetings to discuss the recently released report on North Carolina's connection to the CIA's extraordinary rendition program.

This Appendix A lists the persons and offices contacted and the responses – or lack of responses – which the IHRPC received. This Appendix A only lists individuals and agencies who either declined a meeting with the IHRPC or did not respond to the IHRP's requests for a meeting. See Appendix B for notes on meetings with other politicians and agents who granted meetings with the IHRPC.

1. Office of the Attorney General of North Carolina:

On February 15, 2012, the following email was sent to Julia White, Christie Hyman, and David Elliot from the office Attorney General of North Carolina. After no response after the initial email, the same email to the same parties was resent on March 8, 2012.

Dear Ms. White, Ms. Hyman and Mr. Elliott:

We are seeking a follow-up meeting with Attorney General Cooper, or his designee, to review with him our recently released report entitled North Carolina's Connection to Extraordinary Rendition and Torture which was delivered to you on or about Jan. 19, 2012. As noted at our meeting on Jan 19th, this report documents the connection between the State of North Carolina and its political subdivisions, Aero Contractors, a corporation licensed to do business in the state, and activities related to extraordinary rendition flights. We would appreciate the opportunity to discuss the report with the Attorney General to gain an understanding about his response to the report, and to discuss what recommendations your office may have about how to address the concerns raised in the report.

Please let us know the best time to call you so that we might schedule a mutually convenient time to meet.

Thank you for your attention.

Sincerely,
Derek Loh
Jennifer Jiang
Andrea Davis

Theresa Viera
The Immigration and Human Rights Policy Clinic
UNC School of Law

On February 22, 2012, the IHRPC left a voicemail for David Elliott at the Attorney General's Office. On February 29, 2012, the IHRPC left voicemails for David Elliott and Julia While at Attorney General's Office.

The ultimate result of the IHRPC's communication with the North Carolina Attorney General's Office was no verbal or written response.

2. Office of the Governor of North Carolina, Bev Perdue:

On February 15, 2012, the IHRPC sent the following email to Mike Arnold and Mark Davis of the Governor's Office.

Dear Mr. Arnold and Mr. Davis

We are seeking a follow-up meeting with Governor Perdue, or her designee, to review with her our recently released report entitled North Carolina's Connection to Extraordinary Rendition and Torture which was delivered to you on or about Jan. 19, 2012. As noted at our meeting on Jan 19th, this report documents the connection between the State of North Carolina and its political subdivisions, Aero Contractors, a corporation licensed to do business in the state, and activities related to extraordinary rendition flights. We would appreciate the opportunity to discuss the report with the Governor to gain an understanding about her response to the report, and to discuss what recommendations your office may have about how to address the concerns raised in the report. Please let us know the best time to call you so that we might schedule a mutually convenient time to meet.

Thank you for your attention.

Sincerely,
Derek Loh
Jennifer Jiang
Andrea Davis
Theresa Viera
The Immigration and Human Rights Policy Clinic
UNC School of Law

On February 24, 2012, Mark Davis responded to the IHRPC's email with a voicemail message. The transcribed message is below:

“Hi Andrea [a student at the IHRPC], this is Mark Davis from the Governor’s Office. I wanted to get back to you on the issue you emailed me about. We appreciated the opportunity to meet with you and to look through the materials you gave us. The conclusion of our office is that this is not a matter for the Governor’s office. When all is said and done, what’s being sought is an investigation, and we’re just not set up to do...we are not an investigative entity. I recommend you go to the U.S. Attorney’s Office and/or revisit the District Attorney’s Office, either in Johnston or elsewhere. Again, I really enjoyed meeting y’all and took very seriously everything you said, but I think those two places are the appropriate forum for this type of allegation.”

On March 14, 2012, the IHRPC and Mark Davis had a phone call. During that call, Mr. Davis agreed to a meeting with the IHRPC, but only in his personal capacity. He continued to argue that this was not a matter for the Governor’s office, and, therefore, would not meet with the IHRPC in an official capacity. It was ultimately the decision of the Clinic to forego a meeting with Mr. Davis in this capacity.

