

## The Torture Report and the Accountability Gap

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The release of the Executive Summary of the Senate Select Committee on Intelligence's "Study on CIA Detention and Interrogation Program,"<sup>1</sup> known colloquially as the "torture report," has reinvigorated the debate over whether Bush Administration officials (and/or the responsible CIA line officers) should face criminal prosecution for their role in torturing and otherwise mistreating detainees held in secret U.S. custody after and in light of the September 11 terrorist attacks. Not surprisingly, those who have long supported prosecutions have seen the torture report as only further evidence of both the legal possibility and moral necessity of criminal liability—lest we allow the perpetrators of these heinous abuses to go unpunished and their crimes uncondemned.<sup>2</sup> At the same time, those who have vigorously decried such prosecutions as the "criminalization of political differences" have both disputed the specific findings of the torture report and the extent to which they establish the necessary predicates for criminal prosecution.<sup>3</sup> Simply put, the torture report appears to have only hardened the positions of the two dominant and pre-existing ideological camps—critics of the Bush Administration (who have overwhelmingly tended to support prosecution) and its defend-

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ers (who have adamantly opposed it).

I don't fall into either of these camps. I believe to my core that "the United States engaged in a systematic, widespread, and officially sanctioned campaign of coercively interrogating terrorism suspects in both military and CIA custody in the months and years after the September 11 attacks," and also that "there just cannot be any question, even before [the] release of the (Executive Summary of the) SSCI Torture Report, that many of the interrogation methods we deployed were torture—and were therefore in violation of clearly established domestic and international law whether or not they were ever 'effective.'"<sup>4</sup> And yet, I also believe that it would be a mistake to prosecute the torturers—or, at least, to prosecute those who made—or did nothing other than carry out—the (deeply wrongheaded) U.S. policies in this arena.

I've explained *why* I feel this way in detail elsewhere,<sup>5</sup> and won't rehash those arguments here, especially given the voluminous literature on the tradeoffs between accountability and reconciliation. Suffice it to say, though, that I do not believe *domestic* (as opposed to international) individual criminal responsibility is the best means to what I hope we can all agree should be

ried out by the U.S. government in the name of national security. This is so not only because prosecutions can backfire, but also because, even if they succeed, prosecutions only establish the liability of *individuals*; if the torture study is any indication, the responsibility for the mistreatment of CIA detainees after September 11 is far more collective and widespread. Instead, as I explain in this short essay, the far better means of ensuring meaningful *government* accountability—and not just individual liability—for national security abuses is a robust regime of civil suits for nominal damages where, so long as the relevant government officer was acting within the scope of his employment, the suit runs against the government itself.<sup>6</sup> After introducing this idea in Part I, Part II documents the shortcomings of the existing regime for civil remedies against federal officers; Part III offers five specific suggestions for how Congress can remedy those shortcomings before Part IV briefly surveys the benefits and drawbacks of such reforms.

**I. Individual Liability vs. Collective Responsibility.** As the rich and widespread contributions to the "truth vs. justice" debate underscore, individual criminal responsi-

### Prosecutions only establish the liability of individuals.

our long-term goal: the creation of a consensus narrative that rejects the contemporaneous legal and moral justifications for human rights abuses car-

bility can provide a powerful lesson when accompanied by—or coming on the heels of—regime change. Its utility is far more equivocal, however, when

abuses are the result of widespread policies that have been given formal legal imprimatur from a government that remains in power (and are just the result of the misconduct of rogue government officers). In those circumstances, individual liability, however emotionally satisfying, utterly fails to remedy the rule-of-law harm.<sup>7</sup>

For example, as Justice Jackson cogently explained in his *Korematsu* dissent, the real violence to the “rule of law” resulting from the mass, suspicionless internment of Japanese Americans during the Second World War was not the underlying policy, however racist and unnecessary it may have been, but rather its subsequent legal validation by the Supreme Court’s majority in *Korematsu*.<sup>8</sup> In his words, “a military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.”<sup>9</sup>

By analogy, the real rule-of-law harm resulting from CIA torture after September 11 did not come from the individual officers who were responsible for the torture but from the senior government officials and lawyers who devised the legal rationale that facilitated such conduct (and took steps to avoid meaningful review of those rationales).<sup>10</sup> In Justice Jackson’s words, “the principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>11</sup> And whatever their merits, criminal prosecutions are not designed to—and therefore cannot—repudiate those legal rationales; only the “moral judgments of history” can.<sup>12</sup>

