THE STATE SECRETS PRIVILEGE: ALTERNATIVE REMEDIES IN CASES OF TORTURE ABROAD

I. INTRODUCTION

A car salesman from Germany, Khaled El-Masri, was at the airport on his way to Macedonia.[1] El-Masri was seized and abducted at this airport by Macedonian authorities on the pretense that he was a suspected terrorist.[2] The Macedonian authorities held El-Masri captive and tortured him for almost a month whereupon they turned him over to United States CIA agents.[3] While in the CIA's custody, agents allegedly dressed him in a diaper, tracksuit, and earmuffs, then bound and sedated him on a flight to Afghanistan.[4] In Afghanistan, he arrived at a prison where he was beaten and interrogated for four months by more agents.[5] After four months of captivity and torture, the CIA later found out it had been a case of mistaken identity.[6] El-Masri merely had a similar name as a suspected member of a terrorist organization.[7] When the agents received the green light to release him two months after this discovery, they blindfolded and transported him to an abandoned road in a foreign country where this average car salesman was left to pick up the pieces of his life.[8]

The plaintiff in this case suffered irreparable damages, mentally and physically from being held captive and tortured. However, when El-Masri sued in the United States for damages, the case was dismissed because the

1. El-Masri v. Tenet, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).
2. *Id.* at 533.
3. *Id.*
4. *Id.*
5. Amy Davidson, *Torturing the Wrong Man*, NEW YORKER (Dec. 13, 2012), http://www.newyorker.com/news/amy-davidson/torturing-the-wrong-man.
6. *Id.*
7. *Id.*
8. *El-Masri*, 437 F. Supp. 2d at 533-34.

government invoked a privilege called "The State Secrets Privilege," and there was not enough evidence to proceed.[9] Thus, this car salesman who was mistaken for a terrorist on the basis of a similar name, who was held in captivity for months, and who was tortured during captivity, (assuming all his claims are truthful) received absolutely no relief in a United States courtroom or elsewhere. This is just one case where an alleged unlawfully tortured victim received no remedy from the United States courts.

The State Secrets Privilege (Privilege) is asserted by the government in order to exclude evidence that will divulge state secrets to the public that would reasonably likely cause significant harm to national defense or the diplomatic relations of the United States.[10] The court then reviews the remaining information and determines if there is still a claim.[11] However, in a lot of cases, especially in torture abroad cases, it is dismissed and there is no remedy for the plaintiff(s).[12]

In this comment, I urge Congress to explore the four alternative remedies suggested by the court in *Mohamed v. Jeppesen Dataplan Inc.*,[13] and legislate a process for redress in cases of torture abroad where the Privilege causes a case dismissal. This comment consists of five parts. Part one is an introduction to the situation where torture victims are left without redress due to the Privilege. Part two discusses the Privilege in depth, including its origins and application in torture abroad cases, and addresses the need for an alternative remedy rather than attempting to narrow it or create an exception. Part three explores the four alternatives laid out in *Mohamed*, including the history of the remedy, past uses of the remedy, and challenges to the remedy. Part four considers the alternative remedies suggested in *Mohamed*, and proposes other remedies that are more plausible. Part five concludes by reiterating the need for an alternative remedy in the situation of torture abroad, and briefly proposes that Congress may intervene even before the case is dismissed by assessing the evidence that is supposedly privileged.

9. Davidson, *supra* note 5.

10. State Secrets Protection Act, H.R. 3332, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/3332/text.

11. *Id.*

12. *See El-Masri*, 437 F. Supp. 2d at 541.

13. 614 F.3d 1070, 1091-92 (9th Cir. 2012).

II. THE STATE SECRETS PRIVILEGE AND ITS APPLICATION IN TORTURE ABROAD CASES

a. The Origin of the State Secrets Privilege and its Evolution Through Case Law and Legislation

The concept of a State Secrets Privilege was first established in *Totten v. United States*. In *Totten*, the plaintiff asserted a civil action to recover compensation for an espionage job he was hired to perform by President Lincoln.[14] He made a contract with President Lincoln to ascertain the number of troops stationed in the Southern States and to procure documents and information that might be beneficial to the United States government in exchange for compensation.[15] The plaintiff performed his duties during the war and was only compensated for his expenses.[16] However, when the plaintiff sued for losses incurred, the court dismissed the case.[17] The court reasoned that public policy forbids disclosure of confidences in relationships that are confidential in nature, and thus, there is even greater reason for a secret services contract with the government to not be disclosed, as the existence of that kind of contract is itself a secret.[18] Thus, in 1875 the idea of the Privilege was established for purposes of when the evidence itself is a government secret.

In 1953, the Privilege evolved in *United States v. Reynolds*, when the Supreme Court dismissed a case without reviewing the evidence that the government claimed to be privileged.[19] In *Reynolds*, three widows brought a claim for the death of their husbands in a military plane crash.[20] The government asserted that the civilian husbands were aboard the plane to observe the testing of secret electronic equipment.[21] Since the equipment tested on the plane was confidential, the government asserted the Privilege and argued that the executive power has the authority to withhold any documents in their custody from judicial view if it is in the public interest.[22] The Court accepted this argument and excluded evidence because the equipment on board was a military secret necessary for aiding the United

14. 92 U.S. 105, 106-07 (1875).
15. *Id.*
16. *Id.* at 106.
17. *Id.*
18. *Id.*
19. 345 U.S. 1, 9 (1953).
20. *Id.* at 3.
21. *Id.*
22. *Id.* at 6.

