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## The Civil Redress and Historical Memory Act of 2029: A Legislative Proposal

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## THE CIVIL REDRESS AND HISTORICAL MEMORY ACT OF 2029: A LEGISLATIVE PROPOSAL

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William J. Aceves\*

### ABSTRACT

*During the extant “War on Terror,” U.S. and foreign nationals who did not engage in hostilities were detained and mistreated abroad by the United States or by other countries with the acquiescence of the United States. These individuals were accused of being terrorists or were suspected of associating with terror groups, but they were, in fact, innocent. They were eventually released and were never charged by the United States with any crime. Despite their innocence, the United States has failed to provide them with any form of redress for their mistreatment. The Bush, Obama, and Trump administrations refused to apologize or provide any reparations to these individuals. The federal courts have consistently dismissed their efforts to seek redress through legal process. And, to date, Congress has remained silent.*

*To remedy these acts of injustice, this Article offers a legislative proposal based on the Civil Liberties Act of 1988, which Congress adopted to address the discrimination and detention of Japanese Americans during the Second World War. Based on this historical analog, this Article proposes the adoption of the Civil Redress and Historical Memory Act of 2029, which would establish a commission of inquiry to investigate these cases of arbitrary detention and mistreatment perpetrated by the United States during the War on Terror. The Act would offer an apology and provide restitution to individuals who were wrongfully detained and mistreated by the United States or by other countries with U.S. complicity during the War on Terror. The Act would also establish a public education program that would publicize the commission’s findings and promote awareness of human rights in the United States and abroad.*

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## INTRODUCTION

The stories of the abducted share much in common. While taken from different locations around the world and subjected to various forms of abuse, they were all accused by the United States of being terrorists or were suspected of associating with terror groups in the extant “War on Terror.”<sup>1</sup> And yet, they were all innocent.

Khaled El-Masri, a German national, was captured while visiting Macedonia on a short vacation.<sup>2</sup> Macedonian officials detained him without charge under the mistaken belief that he was an Al Qaeda terrorist. After three weeks, El-Masri was transferred to U.S. custody and was beaten, drugged, and then transported from Macedonia to Afghanistan. He was detained at the “Salt Pit,” an infamous “black

1. The term “War on Terror” is used in this Article with some trepidation to describe the ongoing conflict against terrorism that began after September 11, 2001. Its use is not meant to suggest that terrorism requires a military solution or that the United States has adhered to the constitutional requirements for declaring war under the U.S. Constitution. Not surprisingly, the use of this term is contested. See ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 29 (2016); ADAM HODGES, *THE WAR ON TERROR NARRATIVE: DISCOURSE AND INTERTEXTUALITY IN THE CONSTRUCTION AND CONTESTATION OF SOCIOLOGICAL REALITY* (2011); Stephen D. Reese & Seth C. Lewis, *Framing the War on Terror: The Internalization of Policy in the U.S. Press*, 10 *JOURNALISM* 777 (2009); Michael Isikoff, *Why Obama May Abandon “War on Terror” Phrase*, *NEWSWEEK* (Feb. 3, 2009, 7:00 PM), <http://www.newsweek.com/why-obama-may-abandon-war-terror-phrase-82181>.

2. See *infra* Part II(A).

site” operated by the Central Intelligence Agency (CIA), for four months without charge. When CIA officials finally acknowledged that they had abducted and tortured an innocent man, they flew El-Masri to Albania and released him on an abandoned road. They told him to walk away without turning back.

Maher Arar, a Canadian citizen, was detained by U.S. government officials in New York during a flight layover.<sup>3</sup> At the time, he was returning to Canada after a family vacation in Tunisia. Identified by the Immigration and Naturalization Service (INS) as a suspected terrorist, Arar was transferred to Syria despite serious concerns that he would be tortured. Soon after he arrived in Syria, Arar was tortured by Syrian officials. For almost a year, he remained in custody. Arar was eventually released by Syria, which found no connection between him and any terrorist or criminal organizations. Under diplomatic escort, Arar returned to Canada. Neither Canada nor the United States ever charged Arar with any crime. He was innocent.

Amir Meshal, a U.S. citizen, was initially detained in Kenya.<sup>4</sup> He was first rendered to Somalia and then Ethiopia with the acquiescence of U.S. officials. For over three months, U.S. officials interrogated him and accused him of being a terrorist. He was denied all forms of judicial process and was threatened with torture if he did not cooperate and confess his connections to Al Qaeda. Meshal was finally released by Ethiopian officials and allowed to return to the United States. Despite the allegations made against him, the United States never charged him with a crime. He was also innocent.

These individuals, and many others like them, share another attribute. Despite their innocence, they were denied any form of redress for their detention and mistreatment by the United States.<sup>5</sup> The Bush and Obama administrations did not apologize or provide any reparations to these individuals. The Trump administration has taken the same approach. The federal courts have consistently dismissed efforts to seek redress through the legal process.<sup>6</sup> And, to

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3. See *infra* Part II(B).

4. See *infra* Part II(C).

5. See Conor Friedersdorf, *Former State Department Official: Team Bush Knew Many at Gitmo Were Innocent*, ATLANTIC (Apr. 26, 2013), <http://www.theatlantic.com/politics/archive/2013/04/former-state-department-official-team-bush-knew-many-at-gitmo-were-innocent/275327/>; see also MURAT KURNAZ WITH HELMUT KUHN, FIVE YEARS OF MY LIFE: AN INNOCENT MAN IN GUANTANAMO (Jefferson Chase trans., 2008) (2007); Murat Kurnaz, *Notes from a Guantanamo Survivor*, N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/opinion/sunday/notes-from-a-guantanamo-survivor.html>.

6. See generally William J. Aceves, *Constitutional Barriers and the Perils of Impunity*, in LESSONS AND LEGACIES IN THE WAR ON TERROR: FROM MORAL PANIC TO PERMANENT WAR 49

date, Congress has stayed silent. Impunity remains because no one has been held accountable for these abuses.<sup>7</sup>

In response, this Article offers a legislative proposal that acknowledges the injustices suffered by these individuals and provides them with redress.<sup>8</sup> Part II tells the stories of three individuals—Khaled El-Masri, Maher Arar, and Amir Meshal—who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups. These individuals were detained and mistreated abroad by the United States or by other countries with the complicity of the United States. They were eventually released and were never charged by the United States with any crime. Despite their innocence, their efforts to seek redress from the United States have been unsuccessful. Indeed, the United States has refused to acknowledge any aspect of their detention or mistreatment despite clear evidence that these individuals were detained and abused. Part III of this Article provides a historical analog by reviewing the Civil Liberties Act of 1988, which Congress adopted to offer an apology and reparations to Japanese Americans

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(Gershon Shafir et al. eds., 2013); Jeffrey Davis, *Uncloaking Secrecy: International Human Rights Law in Terrorist Cases*, 38 HUM. RTS. Q. 58, 67 (2016); *Developments in the Law—Compensating Victims of Wrongful Detention, Torture, and Abuse in the U.S. War on Terror*, 122 HARV. L. REV. 1158 (2009); Jameel Jaffer, *Known Unknowns*, 48 HARV. C.R.-C.L. L. REV. 457, 470 (2013); Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625 (2010); Daniel Joseph Natalie, Note, *No Longer Secret: Overcoming the State Secrets Privilege to Explore Meaningful Remedies for Victims of Extraordinary Rendition*, 62 CASE W. RES. L. REV. 1237 (2012); Ashley Scott, Note & Comment, *The State Secrets Privilege: Alternative Remedies in Cases of Torture Abroad*, 45 SW. L. REV. 219 (2015).

7. The impunity that pervades the War on Terror is well-documented. See, e.g., HUMAN RIGHTS WATCH, NO MORE EXCUSES: A ROADMAP TO JUSTICE FOR CIA TORTURE (2015), <https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture>; INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., DENIAL OF JUSTICE: THE UNITED STATES' FAILURE TO PROSECUTE SENIOR OFFICIALS FOR TORTURE (2015), [http://chrgj.org/wp-content/uploads/2015/10/IACHR\\_HR-Situation-of-People-Affected-by-RDI\\_Advocates-for-US-Torture-Prosecutions-102315.pdf](http://chrgj.org/wp-content/uploads/2015/10/IACHR_HR-Situation-of-People-Affected-by-RDI_Advocates-for-US-Torture-Prosecutions-102315.pdf); WORLD ORG. FOR HUMAN RIGHTS USA ET AL., INDEFENSIBLE: A REFERENCE FOR PROSECUTING TORTURE AND OTHER FELONIES COMMITTED BY U.S. OFFICIALS FOLLOWING SEPTEMBER 11TH (2012), [http://www.humaneprosecutions.org/indefensible\\_a\\_reference\\_for\\_prosecuting\\_torture.pdf](http://www.humaneprosecutions.org/indefensible_a_reference_for_prosecuting_torture.pdf).