3. Johnston County Airport Authority, Ray Blackmon

On February 12, 2012, the IHRPC sent the following email to Ray Blackmon, the Director of the Johnston County Airport Authority, the agency that operates Johnston County Airport.

Dear Mr. Blackmon:

We are writing to you to seek a meeting with you to discuss our recently released report entitled North Carolina’s Connection to Extraordinary Rendition and Torture, which was recently delivered to you. This report documents the connection between the State of North Carolina and its political subdivisions, Aero Contractors, a corporation licensed to do business in the state, and activities related to extraordinary rendition flights.

We would appreciate the opportunity to discuss the report with you to gain an understanding about your response to the report, and to discuss what recommendations your office may have as to how to address the concerns raised in the report. Please let us know the best time to call you so that we might schedule a mutually convenient time to meet.

Thank you for your attention.
Sincerely,

Derek Loh; Jennifer Jiang; Andrea Davis; Theresa Viera

On February 24, 2012, the IHRPC left a voicemail message for Mr. Blackmon. In that message, the IHRPC requested an interview. The number called was 919.934.0992. The IHRPC received no response. On March 2, 2012, the IHRPC left another voicemail requested an interview.

Mr. Blackmon never responded to the IHRPC's email or voicemails.

4. Johnston County Sheriff's Office, Steve Bizzell

On February 29, 2012, the IHRPC sent the following email to Steve Bizzell, the Sheriff of Johnston County, North Carolina.

Sheriff Bizzell:

We are writing to you to seek a meeting with you to discuss our recently released report entitled North Carolina's Connection to Extraordinary Rendition and Torture which was recently delivered to you. This report documents the connection between the State of North Carolina and its political subdivisions, Aero Contractors, a corporation licensed to do business in the state, and activities related to extraordinary rendition flights. We would appreciate the opportunity to discuss the report with you to gain an understanding about your response to the report, and to discuss what recommendations your office may have as to how to address the concerns raised in the report. Please let us know the best time to call you so that we might schedule a mutually convenient time to meet.

Thank you for your attention.

Sincerely,

Derek Loh
Jennifer Jiang
Andrea Davis
Theresa Viera
The Immigration and Human Rights Policy Clinic
UNC School of Law

On March 1, 2012, Sheriff Bizzell responded to the IHRPC's email via an email account belonging to Lori Coats of the Johnston County Sheriff's Office. Sheriff Bizzell's response email is below.

Mr. Loh [a student at the IHRPC], I received your email regarding a meeting concerning your recently released report. However, I will not be meeting with you regarding this issue. Personally, I feel the accusations

and opinions that I have heard stated publicly are perhaps a matter of federal interest and should be addressed at the federal level.

Sincerely,

Steve Bizzell, Sheriff of Johnston County

The IHRPC had no further contact with Sheriff Bizzell.

Appendix B

IHRPC Meetings with Government Officials and Agents

On March 22, 2012 and March 23, 2012, the Immigration and Human Rights Policy Clinic (IHRPC) at the University of North Carolina School of Law had meetings with various officials, attorneys, and politicians in Washington, D.C. During these meetings, the IHRPC discussed the recently released report on North Carolina's connection to the CIA's extraordinary rendition program.

This Appendix C lists the persons and offices that met with the IHRPC and summarizes the major points of the meetings.

1. Military Commission – Office of the Chief Defense Counsel for Guantanamo Bay

At this meeting, the lawyers at the Office of the Chief Defense Counsel described the process of the Military Commissions. The lawyers at the Commission explained that the State Secrets Doctrine has been applied to the situations involving the Guantanamo detainees even during early stages of attorney-client representation. The Office of the Chief Defense Counsel suggested that filing a civil action under North Carolina state law might be a successful way of holding Aero Contractors accountable for their involvement in the extraordinary rendition program.

2. Congressman David Price – 4th District of North Carolina

Congressman Price expressed concern over North Carolina's involvement in the CIA extraordinary rendition program. He presumed it was a federal issue. He expressed satisfaction by the Obama Administration's efforts to cease or limit the program. He stated that there has been a decisive disconnect with the extraordinary rendition program of the past.

He also expressed a moral responsibility of North Carolinians to address the issue of extraordinary rendition even to what he sees as a lack of a legal responsibility.