States in times of war.[23] The Court stated that even when there is the most strong and compelling showing of necessity, it cannot overcome the Privilege if the court decides that national security secrets are at stake.[24] Thus, the court shifted from using the Privilege to exclude secret agreements with the government, to excluding any document that could divulge national security secrets, even without reviewing the documents in question. Interestingly, the case was ultimately debunked.[25]

Totten and *Reynolds* are the two major cases that facilitated the establishment of the Privilege, however there is also authority at the statutory level.[26] The State Secrets Protection Act states that the governmental privilege applies to any evidence that will reasonably likely cause significant harm to the national defense or diplomatic relations of the United States.[27] Thus, the legislature concurs with the judicial branch that the executive branch has this power.

Although there are strong national security concerns, this Privilege brings unjust results far too often.[28] Further, the Privilege is not always asserted appropriately. This is illustrated with the *Reynolds* case.[29] When the documents that the plaintiffs sought in the case were eventually declassified, there was limited confidential information that could have easily been redacted and allowed plaintiffs to pursue their claim.[30] This is a situation where lives were lost, and no compensation was given based on a Privilege that ended up protecting a lie. This illustrates that the Privilege is sometimes taken advantage of and abused. However, even without the abuse, the Privilege too often results in dismissal of a case where plaintiffs are seriously injured, such as in cases of torture abroad.

b. The State Secrets Privilege as Applied to Torture Abroad Cases

The Privilege has also been applied in torture abroad cases where the executive power has captured an individual, interrogated him, and subjected him to mental and/or physical pain. I will not address the law on torture in

23. *Id.* at 11.

24. *Id.*

25. D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 464-65 (2012).

26. State Secrets Protection Act, H.R. 3332, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/3332/text.

27. *Id.*

28. *See* El-Masri v. Tenet, 437 F. Supp. 2d at 541; Arar v. Ashcroft, 585 F.3d 559, 581-82 (2d Cir. 2009).

29. Telman, *supra* note 25, at 472.

30. *Id.*

this comment. The torture abroad cases were not decided based on the merits of the claim, and thus did not address the issue of whether the torture was unlawful. Rather, I use the cases to illustrate how the Privilege does not allow an option for redress when a plaintiff alleges unlawful torture, even if a remedy is necessary.

Similar to the situation of El-Masri, the plaintiff in *Arar v. Ashcroft* allegedly suffered a case of mistaken identity also.[31] In *Arar*, the plaintiff was detained under United States custody for twelve days and deemed a member of Al-Qaeda.[32] He was then handed over to Syrian authorities.[33] Thereupon, he was subjected to a year of torture and forced to falsely confess that he attended a training camp in Afghanistan.[34] However, after a year he was transferred back to Canada and set free without any charges.[35] The plaintiff asserts that he was not a part of Al-Qaeda, and was wrongfully detained and handed over for torture by a foreign country's authorities.[36] When he filed a civil suit in the United States for damages, his case was dismissed because the Government invoked the Privilege and there was not enough evidence to proceed further.[37] This again illustrates a case that could not be reviewed due the Privilege, where the plaintiff alleged mistaken and unlawful torture.

Another case involving torture abroad is *Mohamed v. Jeppesen Dataplan, Inc*.[38] This is not a case of mistaken identity, but since the plaintiff alleges that he was subjected to unlawful torture, it is relevant to this comment.[39] The plaintiff alleges that while he was in the custody of the United States, he was placed in a room that was kept in near permanent darkness and subjected to loud noises such as recorded screams of women and children for twenty-four hours a day.[40] He was also fed sparingly and lost around sixty pounds in four months. Then he was transferred to the United States military prison at Guantanamo Bay where he remained for nearly five years.[41] When he brought suit, the government invoked the Privilege, and the court reluctantly dismissed the case.[42] The court reasoned that there are four

31. Center for Constitutional Rights, Arar v. Ashcroft et al. (last modified Sept. 21, 2015), http://ccrjustice.org/arar.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Arar v. Ashcroft, 585 F.3d at 580-81.

38. 614 F.3d 1070, 1074 (9th Cir. 2010).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1085-86.

alternative remedies: The executive branch intervening and awarding damages personally without divulging secrets, Congress investigating alleged wrongdoing and restraining excesses by the executive branch, Congress enacting a private bill for the plaintiff, and Congress enacting remedial legislation authorizing appropriate causes of action and procedures to address these types of claims.[43] These alternatives laid out by the court in *Mohamed* warrant consideration since plaintiffs that have been irreparably harmed by alleged executive branch wrongdoing are receiving no justice.

Most scholars argue that alternative remedies are not sufficient, and that the Privilege should be narrowed instead.[44] However, this is not a plausible solution. The judicial branch has demonstrated through case law that anything potentially harmful to the national security of the United States will not be admitted as evidence, and the legislative branch concurs with this notion as illustrated through the State Secrets Protection Act. Thus, instead of seeking a different interpretation of the Privilege, an alternative remedy should be implemented.

III. EXPLORING FOUR ALTERNATIVE REMEDIES PROPOSED IN *MOHAMED* FOR UNLAWFULLY TORTURED VICTIMS WHERE THE STATE SECRETS PRIVILEGE CAUSED DISMISSAL OF THE CASE

I propose to use the alternative remedies suggested by the United States Court of Appeals for the Ninth Circuit in *Mohamed* as a starting point to creating a non-judicial remedy for unlawfully tortured victims.[45] The Ninth Circuit in *Mohamed* is not the only court that has alluded to non-judicial remedies in this situation.[46] The Second Circuit in *Arar* stressed the importance of non-judicial remedies when resolving this type of case and stated that it must be Congress that creates a civil remedy in damages for this type of harm if it is to happen.[47] In *Mohamed*, the court dismisses the case reluctantly, but claims it only does so because there are other remedies.[48]

43. *Id.* at 1091-92.