8. Reparations and apologies are an important, although under-utilized, response to human rights abuses. See generally ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Abuses*, in THE HANDBOOK OF REPARATIONS 1, 1–21 (Pablo de Greiff ed., 2006); Priscilla Haynes, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Patricia Lundy & Bill Rolston, *Redress for Past Harms? Official Apologies in Northern Ireland*, 20 INT'L J. HUM. RTS. 104 (2016); Natsu Taylor Saito, *At the Heart of the Law: Remedies for Massive Wrongs*, 27 REV. LITIG. 281 (2008); Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT'L L. 121 (2017).

who were subject to discrimination and detention during the Second World War.<sup>9</sup> Based on this historical analog, Part IV then presents a legislative proposal to address the systematic abuses that have occurred during the War on Terror.<sup>10</sup> It proposes the adoption of the Civil Redress and Historical Memory Act of 2029, which would: (1) establish a commission of inquiry to investigate and document these and other cases of arbitrary detention and mistreatment; (2) offer an apology and provide restitution to individuals who were wrongfully detained and mistreated by the United States or by other countries with U.S. complicity during the War on Terror; and (3) establish a public education program that would publicize the commission's findings and promote awareness of human rights in the United States and abroad.

While some political leaders have called for religious profiling to combat terrorism—justifying such calls by relying on the internment of Japanese Americans during the Second World War and the much-maligned Supreme Court decision of *Korematsu v. United States* as precedent—this Article takes a different lesson from history.<sup>11</sup> In this regard, it is a particularly timely moment to revisit the legacy of Japanese internment and the Civil Liberties Act of 1988. Through the Civil Redress and Historical Memory Act of 2029, the

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9. Several commentators have analogized the treatment of detainees during the War on Terror with the treatment of Japanese Americans during the Second World War. See, e.g., Victor Bascara, *Cultural Politics of Redress: Reassessing the Meaning of the Civil Liberties Act of 1988 After 9/11*, 10 *ASIAN L.J.* 185, 186 (2003); Cameron Bell, *Repatriate . . . Then Compensate: Why the United States Owes Reparation Payments to Former Guantanamo Detainees*, 48 *LOV. L.A. L. REV.* 867, 925 (2015); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 *U. KAN. L. REV.* 307, 309–13 (2006); David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women,"* 76 *MO. L. REV.* 1, 2 (2011); Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 *L. & CONTEMP. PROBS.* 255, 265 (2005); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 *ASIAN. L.J.* 1, 11 (2001); Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 *ASIAN L.J.* 37, 38 (2003); Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 *MICH. L. REV.* 1269, 1271 (2003); Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 *VILL. L. REV.* 451, 451 (2002).

10. This Article does not address the potential claims of individuals who engaged in hostilities or acts of terrorism.

11. See, e.g., Gabriel J. Chin, *The Korematsu Supreme Court Ruling Upholding Internment Is Still a "Loaded Weapon" for Discrimination*, *L.A. TIMES* (Dec. 22, 2016, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-chin-korematsu-20161222-story.html>; Margaret Hartmann, *Trump Supporter Cites Japanese Internment Camps as "Precedent" for Muslim Registry*, *N.Y. MAG* (Nov. 17, 2016, 1:53 AM), <http://nymag.com/daily/intelligencer/2016/11/trump-supporter-muslim-registry-internment-camps.html>. But see Noah Feldman, *Why Korematsu is Not a Precedent*, *N.Y. TIMES* (Nov. 21, 2016), [https://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html?\\_r=0](https://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html?_r=0); Lily Rothman, *Why Citing the Japanese Internment as a "Precedent" for a Muslim Registry is So Alarming*, *TIME* (Nov. 17, 2016), <http://time.com/4574680/muslim-registry-japanese-internment/>.

United States would provide a historical record of the human rights abuses it committed during the War on Terror and would accept responsibility for the harms it caused. Such actions would make clear that even advanced democracies must consider transitional justice mechanisms when they emerge from periods of armed conflict or times of crisis.<sup>12</sup>

The proposed legislation is captioned the “Civil Redress and Historical Memory Act of 2029” because the current political environment in the United States makes its adoption unlikely in the immediate future.<sup>13</sup> U.S. actions during the War on Terror remain contentious, and many politicians and commentators argue that the United States should not apologize for actions taken to prevent terrorist attacks.<sup>14</sup> Indeed, President Trump has even argued in support of torture and other extreme measures against detainees.<sup>15</sup> Historically, U.S. apologies and redress for past injustices have occurred only after significant time has passed.<sup>16</sup> The year 2029 is also an appropriate date because it coincides with the potential release

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12. See generally LISA MAGARELL & LORNA PETERSON, INT’L CENT. FOR TRANSITIONAL JUSTICE, *AFTER TORTURE: U.S. ACCOUNTABILITY AND THE RIGHT TO REDRESS* (2010), <https://www.ictj.org/sites/default/files/ICTJ-USA-Right-Redress-2010-English.pdf>; George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193 (2011); Jonathan Hafetz, *Resisting Accountability: Transitional Justice in the Post-9/11 United States*, 19 INT’L J. HUM. RTS. 429 (2015); Jorge Heine, *Politics as Usual? U.S. Torture Practices 2001-2008 and Transitional Justice*, 13 INT’L STUD. REV. 570 (2011); Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681 (2014); Natsu Taylor Saito, *Internments Then and Now: Constitutional Accountability in Post-9/11 America*, 2 DUKE F. FOR L. & SOC. CHANGE 71 (2010); Nadia Shamsi, *From Villa Grimaldi to Guantanamo Bay: Remedying Human Rights Abuses in Chile and the United States*, 22 CARDOZO J. INT’L & COMP. L. 355 (2014).

13. See, e.g., Charlie Savage, *How to End the Stigma of Guantanamo*, N.Y. TIMES (Aug. 14, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/how-to-end-the-stigma-of-guantanamo.html> (“Some advocates for detainees dream of apologies and reparations, but that seems politically unrealistic; the Supreme Court upheld indefinite detention as lawful, the war against Al Qaeda and its progeny continues, and many Republican lawyers have come to oppose releasing any more low-level detainees in the Obama era.”).

14. See generally MICHELLE MALKIN, IN DEFENSE OF INTERNMENT (2004); JAMES E. MITCHELL, ENHANCED INTERROGATION (2016); REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE’S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM (Bill Harlow ed., 2015); MARC A. THIESSEN, COURTING DISASTER (2010).

15. See, e.g., James Risen & Sheri Fink, *Trump Said ‘Torture Works.’ An Echo Is Feared Worldwide*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/us/politics/trump-torture-guantanamo.html>; Matt Apuzzo & James Risen, *Plan to Revive Waterboarding Faces Obstacles*, N.Y. TIMES, Nov. 29, 2016, at A1; Nick Visser, *Trump Amps Up His for Torture: ‘We’re Going to Have to Do Things That Are Unthinkable,’* HUFFINGTON POST, (July 1, 2016), [http://www.huffingtonpost.com/entry/trump-torture-waterboarding\\_us\\_5775d740e4b04164640f6597](http://www.huffingtonpost.com/entry/trump-torture-waterboarding_us_5775d740e4b04164640f6597).

16. Of course, not all reparations movements have succeeded. See, e.g., ALFRED L. BROPHY, REPARATIONS: PRO & CON (2006); J. ANGELO CORLETT, RACE, RACISM AND REPARATIONS (2003); REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES (Michael T. Martin & Marilyn Yaquinto eds., 2007).

date of the infamous report on the CIA's torture and rendition program prepared by the Senate Select Committee on Intelligence (SSCI).<sup>17</sup> The year 2029 thus serves as both aspiration and deadline.

The search for justice often begins with small, incremental steps, and this Article offers a detailed legislative proposal that could mark the beginning of a long journey away from this dark period in our nation's history.

## I. THREE VICTIMS OF WRONGFUL DETENTION AND MISTREATMENT

In its worldwide efforts to identify and detain suspected terrorists, the United States cast a wide net. On some occasions, these efforts were successful and Al Qaeda operatives were captured.<sup>18</sup> But on other occasions, these efforts failed, and innocents were abducted, detained, and abused.<sup>19</sup>

### A. *Khaled El-Masri*

In 2003, Khaled El-Masri, a German citizen of Lebanese descent, lived in Ulm, Germany with his wife and five young children.<sup>20</sup> On December 31, 2003, El-Masri traveled from his home to Skopje, Macedonia for a short vacation.<sup>21</sup> When El-Masri crossed the border

17. Letter from W. Neil Eggleston, Counsel to the President to the Honorable Dianne Feinstein (Dec. 9, 2016), [https://www.feinstein.senate.gov/public/\\_cache/files/4/4/446cfcf7-17ac-4196-a199-3fdc6a28e9b5/E7CD816F81A1BC3DD6BD9018FA3E79B8.wh-letter-on-torture-report.pdf](https://www.feinstein.senate.gov/public/_cache/files/4/4/446cfcf7-17ac-4196-a199-3fdc6a28e9b5/E7CD816F81A1BC3DD6BD9018FA3E79B8.wh-letter-on-torture-report.pdf); see also Spencer Ackerman, *Senate Torture Report to Be Kept from Public for 12 Years After Obama Decision*, *GUARDIAN* (Dec. 12, 2016, 5:34 PM), <https://www.theguardian.com/us-news/2016/dec/12/obama-senate-cia-torture-report-september-11-classified> (noting that the report will not be declassified for "at least 12 years" after December 2016).

18. See, e.g., PETER L. BERGEN, *MANHUNT: THE TEN-YEAR SEARCH FOR BIN LADEN FROM 9/11 TO ABBOTTABAD 95-99* (2012) (describing the detention of Mohammed Al-Qahtani and Khalid Sheikh Mohammed); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 190-93* (2008) (describing the detention of Mohammed Al-Qahtani and other Al Qaeda operatives).

