

COMMENTS

THE GUANTANAMO GAP: CAN FOREIGN NATIONALS OBTAIN REDRESS FOR PROLONGED ARBITRARY DETENTION AND TORTURE SUFFERED OUTSIDE THE UNITED STATES?

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“[Y]ou are now the property of the U.S. Marine Corps.”¹

I. INTRODUCTION

As many as 700 prisoners² from forty-four different countries have been held at the Guantanamo Bay Naval Base (GBNB) in Cuba³ as a result of the “war on terror” initiated by the United States after the terrorist attacks of September 11, 2001 (9-11).⁴ The dehumanizing greeting quoted above is what detainees are told when they arrive at Guantanamo Bay.⁵ Recently released detainees have asserted: “[N]one of us were ever told why we were in Cuba. . . . [W]hen ever any of us asked [what an enemy combatant⁶ was] they refused to give us a definition.”⁷ “[D]etainees were admitting to almost any of the allegations put to them simply to alleviate the harsh conditions.”⁸ One released detainee stated, “[W]hen you are detained in those conditions, you are entirely powerless and have no way of having your

1. RLUHEL AHMED, ASIF IQBAL, & SHAFIQ RASUL, TIPTON REPORT: DETENTION IN AFGHANISTAN AND GUANTANAMO BAY ¶ 56 (July 26, 2004), available at http://www.ccrny.org/v2/legal/september_11th/docs/Guantanamo_composite_statement_FINAL.pdf [hereinafter TIPTON REPORT]; see also Press Release, Amnesty Int’l, Guantánamo: 4 Years Too Many—New Torture Testimonies (Jan. 11, 2006), <http://web.amnesty.org/library/Index/ENGAMR510082006>.

2. James McGarrah, Dir., Dep’t of Defense Office for the Admin. Review of the Det. of Enemy Combatants, Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba (July 8, 2005), <http://www.defenselink.mil/transcripts/2005/tr20050708-3322.html>.

3. Nancy Gibbs, *Inside “The Wire,”* TIME, Dec. 8, 2003, at 40. The United States exercises control over the naval base pursuant to a lease agreement with Cuba entered into in 1934, which grants it complete jurisdiction and control over the base. Treaty Defining Relations with Cuba, U.S.-Cuba, May 29, 1934, 48 Stat. 1683 [hereinafter Lease Agreement].

4. See Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224 [hereinafter AUMF]. On September 18, 2001 Congress authorized the President to use “all necessary and appropriate force” against those connected to the terrorist attacks of 9-11. *Id.*

5. TIPTON REPORT, *supra* note 1, ¶ 56.

6. The Supreme Court defined “enemy combatant [as] an individual who, [the government] alleges, was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (quoting Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)).

7. TIPTON REPORT, *supra* note 1, ¶ 154.

8. *Id.* ¶ 156.

voice heard. This has led me and many others to ‘cooperate’ and say or do anything to get away.”⁹ Released detainees have reported that during interviews, interrogators would repeatedly demand, “[J]ust say you’re a fighter.”¹⁰ In response to threats of life-long detention at Guantanamo Bay, detainees eventually said yes out of desperation.¹¹

During the whole time that we were in Guantanamo, we were at a high level of fear . . . The guards would say to us “we could kill you at any time . . . the world doesn’t know you’re here, all they know is that you’re missing and we could kill you and no one would know.” [W]e were never given access to legal advice. I asked . . . but they just said that this is not America this is Cuba and you have no rights here.¹²

The story of Mamdouh Habib, an Australian citizen who traveled to Pakistan in August 2001 to look for work and a Moslem school for his teenage children, is particularly compelling.¹³ Similar to many other foreign nationals detained at the GBNB, Habib was captured far from the hostilities in Afghanistan on suspicion of having close ties to the terrorist organization al Qaeda.¹⁴ In October 2001, he was arrested in Pakistan, held in Egypt, and transferred to Guantanamo Bay.¹⁵ Pakistan’s interior minister admitted the United States requested Habib’s transfer to Egypt.¹⁶ According to Habib, while imprisoned in

9. *Id.* ¶ 160.

10. *Id.* ¶¶ 80-90.

11. *Id.* ¶¶ 80-90, 106-109.

12. *Id.* ¶¶ 134, 252.

13. Petitioners’ Brief on the Merits at 3, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334).

14. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446-47 (D.D.C. 2005). “[D]etainees at [the GBNB] . . . presently seeking habeas relief . . . include men who were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia, and Thailand.” *Id.* at 446. “Some have already been detained as long as three years . . . [and] may never have been close to an actual battlefield . . . [nor] raised conventional arms against the United States . . . nonetheless [they have been detained] . . . based on conclusions that they have ties to al Qaeda or other terrorist organizations.” *Id.* at 446-47.

15. Petitioners’ Brief on the Merits, *supra* note 13, at 3.

16. HUM. RTS. WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 60 (2005) (citing *The Trials of Mamdouh Habib* (SBS television broadcast July 7, 2004), available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf>).

The post 9/11 rendition of terror suspects was first reported in *The Washington Post* in December 2002, which described transfers to countries including Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia, and Morocco, where they were tortured or otherwise mistreated. One official was quoted as saying, “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”

Egypt, "he was suspended from hooks . . . rammed with an electric cattle prod, forced to stand tip-toe in a water-filled room [to keep from drowning], and threatened with a German Shepard [sic] [guard] dog [while stripped naked]."¹⁷ Habib claims, "Among those overseeing the torture . . . were English-speaking operatives with American accents."¹⁸ In early 2002, Habib was transferred to the GBNB where he alleges he suffered further cruel and degrading treatment.¹⁹ In January 2005, after being detained for more than three years without charges, Habib was repatriated to Australia, where he was reunited with his wife and four children.²⁰

The United States failed to press any charges against Habib, presumably because it was unable to gather any evidence of his alleged connection to al Qaeda.²¹ The alleged treatment of Habib unquestionably violates many internationally recognized human rights.²² However, his case is not unique. As of October 2005, approximately 505 foreign nationals were in detention at the GBNB.²³ Prior to this date, the government transferred sixty-eight detainees to the custody of other governments and released 178 outright.²⁴ It is probable that the released detainees were innocent of any terrorist activity and, in the words of the GBNB's Deputy Camp Commander, were simply "victims of circumstance."²⁵ The U.S. government has asserted that it

Id. (quoting Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 25, 2002, at A1.)

17. *Id.* (citing Declaration of Joseph Margulies Attached to Pl.'s Application for TRO, *Habib v. Bush*, No. 02-CV-1130 (D.D.C. Nov. 24, 2004)).

18. Joe Feuerherd, *Secret Detentions Cover Torture, Say "Enemy Combatant" Advocates*, NAT'L CATH. REP., Jan. 21, 2005, available at http://natcath.org/NCR_Online/archives2/2005a/012105/012105a.php.

19. *Id.* One Australian lawyer described Habib's treatment in Guantanamo Bay: "[T]he guards brought a prostitute who [stood over him] naked while he was strapped to the floor and menstruated on him. Photographs of Habib's wife and four children were defaced. [They said to him]: 'It's a shame we had to kill your family.'" John Pilger, *John Pilger Finds Fear and Silence in Australia*, NEW STATESMAN, Feb. 7, 2005, <http://www.newstatesman.com/200502070017>.

20. Raymond Bonner, *Australian's Long Path in the U.S. Antiterrorism Maze*, N.Y. TIMES, Jan. 29, 2005, at A4; see also Petitioners' Brief on the Merits, *supra* note 13, at 3.

21. Bonner, *supra* note 20.

22. See discussion *infra* Parts III.A, IV.B.1, and IV.B.2.

23. Press Release, U.S. Dep't of Def., Detainee Transfer Announced (Oct. 1, 2005), <http://www.defenselink.mil/releases/2005/nr20051001-4826.html> [hereinafter DOD Detainee Transfer Announced].

24. *Id.*

25. Katharine Q. Seelye, *A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002, at A8 (quoting Deputy Camp Commander Lt. Col. Bill Cline).

does not have to pay compensation to released detainees; “[t]here is no basis in U.S. law to pay claims to those captured and detained as a result of combat activities”²⁶ This stance raises a serious concern: if those who have been wrongfully detained and possibly tortured at the direction of the United States have no legal remedies, how are those responsible for abuses going to be held accountable?

The need to create a remedy for these reported human rights violations is of paramount importance; detention at the GBNB is apparently indefinite and thus similar rights violations are likely continuing.²⁷ Indeed, there are plans to increase the GBNB’s capacity to 2,000 detainees.²⁸ Faced with indefinite detention under these harsh conditions, thirty-four detainees have attempted suicide,²⁹ and many detainees have gone on hunger strikes, sometimes resulting in force-feeding through nasal tubes.³⁰ To maintain legitimacy for the capture and prolonged detention of alleged “enemy combatants,”³¹ the U.S. government needs to provide a remedy to those foreign nationals who are later determined to be innocent of any wrongdoing.

This Comment will explore the avenues of redress currently available to foreign nationals, such as Mamdouh Habib, who arguably suffered rights violations, such as prolonged arbitrary detention and torture.³² After evaluating the inadequacies of potential judicial avenues of civil redress against the U.S. government and other actors, this Comment suggests an alternative dispute resolution mechanism, the creation of an innovative congressional remedy based on the ombudsman concept.³³ Other countries have employed ombudsmen ef-

26. Paisley Dodds, *Damages Sought for Guantanamo Detainees*, ASSOCIATED PRESS, Oct. 27, 2004 (quoting Pentagon spokesman Major Michael Shavers), available at <http://www.political-news.org/breaking/464/damages-sought-for-guantanamo-detainees.html>.

27. See Scott McClellan, White House Press Sec’y, Press Briefing (June 15, 2005), <http://www.whitehouse.gov/news/releases/2005/06/20050615-11.html#b>. “There are no plans at this time for shutting down Guantanamo Bay. No one has come forward with a better alternative for where we keep these enemy combatants.” *Id.*

28. Seelye, *supra* note 25.

29. *World Digest, Cuba: Guantanamo Inmate Tries to Kill Himself*, ST. LOUIS POST-DISPATCH, Jan. 7, 2004, at A8; see also TIPTON REPORT, *supra* note 1, ¶¶ 265-266 (“While [in GBNB] a large number of people tried to commit suicide[, many repeatedly,] [t]he attempts undoubtedly go into several hundred altogether, at least.”).

30. *Guantanamo Detainee Pleads to Die*, ALJAZEERA.NET, Oct. 26, 2005, <http://english.aljazeera.net/NR/exeres/236E5000-43EB-4DC3-9BC0-6C521563E5AC.htm>.

31. See *supra* note 6.

32. The definition of these violations depends on the statute under which recovery is sought.

33. Interview with Lawrence Benner, Professor of Law, California Western School of Law, in San Diego, Cal. (Aug. 19, 2005).

fectively to investigate public complaints of government human rights violations.³⁴ The ombudsman concept addresses the defects present in other remedies. It not only compensates victims, but also provides a means by which to hold individuals accountable for human rights violations.

This Comment discusses three sources of remedial relief arguably available to foreign nationals detained in the “war on terror”: The Federal Tort Claims Act³⁵ (FTCA), the Alien Tort Statute³⁶ (ATS), and a common law action for constitutional torts created under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.³⁷ Part II discusses the events leading to prisoner detention at the GBNB and summarizes the issues currently before the federal courts. Part III examines the use of the FTCA against the U.S. government and discusses the obstacles presented by its various exceptions. In particular, an analysis of the U.S. Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*³⁸ illustrates the negative consequences of the Court’s construction of the FTCA’s foreign country exception. Part IV analyzes the types of violations actionable under the ATS. It also explains why it is difficult to sue the U.S. government and other non-governmental actors involved in the “war on terror” under the ATS. Part V discusses the possibility of bringing a *Bivens* action by extending constitutional rights to foreign nationals detained at the GBNB. It also examines the effect of the qualified immunity doctrine on such a *Bivens* action. Part VI will discuss issues of justiciability. Assuming jurisdictional obstacles can be overcome, the political question doctrine may nevertheless bar a court from hearing a detainee’s claim. Part VII will explore alternative remedies outside the judiciary. In particular, it will discuss setting up a claims commission for detainees pursuant to the Foreign Claims Act.³⁹ This proposed GBNB claims commission is then compared to a similar commission in Iraq that

34. See discussion *infra* Part VIII.

35. 28 U.S.C. § 1346 (2000).

36. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). This act has as been referred to as the “Alien Tort Claims Act” or the “Alien Tort Act.” *Id.* This Comment uses the title and acronym employed by the most recent Supreme Court case discussing the ATS, *Sosa v. Alvarez-Machain*. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

37. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 397 (1971).

38. *Alvarez-Machain*, 542 U.S. 692 (2004).

39. Foreign Claims Act, 10 U.S.C.S § 2734 (LexisNexis 2005) (authorizing claims commissions to be set up where property loss, personal injury, or death results from the non-combat activities of the armed forces in foreign countries).

compensates Iraqis injured by the conduct of U.S. soldiers. Concluding no clear avenue currently exists by which innocent foreign national detainees may obtain adequate redress for their alleged human rights violations, Part VIII proposes the creation of a Human Rights Ombudsman Commission. Such a narrowly tailored administrative remedy would cure justiciability problems and create a forum where foreign nationals can voice their grievances and obtain redress for human rights violations.