44. *Id.* at 1101; John P. Blanc, *A Total Eclipse of Human Rights –Illustrated by Mohamed v. Jeppesen Dataplan, Inc.*, 114 W. VA. L. REV. 1089, 1109 (2012).

45. *Mohamed*, 614 F.3d at 1091-92.

46. International Justice Resource Center, *Ninth Circuit Dismisses Rendition Lawsuit Against Boeing Subsidiary, Granting Government's Invocation of State Secrets Privilege* (Sept. 11, 2010), http://www.ijrcenter.org/2010/09/11/ninth-circuit-dismisses-rendition-lawsuit-against-boeing-subsidiary-granting-governments-invocation-of-state-secrets-privilege/.

47. *Id.*

48. *Mohamed*, 614 F.3d at 1091-92.

However, there is no indication that these remedies have ever been employed. There is no record of the plaintiff in *Mohamed* receiving any kind of relief from other avenues. Thus, Congress should legislate a procedure for an alternative method of obtaining a remedy in a torture abroad case that is dismissed due to the Privilege.

a. Option 1: The Executive Branch, Knowing All The Protected Information, Can Determine If They Made A Mistake and Violated The Plaintiff's Human Rights[49]

In *Mohamed*, the court suggests that even though the judicial branch has deferred to the executive branch's claim of the Privilege, it does not preclude the government from honoring fundamental principles of justice.[50] The court is referring to the executive branch itself when it uses the term "government." Since the executive branch has access to all the secret information, it may determine the merits of plaintiffs' claims and ascertain whether misjudgments were made that violated plaintiffs' human rights.[51] If there was a violation of human rights, the executive branch may be able to find a way to reconcile the issue of national security and still award plaintiffs their redress.[52] This alternative remedy will most likely not work, however it is still a better suggestion than deferring to the judicial branch. In the judicial branch there is likely no chance for plaintiffs to receive compensation. However, in the past the executive branch has awarded compensation to individuals in similar situations.

i. Past Compensation from the Executive Branch

One example of the executive branch giving compensation to individuals, cited to in *Mohamed*, is the case of Latin Japanese Americans.[53] During World War II, Latin Americans of Japanese descent were forcibly abducted from their homes and brought to the United States to be placed in internment camps for the remainder of the war.[54] A class action was brought by the individuals placed in these internment camps and after months of

49. *Id.* at 1091.

50. *Id.*

51. *Id.*

52. *Id.*

53. Larry Siems, *On* Jeppesen, *Part 2: Other Remedies*, AM. CIV. LIBERTIES UNION (Oct. 12, 2010), https://www.aclu.org/blog/national-security/jeppesen-part-2-other-remedies.

54. *U.S. Will Pay Reparations to Former Latin American Internees*, N.Y. TIMES (June 15, 1998), http://www.nytimes.com/1998/06/15/us/us-will-pay-reparations-to-former-latin-american-internees.html.

lobbying and negotiations between plaintiffs' lawyers and the Justice Department, the executive branch settled to acknowledge wrongdoing and compensate each plaintiff with five thousand dollars.[55] This redress was given over fifty years after the incident occurred.[56] Alike the Japanese Latin Americans, torture victims' allegations are also human rights violations conducted by the United States government during a time of war. It follows that the executive branch could potentially settle with the plaintiffs in torture cases rather than attempting to go through the court system.

Another example of the executive branch awarding compensation to individuals is *Nejad v. United States*.[57] In *Nejad*, a United States missile shot down an Iranian plane killing everyone aboard.[58] Family of the victims brought suit in the United States, but the claims were dismissed.[59] The case involved facts about technology that, if revealed, could be harmful to national security and arose from acts conducted under foreign policy.[60] The court sided with the defendant's argument that the Privilege barred substantial evidence and gave deference to the political branches.[61] The government decided to make payments to each of the plaintiffs amounting in $150,000 to $300,000.[62] The *Nejad* case is very similar to torture abroad cases. In both situations, plaintiffs are seeking redress for wrongs by the United States government that occurred abroad. It is also dismissed on the same grounds of national security and deference to the political branches. It follows that plaintiffs claiming unlawful torture may also have the option to receive compensation through the executive branch if deserving. However, there are a lot of viable challenges to this alternative remedy.

55. *Id.*

56. *Id.*

57. Robin Wright, *U.S. to Pay Iranians Who Lost Kin on Downed Plane*, L.A. TIMES (Feb. 23, 1996), http://articles.latimes.com/1996-02-23/news/mn-39211_1_iranian-government.

58. Nejad v. United States, 724 F. Supp. 753, 754 (C.D. Cal. 1989).

59. Mark Gibney, *Human Rights Litigation in US Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261, 277 (1996-97).

60. *Nejad*, 724 F. Supp. at 755-56; Gibney, *supra*, note 59.

61. *Nejad*, 724 F. Supp. at 755-56.