Rep. Price suggested that the I/HRPC contact the U.S. Department of Justice to seek accountability.

Through further discussion, Rep. Price acknowledged a nexus between the private contractor Aero, North Carolina, and the extraordinary rendition program.

3. Office of Congressman G.K. Butterfield – 1st District of North Carolina

The IHRPC met with Rep. Butterfield's Legislative Assistant, Dennis Sills. Mr. Sills stated that Congressman Butterfield will only take action if his intervention or

involvement will have an impact on an on-going situation. Therefore, Mr. Sills was particularly interested if we had any information about on-going flights or other activities of Aero. Sills suggested investigating Federal Aviation Administration records to see if there were relevant records. He also suggested looking into whether or not there was a process of holding aviation companies liable for violations of FAA regulations.

Appendix C

Media Coverage of the Release of “The North Carolina Connection to Extraordinary Rendition and Torture”

After its release in January 2012, “The North Carolina Connection to Extraordinary Rendition and Torture” report (“Report”) received wide media attention, including a story in the Washington Post. This Appendix C provides a list of the media coverage that the Report received.

North Carolina Stop Torture Now (www.ncstoptorturennow.net) has also made efforts of its own and received media attention for its work on holding Aero accountable for its involvement with the rendition program. For a list of the group’s actions to date, including related media coverage, see <http://www.ncstoptorturennow.net/resourceschronology.html>.

Newspaper Coverage

Charles Patton, “Aero Contractors’ Planes Were Used for Torture, Group Report Says,” THE DAILY TARHEEL, January 23, 2011. *Available at* http://www.dailytarheel.com/index.php/article/2012/01/torture_group_to_fight_ncs_role_in_terrorism.

Jay Price, “Report: Aero Has Role in Torture,” THE NEWS AND OBSERVER, January 20, 2012. *Available at* <http://www.newsobserver.com/2012/01/20/1790923/report-aero-has-role-in-torture.html>. This piece was picked up by several other papers, including The Smithfield Herald, The Boston Herald, The Syracuse Post-Standard, and The Bellingham Herald.

Joby Warrick, “Ten Years Later, CIA ‘Rendition’ Program Still Divides N.C. Town,” THE WASHINGTON POST, February 9, 2012. *Available at* http://www.washingtonpost.com/world/national-security/ten-years-later-cia-rendition-program-still-divides-nc-town/2012/01/23/gIQAwrAU2Q_story.html.

Deborah Weissman & Robin Kirk, “Shedding Light on N.C.’s ‘Rendition’ Connection,” THE NEWS AND OBSERVER, January 15, 2012. *Available at* <http://www.newsobserver.com/2012/01/15/1776216/shedding-light-on-ncs-rendition.html/>

Sam Wells, “Torture Undermines American Character,” THE WINSTON-SALEM JOURNAL, January 27, 2012. *Available at*

<http://www2.journalnow.com/news/opinion/2012/jan/27/wsopin02-sam-wells-guest-column-torture-undermines-ar-1861374/>.

Television Coverage

WTVD-TV (ABC) in Raleigh, North Carolina. On January 19, 2012, the release of the Report Lead story on the 5:30 pm news broadcast. *Available at* <http://abclocal.go.com/wtvd/story?section=news/local&id=8511621>.

WRAL in Raleigh, North Carolina. On January 19, 2012, WRAL covered the release of the Report. Text version of WRAL's story is available at <http://www.wral.com/news/local/story/10620411>.

Carolina 14 TV. On January 19, 2012, Carolina 14 TV provided coverage of the released of the Report. *Available at* http://sandhills.news14.com/content/top_stories/652691/area-company-accused-of-facilitating-torture-overseas.

Radio Coverage

WTSB, Johnston County Radio. WTSB provided coverage of the release of the Report.

WPTF AM Radio 680. On January 25, 2012, WPTF provided coverage of the release of the Report. *Available at the 38 minute mark at* <http://rickdonnamartinez.blogspot.com/2012/01/wednesday-12512.html?spref=fb>.

WUNC, Chapel Hill, North Carolina. WUNC covered the release of the report briefly on January 19, 2012.