II. BACKGROUND

In response to the attacks of 9-11, Congress passed the Authorization for Use of Military Force (AUMF) on September 18, 2001.⁴⁰ The AUMF authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States. . . .”⁴¹ Pursuant to the AUMF, the President issued an Order of Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (Detention Order).⁴² The Supreme Court held the AUMF gave explicit congressional authorization for the detention of individuals who fought against the United States in Afghanistan as part of the Taliban.⁴³ This detention of enemy combatants could last for the duration of the conflict in Afghanistan.⁴⁴ Because the detention of enemy soldiers “is so fundamental and accepted an [sic] incident to war[, it was considered by the Court to] be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”⁴⁵

40. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

41. *Id.*

42. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). This order authorizes the Secretary of Defense to detain anyone the President has reason to believe is a member of al Qaeda, has participated in acts of international terrorism against the United States, or has aided, or harbored individuals involved in such terrorist acts. *Id.*

43. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). The Taliban is an “organization known to have supported the al Qaeda terrorist network responsible for [the 9-11] attacks” *Id.*

44. *Id.*

45. *Id.*

Since this authorization, the President has seized more than 700 prisoners and detained them at the GBNB.⁴⁶ Although the United States began detaining so-called “enemy combatants” in early 2002,⁴⁷ it was not until February 2004 that the first charges were pressed against two detainees for conspiracy to commit war crimes.⁴⁸ As of October 2004, the U.S. Government had charged only four detainees with war crimes.⁴⁹ Therefore, from early 2002 until at least June 2004, the vast majority of foreign nationals at GBNB were held incommunicado, without the opportunity to challenge their enemy combatant status before a competent tribunal, without access to counsel, and without knowledge of the basis upon which they were being held.⁵⁰

The Supreme Court has recently decided a string of cases in relation to the rights of citizen and non-citizen detainees held at the GBNB. In June 2004 the Supreme Court held in *Rasul v. Bush*⁵¹ that federal district courts have jurisdiction to hear habeas corpus petitions by foreign nationals challenging their detention at the GBNB.⁵² Since then, litigation has focused on determining what substantive due process rights, if any, are due to foreign national detainees. District courts hearing these petitions for writs of habeas corpus have come to varying decisions.⁵³ Currently, the status of what rights are due to foreign

46. McGarrah, *supra* note 2.

47. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005).

48. Press Release, U.S. Dep’t of Def., Two Guantanamo Detainees Charged (Feb. 24, 2004), <http://www.defenselink.mil/releases/2004/nr20040224-0363.html> [hereinafter DOD Two Guantanamo Detainees Charged].

49. Dodds, *supra* note 26.

50. *Guantanamo*, 355 F. Supp. 2d at 447.

51. *Rasul v. Bush*, 542 U.S. 466 (2004).

52. *Rasul*, 542 U.S. at 481 (“Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”). *See generally* 28 U.S.C.A § 2241 (2006) (federal statute governing court’s power to grant a writ of habeas corpus).

53. Post *Rasul*, “several new habeas cases were filed on behalf of . . . detainees in addition to those cases that were remanded by the [Supreme] Court as part of *Rasul*[,]” in efforts to challenge the legality of the detainees’ indefinite detention. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 451. The *Guantanamo* court held that aliens detained at the GBNB possess cognizable Fifth Amendment due process rights and cannot be deprived of their liberty without due process of the law. *Id.* at 445. The court also found that detainees shall be given the same process as was enunciated in *Hamdi* for American citizens, since “[t]here is no practical difference between incarceration at the hands of one’s own government and incarceration at the hands of a foreign government; significant liberty is deprived in both situations regardless of the jailer’s nationality.” *Id.* at 465; *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding a U.S. citizen detained by the U.S. government wishing to challenge his classification as an enemy combatant is constitutionally entitled to due process). *But see* *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005), *appeal docketed sub nom.*

nationals detained at the GBNB remains unresolved, as contradictory district court opinions are currently pending on appeal.⁵⁴

Current efforts on behalf of foreign national detainees are focused both on classifying them as enemy combatants to afford them due process rights and on preventing the government from transferring them out of U.S. jurisdiction before making such a determination.⁵⁵ The federal judiciary has given little, if any, hint as to what civil remedies are available to detainees against the U.S. government for prolonged arbitrary detention and torture. However, the Court in *Rasul* did suggest that being “held in Executive detention for more than

Boumediene v. Bush, 05-5062, 2005 U.S. App. LEXIS 14580 (D.D.C. July, 18, 2005) (holding “non-[citizen] aliens captured and detained pursuant to the AUMF and the President’s Detention Order” have no cognizable substantive constitutional rights, including a right to due process or protection from cruel and unusual punishment); *cf. Padilla v. Hanft*, 423 F.3d 386, 394-95 (4th Cir. 2005). In response to U.S. citizen Padilla’s argument that military detention is inappropriate because he is subject to criminal prosecution, the Fourth Circuit responded:

[T]he availability of criminal process cannot be determinative of the power to detain, if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place—the prevention of return to the field of battle [C]riminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee . . . [and] ensure that the detainee does not pose a continuing threat to national security even as he is confined

Id.

54. The district court has certified its refusal to grant the U.S. government a motion to dismiss on the question of whether foreign nationals possess due process rights under the U.S. Constitution for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *In re Guantanamo Detainee Cases*, 2005 U.S. Dist. LEXIS 5295 (D.D.C. Feb. 3, 2005), *appeal docketed*, No. 05-8003 (D.C. Cir. Mar. 10, 2005). The U.S. Court of Appeals for the District of Columbia Circuit has scheduled oral argument for early September 2006 on the question of whether non-resident aliens detained at Guantanamo Bay have a viable constitutional basis to seek a writ of habeas corpus. *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005), *appeal docketed sub nom. Boumediene v. Bush*, 05-5062, 2005 U.S. App. LEXIS 14580 (D.D.C. July 18, 2005).

55. *See Almurbati v. Bush*, 366 F. Supp. 2d 72, 73-74 (D.D.C. 2005). Fearing transfer by the U.S. government to an area depriving federal courts of jurisdiction, foreign nationals designated as enemy combatants and detained at the GBNB asked the court to issue a preliminary injunction pursuant to the All Writs Act, 28 U.S.C. § 1651, to protect its jurisdiction to hear their pending habeas petitions in the court of appeals, by requiring government officials to provide advance notice of the prisoners’ proposed transfers to foreign countries. *Id.* at 73 (“[P]etitioners’ motion [for a preliminary injunction is] denied . . . [but the government must] ‘submit a declaration to this Court advising it of any transfers and certifying that any such transfers . . . [are] not made for the purpose of merely continuing the petitioners’ detention on behalf of the United States or for the purpose of extinguishing this Court’s jurisdiction over petitioners’ actions for habeas relief”); *see also Ahmed v. Bush*, No. 05-665(RWR), 2005 U.S. Dist. LEXIS 14024, at *5 (D.D.C. July 8, 2005) (ordering a protective condition that detainee’s attorney be given 30 days’ notice prior to transfer); *Abdah v. Bush*, No. 04-1254(HHK), 2005 U.S. Dist. LEXIS 4942, at *24 (D.D.C. Mar. 29, 2005) (granting petitioners’ request for a preliminary injunction preventing the United States from transferring petitioners from the GBNB absent notice to and approval from the court).

two years . . . without access to counsel and without being charged [of any crime] unquestionably describe[s] ‘custody in violation of the Constitution or laws or treaties of the United States.’”⁵⁶ Additionally, the Court suggested aliens could sue under the ATS for torts committed “in violation of the laws of nations or a treaty of the United States.”⁵⁷

Nevertheless, these vague references to an alien’s ability to sue and the confirmation that the detainees’ allegations are actionable do not assure the viability of a civil suit brought for violation of a detainee’s rights. However, one fact is clear: after capturing foreign nationals in connection with the attacks of 9-11, the United States has held such detainees virtually incommunicado for periods of two or more years without the opportunity to challenge their enemy combatant status.⁵⁸ Such treatment arguably constitutes prolonged arbitrary detention and some detainees have already commenced suits for damages for this alleged rights violation.⁵⁹

Taking into account the length of time individuals have been detained at the GBNB and the fact that there are no current plans to end such detention,⁶⁰ serious thought must be given to how those who might have been wrongfully detained or tortured can be compensated by the U.S. government and other relevant actors. Jonathon Mahler has argued that the “‘war on terror’ is, at its heart, a battle to show the Islamic world that there is an alternative to oppressive . . . dictators, [therefore,] nothing is more important than how the United States government dispenses justice to [its] detainees . . .”⁶¹ Failing to provide an adequate remedy for those detainees who have suffered rights violations would thus undermine the “war on terror” and have serious foreign policy implications. However, as Parts II-IV explain, the judicial remedies that supposedly are available are ill suited to the task of dispensing justice to foreign nationals detained at the GBNB.

56. *Rasul v. Bush*, 542 U.S. 466, 484 n.15 (2004) (quoting 28 U.S.C. § 2241(c)(3) (2000)).

57. *Id.* at 485 (quoting 28 U.S.C. § 1350 (2000)).

58. Petitioners’ Brief on the Merits, *supra* note 13, at 2.

59. First Amended Petition for Writ of Habeas Corpus ¶¶ 2, 66, *El-Banna v. Bush*, No.1:04-CV-011444 (D.D.C. July 8, 2004), available at <http://www.ccr-ny.org/v2/legal/docs/El-Banna%20First%20Amended%20Petition.pdf>. Foreign nationals have requested relief under the ATS for arbitrary arrest and detention. *Id.* ¶ 66.

60. McClellan, *supra* note 27.

61. Jonathon Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 44.

III. FEDERAL TORTS CLAIMS ACT

“It is well established that ‘the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.’”⁶² The United States can therefore be made a defendant in a civil suit for damages only by means of a “statutory cause of action through which Congress has waived sovereign immunity.”⁶³ Enacted in 1946, the Federal Torts Claims Act provides the exclusive means to sue any federal agency.⁶⁴ It provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁶⁵

Federal courts have consistently held that “a suit against the United States under the FTCA is the exclusive remedy for tort claims arising from . . . actions [by] government agencies or employees.”⁶⁶ Further, the Federal Employees Liability Reform and Tort Compensation Act of 1988⁶⁷ confers immunity on federal employees “by making an FTCA action against the Government the exclusive remedy for torts committed by [such] employees in the scope of their employment.”⁶⁸

To establish a claim, a federal employee acting within the scope of his employment must have engaged in negligent or wrongful con-

62. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 268 (D.D.C. 2004) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

63. *Floyd v. Dist. of D.C.*, 129 F.3d 152, 155 (D.C. Cir. 1997).

64. 28 U.S.C. § 2679 (2000); *see also* § 1346 (b)(1).

65. § 1346(b)(1) (2000).

66. *Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988).

67. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. § 2671 (2000) and codified as amended at 28 U.S.C. §§ 2674, 2679 (2000)).

68. *United States v. Smith*, 499 U.S. 160, 163 (1991). This act empowers the Attorney General to certify that the employee “was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . .” § 2679(d)(1). If certified, the employee is dismissed from the action and the United States is substituted as defendant. *Id.*

duct.⁶⁹ The wrongful conduct must be assessed pursuant to the “law of the place where the act . . . occurred.”⁷⁰ The GBNB is located in Cuba. However, as the Supreme Court noted in *Rasul*, “[b]y the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the [GBNB], and may continue to [exercise such control] permanently if it [so] chooses.”⁷¹ Therefore, Cuba’s laws are arguably not applicable at the GBNB, and any alleged wrongful conduct occurring there must be determined according to U.S. law.

*A. Alleged Violations of U.S. Law for Purposes of a
“Wrongful Act” under the FTCA*

One of the detainees’ chief allegations is that their prolonged detention has been arbitrary. When *Rasul* was decided in June 2004, the vast majority of detainees at the GBNB had been confined for a period of two years without being charged or having access to counsel or a court proceeding.⁷² Such detention appears to be a violation of the Fifth Amendment, which forbids the government to deprive “any person . . . of . . . liberty . . . without due process of the law.”⁷³ The heart of this guarantee protects against unlawful bodily restraint.⁷⁴ Prisoners detained at the GBNB have been taken from various foreign countries far from the location of active hostilities in Afghanistan.⁷⁵ Though the plurality in *Hamdi v. Rumsfeld* held that Congress’s passage of the AUMF granted the President the power to detain enemy combatants until the end of hostilities, it also limited its interpretation of the AUMF to individuals actively engaged in armed conflict against the United States in Afghanistan.⁷⁶ Further, the Court expressly acknowledged in *Rasul*:

69. § 1346(b)(1).

70. *Id.*

71. *Rasul v. Bush*, 542 U.S. 466, 467-68 (2004).

72. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 (D.D.C. 2005).