62. Gibney, *supra* note 59, at 278.

ii. Challenges to Compensation by the Executive Branch

The biggest challenge to the suggestion of the executive branch determining compensation is the principle of checks and balances.[63] Judge Michael Daly Hawkins wrote the dissent in *Mohamed* and expressed concern over the issue of checks and balances with this alternative suggestion.[64] He stated that allowing the executive branch to police its own errors and determine a remedy deprives the judiciary of its role, and deprives plaintiffs of having their claims assessed fairly by a neutral arbiter.[65] He states that it is a dangerous engine of arbitrary government to allow the same power that caused confinement and abuse of a person in secret where his sufferings are forgotten to police it.[66] When it is less public it is less striking.[67] Another concern is the unlikeliness of the executive branch admitting to torturing foreign nationals.[68] If it were to compensate victims alleging torture abroad, which is a policy decision of the Executive, then it is admitting to committing gross violations of human rights.[69] This is a potentially dangerous alternative remedy because the executive branch already has an excess of leniency in foreign territory.[70]

Judge Hawkins also brings up, in his dissent in *Mohamed*, that the compensation given to the Latin Japanese Americans elevated the suggestion from impractical to absurd.[71] The compensation given to them was both inadequate and untimely.[72] The victims only received five thousand dollars for being abducted and held captive in a foreign country's internment camp during a time of war. It may be presumed that the harms suffered justified much larger damages. The compensation was also received over fifty years after the losses occurred, thus it was not given within a reasonable amount of time.[73] This supports the assertion that the executive branch determining the claim and awarding compensation is not a proper remedy for unlawfully

63. Jessica Slattery Karich, *Restoring Balance to the Checks and Balances: Checking the Executive's Power Under the State Secrets Doctrine,* Mohamed v. Jeppesen Dataplan, Inc., 114 W. VA. L. REV. 759, 776-79 (2012).

64. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1101 (9th Cir. 2010).

65. *Id.*

66. *Id.*

67. *Id.*

68. Blanc, *supra* note 44, at 1102-03.

69. *Id.* at 1103.

70. Gibney, *supra* note 59, at 280.

71. Siems, *supra* note 53.

72. *Id.*

73. *Id.*

tortured victims. However, it is more than the plaintiffs in *Mohamed*,[74] *Arar*,[75] and *El-Masri*[76] received from the United States.

b. Option 2: Congress Can Investigate Alleged Wrongdoing and Restrain Excesses by the Executive Branch[77]

A second alternative remedy that the court in *Mohamed* suggests is a congressional investigation into alleged wrongdoing by the executive branch.[78] If there is wrongdoing by the executive branch, then congress may restrain excesses by it.[79] Congressional investigations have occurred throughout history and thus, are a viable non-judicial alternative remedy for plaintiffs alleging unlawful torture.

i. A Brief History of Congressional Investigations

The Supreme Court has repeatedly held that Congress may make investigations even though this power is not explicitly laid out in the Constitution.[80] Congress has the inherent power to punish for contempt in order to satisfy its legislative purpose.[81] Its legislative purpose is to satisfy four tasks: to enact legislation, to oversee the administration of programs, to inform the public, and to protect its integrity, dignity, reputation and privileges.[82] It is agreed among the legal community that Congress's legislative purpose and power to investigate extends even to the executive branch.[83] This is also referred to as Congressional Oversight.[84] Congress will generally create a committee to investigate the issue.[85] This power to investigate other departments of the federal government is conferred onto Congress in order to expose corruption, inefficiency or waste, and thus Congress may examine the activities of the executive branch to check for

74. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

75. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).

76. El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).

77. Siems, *supra* note 53.

78. *Id.*

79. *Id.*

80. The 1992-93 Staff of the Legislative Research Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 SYRACUSE J. LEGIS & POL'Y 1 (1995).

81. *Id.*

82. *Id.*

83. *Id.* at 3.

84. Mark Strand & Tim Lang, *Executive Oversight: Congress' Oft Neglected Job*, CONG. INST. (Nov. 28, 2011), http://conginst.org/2011/11/28/executive-oversight-congress-oft-neglected-job/.

85. *Id.*

this.[86] Congress has the authority to oversee whether the President has executed the laws faithfully, which is a task given to the President in the Constitution.[87] This means that Congress may investigate whether the executive branch has acted in a manner consistent with the law.[88] In cases of torture abroad, the plaintiffs are alleging unlawful conduct by the executive branch. It follows that Congress has the authority to make an investigation into the facts in this situation because the executive branch may not have acted in a manner consistent with the law and to punish it for contempt. There have been many Congressional investigations of the executive branch that support this alternative remedy.

ii. Past Congressional Investigations

One example of Congress investigating the executive branch is in *McGrain v. Daugherty*. This case arose from Mally Daugherty's contempt conviction by Congress after an investigation of the Department of Justice.[89] The investigation was to ascertain the individuals responsible for not properly prosecuting violators of certain Acts.[90] Like this investigation, an investigation into unlawful torture would include investigating a department within the executive branch and ascertaining whether its conduct was lawful. Thus, it may be an alternative remedy in the torture context as well.

Another example of when Congress has investigated the executive branch was Richard Nixon's Watergate scandal.[91] This is when Congress investigated possible corruption in a presidential election campaign and ultimately led to President Nixon's resignation.[92] Thus, because of its investigation into the executive branch's activities, Congress was able to reach a result that gave justice to the people. Similarly, Congress may investigate the Executive's activities where individuals claim unlawful torture, and reach a result that grants damages to deserving injured persons.