19. Portions of Part II(A) and (B) of this Article were previously published in Aceves, *supra* note 6.

20. See Marcus Brandt, *Merkel Says that U.S. Admits Error in Detaining German National*, *USA TODAY* (Dec. 6, 2005, 12:28 PM), [http://usatoday30.usatoday.com/news/world/2005-12-06-ricemerkel\\_x.htm](http://usatoday30.usatoday.com/news/world/2005-12-06-ricemerkel_x.htm); Scott Horton, *The El-Masri Cable*, *HARPER'S BLOG* (Nov. 29, 2010, 5:23 PM), <https://harpers.org/blog/2010/11/the-el-masri-cable/>; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, *WASH. POST* (Dec. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html>.

21. Petition with a Request for an Investigation and Hearing on the Merits at 5, *El-Masri v. United States*, Inter-Am. Comm'n H.R., Report No. 21/16, OEA/Ser.L/V/II.157, doc. 25 (2016), [https://www.aclu.org/files/pdfs/safefree/elmasri\\_iachr\\_20080409.pdf](https://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf) [hereinafter IACHR Petition].



into Macedonia, he was detained by Macedonian law enforcement officials.<sup>22</sup> His passport was confiscated, and he was eventually detained without charge in Macedonia for three weeks. Throughout his detention in Macedonia, El-Masri was kept isolated at a hotel.<sup>23</sup> He was questioned about his religious beliefs and his association with several individuals and Islamic organizations.<sup>24</sup> He was not allowed to communicate with his family, and his requests to speak with a lawyer and German consular officials were denied.<sup>25</sup> After two weeks, El-Masri began a hunger strike to protest his detention and treatment.<sup>26</sup> On approximately January 23, 2004, El-Masri was taken to a local airport.

Upon arrival, still handcuffed and blindfolded, he was initially placed in a chair, where he sat for one and a half hours. He was told that he would be taken into a room for a medical examination before being transferred to Germany. Then, two people violently pulled his arms back. On that occasion he was beaten severely from all sides. His clothes were sliced from his body with scissors or a knife. His underwear was forcibly removed. He was thrown to the floor, his hands were pulled back and a boot was placed on his back. He then felt a firm object being forced into his anus. . . . He was then pulled from the floor and dragged to a corner of the room, where his feet were tied together. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in an adult nappy. He was then dressed in a dark blue short-sleeved tracksuit. A bag was placed over his head and a belt was put on him with chains attached to his wrists and ankles. The men put earmuffs and eye pads on him and blindfolded and hooded him. They bent him over, forcing his head down, and quickly marched him to a waiting aircraft, with the shackles cutting into his ankles. The aircraft was surrounded by armed Macedonian security guards. He had difficulty breathing because of the bag that covered his head. Once inside the aircraft, he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft. During the flight he received two injections. An anesthetic [sic] was also administered over his

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 6.

nose. He was mostly unconscious during the flight. A Macedonian exit stamp dated 23 January 2004 was affixed to the applicant's passport.<sup>27</sup>

When he arrived in Afghanistan, El-Masri was transferred to a CIA facility near Kabul, known as the Salt Pit, where he was detained in a cell for the next four months.<sup>28</sup> El-Masri was again interrogated repeatedly about his association with alleged terrorists, which he continued to deny.<sup>29</sup> Despite numerous requests, he was prevented from contacting a lawyer or any member of his family. El-Masri commenced another hunger strike to protest his detention.<sup>30</sup> By February 2004, the CIA had examined El-Masri's passport and conducted further research on his background.<sup>31</sup> It soon concluded that El-Masri was not a member of Al Qaeda or any other terrorist group: he was innocent. CIA Director George Tenet and Secretary of State Condoleezza Rice were notified that the CIA was detaining an innocent German citizen, and yet El-Masri remained in detention for two more months.<sup>32</sup>

On May 28, 2004, El-Masri was taken from the Salt Pit and flown to Albania, where he was placed in a waiting vehicle.<sup>33</sup> After a long car ride, he was released by his captors with no explanation and told to walk away.<sup>34</sup> El-Masri was soon detained by Albanian authorities, who questioned him about his presence in the country.<sup>35</sup> He was eventually sent back to Germany.<sup>36</sup> When he arrived home, El-Masri discovered that his family had returned to Lebanon.<sup>37</sup>

On December 6, 2005, El-Masri filed a federal lawsuit in the U.S. District Court for the Eastern District of Virginia seeking relief for his abduction and detention.<sup>38</sup> The lawsuit was filed against former CIA Director George Tenet, ten unnamed employees of the CIA,

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27. El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, 274–75.

28. IACHR Petition, *supra* note 21, at 8.

29. *Id.* at 9–11.

30. *Id.* at 11.

31. *Id.*

32. *Id.*; see also Lisa Myers et al., *CIA Accused of Detaining an Innocent Man*, NBC NEWS (Apr. 21, 2005, 7:48 PM), [http://www.nbcnews.com/id/7591918/#.V6\\_f5ZMrIFM](http://www.nbcnews.com/id/7591918/#.V6_f5ZMrIFM).

33. IACHR Petition, *supra* note 21, at 14.

34. S. REP. NO. 113-288, at 129 (2014). According to the Senate Select Committee on Intelligence, El-Masri was given €14,500 when he was released. *Id.*

35. IACHR Petition, *supra* note 21, at 15.

36. *Id.*

37. *Id.* at 16.

38. Complaint, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-CV-01417). El-Masri was represented by the American Civil Liberties Union. Press Release, ACLU, ACLU Files Landmark Lawsuit Challenging CIA's "Extraordinary Rendition" of Innocent Man (Dec. 6, 2005), <https://www.aclu.org/news/aclu-files-landmark-lawsuit-challenging-cias-extraordinary-rendition-innocent-man?redirect=cpredirect/22207>.

three corporate defendants, and ten unnamed employees of the defendant corporations.<sup>39</sup> According to the complaint,

Mr. El-Masri's abduction, detention, and interrogation without legal process were carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet known as "extraordinary rendition": the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws.<sup>40</sup>

The complaint raised three causes of action: (1) violation of the Fifth Amendment right to due process; (2) violation of the international norm against prolonged arbitrary detention; and (3) violation of the international norm against torture and cruel, inhuman or degrading treatment.<sup>41</sup> El-Masri sought compensatory and punitive damages.<sup>42</sup>

Soon after the case was filed, the United States submitted a Motion to Intervene and Statement of Interest with the district court.<sup>43</sup> While the United States was not sued by El-Masri, it was entitled to enter the proceedings to protect U.S. interests.<sup>44</sup> In its submission, the United States invoked the state secrets privilege by claiming further court proceedings could risk disclosure of classified information and that such disclosure would harm national security.<sup>45</sup> Accordingly, the United States sought dismissal of the case.

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39. Complaint, *supra* note 38. The corporate defendants were alleged to have provided the aircraft used for El-Masri's rendition. *See id.*

40. *Id.* at 1–2. The complaint offered a detailed description of the extraordinary rendition program and its functions.

[I]t permits agents of the United States to detain foreign nationals that it considers terrorist suspects outside U.S. sovereign territory and without legal process; and it permits those agents, primarily through counterparts in foreign intelligence agencies, to employ interrogation methods on suspects that would not be permissible under federal or international law as a means of obtaining information from suspects.

*Id.* at 6.

41. *Id.* at 18–25.

42. *Id.* at 25.

43. Motion to Intervene, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-CV-01417) (filed on Mar. 13, 2006).

44. *See* 28 U.S.C. § 517 (2012) (granting the Department of Justice the power to "attend to any [ ] interest of the United States").

45. United States' Statement of Interest, Assertion of a Formal Claim of State Secrets Privilege, and Request for Expedited Consideration at 1, Attach. A, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-CV-01417). Two declarations were submitted: one

On May 12, 2006, the district court accepted the U.S. assertion of the state secrets privilege and dismissed the case.<sup>46</sup> The court found that litigating El-Masri's claims would potentially expose classified information.<sup>47</sup> Under these circumstances, the court concluded that dismissal was necessary.<sup>48</sup> Despite its holding, the district court expressed significant concerns about the outcome and suggested that El-Masri was entitled to some type of remedy.

Finally, it is worth noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.<sup>49</sup>

On March 2, 2007, the Fourth Circuit upheld the district court's dismissal, reaffirming the applicability of the state secrets privilege.<sup>50</sup> While the court was mindful of the consequences to El-Masri in dismissing the lawsuit, it nevertheless felt obligated to do so.<sup>51</sup> The U.S. Supreme Court declined to accept El-Masri's petition for writ of certiorari, thereby ending the case.

While El-Masri's efforts to seek redress in the United States were unsuccessful, his case received significant international attention. In Europe, El-Masri's case was the subject of inquiries by the European Parliament as well as the Parliamentary Assembly of the Council of Europe.<sup>52</sup> These inquiries documented several cases of extraordinary rendition and implicated several European countries

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declaration was classified and only available to the judge, and the other declaration was for public release. *Id.* at 2.

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

47. *Id.* at 539.

48. *Id.*

49. *Id.* at 541.

50. El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007).

51. *Id.* at 312.