73. U.S. CONST. amend. V.

74. *E.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

75. *See discussion supra* note 14.

76. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (“We conclude that detention of individuals falling into the limited category we are considering, [those fighting against the United States in Afghanistan,] for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”).

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”⁷⁷

Therefore, prolonged arbitrary detention would appear to constitute the wrongful act required by the FTCA.⁷⁸ The federal actors responsible would be President Bush,⁷⁹ who issued the Detention Order and the Secretary of Defense, Donald Rumsfeld, who detained individuals believed to be involved in the terrorist attacks of 9-11 pursuant to the Order.⁸⁰ The detainee's allegations of torture could constitute a second wrongful act under the FTCA as a “personal injury . . . caused by the . . . wrongful act . . . of any employee of the Government while acting within the scope of his office or employment.”⁸¹ The relevant government actors would include all federal employees conducting interrogations of detainees at the GBNB. Both claims, however, may be subject to statutory exceptions.

But see *Padilla v. Hanft*, 423 F.3d 386, 393 (4th Cir. 2005). In addressing the capture of Padilla on U.S. soil, the *Padilla* court rejected the contention *Hamdi* was so limited by stating:

When the plurality articulated the “narrow question” before it, it referred simply to the permissibility of detaining “an individual who . . . was part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States” there . . . [n]owhere in its framing of the “narrow question” presented did the plurality even mention the locus of capture.

Id.

77. *Rasul v. Bush*, 542 U.S. 466, 484 n.15 (2004) (quoting 28 U.S.C.A. § 2241(c)(3) (West 2006)).

78. Applying U.S. law, since this alleged injury occurred at the GBNB, such claims would be accessed by Fifth Amendment due process requirement. *See supra* text accompanying notes 70-74.

79. The President is protected by “absolute immunity from damages liability” for his official acts. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

80. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57, 834 (Nov. 13, 2001).

81. 28 U.S.C. § 1346 (b)(1) (2000). Under U.S. federal law “[t]orture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.” 18 U.S.C.A § 2340 (West 2004).

B. Exceptions to FTCA Statutory Relief

Though Congress provided a waiver of sovereign immunity by making the U.S. government liable “in the same manner and to the same extent as a private individual under like circumstances,”⁸² it also listed a number of exceptions in 28 U.S.C. section 2680 that deprive the district courts of jurisdiction to hear such a case.⁸³ These exceptions to the FTCA, which could potentially prevent recovery for acts of arbitrary detention and or torture suffered at the GBNB, include the foreign country exception,⁸⁴ the discretionary duty exception,⁸⁵ and the exception for intentional torts.⁸⁶ Ultimately, in light of established precedent surrounding these exceptions, and the novelty of the situation posed by the detention of foreign nationals at the GBNB, it is questionable whether an action under the FTCA would succeed.

1. The Foreign Country Exception

The exception for “[a]ny claim arising in a foreign country”⁸⁷ erects the greatest barrier to recovering for damages suffered in Guantanamo Bay, Cuba. In *Sosa v. Alvarez-Machain*, the Supreme Court specifically addressed this exception when it discussed the civil remedies available under U.S. law for extraterritorial torts by U.S. government employees and their agents.⁸⁸ In that case, employees of the Drug Enforcement Agency (DEA) kidnapped Alvarez, a Mexican national, and forcibly transferred him to the United States to stand trial for his alleged participation in the torture and death of a DEA agent.⁸⁹ After Alvarez’ acquittal, he filed suit under both the ATS and the FTCA, naming the U.S. government as a defendant.⁹⁰

Prior to *Alvarez-Machain*, the headquarters doctrine enabled a claimant to bring a cause of action *even if* he or she suffered damages in a foreign country.⁹¹ This doctrine allowed such claims under the

82. 28 U.S.C. § 2674 (2000).

83. See 28 U.S.C. § 2680 (2000) for a complete description of these exceptions.

84. See *id.* § 2680(k).

85. See *id.* § 2680(a).

86. See *id.* § 2680(h).

87. See *id.* § 2680(k).

88. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717-23 (2004).

89. *Id.* at 697-98.

90. *Id.* at 698.

91. *Id.* at 701.

FTCA *so long as* the injury suffered was a result of planning or a decision made in the United States⁹² with “operative effect in another country.”⁹³ However, in *Alvarez-Machain* the Supreme Court invalidated this doctrine and held “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, *regardless* of where the tortious act or omission occurred.”⁹⁴ Because the detainees are seeking redress for injuries suffered in the foreign country of Cuba, authority for which arose from the Detention Order,⁹⁵ which was issued in the U.S. but has “operative effect in another country,”⁹⁶ the use of the FTCA thus seems problematic at best.

However, the Supreme Court’s opinion in *Rasul* may provide an alternative argument by analogy. *Rasul* allowed the reach of a habeas corpus statute to extend to Guantanamo Bay⁹⁷ because the United States exercises “plenary and exclusive jurisdiction” over the area.⁹⁸ Analogously, the reach of the FTCA could extend to this territory as well.⁹⁹ Moreover, the Court in *Alvarez-Machain* indicated that the reason the foreign country exception was included in the FTCA was to avoid applying a foreign law against the United States.¹⁰⁰ Since U.S. law is applied at the GBNB, allowing such claims to proceed would not be inconsistent with Congress’s rationale for the application of this exception.

92. See generally *id.* at 701-10.

93. *Id.* at 701 (quoting *Sami v. United States*, 617 F.2d 755, 762 (D.C. Cir. 1979)).

94. 542 U.S. at 712 (emphasis added).

95. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57, 834 (Nov. 13, 2001).

96. *Alvarez-Machain*, 542 U.S. at 701.

97. See *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (“Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”).

98. *Id.* at 466; see also *Lease Agreement*, *supra* note 3.

99. Indeed, one district court has already concluded that constitutional rights should be so extended, “In light of the Supreme Court’s decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.” *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005). See also *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (“Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. [T]he indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it.”).

100. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707. “[T]he current text of the foreign country exception . . . codified Congress’s ‘unwillingness] to subject the United States to liabilities depending upon the laws of a foreign power.’” *Id.* (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)).

Nevertheless, arguing for an extension of the FTCA to the territory of the GBNB based on *Rasul* is untenable. The habeas statute in *Rasul* reached the GBNB because it provided for extension of the writ to prisoners in the custody and control of the United States.¹⁰¹ The FTCA, however, explicitly exempts harms arising in a foreign country, leaving considerably less room for extension.¹⁰² Additionally, as noted in *Rasul*, “Under the [Lease] Agreement, ‘the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas].’”¹⁰³ Even if U.S. law does apply in this portion of Cuban territory, the GBNB cannot be considered a sovereign territory of the United States. The fact the United States does not exercise ultimate sovereignty over the GBNB is likely to be crucial in determining that the harms occurred in a foreign country for the purposes of the FTCA. Furthermore, in *Alvarez-Machain* the Court explicitly rejected a selective application of the headquarters doctrine *even when* the state’s choice of law would not dictate the application of a foreign law based on location of injury.¹⁰⁴ The Court reasoned that Congress would not have intended such “jurisdictional variety.”¹⁰⁵ Given that *Rasul* dealt with a statutory entitlement with no geographical exclusions,¹⁰⁶ and the express terms of the Lease Agreement recognize the continuing ultimate sovereignty of Cuba over the leased areas,¹⁰⁷ it is likely that the foreign country exception applies to the GBNB.

2. *The Exception for Intentional Torts*

In addition to excluding acts committed in foreign countries, the FTCA also excludes most intentional torts, including false imprison-

101. See 28 U.S.C.A. § 2241(c)(1) (West 2006); see also *Rasul*, 542 U.S. at 484 (“No party questions the District Court’s jurisdiction over petitioners’ custodians . . . [therefore] § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention . . .”).

102. Courts are more apt to find jurisdiction when there are serious deprivations of liberty at issue, rather than an after-the-fact claim for compensation.

103. *Rasul*, 542 U.S. at 471 (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418).

104. See *Alvarez-Machain*, 542 U.S. at 711-12 (“The idea that Congress would have intended any such jurisdictional variety is too implausible to drive the analysis to the point of grafting even a selective headquarters exception onto the foreign country exception itself.”).

105. *Id.* at 712.

106. See 28 U.S.C.A. § 2241 (West 2006).

107. See Lease Agreement, *supra* note 3.

ment, false arrest, and abuse of process.¹⁰⁸ However, this section was amended in 1974 to allow such actions against “investigative or law enforcement officers of the United States Government.”¹⁰⁹ Since the President authorized the detention¹¹⁰ and the Secretary of Defense and soldiers carried it out, the intentional torts exception will likely also bar suits for claims of prolonged arbitrary detention. However, detainees may be more successful in pursuing a claim for torture against their interrogators. Although the military personnel who interrogated Guantanamo detainees may not fit within the definition of an “investigative or law enforcement officer,”¹¹¹ detainees were also interrogated by members of the FBI who do fit within the definition.¹¹² Nevertheless, this claim will present difficult factual hurdles examined below.¹¹³ Additionally, the foreign country exception remains a problem because the interrogations occurred at the GBNB, rather than on the sovereign territory of the United States.

3. *The Discretionary Duties Exception*

A final obstacle to detainees being able to assert a claim for prolonged arbitrary detention under the FCTA concerns the discretionary duty exception. This exception exempts:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.¹¹⁴

The Detention Order issued by President Bush was discretionary in nature and by its very terms, authorized the Secretary of Defense to detain anyone the President *had reason to believe* was a member of al

108. 28 U.S.C. § 2680(h) (2000).

109. *Id.* Such officers are defined as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” *Id.*

110. See discussion *supra* Part II.

111. Such personnel presumably do not have the power to “execute searches, to seize evidence, or to make arrests.” 28 U.S.C. § 2680(h) (2000).

112. See TIPTON REPORT, *supra* note 1, ¶¶ 202, 228.

113. See discussion *infra* Part IV.2.

114. § 2680(a).

Qaeda or either participated, aided, or harbored individuals involved in acts of terrorism against the United States.¹¹⁵ This exception will thus prevent claims for arbitrary detention. However, it may not bar allegations of torture. Assuming the interrogators fall within the definition of an “investigative or law enforcement officer,”¹¹⁶ and that detainees can surmount the factual obstacles necessary to prove their allegations of torture,¹¹⁷ federal officials might claim that their job as interrogators is discretionary in nature. That is, interrogators may argue their job was to obtain information about national security, and the means by which they retrieved this information involved the use of their discretion. This argument appears unsound because an absolute prohibition on torture exists under U.S. law.¹¹⁸ Furthermore, current treaty obligations of the United States prohibit such human rights violations.¹¹⁹ Consequently, there is clearly no discretion to torture and a claim for torture might succeed, as long as the foreign country exception does not preclude recovery.

4. Conclusion Regarding the FTCA

Although the creation of the FTCA has made suits against the U.S. government possible, its application is clearly limited, especially when seeking redress for harms occurring outside the United States. Even if one could surpass the foreign country exception for the purposes of an arbitrary detention claim, the intentional tort and discretionary duty exceptions appear to pose an insurmountable barrier. In pursuing a torture claim, great obstacles lie in the way of gathering the factual evidence necessary to prove the elements of the claim.¹²⁰ Factual hurdles aside, if one can overcome the foreign country exception, it does not appear any other exception would stand in the way of pursuing this claim. However, given that any waiver of immunity of the United States by Congress is strictly construed and “cannot be ex-

115. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57, 834 (Nov. 13, 2001).

116. See discussion *supra* Part III.B.2.

117. See discussion *infra* Part IV.2.

118. See 18 U.S.C. § 2340A (West 2001).

119. See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

120. See discussion *infra* Part IV.2.

tended beyond the plain language of the statute[.]”¹²¹ an argument based on the opinion of *Rasul*, asserting that the GBNB should not be treated as a foreign country, would likely fail.¹²² Such failure is even more likely considering the narrowing of the FTCA in *Alvarez-Machain* by the elimination of the headquarters doctrine.¹²³ Therefore, it is not likely that that the FCTA will adequately address harms suffered at the GBNB.

IV. ALIEN TORT STATUTE

Another possible source of redress for these claims is the ATS, which provides, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹²⁴ A federal district court will have jurisdiction under the ATS if: (1) the claim is made by an alien; (2) for tort; and (3) the tort is in violation of the law of nations or treaty of the United States.¹²⁵ Although enacted in 1789,¹²⁶ the ATS was virtually unused until a landmark case in 1980 allowed a Paraguayan torture victim to use the U.S. federal courts to sue his alleged torturer, who was a Paraguayan national.¹²⁷ Since then, the statute has been invoked by numerous foreign nationals seeking compensation for human rights violations committed abroad¹²⁸ and has

121. *Price v. United States*, 174 U.S. 373, 376 (1899).

122. See discussion *supra* Part III.B.1.

123. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711-12 (2004). *Alvarez-Machain* was notably decided the same day the Supreme Court held that district courts had jurisdiction to hear foreign national detainees’ habeas corpus petitions in *Rasul*, possibly anticipating the filing of suits on behalf of detainees, as it appears the headquarters doctrine would have been otherwise applicable to allegations of abuse. See discussion *supra* Part III.B.1.