Congress also set up a committee to investigate the Iran-Contra scandal, which is most closely akin to the situation of torture abroad cases.[93] This

86. The 1992-93 Staff of the Legislative Research Bureau, *supra* note 80, at 4.

87. Strand & Lang, *supra* note 84.

88. *Id.*

89. McGrain v. Daugherty, 273 U.S. 135, 137 (1927).

90. *Id.* at 151-52.

91. *A History of Notable Senate Investigations*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Investigations.htm (last visited Oct. 1, 2015).

92. *Id.*

93. *Congress Issues Final Report on Iran-Contra Scandal*, HIST. (2009), http://www.history.com/this-day-in-history/congress-issues-final-report-on-iran-contra-scandal.

scandal resulted in funds from secret weapons sales to Iran being used to finance the Contra war against the Sandinista government in Nicaragua.[94] It is said that this conduct exhibited secrecy, deception, and disdain for the law.[95] In this investigation, Congress was able to get enough information that proved the guilt of members within the executive branch for a secret funding plan, and thus, it follows that Congress would be able to get information about the secret incidents occurring in the context of torture in order to ascertain guilt. Although a congressional investigation is a sound alternative, there are some challenges and concerns with this option.

iii. Challenges to a Congressional Investigation

One contention to this option is the role of Congress.[96] In Judge Michael Daly Hawkins' dissent in *Mohamed*, he states that the proposed remedy of a congressional investigation, private bill, or remedial legislation puts claims into the legislative branch that are more appropriately handled by the judicial branch, which is better equipped to handle these types of claims.[97] The judicial branch may be better equipped for this situation, but in practice it is void of its ability to give redress to plaintiffs alleging unlawful torture.[98] This is due to the Privilege, which as a result does not allow the judicial branch to check the executive branch in this context.[99] Further, case law and legislation do not allow for the Privilege to be altered in order to accommodate this problem.[100] Thus, leaving it to the judicial branch is not an option, even if it is a judicial role and not a general matter for Congress. Redirecting the claim to the legislative branch where plaintiffs have a chance of receiving compensation is a better route than leaving it to the judicial branch where the plaintiffs will more than likely receive absolutely nothing.

However, even if the legislative branch is able to address the claims in cases of torture abroad, this alternative remedy does not seem to grant compensation to the plaintiffs.[101] The court in *Mohamed* stated that the alternative remedy provides for a Congressional investigation into the executive branch's activities, and if plaintiffs' claims are found to be true,

94. *Id.*

95. *Id.*

96. Siems, *supra* note 53.

97. *Id.*

98. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1093 (9th Cir. 2010) (Hawkins, J., dissenting).

99. *Id.*

100. *See, e.g.*, *Mohamed*, 614 F.3d 1070.

101. *Id.* at 1091-92.

then Congress will restrain excesses by the executive branch.[102] There is no mention of compensation to the torture victims,[103] and compensation may not be presumed from the words of the *Mohamed* court. Although a Congressional investigation is a sound alternative remedy with previous investigations to support this option, it falls short if there is to be no compensation to the plaintiff and only restraint of the executive branch.

c. Option 3: Congress Can Enact Private Bills For The Unlawfully Tortured Victims

A third option for an alternative remedy is a private bill enacted by Congress for the unlawfully tortured victims. A private bill provides a remedy for specific individuals.[104] This is sometimes a requested relief when legal remedies are exhausted.[105] Private bills are also applicable in claims against the government by an individual.[106] Thus, this could be a viable remedy made by Congress for unlawfully tortured victims.

i. A Brief History of Private Bills

Before the enactment of the Federal Torts Claim Act, private bills by Congress were the only form of redress for citizens with claims against federal government employees.[107] This was because the doctrine of Sovereign Immunity prohibited lawsuits against the federal government.[108] Thus, private bills were permitted on the rationale that there was a right to petition the government for redress, and Congress had the authority to pay these debts.[109] To date, Congress has enacted over seven thousand private bills.[110] Now, only two types of private bills are passed.[111] A bill may be passed if it deals with a claim against the United States, or if it deals with an exception to an individual from certain immigration requirements.[112] It is

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102. *Id.*

103. *Id.*

104. *Legislation, Laws and Acts*, U.S. SENATE, http://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited Oct. 9, 2015).

105. *Id.*

106. *Id.*

107. Frank Hanley Santoro, *A Practical Guide to the Federal Tort Claims Act*, 63 CONN. B.J. 224 (1989).

108. *History of Private Bills*, 4 WEST'S FED. ADMIN. PRAC. § 4332 (July 2015).

109. *Id.*

110. Anna Marie Gallagher, *Remedies of Last Resort: Private Bills and Pardons*, 6 IMMIGR. BRIEFINGS 2, at 1 (2006).

111. Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684 (1996).

112. *Id.*

used as an alternative remedy where the law fails to provide needed relief in deserving cases.[113]

ii. Private Bills Modernly

Modernly, private bills are mainly used in the immigration context.[114] One example of this is a private bill that granted a Japanese individual, Shigeru Yamada, residency in the United States after his mother died a few months before obtaining citizenship.[115] After his mother passed, his path to immigration was thwarted and he would have been deported without the private bill, since immigration laws would not have helped in his case.[116] This illustrates the notion that private bills are for individuals in exceptional situations where the law does not provide for the necessary result.