52. See EUR. PARL. DOC. A6-0020/2007 (2007); Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, Doc. No. AS/Jur (2006) 03 rev (2006), [http://assembly.coe.int/committeedocs/2006/20060124\\_jdoc032006\\_e.pdf](http://assembly.coe.int/committeedocs/2006/20060124_jdoc032006_e.pdf).

as complicit in the rendition program. In response, several countries initiated criminal investigations.<sup>53</sup> However, no individual was ever held accountable for El-Masri's rendition.

On April 8, 2008, El-Masri filed a petition with the Inter-American Commission on Human Rights against the United States.<sup>54</sup> The complaint alleged that the United States had violated the American Declaration on the Rights and Duties of Man by subjecting El-Masri to extraordinary rendition and by failing to provide him with a judicial remedy.<sup>55</sup> The United States took eight years to respond to El-Masri's petition.<sup>56</sup> In its submission to the Inter-American Commission, the United States argued that the American Declaration did not create binding obligations on it even though the United States takes its commitments under the American Declaration "very seriously."<sup>57</sup> On April 15, 2016, the Inter-American Commission declared El-Masri's petition admissible and announced that it would consider the merits of his claims.<sup>58</sup>

El-Masri also pursued a separate case in the European Court of Human Rights against Macedonia for its complicity in his rendition. On July 20, 2009, El-Masri filed a complaint before the European Court of Human Rights against Macedonia alleging several violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>59</sup> The complaint alleged that Macedonia "had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over" to the CIA, who then subjected him to further abuse for several months.<sup>60</sup> On December 13, 2012, the European Court issued its decision in the case.<sup>61</sup> The Court found Macedonia responsible for multiple violations of the European Convention, including the prohibitions against torture, inhuman and degrading treatment, and arbitrary detention.<sup>62</sup> The Court awarded El-Masri €60,000 in damages.<sup>63</sup>

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53. OPEN SOCIETY JUSTICE INITIATIVE, INVESTIGATIONS INTO CIA TORTURE AND RENDITION 2–4 (Nov. 2013), [https://www.opensocietyfoundations.org/sites/default/files/briefing-cia-investigations-roundup\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/briefing-cia-investigations-roundup_0.pdf) (Germany and Spain specifically investigated matters related to El-Masri).

54. IAHR Petition, *supra* note 21.

55. *Id.* at 4.

56. El-Masri v. United States, Inter-Am. Comm'n H.R., Report No. 21/16, OEA/Ser.L/V/II.157, doc. 25 (2016).

57. *Id.* at 3.

58. *Id.* at 7.

59. El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, 271.

60. *Id.* at 271.

61. *Id.* at 263.

62. *Id.* at 341, 348–49, 352.

63. *Id.* at 354.

B. *Maher Arar*

In 2002, Maher Arar, a Syrian-born Canadian citizen, was working as a telecommunications engineer in Ottawa, where he lived with his family.<sup>64</sup> On September 26, 2002, Arar was traveling from Tunisia back to Canada after a family vacation.<sup>65</sup> His return flight went through Zurich and New York City before it was scheduled to arrive in Montreal. While transiting through John F. Kennedy International Airport in New York City, U.S. immigration officials stopped Arar for questioning.<sup>66</sup> Arar was identified by the National Automated Immigration Lookout System as a member of a known terrorist organization.<sup>67</sup> He was subsequently questioned by immigration officials about possible connections to Al Qaeda. Arar was then transferred from the airport to the Metropolitan Detention Center in Brooklyn and held for several days.<sup>68</sup> During his detention, he was visited briefly by a Canadian consular official and an attorney.<sup>69</sup> Eventually, the U.S. Immigration and Naturalization Service (INS) incorrectly determined that Arar was a member of Al Qaeda and that he posed a threat to the United States.<sup>70</sup> In consultation with the State Department, INS concluded that Arar was inadmissible and should be sent to Syria.<sup>71</sup> In making this determination, INS and State Department officials considered Syria's assurances that Arar would not be subjected to torture if sent there.<sup>72</sup> A subsequent investigation by the Office of the Inspector

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64. CTR. FOR CONSTITUTIONAL RIGHTS, *THE STORY OF MAHER ARAR: RENDITION TO TORTURE 2* (2008), <https://ccrjustice.org/sites/default/files/assets/rendition%20to%20torture%20report.pdf>.

65. I COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, *REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 149* (2006), [http://www.sirc-csars.gc.ca/pdfs/cm\\_arar\\_bgv1-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf) [hereinafter I COMM'N OF INQUIRY].

66. *Id.*

67. *Id.* at 204; Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. TIMES (May 29, 2005), <http://www.nytimes.com/2005/05/29/world/americas/the-costs-of-outsourcing-interrogation-a-canadian-muslims.html>.

68. I COMM'N OF INQUIRY, *supra* note 65, at 182.

69. *Id.*

70. *Id.* at 204.

71. *Id.*; see also *Arar v. Ashcroft*, 585 F.3d 559, 586 (2d Cir. 2009) (“[T]he INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is ‘clearly and unequivocally’ a member of al-Qaeda and, therefore, ‘clearly and unequivocally inadmissible to the United States’ under 8 U.S.C. § 1182(a)(3)(B)(i)(V).”).

72. See Jeff Sallot, *U.S. Trusted Syria's Assurances on Arar: Ashcroft*, GLOBE & MAIL (Nov. 21, 2003), [https://beta.theglobeandmail.com/news/national/us-trusted-syrias-assurances-on-arar-ashcroft/article1168875/?ref=hp://www.theglobeandmail.com&see\\_also\\_I\\_COMM'N\\_OF\\_INQUIRY\\_supra\\_note\\_65\\_at\\_204](https://beta.theglobeandmail.com/news/national/us-trusted-syrias-assurances-on-arar-ashcroft/article1168875/?ref=hp://www.theglobeandmail.com&see_also_I_COMM'N_OF_INQUIRY_supra_note_65_at_204). Article 3 of the Convention against Torture provides that States Parties may not “expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to

General in the Department of Homeland Security concluded that the process used to remove Arar and send him to Syria was questionable and did not follow standard procedures.<sup>73</sup> In addition, the Inspector General determined that Syria's assurances that Arar would not be tortured were ambiguous.<sup>74</sup> Given Syria's abysmal human rights record, the decision to send Arar to Syria was troubling. Because the United States could have sent Arar back to Canada, its decision to send him to Syria was even more problematic.<sup>75</sup>

On October 8, 2002, Arar was transported to Washington D.C. by private plane and then flown to Jordan.<sup>76</sup> Neither the Canadian consulate nor Arar's attorney were informed that he had been removed.<sup>77</sup> From Jordan, Arar was transferred to Syria, where the Syrian government immediately detained him.<sup>78</sup> For several days, Syrian officials interrogated and tortured Arar. They accused him of being a terrorist and demanded his confession.<sup>79</sup> The torture began soon after Arar arrived in Syria.

The beating started that day and was very intense for a week, and then less intense for another week. That second and the third days were the worst. I could hear other prisoners being tortured, and screaming and screaming. Interrogations are carried out in different rooms.

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torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85. The United States implemented this obligation through various laws and administrative actions. *See* Foreign Relations Authorization Act, Pub. L. No. 103-236, 108 Stat. 382 (1994). Pursuant to 8 C.F.R. § 208.18(c), the Secretary of State may seek assurances from a specific country that an alien will not be tortured if the alien is removed to that country. 8 C.F.R. § 208.18(c)(1) (2016). "Once assurances are provided under . . . this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer." 8 C.F.R. § 208.18(c)(3) (2016).

73. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, OIG-08-18 30 (2008), <https://www.oig.dhs.gov/assets/PDFs/The%20Removal%20of%20a%20Canadian%20Citizen%20to%20Syria%20%28Redacted%29.pdf> [hereinafter, OIG REPORT]; *see also* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, ADDENDUM TO OIG-08-18 (2010), [https://www.oig.dhs.gov/assets/Mgmt/OIGa\\_08-18\\_Mar10.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIGa_08-18_Mar10.pdf).

74. OIG REPORT, *supra* note 73, at 5.

75. *Id.* at 21–22.

76. 1 COMM'N OF INQUIRY, *supra* note 65, at 174.

77. *Id.*

78. OIG REPORT, *supra* note 73, at 7.

79. *Canadian Citizen Maher Arar, Deported by U.S., Details Torture in Syria*, DEMOCRACY NOW! (Nov. 7, 2003), [http://www.democracynow.org/2003/11/7/canadian\\_man\\_deported\\_by\\_u\\_s](http://www.democracynow.org/2003/11/7/canadian_man_deported_by_u_s).

One tactic they use is to question prisoners for two hours, and then put them in a waiting room, so they can hear the others screaming, and then bring them back to continue the interrogation.

The cable is a black electrical cable, about two inches thick. They hit me with it everywhere on my body. They mostly aimed for my palms, but sometimes missed and hit my wrists they were sore and red for three weeks. They also struck me on my hips, and lower back. Interrogators constantly threatened me with the metal chair, tire and electric shocks.

The tire is used to restrain prisoners while they torture them with beating on the sole of their feet. I guess I was lucky, because they put me in the tire, but only as a threat. I was not beaten while in tire.

They used the cable on the second and third day, and after that mostly beat me with their hands, hitting me in the stomach and on the back of my neck, and slapping me on the face. Where they hit me with the cables, my skin turned blue for two or three weeks, but there was no bleeding. At the end of the day they told me tomorrow would be worse. So I could not sleep.

Then on the third day, the interrogation lasted about eighteen hours.<sup>80</sup>

When he was not being interrogated, Arar was placed in a damp, underground cell.