124. Alien Tort Claims Act, 28 U.S.C. §1350 (2000).

125. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 545 (D.D.C. 1981), *aff’d*, 726 F.2d 774 (D.C. Cir. 1984).

126. Act to Establish the Judicial Courts of the United States, of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2000)).

127. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 887 (2d Cir. 1980).

128. See *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1377 (9th Cir. 1998) (Mexican citizen and his wife sued Los Angeles “for arbitrary arrest and detention, a violation of the law of nations, under the [ATS]”); *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) (concluding alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATS); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 978 F.2d 493, 495 (9th Cir. 1992) (Philippine citizen brought a suit under the ATS against former Philippine President Ferdinand Marcos for the alleged torture and wrongful death of her son); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003) (suit filed against defendant oil company alleging it collaborated with Sudan “to commit gross human rights violations, including extrajudicial killing, forcible

played a leading role in the international effort to hold accountable those who violate internationally recognized human rights. But can the ATS hold the U.S. government accountable for similar violations, or is it simply a mechanism by which America seeks to hold others accountable, while granting its own officials immunity?

A. The “Law of Nations”

There are two main obstacles detainees must overcome in order to utilize the ATS. First, they must identify a “law of nations” that has been violated.¹²⁹ Second, they must name a defendant who is not protected by immunity.¹³⁰ Prior to *Alvarez-Machain*, courts disagreed on how to define and locate the “law of nations.”¹³¹ *Alvarez-Machain* settled the law in one respect, holding that claims that violate the “law of nations” are not restricted to the set of international norms that existed at the time the ATS was enacted in 1789.¹³² In ascertaining the modern law of nations, the Court instructed, “[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹³³

displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and enslavement”).

129. See *Filartiga*, 630 F.2d at 876-86 (stating that substantive principles to be applied in ATS litigation are to be ascertained by looking to international law). Valid sources for discerning what constitutes international law are the customs and usages of civilized nations, judicial opinions, and the works of jurists. *Id.* at 880-81.

130. See *Murray v. United States*, 686 F.2d 1320, 1325 (8th Cir. 1982). A waiver of sovereign immunity must be unequivocally expressed, and “should be sought in the statute giving rise to [the] cause of action.” *Id.*

131. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring) (“[V]iolations of the ‘law of nations’ under section 1350 are not limited to Blackstone’s enumerated offenses.”); *Filartiga*, 630 F.2d at 888 (jurisdiction is extended to “well-established, universally recognized norms of international law”). *But see Tel-Oren*, 726 F.2d at 813-14 (Bork, J., concurring) (asserting that jurisdiction under the ATS should be limited to violations of international law available in 1789, as articulated by Blackstone, such as violation of safe-conducts, infringement of the rights of ambassadors, and piracy).

132. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25.

133. *Id.* at 725; see also *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). A claim is actionable under the ATS when the violation alleged is of a “norm that is specific, universal, and obligatory.” *Id.*

B. Actionable Violations Alleged by Guantanamo Bay Detainees

Detainees assert torture and prolonged arbitrary detention claims, both of which present their own obstacles to utilizing the ATS as a means of recovery. Factually, proving the allegations of prolonged arbitrary detention will be more straightforward than that of torture. Legally, however, it will be easier to establish that there is an international norm against torture, whereas prolonged detention has not clearly become customary international law.

1. Arbitrary Detention

When *Rasul* was decided, 650 foreign nationals were being held at the GBNB pursuant to the President's Detention Order.¹³⁴ At that time, only two individuals had been formally charged with an offense.¹³⁵ These facts clearly indicate that the detainees have been subjected to prolonged detention. The detention is arbitrary based on the facts conceded by the government in *Rasul*: detainees were held in military custody for a period of two years or more, without formal charges, a hearing, or access to counsel.¹³⁶ Still, proving a claim of arbitrary detention also requires that there be an international norm against it that qualifies as a "law of nations" under the ATS. In *Alvarez-Machain*, the Court unanimously excluded arbitrary arrest and non-prolonged arbitrary detention as viable claims under the ATS.¹³⁷ However, this decision was confined to the particularly broad definition of arbitrary detention presented by Alvarez,¹³⁸ which is clearly distinguishable from the kind of arbitrary detention involved at the GBNB.

Alvarez deemed his detention arbitrary because the DEA agents who captured him in Mexico had no extraterritorial authority to arrest him outside U.S. jurisdiction, and therefore no applicable law authorized his arrest and subsequent detention.¹³⁹ The Court described Alva-

134. Brief for the Respondents at 6, *Rasul v. Bush*, Nos. 03-334, 03-343 (2004); see also Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57, 834 (Nov. 13, 2001)

135. Brief for the Respondents, *supra* note 134, at 7. The offense was conspiracy to commit war crimes. *Id.*

136. Petitioners' Brief on the Merits, *supra* note 13, at 2.

137. *Alvarez-Machain*, 542 U.S. at 737-38.

138. See *infra* note 142 and accompanying text.

139. 542 U.S. at 735-36.

rez's claim as an "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."¹⁴⁰ While the majority concluded that additional causes of action could be recognized under the "law of nations," besides those that existed at the time the ATS was enacted,¹⁴¹ the Court nevertheless held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."¹⁴² In response to the Ninth Circuit's finding of an international norm against arbitrary detention,¹⁴³ the Supreme Court characterized Alvarez's claim as "so broad" that its "implications would be breathtaking," concluding "it expresses an aspiration that exceeds any binding customary rule having the specificity we require . . . [and] would go beyond any residual common law discretion we think it appropriate to exercise."¹⁴⁴ Despite the Supreme Court's failure to recognize Alvarez's arbitrary detention claim as violating a "law of nations," such a claim may nevertheless be recognized in the context of detention at the GBNB, a kind of detention that can be readily distinguished from Alvarez's "single illegal detention of less than a day."¹⁴⁵

Nevertheless, it remains uncertain whether prolonged arbitrary detention violates established international norms, despite the findings of the American Law Institute (ALI) and case law. In 1987, the ALI set out the then-current list of customary human rights norms, which included "prolonged arbitrary detention."¹⁴⁶ The ALI's *Restatement (Third) of the Foreign Relations Law of the United States (Restatement)* defined detention as arbitrary if it "is not pursuant to law," or if it "is incompatible with the principles of justice or with the dignity of the human person," and stated, "[A]rbitrary detention violates cus-

140. *Id.* at 736.

141. *See id.* at 729.

142. *Id.* at 738.

143. *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003) (majority opinion) (holding "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention"). The court rejected any element of "prolonged" detention, "as the language of the international instruments demonstrates, the norm is universally cited as one against 'arbitrary' detention and does not include a temporal element." *Id.* at 621.

144. *Alvarez-Machain*, 542 U.S. at 736, 738.

145. *Id.* at 738.

146. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(e) (1987) [hereinafter RESTATEMENT].

tomary law if it is prolonged and practiced as state policy.”¹⁴⁷ Noting that the *Restatement* did not define “state policy” and “prolonged” detention, the Court in *Alvarez-Machain* neither disagreed with the ALI definition nor denied that such detention had the status of customary international law.¹⁴⁸ The Court only rejected its application to *Alvarez-Machain*.¹⁴⁹ The Court stated, “Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority.”¹⁵⁰ Although the detainee’s detention at the GBNB is pursuant to law,¹⁵¹ it may very well be “incompatible with the principles of justice or with the dignity of the human person.”¹⁵² The *Restatement* suggests that “[d]etention is arbitrary if it . . . is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.”¹⁵³ Unlike Alvarez’s illegal detention of less than one day, “followed by the transfer of custody to lawful authorities and a prompt arraignment,”¹⁵⁴ the situation of detainees falls squarely within the *Restatement* definition of arbitrary detention.¹⁵⁵ In addition, several U.S. cases have recognized arbitrary detention as prohibited under customary international law.¹⁵⁶ For more than thirty years, some U.S. courts have considered prolonged arbitrary detention as an actionable viola-

147. *Id.* § 702 cmt. h (quoting Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863 at 137 (1958)).

148. *See Alvarez-Machain*, 542 U.S. at 737.

149. *See id.* at 737-38.

150. *Id.* at 737.

151. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

152. *RESTATEMENT*, *supra* note 146, § 702 cmt. h (quoting Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863 at 137 (1958)).

153. *Id.* § 702 cmt. h.

154. *Alvarez-Machain*, 542 U.S. at 738.

155. *See supra* Part II.

156. *See* *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (recognizing a “clear international prohibition against arbitrary arrest and detention”); *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) (recognizing arbitrary detention as an actionable violation of international law, describing it as “detention of a person in an official detention facility . . . without any notice of the charges and failure to bring to trial that person within a reasonable time”); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing a right not to be arbitrarily detained as a law of nations); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169, 185 (D. Mass. 1995) (deeming torture, summary execution, disappearance, and arbitrary detention by Guatemalan military actionable violations under the ATS).

tion of international law.¹⁵⁷ Considering the duration of the detention at the GBNB without any type of hearing, it is likely that this detention, therefore, constitutes a readily actionable violation of the “law of nations” under the ATS.¹⁵⁸

However, despite the apparent status of a prohibition on prolonged arbitrary detention as customary international law, the Supreme Court has indicated reluctance to recognize new causes of action under the ATS without prior congressional action.¹⁵⁹ The *Alvarez-Machain* Court urged judicial caution when considering new claims under the “law of nations,” instructing courts to look for “legislative guidance before exercising innovative authority over substantive law” and stressing the potential danger to foreign relations when international rules are made privately actionable.¹⁶⁰ The Supreme Court’s strong hesitation to recognize additional claims in the absence of congressional action¹⁶¹ creates uncertainty as to whether prolonged arbitrary detention would be actionable under the ATS regardless of its status as a “law of nations.”

2. Torture

In contrast to the claim of prolonged arbitrary detention, the prohibition against torture has been well established as customary international law since the 1980 decision of *Filartiga v. Pena-Irala*.¹⁶² The Supreme Court affirmed this fact in *Alvarez-Machain*, where it indi-

157. See *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201-02 n.13 (9th Cir. 1975) (stating illegal arrest and detention may constitute a violation of the law of nations).

158. Other law review articles examining the *Alvarez-Machain* decision have reached similar conclusions. See, e.g., Sandra Coliver et. al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT’L L. REV. 169, 171 (2005) (“Although the Court denied the particular arbitrary arrest claim advanced by Dr. Alvarez, it did so in a manner that does not appear to undermine the prior case law in which claims of . . . prolonged arbitrary detention were found actionable under the ATS.”).

159. See *Alvarez-Machain*, 542 U.S. at 727.

160. *Id.* at 726-27.

161. The Supreme Court noted that Congress did take some limited and specific action by adding the Torture Victims Protection Act to the ATS, which was passed partially to respond to the judicial concern that Congress had never made clear its desire that federal courts hear cases alleging torture carried out under the authority of a foreign government. *Id.* at 728; see also H.R. REP. NO. 102-367, at 3-4 (1991).

162. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (“We hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”).

cated that the Torture Victims Protection Act¹⁶³ (TVPA) was added to the ATS to fulfill U.S. treaty obligations and “‘establish[es] an unambiguous and modern basis for’ federal claims of torture and extrajudicial killing.”¹⁶⁴ However, the difficulty in pursuing a torture claim is proving the necessary factual elements of torture. The TVPA defines torture as:

[A]ny act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering, . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining . . . personal information or a confession, punishing that individual for an act . . . committed or is suspected of having committed, intimidating or coercing that individual or a third person¹⁶⁵

Further, the TVPA defines mental pain or suffering as:

[P]rolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to *disrupt profoundly* the senses or the personality; the threat of imminent death; or the threat that another individual will imminently be subjected to death, *severe* physical pain or suffering¹⁶⁶

It is important to note that it is not simply the infliction of pain and suffering that is prohibited as torture, but only *severe* pain and suffering. Scholars have noted the great potential for disagreement as to what constitutes “the relevant measure of severity and from whose perspective it should be judged.”¹⁶⁷ Therefore, a detainee bears the burden of demonstrating both the the conduct was prolonged and that the severity of the conduct amounted to torture. In addition, there re-

163. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2000)).

164. *Alvarez-Machain*, 542 U.S. at 728 (quoting H.R. REP. NO. 102-367, at 3 (1991)).

165. Pub. L. No. 102-256. This definition is reiterated in the United States’ understanding regarding CAT’s definition of torture. CAT, *supra* note 119, art. 1.

166. Pub. L. No. 102-256 (emphasis added).

167. Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2038 (2003) (discussing the difficulties of proving torture). “Moreover, the addition by the United States of a requirement that mental harm be ‘prolonged’ also offers more than enough opportunity for such apologists to deny that some act constituted ‘torture’ because the mental harm lasted ‘only’ a week or a month, or three months” *Id.*

mains an additional obstacle: the TVPA cannot be used when the torture was conducted at the direction of a U.S. official.