In that regard, consider the “increasing consensus not only that the measures taken against Japanese Americans during World War II had in fact been both unnecessary and illegal, but that the government had affirmatively misled key institutions—including the Supreme Court—to cover up these points.”<sup>13</sup> This narrative emerged, however painfully, without the aid of any criminal prosecutions. Instead, it stemmed from the gradual development of a bipartisan, multi-branch consensus over the need to create a complete, public historical record—which led to the creation (and damning final report<sup>14</sup>) of the Commission on Wartime Relocation and Internment of Civilians (CWRIC), Congress’s enactment of the Civil Liberties Act of 1988,<sup>15</sup> President George H.W. Bush’s formal apology for internment in 1989,<sup>16</sup> and, most recently, the Acting Solicitor General’s “confession of error” to the Supreme Court in 2011.<sup>17</sup>

**II. The Inadequacies of the Existing Regime for Civil Remedies.** For all of its successes, the historiography of internment is at best an imperfect precedent, since it took the better part of 40 years for such a consensus narrative to emerge. But civil litigation may still have had quite a lot to do with precipitating the end of the internment camps.<sup>18</sup> And a scheme in which the government assumes civil liability for wrongs committed by its officers within the scope of their employment is the exact remedial structure Congress has created over time for run-of-the-mill non-intentional torts committed by most federal officers—and for intentional torts

committed by law enforcement officers—through the Federal Tort Claims Act (FTCA).<sup>19</sup>

At the same time, the FTCA is riddled with exceptions that make it all but useless in challenging government national security and counterterrorism policies. Thus, for example, the FTCA does not run to torts committed on the territory of a foreign sovereign (including, for example, virtually all of the abuses documented in the torture report);<sup>20</sup> it does not run to intentional torts committed by non-law enforcement officers (and thus would not apply to CIA employees);<sup>21</sup> it does not encompass “combatant activities” (which, some have argued, include the interrogation of military detainees qua terrorism suspects);<sup>22</sup> it has a fairly strict statute of limitations (that may not be subject to “equitable tolling,” that is, to exceptions for good cause);<sup>23</sup> and its express cause of action against the government has even been held, in one especially vexing decision, to be overridden by the political question doctrine.<sup>24</sup> Even if one could somehow surmount the FTCA’s many hurdles (which is difficult to envision in a case challenging an overseas counterterrorism operation), any number of other roadblocks—including immunity defenses, the state secrets privilege, and other evidentiary and procedural obstacles—could, and to date *have*, prevented victims of government abuses from prevailing even on otherwise meritorious claims.<sup>25</sup>

To similar effect, plaintiffs who have pursued alternative avenues of relief, including suits directly under the Constitution or express statutory causes of action, have also met with

vanishingly little success in challenging post-September 11 counterterrorism policies.<sup>26</sup> Again, these decisions have not usually involved courts upholding the *legality* of these policies, but rather courts finding any number of justifications to dismiss the suit without even *reaching* the underlying legality of the government’s conduct.<sup>27</sup> The doctrinal obstacles that have made it so difficult for these plaintiffs to recover are not all *unique* to the field of national security law, but for reasons both obvious and otherwise, they tend to produce the most comprehensive *effects* in that field, thereby creating a serious accountability gap for *all* government abuses in the field—and not just those arising from the CIA detainee program.

To be sure, the difficulties civil litigants have encountered in challenging post-September 11 counterterrorism policies may help to explain why critics of the CIA have gravitated toward criminal prosecution as the best means of pursuing meaningful accountability for the abuses documented by the torture report. But it seems as if the energies of those who find this accountability gap so disheartening would better be directed toward bolstering the availability of meaningful civil remedies in these cases, whether through judicial decision-making, legislative reform, or some combination thereof.

**III. How Congress Can Close the Accountability Gap.** As has been suggested in the more specific context of remedies for targeted killing operations, Congress could (and, therefore, should) take five concrete steps to create more meaningful accountability mechanisms for governmental miscon-

duct. *First*, Congress should provide an express cause of action for violations of federal law by federal officers. That is to say, Congress should codify the ability of individuals whose federal rights have been violated by federal officers to pursue private civil litigation for prospective relief (for ongoing violations) or retrospective relief (for completed violations), much as it has already done for violations of federal rights by *state* officers,<sup>28</sup> or for specific violations of federal statutes, such as the Foreign Intelligence Surveillance Act (FISA).<sup>29</sup> Given the hostility courts have shown to inferring such a cause of action in general—and in national security cases in particular—an express statutory remedy would be a vital first step.

*Second*, to both recognize the role of the government in sanctioning the allegedly unlawful conduct of individual officers and to preclude defenses that would otherwise be available to individual officers as defendants, Congress should “immunize potential officer-defendants by substituting the United States as the defendant on any claims arising under this cause of action in which the officer-defendant was acting within the scope of his employment.”<sup>30</sup> Congress took this precise step in 1988 in enacting the Westfall Act, which converts all state-law tort suits against federal officers

eral government.<sup>31</sup> Individual officers would still be liable in cases in which they were acting *outside* the scope of their employment, but courts have broadly construed the scope of a government officer’s employment—to even encompass allegations of torture so long as the officer was not acting *ultra vires*.<sup>32</sup>

*Third*, any such statute should also expressly waive the federal government’s sovereign immunity, which would otherwise bar litigants from recovering *any* damages even for clearly unlawful government misconduct. Such a waiver may seem unnecessary if Congress is expressly authorizing such private suits, but in the context of the express cause of action Congress provided in FISA,<sup>33</sup> a federal appeals court recently denied recovery to a plaintiff entirely because FISA had *failed* to expressly waive the government’s immunity.<sup>34</sup> In other words, these procedural technicalities matter.