[H]e was kept in an underground cell in darkness, except for the light that would come in through a small opening on the top of the cell. Cats would sometimes walk over the small opening and relieve themselves on him. The only time he saw daylight was when he was brought to see Mr. [Léo] Martel for a consular visit. His cell measured 3' x 6' x 7' and he slept on a thin mattress on the floor. He was given two bottles: one to drink from and one to relieve himself in. The toilets were outside the cell and he could use them only three times a day.

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80. 2 COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 792-93 (2006), [http://www.sirc-csars.gc.ca/pdfs/cm\\_arar\\_bgv2-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf) [hereinafter 2 COMM'N OF INQUIRY].



He was allowed to do his laundry only once a week, in the toilet area in darkness.<sup>81</sup>

On October 21, 2002, the Canadian Embassy discovered that Arar had been transferred to Syria.<sup>82</sup> Embassy personnel immediately contacted Syrian authorities, who confirmed Arar was in custody. In fact, Arar remained in Syrian custody for an additional year. On October 5, 2003, Syrian authorities released Arar to the Canadian Embassy, stating they had found no connection between Arar and any criminal or terrorist organization.<sup>83</sup> He immediately left the country accompanied by Canadian diplomatic officials.<sup>84</sup> Arar was never charged with any crime by the United States or Canada.<sup>85</sup>

On January 22, 2004, Arar filed a federal lawsuit in the U.S. District Court for the Eastern District of New York seeking compensatory damages and declaratory relief against Attorney General John Ashcroft, FBI Director Robert Mueller, and several other federal officials.<sup>86</sup> The complaint alleged four causes of action: (1) violation of the Fifth Amendment arising out of Arar's detention in the United States (before his removal to Syria); (2) violation of the Fifth Amendment arising out of Arar's detention in Syria and his denial of access to counsel, the courts, and the Canadian consulate; (3) violation of the Fifth Amendment arising out of Arar's torture in Syria; and (4) violation of the prohibition against torture for conspiring with Jordanian and Syrian officials to bring about his torture.<sup>87</sup> According to the complaint, "federal officials removed Mr. Arar to Syria under the Government's 'extraordinary renditions' program precisely because Syria could use methods of interrogation to obtain information from Mr. Arar that would not

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81. *Id.* at 471; see also 1 COMM'N OF INQUIRY, *supra* note 65, at 229 (identifying Mr. Léo Martel as the counsel at the Canadian Embassy in Syria).

82. 1 COMM'N OF INQUIRY, *supra* note 65, at 229.

83. See 2 COMM'N OF INQUIRY, *supra* note 80, at 467–70 ("General Khalil informed his guests that Mr. Arar had been acquitted by the judge and was free to go.").

84. *Id.* at 470.

85. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 64, at 4 ("Maher has never been charged with any crime in any country."). According to the Canadian government's official inquiry, Syrian officials indicated that Arar had been acquitted by a judge although no evidence was presented to confirm that any proceedings occurred. 2 COMM'N OF INQUIRY, *supra* note 80, at 468.

86. Complaint, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 1:04-CV-00249), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *aff'd on other grounds on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009), 2004 WL 2410405. Arar was represented by the Center for Constitutional Rights. *Arar v. Ashcroft et al.*, CTR. CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/arar-v-ashcroft-et-al> (last visited Oct. 22, 2017).

87. Complaint, *supra* note 86, at 20–24.

be legally or morally acceptable in this country or in other democracies.”<sup>88</sup> The complaint sought compensatory and punitive damages as well as a judgment “[d]eclaring that the actions of Defendants, their agents, and their employees, are illegal and violate Mr. Arar’s constitutional, civil, and international human rights.”<sup>89</sup> The United States moved to dismiss the case on several grounds, including the state secrets privilege.<sup>90</sup>

On February 16, 2006, the district court dismissed the lawsuit although it declined to rule on the assertion of the state secrets privilege.<sup>91</sup> With respect to Arar’s constitutional claims regarding extraordinary rendition, the court examined their applicability under the *Bivens* doctrine,<sup>92</sup> which offers civil redress for constitutional violations.<sup>93</sup> In this case, the district court determined that special factors counseled hesitation in extending a constitutional claim under *Bivens* for extraordinary rendition.

[T]he task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched—perhaps deliberately—by the Legislative and Executive branches. To do otherwise would threaten “our customary policy of deference to the President in matters of foreign affairs.”<sup>94</sup>

Accordingly, the district court dismissed Arar’s constitutional law claims and the remaining counts.

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88. *Id.* at 2.

89. *Id.* at 24.

90. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir. 2008), *aff’d on other grounds on reh’g en banc*, 585 F.3d 559 (2d Cir. 2009).

91. *Id.* at 287–88. Since the district court determined that there was no constitutional right to seek damages under *Bivens*, it concluded that “the issue involving state secrets is moot.” *Id.* at 287.

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

93. *Arar*, 414 F. Supp. 2d at 267.

94. *Id.* at 283 (citations omitted).

On June 30, 2008, a three-judge panel of the Second Circuit affirmed the dismissal.<sup>95</sup> An en banc panel of the Second Circuit upheld the decision on November 2, 2009.<sup>96</sup> The en banc court identified several distinct factors that compelled dismissal.<sup>97</sup> Specifically, the court indicated that adjudication would result in excessive judicial entanglement in government affairs and would result in the potential release of confidential information.<sup>98</sup> Even admitting redacted documents would impose undue restrictions on judicial proceedings.<sup>99</sup> In closing remarks, the court suggested that Congress was better situated to provide a remedy. “We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition. By the same token, we can easily locate that competence, expertise, and responsibility elsewhere: in Congress.”<sup>100</sup> The U.S. Supreme Court declined Arar’s petition for certiorari.<sup>101</sup>

While Arar was unsuccessful in U.S. courts, he received a more receptive response in Canada. Following Arar’s release and return to Canada, the Canadian government initiated a public inquiry to examine the circumstances surrounding Arar’s rendition and to consider Canada’s culpability.<sup>102</sup> The Commission of Inquiry conducted an extensive investigation into Arar’s rendition and reviewed the Canadian government’s role.<sup>103</sup> It found that the Canadian government provided the United States with inaccurate information regarding Arar and his alleged terrorist connections, which the United States then used as the basis for detaining him and subsequently sending him to Syria.<sup>104</sup> In addition, the Canadian government failed to take appropriate steps to protect Arar once he

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95. Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008), *aff’d on other grounds on reh’g en banc*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 560 U.S. 978 (2010).

96. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 560 U.S. 978 (2010); *see also Second Circuit Holds That Alleged Victim of Extraordinary Rendition Did Not State a Bivens Claim*, 123 HARV. L. REV. 1787 (2010).

97. *See Arar*, 585 F.3d at 571–82.

98. *Id.* at 574–76.

99. *Id.* at 576–77.

100. *Id.* at 580–81.

101. Arar v. Ashcroft, 560 U.S. 978 (2010).

102. *See, e.g.*, COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 9–10 (2006) [hereinafter COMM’N OF INQUIRY, ANALYSIS], <http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf>. *See generally* Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada’s Arar Inquiry*, 29 CARDOZO. L. REV. 53 (2007); Erin Craddock, Note, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions “Cure” the Due Process Deficiencies in U.S. Removal Proceedings*, 93 CORNELL L. REV. 621 (2008).

103. *See* COMM’N OF INQUIRY, ANALYSIS, *supra* note 102.

104. *Id.* at 13–14.

was in Syrian custody.<sup>105</sup> On January 26, 2007, the Canadian government formally apologized to Arar for its role in his detention and provided him \$10 million in compensation. Prime Minister Stephen Harper issued an apology on behalf of the Canadian government.

On behalf of the Government of Canada, I wish to apologize to you, Monia Mazigh [Arar's wife] and your family for any role Canadian officials may have played in the terrible ordeal that all of you experienced in 2002 and 2003.

Although these events occurred under the last government, please rest assured that this government will do everything in its power to ensure that the issues raised by Commissioner O'Connor are addressed.

I trust that, having arrived at a negotiated settlement, we have ensured that fair compensation will be paid to you and your family. I sincerely hope that these words and actions will assist you and your family in your efforts to begin a new and hopeful chapter in your lives.<sup>106</sup>

### C. Amir Meshal

Amir Meshal is a U.S. citizen who traveled to Somalia in November 2006 to gain a greater understanding of Islam.<sup>107</sup> At the time, south Somalia was relatively peaceful after years of conflict.<sup>108</sup> Soon after he arrived, however, a violent conflict developed in Somalia, and Meshal was forced to flee to neighboring Kenya.<sup>109</sup> For three weeks, Meshal sought refuge and a way to get home.<sup>110</sup> On approximately January 24, 2007, a Kenyan military patrol detained Meshal.<sup>111</sup> Although Meshal was initially held by Kenyan authorities,

105. *See id.* at 14–15 (noting a “serious concern” for actions taken by Canadian officials while Arar was in Syrian captivity).

106. Press Release, Gov't of Can., Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), <https://www.canada.ca/en/news/archive/2007/01/prime-minister-releases-letter-apology-maher-arar-his-family-announces-completion-mediation-process.html?=&wbdisable=true>; *see also* Yasmeen Abu-Laban & Nisha Nath, *From Deportation to Apology: The Case of Maher Arar and the Canadian State*, 39 CAN. ETHNIC STUD. 71 (2008).