C. The Unavailability of the TVPA as a Civil Remedy for Guantanamo Detainees

Generally, the FTCA is the exclusive mechanism by which the government and its employees may be sued for torts.¹⁶⁸ However, the TVPA also can be used to sue a federal employee. The FTCA provides that the United States cannot be substituted in as the defendant when an action is brought “for a violation of a statute . . . under which such action against an individual is otherwise authorized.”¹⁶⁹ Because the TVPA authorizes actions against individuals, it qualifies as a statute exempt from the exclusiveness of remedy provision of the FTCA.¹⁷⁰ Therefore, a federal employee cannot use the FTCA as a shield to avoid liability for torture.

Nevertheless, a larger difficulty remains: the TVPA imposes civil liability only on an individual acting “under actual or apparent authority, or color of law, of any *foreign nation*.”¹⁷¹ Thus, the statute exempts actions undertaken at the direction of the United States.¹⁷² Therefore, foreign nationals cannot use the TVPA to obtain a remedy for torture suffered at the direction of the U.S. government. Assuming violations for prolonged arbitrary detention and torture can be established as actionable violations of the “law of nations,” it may still be possible to sue the United States under ATS.

168. *Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988). See generally discussion *supra* Part III.

169. 28 U.S.C. § 2679(b)(2)(B) (2000). See generally discussion *supra* Part III.B.3.

170. See *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (“[A] violation of the TVPA arguably fulfills the requirements of § 2679(b)(2)(B).”), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005).

171. Pub. L. No. 102-256 (emphasis added).

172. The TVPA was designed to allow “suits against individuals, but not governments, who engage in or, under certain circumstances, permit their subordinates to engage in torture . . . in foreign countries” and then travel to the United States. Rachael E. Schwartz, Note, “*And Tomorrow?*” *The Torture Victim Protection Act*, 11 ARIZ. J. INT’L & COMP. L. 271, 275 (1994).

D. The United States as a Defendant

It is uncertain whether the ATS can be used to sue the U.S. government.¹⁷³ The United States is sovereign, and therefore, immune to suits unless it consents to be sued.¹⁷⁴ Any waiver of “sovereign immunity must be unequivocally expressed in statutory text.”¹⁷⁵ Since the ATS contains no such language, it would appear a foreign national cannot maintain a cause of action against the federal government under it. Nevertheless, it is important to review *Rasul*, which addressed an alien’s ability to pursue litigation in U.S. federal courts.

In addition to requesting relief under the federal habeas statute, the detainees in *Rasul* “sued for injunctions and declaratory judgments under the [ATS] . . . alleging that the United States is confining them in violation of treaties and international law.”¹⁷⁶ Previously, the D.C. Circuit stated that the Supreme Court had held that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’”¹⁷⁷ The D.C. Circuit therefore surmised that the Supreme Court’s holding “doom[ed] these additional causes of action, even if they deal only with conditions of confinement and do not sound in habeas. . . . [Detainees] cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them.”¹⁷⁸

However, in *Rasul* the Supreme Court disagreed and held that nothing “categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts.”¹⁷⁹ The Court noted that U.S. courts have traditionally been available to non-resident aliens, and the ATS explicitly conferred such a litigation right upon them.¹⁸⁰ It also stated that the fact that the de-

173. However, it is clear that foreign governments can be sued under the ATS as long as such suits comply with the Foreign Sovereign Immunity Act. *Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir. 1989) (stating that claims against foreign states must fall within listed exception to Foreign Sovereign Immunity Act).

174. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 268 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

175. *Floyd v. District of Columbia*, 129 F.3d 152, 156 (D.C. Cir. 1997).

176. *Khaled v. Al Odah*, 321 F.3d 1134, 1144 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004).

177. *Id.* at 1144 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

178. *Id.* at 1144-45.

179. *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (citing *Al Odah*, 321 F.3d. at 1139).

180. *Id.* at 484-85.

tainees were in military custody was “immaterial to the question of the District Court’s jurisdiction over their non-habeas statutory claims.”¹⁸¹

Although *Rasul* affirms that federal courts generally have jurisdiction to hear claims traditionally brought by aliens under the ATS,¹⁸² it does not hold that the ATS provides an avenue for suing the federal government.¹⁸³ The Court notably failed to overrule prior cases to the extent they held that the ATS was not itself a waiver of sovereign immunity.¹⁸⁴ Suits traditionally brought by aliens under the ATS have not included claims against the United States, and therefore, if the Supreme Court had intended to expand the liability of the U.S. government under the ATS, it would have done so explicitly.¹⁸⁵ The exclusivity clause of the FTCA also implies that the ATS does not create a

181. *Id.* at 485.

182. *Id.*

183. Nevertheless, the Center for Constitutional Rights has brought claims against U.S. officials under the ATS in *Turkmen v. Ashcroft*. See Plaintiffs’ Memorandum in Opposition to Motion of the United States to be Substituted as Defendant at 8-10, *Turkmen v. Ashcroft*, No. 02-CV-2307 (E.D.N.Y. Jan. 11, 2005), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Westfall_Act_briefFINAL.pdf. Although this case was brought for harms occurring in a New York detention center, plaintiffs alleged violations both of their right to contact their foreign consulate and of customary international prohibitions against arbitrary detention and cruel, inhuman, or degrading treatment. See *id.* at 1-5. The government argued 28 U.S.C. section 2679(d)(1) of the FTCA conferred immunity on federal officials by making an FTCA action against the government the exclusive remedy for any alleged torts committed by such employees in the scope of their employment. See *id.* at 1, 5-10. Plaintiffs contend this statute does not apply because their claims under the ATS exempt from the FTCA’s exclusivity clause. See *id.* at 1, 8-10; see also Complaint, *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006) (No. 04 Civ. 01864), 2004 WL 2878175 (the first action for damages brought against U.S. officials on behalf of released GBNB detainees, alleging prolonged arbitrary detention and torture). But see *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (holding the ATS “itself cannot be violated for purposes of [28 U.S.C.] § 2679(b)(2)(B),” the section of the FTCA which allows other suits to proceed against the government when another statute otherwise authorizes the action (such as the TVPA)), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005).

184. See *Sanchez v. Regan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Can. Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

185. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Court discussed the law of nations “as a body of judge-made law regulating the conduct of *individuals* situated outside domestic boundaries and consequently carrying an international savor.” *Id.* at 715 (emphasis added). The ATS was originally enacted to address the following: “law of nations”; “violation of safe conducts”; “infringement of the rights of ambassadors”; and “piracy.” *Id.* The Court stated that each of these offenses contemplate actions by *private individuals* that could have “threatening serious consequences in international affairs” and possibly lead to war if not addressed. *Id.* (emphasis added). Nowhere in the Court’s discussion of these violations did it mention actions taken by government officials. See generally *id.* at 712-24.

cause of action for wrongs committed by government employees.¹⁸⁶ In addition, it is established doctrine that in the absence of an apparent remedy for an injury caused by an act or omission of the United States, a remedy may not be supplied by an implied waiver of sovereign immunity.¹⁸⁷ A waiver of sovereign immunity must be unequivocally expressed, and “should be sought in the statute giving rise to [the] cause of action.”¹⁸⁸ Moreover, courts have repeatedly stated that the ATS is not a waiver of sovereign immunity and does not authorize suits against the United States.¹⁸⁹ Therefore, in its current state, the ATS does not appear to provide a solid basis for a cause of action against the U.S. government.

E. Guantanamo Bay Detainees’ Suits Against Private Individuals and Corporations Under the ATS

Assuming federal officials cannot be sued under the ATS because they are protected from liability, detainees may nevertheless be able to identify a non-state actor to hold responsible. In *Kadic v. Karadzic*, the reach of the ATS was expanded to private parties for certain international human rights claims.¹⁹⁰ This expansion opened the door to corporate accountability, and the first such lawsuit was filed in 1996 in *Doe v. Unocal*.¹⁹¹ Without the ability to sue the direct perpetrators,

186. 28 U.S.C. § 2679(a) (2000); see also *Alvarez-Machain*, 331 F.3d at 631-32. In *Alvarez-Machain*, the Ninth Circuit found the district court properly substituted the United States for individual government defendants in a lawsuit filed by a Mexican national under the ATS. *Id.* The court’s rationale was the ATS does not fall within the exception of 28 U.S.C. section 2679(b)(2)(B), which states the exclusiveness provision does not apply when another statute otherwise authorizes the action, since the ATS creates no obligations or duties. *Id.* But see *supra* text accompanying note 185. Regardless of this holding, plaintiffs’ brief in *Turkman v. Rumsfeld* argues that ATS claims are statutory exceptions to the FTCA. Plaintiffs’ Memorandum in Opposition to Motion of the United States to be Substituted as Defendant, *supra* note 183, at 8-10.

187. *Murray v. United States*, 686 F.2d 1320, 1325 (8th Cir. 1982).

188. *Id.*

189. See *Goldstar (Pan.) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Koohi v. United States*, 976 F.2d 1328, 1333 n.4 (9th Cir. 1992); *Can. Transp.*, 663 F.2d at 1092.

190. *Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995) (applying certain norms proscribing genocide, war crimes, summary execution, rape, and other forms of torture committed in pursuit of these crimes, to private (i.e., non-state) actors under international law and finding these norms can be the basis for an ATS claim).

191. See *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff’d in part*, 395 F.3d 932 (9th Cir. 2002), and *rev’d in part*, 395 F.3d 932 (9th Cir. 2002). In that case, plaintiffs alleged that Unocal hired the Burmese military to provide security and other support

such as federal government actors, detainees could try to sue a corporation by proving it was an accomplice, aider and abettor, or co-conspirator.¹⁹²

Corporations have been sued both for their direct involvement in human rights violations, such as destructive environmental practices,¹⁹³ and for their complicity in the human rights violations of government officials and soldiers.¹⁹⁴ In the latter case, plaintiffs seek to hold corporations liable for the actions of governmental or private third parties, alleging that the corporations either caused plaintiffs' injuries or are vicariously liable because of their participation in a joint venture.¹⁹⁵ The Ninth Circuit stated that a corporate defendant can be found liable if it provides "knowing practical assistance or encouragement [that] has a substantial effect on the perpetration of the crime," which requires actual or constructive knowledge.¹⁹⁶

For claims of torture, detainees would have to identify a non-governmental body involved in the provision or training of the interrogators that allegedly committed the torture at the GBNB. Such a suit has already been brought on behalf of prisoners who were held in Iraqi prisons under U.S. control, alleging that Titan Corporation conspired with the United States to torture them.¹⁹⁷ For the claims of arbitrary detention, the detainees could sue the construction companies that built and expanded the GBNB detention facility, alleging that they aided the United States in its violation of the international prohibition against prolonged arbitrary detention.

Since litigation on corporate liability is relatively new, it is unclear if such suits are likely to succeed. However, corporations have deep pockets, and a successful suit may provide detainees compensa-

for a pipeline project, knowing that the military had a long record of violent human rights abuses. *Id.*

192. See *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 91, 100 (D.D.C. 2003); see also *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1355 (S.D. Fla. 2003).

193. *Jota v. Texaco Inc.*, 157 F.3d 153, 155-56 (2d Cir. 1998) (seeking damages under the ATS for environmental and personal injuries allegedly caused by Texaco's dumping of toxic byproducts into local rivers, as well as equitable relief to remedy the resulting property contamination).

194. *Unocal*, 963 F. Supp. at 891.

195. See *id.*

196. *Doe v. Unocal Corp.*, 395 F.3d 932, 951 (9th Cir. 2002), *reh'g en banc*, 403 F.3d 708 (9th Cir. 2005). The parties settled in 2004. See *Unocal Corp.*, 403 F.3d at 708.

197. See *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1152 (S.D. Cal. 2005) (granting the corporations' motion to transfer the detainees' action to the U.S. District Court for the Eastern District of Virginia). As of the date of this publication, no decision has been rendered on the merits of this case.

tion. Furthermore, a successful suit would deter corporations from contracting to do what the government cannot legally do itself. However, these suits do not fulfill the goal of accountability. Although corporations may be to blame for their complicity in human rights abuses, it is the U.S. government that has employed them to do its dirty work. Corporations are only poor substitutes for the real wrongdoers. Pursuing claims against corporations simply deflects responsibility away from the U.S. government.

While the ATS prevents the United States from becoming a safe haven for human rights abusers, it also insulates the United States from accountability for its own human rights abuses. In seeking to provide alien victims of human rights abuses with a forum where they can obtain reparation for human rights violations, it defies logic for the United States to exempt itself from that very same process. The ATS has made an important contribution to deterring human rights violations, by preventing foreigners from committing human rights violations abroad and then fleeing to the United States. But there is no such deterrence for U.S. officials, who can commit human rights violations abroad and then return home with impunity. The ATS is an ineffective mechanism for holding U.S. government actors accountable for the abuses occurring in Guantanamo Bay.

V. UTILIZING A *BIVENS* ACTION

The Supreme Court has generated another possible method to redress these abuses. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court created a cause of action against federal agents in their individual capacities for constitutional law violations committed while acting under the color of the law.¹⁹⁸ The *Bivens* Court held that an unconstitutional search and seizure by federal drug officers implied an individual cause of action not expressly provided in the Fourth Amendment.¹⁹⁹ *Bivens* actions were subsequently extended to violations of the Fifth Amendment's due

198. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). This case cannot be used as authority to sue the federal government. *See id.* Though no statute exists for this cause of action, the right to recover nevertheless exists as a judicially-created cause of action. *Carlson v. Green*, 446 U.S. 14, 18 (1980).