*Fourth*, and more controversially, any such cause of action should formally abrogate the state secrets privilege—which otherwise would likely prevent (and has prevented) courts from reaching the merits of any number of lawsuits challenging government counterterrorism policies. That’s not to say that these cases should proceed without *any* meaningful mechanism for protecting the government’s interest in preserving

Information Procedures Act (CIPA),<sup>35</sup> FISA,<sup>36</sup> and cases before the Alien Terrorist Removal Court (ATRC).<sup>37</sup> Congress could demand that certain proceedings proceed *in camera*, requiring plaintiffs to be represented by security cleared private counsel in order to proceed in cases that would have previously implicated the state secrets privilege.<sup>38</sup>

*Fifth*, and finally, if the real purpose of such litigation is to establish the government’s liability—as opposed to remuneration to the victims of governmental misconduct—Congress could bar the recovery of punitive damages—and could even go so far as to authorize the recovery only of nominal damages.<sup>39</sup>

rial discretion. And if, as suggested above, our long-term goal should be “the creation of a consensus narrative that rejects the contemporaneous legal and moral justifications for human rights abuses carried out by the U.S. government in the name of national security,”<sup>40</sup> such civil litigation—and not criminal prosecutions of individual government officers—is far more likely to be instrumental in the formation of such an historical narrative.

Of course, meaningful damages remedies are at best a least-worst solution. After all, “[it is] obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will make the victim (or his heirs) whole.”<sup>41</sup> And

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## Appropriately calibrated civil litigation offers a number of advantages over criminal prosecutions.

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### IV. The Virtues and Vices of More Robust Civil Liability.

Among other things, appropriately calibrated civil litigation offers any number of advantages over criminal prosecutions: It places both legal and financial responsibility on the government writ large, as opposed to the individual officer; it has a more forgiving burden of proof—making it more likely that government abuses will be identified even in cases with circumstantial evidence; it is designed more to establish whether a plaintiff’s rights were violated than whether a defendant’s actions were unlawful; and it can be pursued by victims, rather than the government—thereby not requiring an exercise of the President’s prosecuto-

“[it is] also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for [these programs] than, ideally, we might want.”<sup>42</sup> But if one believes that neither internal Executive Branch checks and balances nor external congressional oversight will always be sufficient to confine uses of military force by the Executive Branch to the law, then a cause of action along these lines . . . may well be the best way to both create the necessary accountability and not unduly handcuff the Commander in Chief during wartime.<sup>43</sup> At the very least, it is certainly more likely to be effective than politically

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Congress could take **five concrete steps** to create more meaningful accountability mechanisms for governmental misconduct.

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within the scope of their employment into FTCA claims against the fed-

legitimate secrecy. As it has provided in other contexts, including the Classified

fraught prosecutions of a handful of CIA line officers, government lawyers, or other “responsible” officials.

**Conclusion.** In the end, if we had a more robust scheme of civil remedies for government national security abuses, it stands to reason that we would not see such polarized reactions to episodes such as the disclosure of the torture report’s Executive Summary. Instead, reasonable individuals across the political spectrum might be willing to accept that the question of whether government counterterrorism policies were indeed carried out in an unlawful manner *should* be resolved by the courts—in the context of civil suits *against* the government, and not criminal prosecutions by the government against individual officers. Thus, the diametrically opposed reactions to the release of the torture report’s Executive Summary may well be a symptom of this larger disease—and of the extent to which criminal prosecutions are the

only means under current law of providing meaningful accountability for such governmental abuses.

That is to say, perhaps the real lesson we should take away from the release of the torture report’s Executive Summary is how deeply problematic existing law actually is when it comes to government accountability. If so, though, then our response ought to be characterized by a more fundamental reassessment of our accountability mechanisms—and not a rush to endorse a deeply flawed and structurally inadequate mechanism (criminal prosecutions) simply because it’s the only one that appears to be viable under current law. Prosecuting the torturers may have an emotional appeal, but it will do little either to solidify the moral judgments of history to which Justice Jackson referred in *Korematsu*, or to close the alarming accountability gap that dominates contemporary U.S. counterterrorism jurisprudence.

## NOTES

1 S. Select Comm. on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (2014), available at <http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program>.