107. Second Amended Complaint at ¶ 23, *Meshal v. Higgenbotham*, 47 F. Supp. 3d 115 (D.D.C. 2014) (No. 09-CV-2178-EGS), *aff'd*, 804 F.3d 417 (D.C. Cir. 2015), <https://www.clearinghouse.net/chDocs/public/NS-DC-0005-0003.pdf>.

108. *Id.* ¶ 21.

109. *Id.* ¶¶ 2, 35.

110. *Id.* ¶ 46.

111. *Id.*

he was interrogated on several occasions by U.S. government agents, including two FBI agents.

During these interrogation sessions, U.S. agents threatened Meshal with torture and death. On one occasion, a U.S. government agent grabbed Meshal and forced him to the window and stated, “Allah is up in the clouds,” and “the U.S. is almost as powerful as Allah.”<sup>112</sup> He also told Meshal that the agents knew he was hiding something, but they “had ways of getting the information they want.”<sup>113</sup> The agent threatened to send Meshal to Israel, where he said the Israelis would “make him disappear.”<sup>114</sup> On another occasion, a U.S. government agent told Meshal “that he had spoken with the Egyptians and that they were very interested in speaking with” him.<sup>115</sup> He added “that the Egyptians ‘had ways of making [him] talk.’”<sup>116</sup> The agent alluded to the film *Midnight Express* and warned Meshal that he could also be tortured if he did not cooperate and disclose his ties to Al Qaeda.<sup>117</sup> He also told Meshal that “[y]ou[’ve] made it so that even your grandkids are going to be affected by what you did.”<sup>118</sup>

As part of their investigation, FBI agents contacted Meshal’s parents in the United States and notified them that Meshal was detained in Kenya.<sup>119</sup> Eventually, U.S. consular officials in Kenya discovered Meshal’s detention. At the same time, the Muslim Human Rights Forum, a Kenyan human rights organization, also became aware of Meshal’s detention and began legal proceedings seeking his release.<sup>120</sup> In response, Kenyan officials, working with U.S. government agents, transferred Meshal to Somalia and then Ethiopia where U.S. government agents repeatedly interviewed him again.<sup>121</sup>

Throughout his detention in Ethiopia, U.S. government officials and Ethiopian authorities denied Meshal access to counsel. When Meshal’s family discovered he was being held in Ethiopia, they contacted the State Department to seek assistance.<sup>122</sup> Congressman

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112. *Id.* ¶ 86.

113. *Id.*

114. *Id.*

115. *Id.* ¶ 88.

116. *Id.*

117. *Id.* In the movie *Midnight Express*, a U.S. citizen is detained in Turkey and subjected to repeated torture and abusive treatment while in prison. *MIDNIGHT EXPRESS* (Columbia Pictures 1978).

118. Second Amended Complaint, *supra* note 107, ¶ 88.

119. *Id.* ¶ 102.

120. *See id.* ¶¶ 92–101.

121. *See id.* ¶¶ 108–19.

122. First Amended Complaint at 49, *Meshal v. Higgenbotham*, 47 F. Supp. 3d 115 (D.D.C. 2014) (No. 09-CV-2178-EGS), *aff’d*, 804 F.3d 417 (D.C. Cir. 2015), ECF No. 31.

Rush Holt, who served as Meshal's congressional representative, also inquired about Meshal's status with the FBI and State Department.<sup>123</sup> Soon thereafter, Meshal was released by Ethiopian officials.<sup>124</sup> On May 26, 2007, Meshal returned to the United States.<sup>125</sup> He was never charged with any crime by the United States.

Upon his return to the United States, Meshal filed a lawsuit in the U.S. District Court for the District of Columbia against two FBI agents and several other federal officials who participated in his detention.<sup>126</sup> The complaint raised several constitutional claims, including violations of the Fourth and Fifth Amendments.<sup>127</sup>

Mr. Meshal brings this action against the Defendants for their role in the violation of his rights under the Constitution of the United States. The Constitution does not permit U.S. officials to threaten American citizens with forced disappearance, torture, and other serious harm, or otherwise to interrogate them coercively. Nor does the Constitution permit U.S. officials to evade the elementary commands of due process simply by directing, conspiring, and/or actively and substantially participating with foreign officials to detain, interrogate, or render U.S. citizens in a manner that would be patently unlawful if carried out by those U.S. officials themselves.<sup>128</sup>

The complaint also alleged violations of the Torture Victim Protection Act (TVPA).<sup>129</sup> On June 13, 2014, the district court dismissed the lawsuit.<sup>130</sup> While the court was outraged "by Mr. Meshal's 'appalling (and, candidly, embarrassing) allegations' of mistreatment by the United States of America," it held that a constitutional cause of action was unavailable under the *Bivens* doctrine.<sup>131</sup> Citing circuit precedent, the court also dismissed the TVPA claim because it did not apply to U.S. government officials or private U.S. persons.<sup>132</sup>

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123. Second Amended Complaint, *supra* note 107, ¶ 158.

124. *Id.* ¶ 166.

125. *Id.*

126. *See id.* at 1. Meshal was represented by the American Civil Liberties Union. *Id.*

127. *Id.* ¶ 3.

128. *Id.* ¶ 7.

129. *Id.* ¶¶ 3, 204–13; *see also* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

130. *Meshal v. Higgenbotham*, 47 F. Supp. 3d 115 (D.D.C. 2014), *aff'd*, 804 F.3d 417 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

131. *Id.* at 130 (citation omitted).

132. *Id.* at 123 n.5.

On October 23, 2015, the D.C. Circuit affirmed the dismissal in a 2–1 ruling.<sup>133</sup> The Court of Appeals shared the district court’s concerns regarding the troubling nature of Meshal’s allegations of mistreatment by U.S. government officials.<sup>134</sup> Notwithstanding, the Court found that Meshal’s constitutional claims under *Bivens* were unavailable in light of the unique circumstances of the case.<sup>135</sup> Because Meshal’s case implicated a terrorism investigation and involved the extraterritorial application of constitutional remedies, the Court determined that dismissal was warranted.<sup>136</sup> To achieve redress in such cases, the Court indicated that victims must look to another branch of government.<sup>137</sup> According to the Court, “[i]f people like Meshal are to have recourse to damages for alleged constitutional violations committed during a terrorism investigation occurring abroad, either Congress or the Supreme Court must specify the scope of the remedy.”<sup>138</sup> Judge Brett Kavanaugh issued a concurring opinion reiterating the need for the federal courts to defer to Congress in resolving these claims.<sup>139</sup> According to Judge Kavanaugh, “[i]f I were a Member of Congress, I might vote to enact a new tort cause of action to cover a case like Meshal’s. But as judges, we do not get to make that decision.”<sup>140</sup> In dissent, Judge Nina Pillard argued that Meshal should have the right to challenge the government’s alleged misconduct;<sup>141</sup> indeed, such actions serve as a necessary check on unbridled government power:

Constitutional damages remedies hold out hope of redress to survivors of what is sometimes truly horrific abuse at the hands of government agents. Witness this case. Such claims are rarely brought and, due to legal and factual complexities, they almost never succeed. Yet their existence has enormous value. . . . United States law enforcement is more active internationally today than ever before, increasing the relevance of *Bivens*’ remedial and deterrent functions in cases like this one. Because I do not believe that precedent supports eliminating

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133. Meshal v. Higgenbotham, 804 F.3d 417 (D.C. Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017).

134. *Id.* at 418.

135. *Id.* at 429.

136. *Id.* at 424–25.

137. *Id.* at 426–27.

138. *Id.* at 429.

139. See *id.* at 429–31 (Kavanaugh, J., concurring).

140. *Id.* at 431.

141. *Id.* at 446–47 (Pillard, J., dissenting).

Meshal's suit or that defendants made a showing that any congressional action or special factors should preclude it, I respectfully dissent.<sup>142</sup>

#### D. *Acknowledging There are More Victims*

The stories of Khaled El-Masri, Maher Arar, and Amir Meshal highlight the challenges faced by victims of arbitrary detention and mistreatment during the War on Terror. Regrettably, their stories are not unique and many more victims shared a similar fate.<sup>143</sup> According to a former State Department official, many detainees at Guantanamo were innocent.<sup>144</sup>

[I]t became apparent to me as early as August 2002, and probably earlier to other State Department personnel who were focused on these issues, that many of the prisoners detained at Guantánamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all. I soon realized from my conversations with military colleagues as well as foreign service officers in the field that many of the detainees were, in fact, victims of incompetent battlefield vetting. There was no meaningful way to determine whether they were terrorists, Taliban, or simply innocent civilians picked up on a very confused battlefield or in the territory of another state such as Pakistan.<sup>145</sup>

Similar acknowledgements appear in the 2014 Senate Select Committee on Intelligence report on the CIA's torture and rendition program:

While the CIA acknowledged to the House Permanent Select Committee on Intelligence (HPSCI) in February 2006 that it had wrongfully detained five individuals throughout the course of the detention program, a review of CIA records indicates that at least 21 additional individuals, or a total of 26 of the 119 (22 percent) CIA detainees identified in this Study,

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142. *Id.* at 447 (Pillard, J., dissenting) (citations omitted).

143. *See, e.g.*, ANDY WORTHINGTON, *THE GUANTANAMO FILES* (2007); Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, 41 *SETON HALL L. REV.* 1211 (2011).