Although private bills are rarely used for claims against the government modernly, the power to enact this type of private bill is still retained by "moral claims."[117] An example of a moral claim is where an individual seeks payment but has no legal rights or has already exhausted all their legal rights and received no remedy.[118] These types of private bills are not completely extinct post-Federal Tort Claims Act.[119] There have been private bills that waived personal debts owed to the government, granted federal health care and retirement benefits to individuals who otherwise would not have qualified, and extended terms of patents.[120] Another private bill, enacted in 1987, ordered the government to pay an individual compensation for damages incurred during his imprisonment in Cuba for spying on behalf of the United States.[121] This is similar to the claims by unlawfully tortured victims because both claims are for compensation of losses incurred during imprisonment in a foreign country that was caused by the United States. Both imprisonments were caused by the United States since in Lunt's case he was hired to perform duties for the government that resulted in his imprisonment in Cuba, and in the torture context, plaintiffs are allegedly imprisoned and

113. Gallagher, *supra* note 110.

114. *History of Private Bills*, 4 WEST'S FED. ADMIN. PRAC.§ 4332 (July 2015).

115. Roxana Popescu, *Some Private Bills Benefit Larger Interests*, INEWSOURCE (Oct. 26, 2011), http://inewsource.org/2011/10/26/some-private-bills-benefit-larger-interests/.

116. *Id.*

117. 4 WEST'S FED. ADMIN. PRAC. § 4332.

118. *Id.*

119. Devin Dwyer, *Looking for a Bailout? Just Call Your Congressman*, ABC NEWS (Nov. 5, 2009), http://abcnews.go.com/Politics/congress-private-laws-bailout-americans-special-cases/story?id=8995047.

120. *Id.*

121. *Id.*

tortured by government employees in foreign lands. Since the government wronged the torture victims directly, rather than indirectly as in Lunt's case, it would seem that they have an even greater right for compensation than Lunt. Further, it can be inferred that even though no judicial claim was brought by Lunt, he was given the private bill because it was the only way to award compensation in this situation. The facts of the case deal with espionage, which clearly would fall under the Privilege as set forth in *Totten*,[122] thus it would have most likely been dismissed in a courtroom. This is an even stronger argument that private bills should be the remedy when a torture case is dismissed on the grounds of the Privilege.

Comparing the matter at hand with immigration bills, it seems that torture victims have an even greater argument for use of private bills than aliens do. The chair of the House Committee on the Judiciary has stated on the matter of immigration bills that private bills are available for aliens with "unusual problems resulting in unusual hardship."[123] The situation of an unlawfully tortured victim that has their case dismissed due to the Privilege, fits within this "unusual" category. First, being unlawfully tortured is not a common problem. Second, it results in an unusual hardship for two reasons: the victim has suffered a severe hardship from being tortured, and can receive no relief from the judicial branch due to a Privilege even if relief is owed. These hardships are not common occurrences either. Further, immigration hardships are much more common and usual than the torture hardships listed above as illustrated by the large amount of private immigration bills passed each year.[124] Since these bills should only be used for unusual problems resulting in unusual hardships in the context of immigration bills, it should also be available to torture victims when judicial relief is not an option. However, there are still concerns with Congress enacting a private bill in torture abroad cases.

iii. Challenges to the Use of Private Bills in Cases of Torture Abroad

One concern is that the *Mohamed* court does not cite to any cases that have used private bills where the Privilege has been invoked.[125] However, the cited cases are still supportive. The court cited to *Nixon v. Fitzgerald*, a case where the court could not provide damages to an individual who suffered

122. Totten v. United States, 92 U.S. 105 (1875).

123. Mathew Mantel, *Private Bill and Private Laws*, (2007), http://www.aallnet.org/mm/Publications/llj/LLJ-Archives/Vol-99/pub_llj_v99n01/2007-05.pdf.

124. Gallagher, *supra* note 110.

125. Blanc, *supra* note 44, at 1102-03.

retaliatory discharge from the Air Force by President Nixon.[126] The suit could not proceed because President Nixon had absolute immunity,[127] however the court stated that alternative remedies and deterrents preclude the President, with his absolute immunity from civil liability, from being "above the law".[128] Like the torture victims, Fitzgerald was not able to receive compensation due to the executive branch barring the case from proceeding, even if the plaintiff would have been successful with his claim. Further, the court emphasized that the executive branch's power to bar the case does not make the President above the law because there are alternative routes such as private bills. In the case of torture victims, the executive branch is able to invoke the Privilege and essentially be untouchable without alternative remedies. This essentially makes the executive branch above the law in this context. It follows that alternative remedies such as private bills would be necessary in the case of a torture victim. The court also cites to *Plaut v. Spendthrift* and *Office of Personal Management v. Richmond*,[129] which were cases that suggested the use of private bills since their claims did not fit within the law.[130] This is also supportive of torture victims receiving a private bill as an alternative remedy because even though there is legal support for their claims, they are barred from using the law and the court system. Thus, since in the three cited cases there was no option of pursuing a claim in the judicial branch even if redress was warranted, the reasons for enacting the private bills in the three cited cases are similar to the reasons Congress would enact a private bill in the context of torture abroad.

There is further criticism of the cases cited to by the court in *Mohamed* because the plaintiffs were sympathetic and clearly innocent.[131] The concern is that Congress will have to make a determination regarding the law on torture and it is unknown if the executive branch will even comply and willingly hand over necessary information for Congress to make that determination.[132] This is a valid concern since in the cases cited to in *Mohamed*, and other private bills that have been enacted, the facts of the case are generally known to Congress because it is either public knowledge[133] or there was a court proceeding where the facts were disclosed.[134] Thus, it is

126. *Id.*
127. *Id.*
128. Nixon v. Fitzgerald, 457 U.S. 731, 758 (1981).
129. Blanc, *supra* note 44, at 1102-03.
130. *Id.*
131. *Id.*
132. *Id.*
133. *See* Dwyer, *supra* note 119.
134. Blanc, *supra* note 44, at 1102-03.

unusual for Congress to be unaware of the facts of the claim and require disclosure of facts from the executive branch to enact a private bill.