199. *See Bivens*, 403 U.S. at 391-92.

process guarantee,²⁰⁰ as well violations of the Eighth Amendment's prohibition on cruel and unusual punishment.²⁰¹

To be able to pursue the constitutional remedy created in *Bivens*, detainees must possess substantive constitutional rights.²⁰² Though the Supreme Court in *Rasul* gave jurisdiction to federal courts to hear petitions for writs of habeas corpus, the Court did not explicitly determine what substantive rights are due to detainees.²⁰³ Assuming detainees have substantive constitutional rights, it is necessary to access what constitutional right violations they have suffered.²⁰⁴ Detainees could raise both a Fifth Amendment due process claim regarding their prolonged arbitrary detention²⁰⁵ and an Eighth Amendment cruel and unusual punishment claim regarding torture.²⁰⁶ However, *Bivens* only provides a remedy against individual government employees or agents for unconstitutional conduct, rendering a Fifth Amendment due proc-

200. *Davis v. Passman*, 442 U.S. 228, 229 (1979).

201. *Carlson v. Green*, 446 U.S. 14, 16-18 (1980).

202. Whether the GBNB detainees have substantive constitutional rights is uncertain. *See supra* Part II; cf. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 40 (2004) ("The highly unusual character of the U.S.' jurisdiction and control over [the Guantanamo Base], . . . compels the conclusion that the [U.S.] Constitution applies [there] in the same fashion as to other territor[ies], [such as the Canal Zone, the Trust Territory of the Pacific Islands, and the American sector in Berlin,] where the [United States] is not sovereign but possesses complete jurisdiction and control."). *But see* Leah E. Kraft, *The Judiciary's Opportunity to Protect International Human Rights: Applying the U.S. Constitution Extraterritorially*, 52 KAN. L. REV. 1073, 1074 (2004) ("Though the current standard of extraterritorial applicability of the Constitution as a whole is unclear, the Supreme Court would likely find little or no protection for nonresident aliens.").

203. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) ("Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention . . ."); *see also supra* Part II and note 53 (discussing different district court opinions that have reached varying conclusions on this issue).

204. Though section 2769(d) of the FTCA allows the United States to be substituted as the party in negligence suits against federal employees, it specifically states that such immunity does not extend to civil action against a government employee for violations of constitutional rights. 28 U.S.C. § 2679(b)(2)(A), (d)(1) (2000).

205. *See generally* U.S. CONST. amend. V.

206. *See generally* U.S. CONST. amend. VIII. The Eighth Amendment regulates the treatment of prisoners. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[S]everal . . . 'forms of corporal punishment run afoul of the Eighth Amendment . . .'. Among those forms of punishment were 'handcuffing inmates to the fence and to cells for long periods of time, . . . and forcing inmates to . . . maintain awkward positions for prolonged periods.'") (quoting *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974)). Several detainees have complained of having to sit shackled in uncomfortable positions for long periods, extending eight hours or more. *See TIPTON REPORT, supra* note 1, ¶¶ 226-227, 241.

ess claim inappropriate.²⁰⁷ Since the detainees were detained at the President's direction, and the President is shielded from damages liability predicated upon his official acts by absolute immunity,²⁰⁸ there is no one to hold liable for the Fifth Amendment due process violation.

Even if detainees possess substantive constitutional rights and detainees could find someone to hold liable for violating their Fifth Amendment due process rights, a *Bivens* action is still likely to fail. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."²⁰⁹ Thus, government actors are protected from liability for reasonable mistakes. The Supreme Court has indicated that the test for whether a government official has violated a "clearly established right" is met if "in the light of pre-existing law the unlawfulness [is] apparent."²¹⁰ Under this condition, accused government officials would likely claim that the extension of constitutional rights to detainees in Guantanamo Bay does not constitute clear establishment of those rights. This argument is likely to succeed because it has not yet been determined whether constitutional rights extend to the detainees held at the GBNB.²¹¹

Additionally, courts would probably avoid extending the scope of *Bivens* because "special factors counsel[] hesitation in the absence of affirmative action by Congress."²¹² The foreign policy and national security concerns surrounding the detention of foreign nationals at Guantanamo Bay arguably constitute such special factors. Consequently, a *Bivens* action would likely fail, even if it were determined that the GBNB detainees do have substantive constitutional rights.

207. As a side note, a Fifth Amendment claim of compelled self-incrimination would not be actionable unless statements made as a result of torture were actually admitted in a criminal proceeding. See *Chavez v. Martinez*, 538 U.S. 760, 760 (2003).

208. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); see also discussion *supra* Part III.B.2.

209. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

210. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

211. See discussion *supra* note 53.

212. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

VI. THE POLITICAL QUESTION DOCTRINE AS AN ADDITIONAL BARRIER TO JUDICIAL ACCESS

Assuming there was a judicially cognizable remedy available to foreign national detainees, issues of justiciability present an additional barrier to recovery. The political question doctrine reflects concerns about keeping the federal judiciary from inappropriate involvement in sensitive political issues that are best addressed by the political branches of government.²¹³ Under the political question doctrine, a federal court can decline to hear a case that presents such a non-justiciable political question.²¹⁴ The doctrine generally “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”²¹⁵ In addition, the political question doctrine may also exclude cases when there is an “impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”²¹⁶

Certainly, the detention of alien prisoners at the GBNB is a sensitive political issue that is likely to have consequences for U.S. foreign relations. However, the Supreme Court has stated that, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”²¹⁷ Nevertheless, the D.C. Circuit has warned, “the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.”²¹⁸ This warning applies to the situation in Guantanamo Bay and reflects the policy that courts should defer to the political branches in addressing problems best resolved by those branches, since the political question doctrine is “primarily a function

213. See *Baker v. Carr*, 369 U.S. 186, 209-14 (1962) (enunciating this doctrine for the first time).

214. See, e.g., *id.* at 209.

215. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 257-58 (D.D.C. 2004).

216. *Carr*, 369 U.S. at 217.

217. *Id.* at 211.

218. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.D.C. 1985).

of the separation of powers.”²¹⁹ Arguably, the decision to detain foreign nationals at the GBNB during the “war on terror” involves decisions made by the political and not judicial branches of government. Indeed, Congress’s passage of the AUMF and the President’s subsequent Detention Order initiated “war on terror” and brought foreign nationals to the GBNB.²²⁰ Furthermore, Article III of the Constitution, which defines the scope of judicial power, “provides no authority for policymaking in the realm of foreign relations or provision of national security.”²²¹ Finally, it would be difficult for a court to award damages for detainees’ alleged claims without “expressing lack of the respect due coordinate branches of government.”²²²

The recent case of *Schneider v. Kissinger* indicates that the political question doctrine may be invoked in the case of foreign national detainees seeking compensation for harms suffered at Guantanamo Bay.²²³ *Schneider* presented a sensitive situation similar to that of the foreign nationals detained at the GBNB. In *Schneider*, the plaintiffs alleged their father, General Schneider, was shot in an attempted kidnapping as a result of “covert actions . . . directed by [high-ranking] United States officials[,] in connection with an attempted coup in Chile in 1970.”²²⁴ The court held that the political question doctrine barred review of the plaintiff’s claim. This is because decisions in the realm of foreign affairs and national security are best left to the political branches. The court stated: “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . [branches], and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”²²⁵ The court declined to “gauge the reasonableness of

219. *Carr*, 369 U.S. at 210.

220. *See supra* Part II.

221. *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005).

222. *Carr*, 369 U.S. at 217. For example, a finding that detention at GBNB was arbitrary would criticize the President’s Detention Order by implying it does not provide adequate procedural safeguards to determine enemy combatant status.

223. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 254 (D.D.C. 2004), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005).

224. *Id.* at 253-54. General Schneider was to be elected as Chile’s first Socialist President and was “opposed [to] military intervention in the electoral process.” *Id.* at 254. The United States planned to neutralize him, and in their efforts to do so, the General was killed. *See id.* at 254-56. Schneider’s children sued Henry A. Kissinger, who was Assistant for National Security Affairs to President Nixon at the time. *Id.* at 254.

225. *Id.* at 258-59 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)).

[the] foreign policy decisions . . . [through] balanc[ing] a myriad of thorny foreign [policy] and domestic political considerations.”²²⁶

Similarly, the taking, detention, and subsequent treatment of Guantanamo Bay prisoners are matters inevitably intertwined with national security and foreign policy concerns, which would require courts to make inappropriate policy determinations. Considering the extremely sensitive nature of the ongoing “war on terror,” it is likely a court would “declin[] to interpose its own will above the will of the President or . . . Congress” in authorizing a remedy for alleged rights violations occurring in Guantanamo Bay.²²⁷ Courts are especially likely to decline review given the uncertainties regarding the end of the “war on terror,” the highly sensitive nature of the national security interests involved in combating terrorism, and the fact that the United States is still in pursuit of Osama Bin Laden, the main suspect in the attacks of 9-11.²²⁸

Under any of the potential remedies previously discussed, courts will undoubtedly have to “gauge the reasonableness of . . . foreign policy decisions.”²²⁹ Courts have stated, “[I]t is not within the role of the courts to second-guess executive judgments made in furtherance of that branch’s proper role.”²³⁰ The Supreme Court has advised that the “nuances” of “the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.”²³¹ In addition, many cases have applied the political question doctrine to prevent courts from reaching the merits of cases regarding torts allegedly committed by U.S. officials against foreigners outside the United States.²³² In conclusion, the political question doctrine would likely bar any judicially cognizable claim brought by the detainees. Thus, it is necessary to consider non-judicial avenues of redress.

226. *Id.* at 262.

227. *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 739 (S.D.N.Y. 1986).

228. Bin Laden is among the FBI’s ten most wanted fugitives. FBI, FBI Ten Most Wanted Fugitive, <http://www.fbi.gov/wanted/topten/fugitives/laden.htm> (last visited Apr. 11, 2006).

229. *Kissinger*, 310 F. Supp. 2d at 262.

230. *Kissinger v. Schneider*, 412 F.3d 190, 196 (quoting *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003)).

231. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983).

232. *See, e.g., Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1159-61 (D.D.C. 1991), *aff’d*, 957 F.2d 886 (D.C. Cir. 1992); *Chaser*, 649 F. Supp. at 737; *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 597-601 (D.D.C. 1983), *aff’d*, 770 F.2d 202, (D.C. Cir. 1985).

VII. ALTERNATIVES TO THE JUDICIARY: THE FOREIGN CLAIMS ACT

The Foreign Claims Act authorizes the creation of claims commissions to provide compensation up to a maximum of \$100,000 where property loss, personal injury, or death occurs because of non-combat activities of the armed forces in foreign countries.²³³ The purpose of the act is “[t]o promote and to maintain friendly relations through the prompt settlement of meritorious claims.”²³⁴ This administrative claims process is not subject to the same exceptions as the FTCA,²³⁵ and it arguably presents the most straightforward route to seeking compensation from the U.S. government.²³⁶

The Secretary of Defense has discretion in selecting commission members and in promulgating rules for commissions.²³⁷ Foreign victims are spared the burden of having to travel to the United States to seek compensation for rights violations. Since commissions are most often established where the U.S. military has significant presence, the act appears to apply to the GBNB.²³⁸ This administrative procedure would thus, in theory, allow recovery for foreign national detainees who could not otherwise travel to the United States and hire a lawyer, assuming that the U.S. system would even hear their claims.

However, examination of the anecdotal evidence available from the claims commission set up to compensate injured Iraqis indicate the system is inadequate. The Occupation Watch Center in Baghdad (Occupation Watch) and the National Association for the Defense of Hu-

233. Foreign Claims Act, 10 U.S.C.S § 2734(a) (LexisNexis 2005).

If the Secretary concerned considers that a claim in excess of \$100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant \$100,000 and report any meritorious amount in excess of \$100,000 to the Secretary of the Treasury for payment under section 1304 of title 31.

Id. § 2734(d).

234. *Id.* § 2734(a).

235. *See* 28 U.S.C. § 2680 (2000).

236. In addition, the Secretary of Defense can designate the claims commission to settle and pay damages “caused by a civilian employee of the [Department of Defense] other than an employee of a military department.” Foreign Claims Act, 10 U.S.C.S § 2734(h) (LexisNexis 2005). This provision would therefore cover non-military personnel hired by the Department of Defense for the purposes of interrogation.

237. *See id.* § 2734(a).