144. Declaration of Colonel Lawrence B. Wilkerson (Ret.) at 5, *Hamad v. Bush*, No. CV 05-1009 JDB (D.D.C. Mar. 24, 2010), <http://www.truth-out.org/files/wilkerson-sworn-declaration.pdf>.

145. *Id.* at 4.



did not meet the MON [Memorandum of Notification] standard for detention. This is a conservative calculation and includes only CIA detainees whom the CIA itself determined did not meet the standard for detention.<sup>146</sup>

Some of the detainees who were eventually released by the CIA because they were innocent had been subjected to horrific treatment, including being “subjected to ice water baths and 66 hours of standing sleep deprivation.”<sup>147</sup> As more information is released about U.S. operations during the War on Terror, the number of documented cases involving innocent detainees will only increase.<sup>148</sup> The Bush and Obama administrations refused to accept responsibility.<sup>149</sup> The Trump administration has given no indication it will do so. The federal courts have declined to provide redress.

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146. S. REP. NO. 113–288, at 15–16 (2014) (citations omitted); *see also* MAYER, *supra* note 18, at 183–87 (describing internal reviews at the CIA and the lack of response). The Memorandum of Notification (MON) was issued by President George Bush on Sept. 17, 2001 and authorized the CIA to capture and detain individuals posing a threat to the United States. S. REP. NO. 113–288, Findings and Conclusions, at 9.

147. S. REP. NO. 113–288, at 16 n.32.

148. *See, e.g.*, Alex Emmons, *Former CIA Detainees Describe Previously Unknown Torture Tactic: A Make-Shift Electric Chair*, INTERCEPT (Oct. 3, 2016, 9:00 AM), <https://theintercept.com/2016/10/03/former-cia-detainees-describe-previously-unknown-torture-tactic-a-makeshift-electric-chair/>; Maggie Michael, *In Yemen’s Secret Prisons, UAE Tortures and US Interrogates*, ASSOCIATED PRESS (June 22, 2017), <https://www.apnews.com/4925f7f0fa654853bd6f2f57174179fe>; Greg Miller et al., *Newly Released CIA Files Expose Grim Details of Agency Interrogation Program*, WASH. POST (June 14, 2016), [https://www.washingtonpost.com/world/national-security/newly-released-cia-files-expose-grim-details-of-agency-interrogation-program/2016/06/14/6d04a01e-326a-11e6-95c0-2a6873031302\\_story.html?utm\\_term=.06db0ceef677](https://www.washingtonpost.com/world/national-security/newly-released-cia-files-expose-grim-details-of-agency-interrogation-program/2016/06/14/6d04a01e-326a-11e6-95c0-2a6873031302_story.html?utm_term=.06db0ceef677); Charlie Savage, *15 Guantanamo Detainees Are Sent to Emirates in Largest Obama-Era Transfer*, N.Y. TIMES (Aug. 16, 2016), [https://www.nytimes.com/2016/08/16/us/politics/guantanamo-detainees-emirates-transfer.html?\\_r=0](https://www.nytimes.com/2016/08/16/us/politics/guantanamo-detainees-emirates-transfer.html?_r=0).

149. *See, e.g.*, LORAMY GERSTBAUER, U.S. FOREIGN POLICY AND THE POLITICS OF APOLOGY 104–07 (2016). In stark contrast, the Canadian government offered Maher Arar an apology and reparations for its own actions and complicity. *See supra* note 106 and accompanying text. The European Court of Human Rights held Macedonia accountable for its role in the mistreatment of Khaled El-Masri and provided him compensation for his suffering. *El-Masri v. Former Yugoslav Republic of Maced.*, 2012-VI Eur. Ct. H.R. 263. The United Kingdom also indicated a willingness to offer redress in cases of government mistreatment of detainees. David Cameron, Prime Minister of U.K., Statement Given to the House of Commons on the Treatment of Terror Suspects (July 6, 2010), <https://www.gov.uk/government/speeches/statement-on-detainees> (“[W]e are committed to mediation with those who have brought civil claims about their detention in Guantanamo. And wherever appropriate, we will offer compensation.”); *see* John F. Burns & Alan Cowell, *Britain to Compensate Guantanamo Detainees*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/17/world/europe/17britain.html>. *But see* Cori Crider, *Why Can’t Britain Apologise to These Victims of Rendition?*, GUARDIAN (Jan. 19, 2017, 5:38 PM), <https://www.theguardian.com/commentisfree/2017/jan/19/britain-apologise-rendition-mi6-abdel-hakim-belhaj-gaddafi>.

Indeed, they have been unwilling to even consider the merits of the underlying claims.<sup>150</sup>

And yet, while the federal courts have failed to offer redress in these cases, they have often suggested that some type of remedy is warranted. In *Mohamed v. Jeppesen Dataplan Inc.*, for example, the Ninth Circuit concluded that victims of extraordinary rendition could not seek compensation for their injuries.<sup>151</sup> While the court denied relief, it suggested the plaintiffs might be entitled to non-judicial remedies through executive branch action or remedial legislation. The court even referenced an important historical precedent—the reparations offered to Japanese Americans for their detention during the Second World War.

## II. A HISTORICAL ANALOG: THE CIVIL LIBERTIES ACT OF 1988

The treatment of Japanese Americans by the United States government during the Second World War is, and will always remain, a national shame.<sup>152</sup> It offers a sober reminder that in times of crisis, even courts do not always serve the interests of justice.<sup>153</sup>

### A. *Discrimination and Detention*

Soon after the attack on Pearl Harbor, the U.S. military began developing plans to move and detain individuals of Japanese ancestry living in the western United States.<sup>154</sup> While these plans were

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150. See, e.g., *Salim v. Mitchell*, 183 F. Supp. 3d 1121 (E.D. Wash. 2016); *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 563 U.S. 1002 (2011).

151. *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d at 1091–92.

152. See generally JEANNE WAKATSUKI HOUSTON & JAMES D. HOUSTON, *FAREWELL TO MANZANAR* (1973); *LAST WITNESSES* (Erica Harth ed., 2001); JOHN TATEISHI, *AND JUSTICE FOR ALL* (1984); MICHIE WEGLYN, *YEARS OF INFAMY* (1976).

153. See generally ROGER DANIELS, *THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR* (2013); *JUSTICE DELAYED: THE RECORD OF JAPANESE AMERICAN INTERNMENT CASES* (Peter Irons ed., 1989); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 *UCLA L. REV.* 933 (2004); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489 (1945). Cf. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998) (describing how presidents have suspended most civil liberties laws for the sake of national security during wartime throughout the American history).

154. See generally ROGER DANIELS, *CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II* (1972); ALLAN R. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* (1967); RICHARD REEVES, *INFAMY: THE SHOCKING STORY OF THE JAPANESE-AMERICAN INTERNMENT IN WORLD WAR II* (2015).

ostensibly based on military necessity, they were, in fact, wholly unnecessary. No credible evidence existed that Japanese Americans were disloyal or posed any national security threat. The removal and internment plans were based on fear and motivated by racial animus.<sup>155</sup> On February 19, 1942, President Roosevelt signed Executive Order No. 9066, which authorized the Secretary of War to establish military areas in which designated persons could be removed and excluded.<sup>156</sup> Congress ratified the Executive Order on March 21, 1942 by authorizing criminal liability for individuals who violated military orders regarding entry, presence, or departure within designated military areas or zones or who committed any prohibited acts in these locations.<sup>157</sup> In response, military areas were established in the western United States. The government imposed curfews to regulate and restrict movement of persons of Japanese ancestry, including U.S. citizens and lawful permanent residents.<sup>158</sup> Japanese Americans living in designated areas were forced to sell their property, assemble at designated staging areas, and relocate to internment camps.<sup>159</sup> Ten camps were established, mostly in the western United States.<sup>160</sup> The War Relocation Authority was established in the Office of Emergency Management within the Executive Office of the President to implement these internment policies.<sup>161</sup> The U.S. government forcibly relocated thousands of individuals, both U.S. citizens and permanent residents of Japanese ancestry.

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155. See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 3–6 (2001) (describing the process of Japanese internment).

156. Exec. Order No. 9066, 3 C.F.R. § 1092 (1938–43).

157. Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zones, Pub. L. No. 77-503, 56 Stat. 173 (1942).

158. See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the curfew). No distinction was made between Issei (first generation Japanese Americans) and Nisei (second generation Japanese Americans).

159. NAT'L JAACL POWER OF WORDS II COMM., *POWER OF WORDS HANDBOOK* 5 (2013), <https://jaacl.org/wordpress/wp-content/uploads/2015/08/Power-of-Words-Rev.-Term.-Handbook.pdf>. This Article uses the standard nomenclature although it recognizes that internment camps could also be referred to as concentration camps and internment as incarceration. See *id.* at 10–15; ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATIONS* 19–22 (2d ed. 2013); see also Yoshinori H.T. Himel, *Americans' Misuse of "Internment,"* 14 SEATTLE J. SOC. JUST. 797 (2016).

160. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATIONS*, *supra* note 159, at 167–68; see also GREG ROBINSON, *A TRAGEDY OF DEMOCRACY* 154 (2009).