However, even with the concern of Congress being responsible for making a determination as to the law on torture and merits of the case, a private bill in the situation of a torture victim satisfies the same policy reasons for private bills pre Federal Tort Claims Act and private bills that have been enacted thereafter.[135] Before the Federal Tort Claims Act, private bills were permitted because there is a right to obtain redress from the government for their wrongs and Congress has the authority to pay the debts of the government.[136] When Sovereign Immunity protected the government, this was the only form of redress an individual could seek. Similarly, when the case cannot go forth due to the Privilege, which protects government information, an individual still has the right to redress from the government and Congress has the authority to pay these debts. Further, private bills enacted after the Federal Tort Claims Act are premised on the rationale that an alternative remedy is needed in deserving cases where the law fails to provide a remedy.[137] Thus, private bills may be a valid alternative remedy, however there is a concern that Congress may not have enough information as to the merits of the case to make a clear determination.

d. Option 4: Congress Has The Authority To Enact Remedial Legislation Authorizing Appropriate Causes Of Action And Procedures To Address Claims Like Those Presented In Cases Of Unlawfully Tortured Victims

The fourth option presented by the court in *Mohamed* is to have Congress enact remedial legislation that will authorize appropriate causes of action and procedures to address the claims of unlawfully tortured victims.[138] Remedial statutes provide, improve, or facilitate remedies for the enforcement of rights and redress of injuries.[139] They are also intended to make corrections to defects, mistakes, and omissions in civil institutions and the administration of the state. [140] It has been noted by courts that remedial legislation is enacted for the purpose of protecting life and property. It also introduces a new regulation that is generally conducive to the public good.[141]

135. 4 WEST'S FED. ADMIN. PRAC. § 4332 (July 2015); Gallagher, *supra* note 110.

136. 4 WEST'S FED. ADMIN. PRAC. § 4332.

137. Gallagher, *supra* note 110.

138. Siems, *supra* note 53.

139. *Characteristics of Remedial Statutes*, 3 SUTHERLAND STATUTORY CONSTR. §60:2 (7th ed.).

140. *Id.*

141. *Id.*

Remedial legislation throughout history has commonly provided a different procedure in the judicial branch.[142]

i. Past Remedial Legislation

An example of remedial legislation by Congress to provide an appropriate cause of action and procedure for plaintiffs in the judicial branch is the Antiterrorism Act and its amendments.[143] In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act.[144] Although foreign states were previously protected by foreign sovereign immunity, this Act lifted the immunity of foreign states that committed acts such as terrorism, that are found to be repugnant to the United States and international community as a whole.[145] This was a remedial statute because prior to it claims could not be brought against foreign states due to their immunity.[146] Congress went a step further with an amendment to the Act that provides the availability of punitive damages to plaintiffs because the previous cause of action was not adequate for such a serious issue.[147] This is similar to the proposition that Congress could enact remedial legislation to authorize appropriate causes of action and procedures for torture abroad cases. Like the reason for the enactment of the Antiterrorism Act and Effective Death Penalty Act of 1996,[148] the reason for remedial legislation in the context of torture abroad is to get past a governmental privilege that essentially bars the case from going forward. However, there is a distinction between the remedial legislation in 1996 and the proposed remedial legislation for torture abroad because the legislation created an exception to sovereign immunity in 1996, but it is highly unlikely that Congress will create an exception to the Privilege when it has demonstrated that national security is a higher priority.[149]

Other remedial legislation also addresses plaintiffs' right to a remedy, but does not illustrate legislation that overcomes a privilege like the one at issue in torture abroad cases.[150] In *Morgan v. Western Elec. Co., Inc.*, the

142. *Remedial Character of Procedural Statutes*, 3 SUTHERLAND STATUTORY CONSTR. §60:2 (7th ed.).

143. Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 12 (9th Cir. 2002).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See*, e.g., Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).

150. Morgan v. W. Elec. Co., 69 Ohio St. 2d 278, 278 (1982); Bailey v. Bailey, 172 Va. 18, 21 (1939).

plaintiff was able to file an appeal to a judgment of the Court of Common Pleas for an occupational disease claim because the remedial statute provided for an appeal in this situation.[151] In *Bailey v. Bailey*, the plaintiff was able to make a claim for the order of the maintenance and support of her minor child by her previous husband due to a remedial statute that allowed for the enforcement of this claim.[152] While remedial legislation in the past has been provided to facilitate plaintiffs' right to a remedy, it may not be helpful in a case where the Privilege is an obstacle.

ii. Challenges to Remedial Legislation

Although Congress may enact remedial legislation to authorize causes of action and procedures to address a torture abroad claim, it most likely will not result in a different outcome than in the past.[153] The Alien Tort Statute provides a reasonable cause of action for this type of plaintiff, stating that district courts have jurisdiction over any civil action by an alien for a tort committed in violation of the laws of the nation or a treaty of the United States.[154] However, a case brought under the Alien Tort Statute would still be barred because of the Privilege.[155] Thus, the real hurdle is the Privilege, rather than the causes of action or procedure.[156]

Remedial legislation in this context would be the best option if it were plausible because it would allow the court to perform its role[157] and provide plaintiffs with a fair remedy. It would also silence any separation of powers concerns because the claim would be addressed through the judicial branch. However, it does not appear that this remedy will be adequate because any claim with similar facts to past cases of torture will unlikely overcome the Privilege.[158] This is the most vague of the alternative remedies proposed in *Mohamed*, however it is worth exploring.

iii. Exploring the Plausibility of Remedial Legislation

It appears the only plausible way to overcome the Privilege is the passage of time. All of the political branches are in unison with their opinion

151. *Morgan*, 69 Ohio St. 2d at 278.