2 The Editorial Board, “Prosecute Torturers and Their Bosses”, *The New York Times* (22 Dec 2014): A26.

3 “Marc Thiessen, Democrats Lose the ‘Torture’ Debate”, *The Washington Post*, 5 Jan 2015, Internet, [http://www.washingtonpost.com/opinions/marc-thiessen-democrats-lose-the-torture-debate/2015/01/05/5e5347ca-94da-11e4-927a-4fa2698cd1b0\\_story.html](http://www.washingtonpost.com/opinions/marc-thiessen-democrats-lose-the-torture-debate/2015/01/05/5e5347ca-94da-11e4-927a-4fa2698cd1b0_story.html).

4 Steve Vladeck, “Why We Shouldn’t Prosecute the Torturers”, Internet, <http://justsecurity.org/18288/prosecute-torturers/>.

5 *Ibid.*; see also Stephen I. Vladeck, “Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration”, in *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration*, Austin Sarat & Nasser Hussain eds. (2010), 183.

6 Stephen I. Vladeck, “Targeted Killing and Judicial Review”, *Geo. Wash. L. Rev. Arguing* 82, no 11 (2014), 23–28.

7 Vladeck, *supra* note 5.

8 *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

9 *Ibid.* 246.

10 Vladeck, *supra* note 5.

11 *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

12 Eric Posner, “Why Obama Won’t Prosecute Torturers” Internet, [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/12/senate\\_torture\\_report\\_why\\_obama\\_won\\_t\\_prosecute\\_cia\\_and\\_bush\\_administration.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/12/senate_torture_report_why_obama_won_t_prosecute_cia_and_bush_administration.html).

13 Vladeck, *supra* note 4.

14 Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians (1982). The report is also accessible online at [http://www.nps.gov/history/history/online\\_books/personal\\_justice\\_denied/index.htm](http://www.nps.gov/history/history/online_books/personal_justice_denied/index.htm).

15 50 U.S.C. app. §§ 1989 et seq.

16 Wendy Ng, *Japanese American Internment During World War II: A History and Reference Guide*, 2002, 109.

17 Neal Katyal, “Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases,” Internet, <http://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.

18 See generally Patrick O. Gudridge, *Remember Endo?*, 116 Harv. L. Rev. 1933 (2003) (discussing the impact of the Supreme Court’s ruling in the companion case to *Korematsu*, *Ex parte Endo*, 323 U.S.

283 (1944), in which the Justices granted a habeas petition to a concededly loyal Japanese American girl on the ground that the government lacked the legal authority to detain her).

19 28 U.S.C. §§ 2671 et seq.

20 *Id.* § 2680(k).

21 *Id.* § 2680(h).

22 *Id.* § 2680(j); see also *Saleh v. Titan Corp.*, 580 F.3d 1, 6–11 (D.C. Cir. 2009).

23 See 28 U.S.C. § 2401(b); see also *Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (en banc) (holding that § 2401(b) is not jurisdictional and so may be subject to “equitable tolling”), *cert. granted sub nom.* *United States v. Wong*, 134 S. Ct. 2873 (2014).

24 *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 997 (2011).

25 Stephen I. Vladeck, “The New National Security Canon”, *Am. U. L. Rev.* 61, no 1295 (2012).

26 *Ibid.*

27 *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138 (2013) (dismissing a lawsuit challenging the constitutionality of warrantless surveillance under the FISA Amendments Act of 2008 on the ground that the plaintiffs could not prove that they were subjected to the allegedly unlawful surveillance, and therefore did not have “standing” to pursue their claims).

28 42 U.S.C. § 1983 (providing that any state officer who “subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).

29 50 U.S.C. § 1810 (authorizing suits for damages by individuals subjected to unlawful surveillance under FISA).

30 Vladeck, *supra* note 6, 25.

31 See 28 U.S.C. § 2679(b)(1).

32 *Rasul v. Myers*, 512 F.3d 644, 654–61 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *reinstated on remand*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009) (per curiam).

33 See *supra* note 29 and accompanying text.

34 *al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012).

35 18 U.S.C. app. §§ 1–16.

36 50 U.S.C. §§ 1861(f), 1881a(h)(4).

37 8 U.S.C. § 1534(e)(3)(F).

38 David Cole & Stephen I. Vladeck, “Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and “Cleared Counsel” in the United States, the United Kingdom, and Canada”, *Reasoning Rights: Comparative Judicial Engagement*, Liara Lazarus et al., eds., 161 (2014).

39 See Vladeck, *supra* note 6 24–26.

40 See *supra* text accompanying notes 5–7.

NOTES

<sup>41</sup> Steve Vladeck, “Why a “Drone Court” Won’t Work—But Nominal Damages Might...,” *Lawfare*, Internet, <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>. (date accessed 22 April 2015).

<sup>42</sup> *Ibid.*

<sup>43</sup> Vladeck, *supra* note 6, 27.