238. “Foreign country” under the Foreign Claims Act “includes any place under the jurisdiction of the United States.” *Id.* Therefore, the GBNB would qualify as a “foreign country” for the purposes of this act. In addition, the detention of Guantanamo Bay detainees would be characterized under the act’s broad definition of “non-combat” activity; “[a]ctivity, other than combat, war, or armed conflict, that is particularly military in character and has little parallel in the civilian community.” 32 C.F.R. § 842.41(c) (2004).

man Rights in Iraq compiled a *Joint Report on Civilian Casualties and Claims Related to U.S. Military Operations (Report)*, which discusses the lack of successful claims brought by Iraqi victims harmed incident to the war in Iraq.²³⁹ According to the *Report*, “The atmosphere, behavior, places and people that Iraqis must deal with as they search for answers or try to get compensation for their injuries and losses are part of a crescendo of frustration, disappointment and disillusion in Baghdad.”²⁴⁰

The Iraqi claims commissions are so disorganized that Occupation Watch has referred to this maladministration as “strategic.”²⁴¹ The commissions are characterized by missing files, extensive delays, frequent procedural changes, and requests to “come back next week.”²⁴² Additional complaints include insufficient time to present a claim and failure to provide enough staff.²⁴³ Furthermore, the lack of impartiality is alarming. Iraqi translators often showed “great familiarity with soldiers and lawyers” and were observed being asked for advice by military lawyers more than once.²⁴⁴ The main problem with the commissions is lack of neutrality; those accused of committing the harm, the military, are responsible for making the primary decisions on whether misconduct has occurred. As the former head of Occupation Watch described, “[T]he real power to define an incident lies in the hands of the very military being accused of misconduct. In essence, they can deny everything because we don’t ever know when there is a ‘combat’ situation.”²⁴⁵ This absence of impartiality is repugnant to values of justice. An employee of the Iraqi Assistance Center who assists Iraqis in filling out their claims for compensation estimates that

239. OCCUPATION WATCH CTR. & NAT’L ASS’N FOR THE DEF. OF HUMAN RIGHTS IN IRAQ, JOINT REPORT ON CIVILIAN CASUALTIES AND CLAIMS RELATED TO U.S. MILITARY OPERATIONS 1, available at <http://www.civicworldwide.org/pdfs/compensationreport.pdf>. “Occupation Watch is a nongovernmental monitoring organization backed by mostly western peace and social justice groups.” Orly Halpern, *Running the U.S. Military’s Compensation Gauntlet*, NEW STANDARD, July 14, 2004, <http://newstandardnews.net/content/index.cfm/items/676>.

240. OCCUPATION WATCH CTR., *supra* note 239, at 1.

241. *Id.* at 3-4.

242. *Id.* at 4-5.

243. *Id.* at 4.

244. *Id.* at 3.

245. Halpern, *supra* note 239. In addition, if compensation is received, it may not be tendered “unless the amount tendered is accepted by the claimant in full satisfaction.” 10 U.S.C. § 2734(e) (2000). This provision, therefore, forecloses any further avenue of relief if the compensation offered is inadequate.

out of the 2,000 victims she helps on a weekly basis, “[o]nly 30 to 40 percent get compensation.”²⁴⁶

Certainly the history of claims commissions in Iraq indicates that such commissions, far from “promot[ing] and . . . maintain[ing] friendly relations,”²⁴⁷ have done nothing but invoke anger and resentment by those denied compensation. As one victim who was denied compensation asserted, “If we don’t get compensation, we will fight.”²⁴⁸ While at first glance, the Foreign Claims Act appears to present the most efficient and feasible avenue for detainee compensation, in reality, the recent experience in Iraq does not provide much hope for its successful application in Guantanamo Bay. Far from serving the dual goals of accountability and compensation, such a military-dominated process would only result in further degradation, while protecting those responsible for abuses. An independent, unbiased entity with the power and credibility to investigate claims of human rights abuses is necessary. One alternative is to create a commission modeled on the ombudsman concept.

VIII. BYPASSING THE JUDICIARY ALTOGETHER: THE OMBUDSMAN COMMISSION AS AN ALTERNATE DISPUTE RESOLUTION MECHANISM

The ombudsman concept has received widespread global recognition.²⁴⁹ As of 1998, ninety countries have created such offices to investigate complaints against the government by members of the public.²⁵⁰ In this capacity, an ombudsman serves as a government watchdog and guardian of the law, advocating for compliance with human rights.²⁵¹ Used in both stable and emerging democracies,²⁵² the

246. Halpern, *supra* note 239.

247. 10 U.S.C. § 2734(a) (2000).

248. Halpern, *supra* note 239.

249. See generally WALTER GELLHORN, *OMBUDSMAN AND OTHERS* (1967); THE OMBUDSMAN CITIZEN’S DEFENDER (Donald C. Rowat ed., 1965); DONALD C. ROWAT, *THE OMBUDSMAN PLAN* (1973); FRANK STACEY, *OMBUDSMAN COMPARED* (1978).

250. INT’L OMBUDSMAN INST., *OMBUDSMAN CONCEPT & ORGANIZATION*, http://www.law.ualberta.ca/centres/loi/eng/about_loi.html (last visited Apr. 21, 2006).

251. Jennifer Gannett, Note, *Providing Guardianship of Fundamental Rights and Essential Governmental Oversight: An Examination and Comparative Analysis of the Role of Ombudsman in Sweden and Poland*, 9 NEW ENG. J. INT’L & COMP. L. 519, 519 (2003); see also Symposium, *Legal Reform: The Role of Public Institutions and Legal Culture*, 35 CAL. W. INT’L L.J. 237, 257-64 (2005) (discussing law Professor Laurence Benner’s experience as legal counsel to the Ombudsman Commission of Papua New Guinea) [hereinafter Benner].

ombudsman's role "is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decision and maladministration in order to improve public administration and make the government's actions more open and the government and its servants more accountable to members of the public [sic]."²⁵³

Typically, either a legislature or a head of state elects an ombudsman.²⁵⁴ The ombudsman's powers include the ability to independently investigate complaints from the public about the administration of government.²⁵⁵ If the ombudsman finds a complaint is justified, the ombudsman commission proposes a solution or remedy in the form of a recommendation.²⁵⁶ The commission also issues an annual report to the legislature concerning its investigations and recommendations, which is also made available to the public.²⁵⁷ While the ombudsman commission only has the power to make recommendations, it can call upon the power of public opinion to enforce its recommendations when necessary.²⁵⁸ A pivotal element of the ombudsman's office is that it operates independently from the legislative and executive branches of government. This independence lends credibility to the ombudsman's findings and recommendations.

Given the absence of a sufficient remedy for foreign national detainees, if Congress were to create an ombudsman commission, it would greatly improve the chances of foreign nationals obtaining a remedy. By impartially investigating complaints and publishing findings, an ombudsman commission would also solve the problem posed by the political question doctrine and provide an independent means for assuring government accountability.

252. See Gannett, *supra* note 251 (providing a comparative analysis of ombudsman commissions used in Poland, which is transitioning to democracy, and politically stable Sweden).

253. INT'L OMBUDSMAN INST., *supra* note 250.

254. See Benner, *supra* note 251, at 262.

255. See *id.* at 264.

256. See *id.* at 265.

257. See *id.*

258. See *id.*

A. Constitutional Authority to Establish a Congressional Remedy

Article I, section 8 of the Constitution confers the power upon Congress “to pay the debts . . . of the United States.”²⁵⁹ The term debts is broadly defined, and is “not limited to those which arise through contract, or . . . written obligation, [or] which otherwise are of a strictly legal nature.”²⁶⁰ On numerous occasions, the Supreme Court has indicated that “debts” extends to “those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual.”²⁶¹ This rationale is founded on the notion that the nation “owes a ‘debt’ to an individual when his claim grows out of general principles of right and justice . . . although the debt could obtain no recognition in a court of law.”²⁶²

Utilizing this power, Congress has the authority to create new obligations where none existed before.²⁶³ Additionally, Congress can delegate its power to pay U.S. debts to an executive officer, an administrative board, or a court.²⁶⁴ Furthermore, Congress can pay such debts by direct legislative enactment or through passage of a private relief bill, granting payment as a gratuity to a claimant directly.²⁶⁵ Therefore, when the legal system fails to do justice, alternatives exist: Congress has the power to pay U.S. debts by creating a judicial remedy, an administrative remedy, or a direct remedy through the issu-

259. U.S. CONST. art I, § 8, cl. 1; *see also* *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *Williams v. United States*, 289 U.S. 553, 569 (1933); *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

260. 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 2.14 (2005).

261. *United States v. Realty Co.*, 163 U.S. 427, 440 (1896); *see also* *Pope v. United States*, 323 U.S. 1, 9-10 (1944); *Marion & Rye Valley Ry. v. United States*, 270 U.S. 280, 284 (1926) (“Congress has power to recognize moral obligations.”); *Work v. United States ex rel. Rives*, 267 U.S. 175, 181 (1925) (stating that Congress granted a gratuity based on equitable and moral considerations).

262. *Realty Co.*, 163 U.S. at 440.

263. *Pope*, 323 U.S. at 9.

264. *Bakelite*, 279 U.S. at 452 (“Congress has a discretion either to exercise directly or to delegate to other agencies [its article 1 § 8 power].”). The FTCA is an example of Congress delegating this power to the judiciary. *See* 28 U.S.C. § 1346 (2000).

265. *See* 1 JAYSON & LONGSTRETH, *supra* note 260, §§ 2.02-2.05. Prior to the enactment of the FTCA, there was no government liability for the harmful conduct of its employees and the injured party had to appeal to Congress. *German Bank v. United States*, 148 U.S. 573, 579 (1893)

ance of a private relief bill for those harmed by tortious conduct of a federal government employee.²⁶⁶

B. The History of Congress's Power to Issue Private Relief Bills

Prior to the enactment of the FTCA, the doctrine of sovereign immunity absolutely shielded the U.S. government from claims based on tort or contract.²⁶⁷ Such claims against the government were only pursued through private legislation.²⁶⁸ As the number of claims increased, Congress faced the impossible task of attempting to adjudicate them.²⁶⁹ These difficulties eventually led to the creation of the Court of Claims in 1855, which initially had no power to render final decisions and served only in an advisory capacity.²⁷⁰ “[W]hen the [Court of Claims’] decision was favorable to the claimant, a [private relief] bill [would be drafted,] which, if enacted, would carry the Court’s advisory decision into effect.”²⁷¹ The Court of Claims, however, did not have the power to adjudicate tort claims, because the Supreme Court had held that such claims were not within the court’s jurisdiction.²⁷² It was not until 1946, when Congress passed the FTCA, that federal district courts were given limited power to hear tort claims against the U.S. government.²⁷³

As previously discussed, the FTCA and other judicial remedies are inadequate for the GBNB detainees.²⁷⁴ Creating an ombudsman commission with independent investigative and subpoena powers is one solution to bridging the gap in legal remedies. This commission could act as the original Court of Claims did, making recommendations to Congress for compensation for the passage of private relief bills. The commission would provide appropriately crafted relief for foreign nationals who have been victims of human rights abuses in Guantanamo Bay.

266. See 1 JAYSON & LONGSTRETH, *supra* note 260, §§ 2.03, 2.10; see also *Morgan v. United States*, 81 U.S. 531, 534 (1871); *Pitcher v. United States* 1 Ct. Cl. 7 (1863).

267. 1 JAYSON & LONGSTRETH, *supra* note 260, § 2.02 (2005).

268. *Id.* (stating that claimants often only had an opportunity to present *ex parte* cases supported by affidavits).

269. *Id.*

270. See *id.* §§ 2.02-2.03.

271. *Id.* § 2.03; see also *United States v. Mitchell*, 463 U.S. 206, 213 (1983).

272. See *Morgan v. United States*, 81 U.S. 531, 534 (1871).

273. See 1 JAYSON & LONGSTRETH, *supra* note 260, § 2.10.

274. See generally discussion *supra* Part III-V.

C. *Delegating Power to a Properly Constituted Administrative Body*

1. *The Authority to Create an Ombudsman Commission for Human Rights*

Using the article I, section 8 power to pay the debts of the United States, Congress could pass a statute creating a Human Rights Ombudsman Commission to address grievances asserted by foreign nationals that arise from non-combat activities in the “war on terror.” Creation of this Commission would fall within Congress’s power to pay a “debt . . . which rests upon a merely equitable . . . obligation . . . [growing] out of general principles of right and justice.”²⁷⁵ When the United States perpetrates human rights violations, even in the context of an armed conflict arising out of a terrorist attack upon its soil, Congress has authority to compensate such victims by virtue of a “moral obligation,” even when U.S. law provides no remedy.²⁷⁶

Congress could limit the jurisdiction of the Human Rights Ombudsman Commission to claims by foreign nationals alleging human rights abuses by U.S. officials in connection with the “war on terror.” The Commission’s jurisdiction to hear such claims would be narrow. Jurisdiction would be limited to instances in which individuals suffered violations of a constitutional right, treaty right,²⁷⁷ a federal statutory right, or a human right recognized as part of customary international law. The Commission would only hear complaints from victims who suffered at the hands of the United States, and were unable to pursue a judicial remedy. Though similar to commissions set up under the Foreign Claims Act, the Human Rights Ombudsman Commission would avoid the bias of commissions set up in Iraq. This Commission could be composed in a manner that preserves its integrity and neutrality, thereby giving it the credibility that is markedly absent from the claims commissions currently operating in Iraq.