152. *Bailey*, 172 Va. 18 at 21.

153. Blanc, *supra* note 44, at 1108.

154. 28 U.S.C.A. §1350 (1948).

155. Blanc, *supra* note 44, at 1108.

156. *Id.*

157. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1070 (9th Cir. 2010) (Hawkins, J., dissenting).

158. Blanc, *supra* note 44, at 1108.

that protection of national security secrets trumps any other consideration.[159] Thus, the only way to proceed with a case that threatens national security is to pause until the information no longer threatens danger. Documents generally become declassified after a period of time,[160] thus dangerous evidence may also become "declassified" after the passage of time. Congress could enact remedial legislation that provides a time period on cases that were dismissed due to the Privilege. For example, the time period could be ten years from the time the event occurred, or when a reasonable amount of time has passed, subject to the dangers posed by the evidence at that time. However, plaintiffs may not be completely satisfied with this solution, as it will take an indefinite amount of time after the injuries were suffered. Even so, this is the only apparent route to overcoming the issue of the Privilege if the claim is to remain in the judicial branch.

IV. ALTERNATIVE REMEDIES THAT DO NOT CONFLICT WITH THE PRIVILEGE AND HAVE POTENTIAL IN THE CONTEXT OF UNLAWFUL TORTURE ABROAD

The four alternative remedies suggested in *Mohamed* are not without their flaws. The first option, suggesting that the executive branch make a determination as to the merits of the plaintiffs' claim, is not sufficient because it conflicts with the principle of checks and balances,[161] and has not provided adequate remedies in the past.[162] The second option, suggesting that Congress perform an investigation into the executive branch's activities and restrain its excesses, is not sufficient if it does not provide compensation for the plaintiffs. The third option, suggesting that Congress enact private bills for plaintiffs, is not sufficient because Congress may not know enough information about the case to make a fair decision on the merits. Lastly, the fourth option suggesting that Congress enact remedial legislation authorizing appropriate causes of action and procedure in cases of this type could potentially be a valid solution if the remedial legislation is constructed in a way that will not conflict with the Privilege. The only alternative remedy proposed by the *Mohamed* court that has the potential to work individually is the fourth option. Options two and three that deal with Congress are most likely insufficient individually, but combined there may be a viable remedy.

If options two and three were to be combined, then Congress would have the power to investigate the executive branch, restrain its excesses, and enact

159. *Mohamed*, 614 F.3d at 1070; El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).

160. Telman, *supra* note 25, at 472.

161. Blanc, *supra* note 44, at 1108; Seims, *supra* note 53.

162. Seims, *supra* note 53.

a private bill that would give compensation to the plaintiff if deserving. There is no separation of powers problem with Congress having this authority since it will be checking the executive branch for wrongdoing. Also, even though there has been concern that this is not Congress's role,[163] the policy reasons for allowing Congress to grant redress are satisfied.[164] Further, it is a better solution for the plaintiffs to receive any amount, rather than receiving nothing from the judicial branch.

Another remedy could be to combine options one and two of the proposed alternative remedies in *Mohamed*. Congress could establish a committee to investigate the merits of the case, and if deserving, Congress could then authorize the executive branch to compensate the victims.[165] This would eliminate the process of enacting a private bill, and would not call for Congress to restrain the executive branch. Had this alternative remedy been implemented before the Latin Japanese Americans in internment camps settled their case,[166] the class likely would have been compensated more graciously as well as in a timely manner since there is no conflict of interest that would prevent Congress from making a fair decision. The executive branch would be more likely to comply with this combination of options since there would be no restraint by Congress. Although no option is completely ideal, in this situation the plaintiff has the greatest possibility of receiving just compensation, which is the ultimate goal.

V. CONCLUSION

The proposed solutions above could go a step further and be implemented even before the case is dismissed. If Congress were to create an investigation committee at the time that the Privilege is asserted, then Congress could assess whether the Privilege should be granted for certain information. This could provide a fair court proceeding for plaintiffs and keep the case within the judicial branch if warranted. Further, it would presumably deter the executive branch from asserting the Privilege for information that does not deserve such a high level of protection for fear of being denied.

The United States cannot ignore this problem. Too many victims of serious injuries are leaving the United States without any option for a remedy. Victims have even sought redress in other countries that also took part in their

163. *Id.*

164. 4 WEST'S FED. ADMIN. PRAC. § 4332; Gallagher, *supra* note 110.

165. 4 WEST'S FED. ADMIN. PRAC. § 4332.

166. Siems, *supra* note 53.

captivity when they were denied a remedy in the United States.[167] This was the case for the plaintiff in *El-Masri* who was given relief by the European Human Rights Court for the part that Macedonia played in his detention.[168] However, this is not adequate for the United States to defer to. The United States government must remedy its own wrongs.

*Ashley Scott**

167. *European human rights court rules on* El-Masri *rendition case*, DW (Dec. 13, 2012), www.dw.de/european-human-rights-court-rules-on-el-masri-rendition-case/a-16451584.

168. *Id.*

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