275. *United States v. Realty Co.*, 163 U.S. 427, 440-41 (1896).

276. *See id.*

277. For example, the United States is a party to CAT and the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

2. *Setting up the Commission*

To ensure the Commission's integrity and neutrality, Congress could authorize office holders from each branch of government to appoint members to serve on an Appointments Committee.²⁷⁸ By representing all branches of government, the Appointments Committee would help ensure the Commission's independence as well as address the separation of powers concern inherent in the political question doctrine. The Appointments Committee would select the members of the Ombudsman Commission by a three-fourths majority or consensus. These ombudsmen would each serve for a term of years. One ombudsman would be designated as Chief Ombudsman. In selecting candidates, the Appointments Committee would search for educated individuals of unimpeachable integrity with legal experience in human rights issues. Since the personal standing and reputation of the ombudsmen is critical to establishing the legitimacy and independence of the Ombudsman Commission, all of the ombudsmen should be politically neutral and have impeccable character.²⁷⁹

The Human Rights Ombudsman Commission would have three main functions, investigative, remedial, and informative. Congress should grant the Commission subpoena power to take testimony under oath. It should empower the Commission to investigate all claims by foreign nationals alleging human rights abuses by the United States, regardless of the locus of the complaint.²⁸⁰ Once the Commission had investigated a claim, it would recommend compensation for victims of abuse, as well as make other recommendations regarding reforms or corrective measures. The Commission would be obligated to publish its findings and recommendations to inform the public of the U.S. government's treatment of human rights. This transparency would promote governmental accountability and foster the political consciousness necessary to implement the recommended reforms.

a. Investigative Function

For the Ombudsman Commission to be successful, it is critical that it possess sufficient investigative powers, staff, and funding to

278. The President, the Chief Justice of the Supreme Court, the Speaker of the House, and perhaps the minority leader of the Senate could serve as the appointing authority.

279. See Benner, *supra* note 251, at 263-64.

280. See generally *id.* at 261-62.

conduct competent and thorough investigations. The Commission must have authority to pursue complaints that it deems merit investigation. In addition to accepting claims from alleged victims, it could also accept complaints submitted by family members, as well as organizations that have involved themselves with the victims and families.²⁸¹ The Commission could also initiate its own investigations.

To be able to conduct effective investigations, it is essential that the Commission be granted subpoena power, not only to retrieve documents, but also to summon witnesses and take testimony under oath subject to the penalty of perjury. In addition, the Commission should have the authority to inspect all detention centers and to inform detainees of their right to bring claims. After conducting an investigation, the Commission would make findings of fact and issue recommendations to the federal agency alleged to have committed the wrong. In cases where its investigations found no wrongdoing, the Commission would also publish its exoneration, thus protecting the government from unfounded criticism.

b. Remedial Function

The Ombudsman Commission would be empowered to make recommendations to Congress, to the federal agency involved, or to both, based on the findings of its investigation. Recommendations could include various types of relief, including any appropriate corrective measures necessary to remedy a violation or prevent its recurrence. The Commission could recommend a public forum where the claimant would have the opportunity to state his or her claim in a public setting and receive a public apology from the appropriate federal agency. Additionally, the Commission could recommend a damages award for any rights violations or property damage. Once the appropriate federal agency receives a Commission recommendation, the agency would be required to accept or reject it, and provide a written explanation for any refusal. Should the agency refuse to accept or implement the recommendation, the Commission could recommend that Con-

281. Examples of such organizations include the Red Cross, which may have had direct contact with victims in GBNB, and non-profit organizations, such as the Center for Constitutional Rights, an organization that has provided legal representation to many foreign national detainees held at GBNB. *See* American Red Cross, *Why the Red Cross is Visiting Detainees at Guantanamo Bay*, <http://www.redcross.org/news/in/intlaw/guantanamo1.html> (last visited Apr. 12, 2006); Ctr. for Constitutional Rights, *What's New*, <http://www.ccrny.org/v2/home.asp> (last visited Apr. 12, 2006).

gress award damages through the enactment of a private bill of relief. Alternatively, Congress may remedy the abuse through other legislation.

c. Informative Function

To best hold the government accountable for human rights violations, the Commission must increase government transparency through access to a wide media audience. Accordingly, the Commission should be required to report its findings, recommendations, and the extent of acceptance and implementation of recommendations to Congress annually. The creation of a Human Rights Ombudsman Commission can serve as a powerful check on the government, subjecting it to oversight while also creating a forum for redressing of grievances that is otherwise unavailable.

Allowing the harms suffered by the foreign national detainees at the GBNB to go unnoticed allows the United States to commit human rights violations abroad with impunity. Even if Congress should eventually deny such claims brought through the Ombudsman Commission, detainees would have at least had the opportunity to be heard and to inform the public of their grievances. One of the greatest sanctions the Ombudsman Commission can impose is to inform public opinion. Though the Ombudsman Commission would have no adjudicative powers, the publicity created by the Commission's public reports would exert pressure on Congress to remedy the problems of prolonged arbitrary detention and torture by either passing private bills or enacting broader statutory remedies. The Ombudsman Commission would thus constitute an alternative dispute resolution mechanism that would be the most effective and direct means to provide the detainees with the opportunity to be heard and granted appropriate relief.

Public exposure through the Ombudsman Commission's annual report will inform the public about the U.S. government's treatment of human rights. This publicity may encourage members of Congress to devote more time and consideration to not only hearing the claims of foreign nationals harmed during the "war on terror," but also to actively seek broader remedies to prevent human rights violations perpe-

trated by U.S. officials committed abroad.²⁸² Establishment of the Human Rights Ombudsman Commission would be a great stride in increasing government accountability and responsiveness to human rights abuses committed abroad. It would also politically mobilize the U.S. public to pressure its leaders to comply with their human rights obligations.

IX. CONCLUSION

As this Comment has illustrated, the prospect of redress for Guantanamo Bay detainees under current statutory and judicial remedies for human rights violations appears grim. The FTCA, the primary mechanism for suing the U.S. government, appears to bar actions based on arbitrary detention through the intentional tort, discretionary duty, and foreign country exceptions.²⁸³ Torture claims appear more hopeful, though the foreign country exception continues to erect a high bar for recovery when the harm “aris[es] in a foreign country.”²⁸⁴ With the elimination of the headquarters doctrine in *Alvarez-Machain*,²⁸⁵ presenting claims for arbitrary detention and torture will prove exceedingly difficult since all claims by detainees arise from harms that occurred at the GBNB in Cuba. Though *Rasul* extended federal habeas corpus jurisdiction to the GBNB, this extension was based on a statutory entitlement explicitly allowing such jurisdiction even when prisoners are not within the territorial jurisdiction of any federal court, so long as the custodian can be reached by service of process.²⁸⁶ The foreign country exception is clearly distinguishable

282. The Human Rights Ombudsman Commission could thus serve as an example for further expanding the reach of the ombudsman concept in the United States to rights abuses of those incarcerated.

283. See generally discussion *supra* Part III.B.

284. 28 U.S.C. § 2680(k) (2000); see also discussion *supra* Part III.B.1.

285. See discussion *supra* Part III.B.1.

286. *Rasul v. Bush*, 542 U.S. 466, 478-79 (“[T]he prisoner’s presence within the territorial jurisdiction of the district court is not ‘an invariable prerequisite’ to the exercise of district court jurisdiction under the federal habeas statute. [B]ecause ‘the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,’ a district court acts ‘within [its] respective jurisdiction’ within the meaning of § 2241 [(the federal habeas statute)] as long as ‘the custodian can be reached by service of process.’”).

because this prohibition is expressly found in the text of the statute²⁸⁷ and can no longer be avoided by the application of the headquarters doctrine.²⁸⁸ Furthermore, in *Rasul*, the Court said nothing to negate Cuba's ultimate sovereignty over the territory of the GBNB,²⁸⁹ effectively prohibiting the United States from treating it as one of its sovereign territories. This fact undoubtedly renders the GBNB a "foreign country" for the purposes of the FTCA. Therefore, the FTCA is unlikely to bring relief for foreign national detainees' claims of prolonged arbitrary detention and torture.

Under the ATS, detainees could arguably prove that prolonged arbitrary detention and torture are actionable violations of the "law of nations."²⁹⁰ However, the main barrier to utilizing this statute is that it does not permit suits against the U.S. government.²⁹¹ The ability to sue non-governmental actors is tenuous given the difficulties that detainees would have proving such individuals or corporations acted as accomplices or co-conspirators to federal actors. Furthermore, and perhaps more importantly, choosing to sue corporations grossly ignores the goal of accountability, thereby underscoring the U.S. government's impunity for its part in perpetrating human rights abuses. Therefore, the ATS appears to provide an inadequate solution to detainees' grievances.

Likewise, *Bivens* actions will also prove fruitless. Even assuming substantive constitutional rights will be extended to those detained at the GBNB, officials performing discretionary functions "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."²⁹² Given the ambiguity surrounding the extension of constitutional protections to Guantanamo Bay prisoners,²⁹³ an accused federal official will likely be able

287. See 28 U.S.C. § 2680(k) (2000) ("The provisions of this chapter and section 1346(b) of this title shall not apply to—Any claim arising in a foreign country.").

288. See discussion *supra* Part III.B.1.

289. See *Rasul*, 542 U.S. at 466.

290. See discussion *supra* Part IV.B.

291. See discussion *supra* Part IV.D. Furthermore, the addition of the TVPA to the ATS similarly denies relief, as it only permits claims for torture at the direction of any "foreign country." See discussion *supra* Part IV.C.

292. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

293. See discussion *supra* Parts II, V.

to successfully argue that his or her actions did not violate a “clearly established right,” and thus will be granted a qualified immunity from such suits.²⁹⁴ *Bivens*, therefore, offers a slim chance of recovery for foreign national detainees.

Even in the event of a viable judicial route of recovery, the political question doctrine will erect a barrier to recovery given the national security and foreign policy implications surrounding the detention of foreign nationals during the “war on terror.”²⁹⁵ Therefore, any judicial remedy would seem to present insurmountable obstacles to recovery. However, the United States cannot neglect its duty to hear the grievances of those it has harmed during this “war on terror.” It is crucial to U.S. domestic and international legitimacy that the United States take responsibility for the harms it has inflicted upon others. Leaving detainees who might be innocent of any wrongdoing without any meaningful avenue for presenting their claims aggravates the injustice already done to them by giving immunity to those who have allegedly violated their rights. Implicitly condoning such rights violations against foreign nationals could have serious repercussions for the future of U.S. foreign relations, as well as for the U.S. public’s faith in the federal government’s ability to protect fundamental human rights in times of conflict.²⁹⁶ As the Department of Defense itself acknowledged:

The United States strengthens its national security when it promotes a well-ordered world of sovereign states: a world in which states respect one another’s rights to choose how they want to live; a world in which states do not commit aggression and have governments that can and do control their own territory; *a world in which states*

294. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

295. See discussion *supra* Part VI.

296. One released detainee describes his interaction with the military police at Guantanamo Bay in the following way:

It seemed to us that a lot of the [military police] couldn’t themselves believe it was happening. They [told] us they wanted to get out when their time was done and they would not go back in. They said that they felt ashamed of the Army that these things were going on.

TIPTON REPORT, *supra* note 1, ¶ 162. Failure to rectify rights violations in Guantanamo Bay could deter U.S. citizens from joining a military that does not respect human rights and refuses to compensate rights violations.

*have governments that are responsible and obey, as it were, the rules of the road.*²⁹⁷

As an alternate method of dispute resolution, the creation of a Human Rights Ombudsman Commission is one viable mechanism by which the United States can fulfill its duty to take responsibility for actions that cause harm abroad. With the creation of a properly constituted Human Rights Ombudsman Commission, any foreign national detainee could obtain official acknowledgment and reparation for harms suffered.

By embracing the intent of the Foreign Claims Act “[t]o promote and to maintain friendly relations through the prompt settlement of meritorious claims,”²⁹⁸ and leaving its demonstrated deficiencies behind,²⁹⁹ the creation of the Ombudsman Commission represents the perfect compromise solution for this unprecedented situation. Including the executive and legislative branches of government will alleviate the concerns raised by the political question doctrine. With the potential to fulfill the goals of providing an effective remedy, compensating victims, and holding actors accountable, the Human Rights Ombudsman Commission will provide an easily accessible forum for the foreign nationals harmed at Guantanamo Bay to voice their grievances and demand a response from the appropriate federal agencies. By manifesting devotion to fulfill the obligation to protect human rights abroad, even when the violators are U.S. citizens, the creation of a Human Rights Ombudsman Commission would make great strides in promoting friendly relations between the U.S. and other nations.

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297. Douglas J. Feith, Under Sec’y of Def. for Policy, U.S. Dep’t of Def., Speech to the Council of Foreign Relations: Freedom, Safety and Sovereignty (Feb. 17, 2005), *available at* <http://www.defenselink.mil/speeches/2005/sp20050217-1082.html> (emphasis added).

298. 10 U.S.C. § 2734(a) (2000).

299. See discussion *supra* Part VII.

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