161. ROBINSON, *A TRAGEDY OF DEMOCRACY*, *supra* note 160, at 106; YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATIONS*, *supra* note 159, at 168–69; Eric L. Muller, *Of Coercion and Accommodation: Looking at Japanese American Imprisonment Through a Law Office Window*, 35 L. & HIST. REV. 277, 280 (2017).

The Supreme Court considered the legitimacy of these military orders in a series of decisions.<sup>162</sup> In *Hirabayashi v. United States*, the Supreme Court considered the constitutionality of curfew and exclusion orders that only applied to individuals of Japanese ancestry.<sup>163</sup> Gordon Kiyoshi Hirabayashi had been convicted of violating the curfew and exclusion orders, which he then challenged as an unconstitutional delegation of authority by Congress and as a violation of the Fifth Amendment.<sup>164</sup> The Court determined that Congress had lawfully ratified Executive Order No. 9066 through its Act of March 21, 1942.<sup>165</sup> Although the Court was troubled that the orders were based on racial classifications, it found the national security considerations proffered by the government to be persuasive.

In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.<sup>166</sup>

Three justices offered concurring opinions, two of which expressed concerns about the broader implications of the decision.<sup>167</sup> There were no dissenting opinions. A companion case, *Yasui v. United States*, similarly held that the curfew order was constitutional.<sup>168</sup>

In *Korematsu v. United States*, which was decided the following year, the Supreme Court considered the constitutionality of the exclusion order that prohibited individuals of Japanese ancestry, including those who were U.S. citizens, from remaining in designated military areas.<sup>169</sup> Fred Toyosaburo Korematsu was convicted of violating the exclusion order even though there were no questions regarding his loyalty to the United States.<sup>170</sup> He challenged his conviction on constitutional grounds. As in *Hirabayashi*, the Court

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162. Several convictions arising out of these decisions were subsequently overturned in *coram nobis* actions.

163. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

164. *Id.* at 83–84. See generally GORDON K. HIRABAYASHI, *A PRINCIPLED STAND: THE STORY OF Hirabayashi v. United States* (2013).

165. *Hirabayashi*, 320 U.S. at 91.

166. *Id.* at 95.

167. See *id.* at 105–14 (Douglas, Murphy & Rutledge, JJ., concurring).

168. *Yasui v. United States*, 320 U.S. 115, 116–17 (1943).

169. *Korematsu v. United States*, 323 U.S. 214 (1944). See generally LORRAINE K. BANNAL, *ENDURING CONVICTION* (2015).

170. *Korematsu*, 323 U.S. at 215–16.

was troubled that the exclusion order solely targeted Japanese Americans.<sup>171</sup> However, it also found the national security considerations presented by the government to be dispositive, citing its earlier reasoning in *Hirabayashi*.<sup>172</sup> According to the Court, “[w]e cannot—by availing ourselves of the calm perspective of hindsight—now say that, at that time, these actions were unjustified.”<sup>173</sup> For these reasons, the Court affirmed Korematsu’s conviction, albeit on limited grounds.<sup>174</sup> The Court stated that “[w]e uphold the exclusion order as of the time it was made and when the petitioner violated it.”<sup>175</sup> But unlike *Hirabayashi*, three justices dissented from the majority opinion.<sup>176</sup> All three dissenting justices agreed the exclusion order was unconstitutional because it was based on racial classifications. In his forceful dissent, Justice Frank Murphy noted the order was racist:

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.<sup>177</sup>

*Ex Parte Endo* was issued the same day as *Korematsu*.<sup>178</sup> In this case, the Supreme Court considered a petition for habeas corpus filed by Mitsuye Endo, a U.S. citizen of Japanese ancestry who challenged her detention at an internment camp.<sup>179</sup> The Court acknowledged that there was no dispute that Endo was a loyal citizen, and there were no allegations that she supported the Japanese war effort or

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171. *Id.* at 216.

172. *Id.* at 218.

173. *Id.* at 223–24.

174. *Id.* at 224.

175. *Id.* at 219.

176. *Id.* at 225, 233, 242 (Roberts, Murphy & Jackson, JJ., dissenting).

177. *Id.* at 242 (Murphy, J., dissenting).

178. *Ex Parte Endo*, 323 U.S. 283 (1944) (both decisions were issued on December 18, 1944).

179. *Id.* at 291–94.

opposed the United States.<sup>180</sup> The Court also found it significant that neither Executive Order No. 9066 nor the subsequent Act of Congress that ratified it included language authorizing detention.<sup>181</sup> Such an omission distinguished *Endo* from prior cases.<sup>182</sup> Under such circumstances, the Court found her detention unlawful. “When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.”<sup>183</sup> For these reasons, *Endo* was entitled to unconditional release from internment.

By the end of the war, over 110,000 individuals of Japanese ancestry had been forced from their homes.<sup>184</sup> Their freedom of movement was highly regulated, and most were eventually interned in camps. Calls for redress were initially muted. In 1948, Congress adopted the Japanese American Evacuation Claims Act, which authorized compensation to individuals who had suffered property losses as a result of evacuation orders.<sup>185</sup> Additional legislation offered limited social security and retirement benefits to individuals who had been interned.<sup>186</sup> In the 1970s, a growing community of Japanese American activists supported, by the burgeoning civil rights movement, issued renewed calls for redress.

### B. *The Road to Reparations*

After extensive lobbying by the Japanese American community and civil rights groups, Congress authorized the adoption of the Commission on Wartime Relocation and Internment of Civilians Act in 1980.<sup>187</sup> The Act acknowledged that thousands of U.S. citizens had been relocated and detained in internment camps during the Second World War.<sup>188</sup> It also determined that no inquiry had been made into these matters. The Act established a bipartisan Commission that was directed to:

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180. *Id.* at 294.

181. *Id.* at 300–01.

182. *See id.* at 301.

183. *Id.* at 302.

184. ROBINSON, *A TRAGEDY OF DEMOCRACY*, *supra* note 160, at 143; MITCHELL T. MAKI ET AL., *ACHIEVING THE IMPOSSIBLE DREAM I* (1999).

185. Japanese-American Evacuation Claims Act, Pub. L. 80-886, 62 Stat. 1231 (1948).

186. *See* 42 U.S.C. § 431 (2012); 5 U.S.C. § 8332(l) (2012).

187. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. 96-317, 94 Stat. 964 (1980). *See generally* YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATIONS*, *supra* note 159, at 315; Eric K. Yamamoto & Liann Ebesugawa, *Report on Redress: The Japanese American Internment*, in *THE HANDBOOK OF REPARATIONS* 257, 269–70 (Pablo de Greiff ed., 2006); MAKI ET AL., *supra* note 184, at 85–116.

188. Commission on Wartime Relocation and Internment of Civilians Act § 2(a).

- (1) review the facts and circumstances surrounding Executive Order Numbered 9066, issued February 19, 1942, and the impact of such Executive Order on American citizens and permanent resident aliens;
- (2) review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including Aleut civilians, and permanent residents of the Aleutian and Pribilof Islands; and
- (3) recommend appropriate remedies.<sup>189</sup>

The Commission was granted broad powers to investigate, and the Attorney General was authorized to assist the Commission in gaining witness attendance and testimony as well as document production.<sup>190</sup> The Commission was empowered to establish its own staff and seek the assistance of appropriate federal agencies.

In pursuing its mandate, the Commission studied historical records and conducted multiple hearings throughout the United States.<sup>191</sup> It received testimony from hundreds of witnesses, including internees, former government officials, and military leaders.<sup>192</sup> In February 1983, the Commission presented its monumental report, *Personal Justice Denied*, to Congress.<sup>193</sup> Through its methodical review of the historical record, it concluded that Executive Order No. 9066 was not compelled by military necessity.<sup>194</sup> Other factors, including racial animus, had motivated the policies adopted against persons of Japanese ancestry.

The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in any atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative

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189. *Id.* § 4(a).

190. *Id.* § 5(a).

191. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED I (1982) [hereinafter PERSONAL JUSTICE DENIED].

192. *Id.*

193. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: PART II: RECOMMENDATIONS I (1983) [hereinafter PERSONAL JUSTICE DENIED: PART 2].

194. PERSONAL JUSTICE DENIED, *supra* note 191, at 18.

evidence against them, were excluded, removed and detained by the United States during World War II.<sup>195</sup>

In a subsequent report issued in June 1983, the Commission acknowledged U.S. responsibility for the internment and called for several forms of redress.<sup>196</sup> First, Congress should pass a Joint Resolution signed by the President apologizing on behalf of the nation for the exclusion, removal, and detention policies.<sup>197</sup> Second, the President should pardon those individuals who were convicted of violating curfew and removal laws that were based on discriminatory grounds.<sup>198</sup> The Commission called on the Department of Justice to review any wartime convictions that were based on an individual's refusal to accept discriminatory treatment due to their Japanese ancestry. Third, Congress should direct the appropriate Executive agencies to consider applications for reinstatement of positions, status, or entitlements that were lost in whole or in part by individuals of Japanese ancestry because of the events that occurred during the Second World War.<sup>199</sup> Fourth, Congress should appropriate funds to establish a special foundation that would support research and educational activities regarding the discriminatory policies that were applied to individuals of Japanese ancestry during the Second World War.<sup>200</sup> Finally, Congress should appropriate \$1.5 billion for the payment of reparations as well as the establishment of a foundation to support research and educational activities.<sup>201</sup> The report recommended that compensatory payments of \$20,000 should be provided to each of the "surviving persons [who were] excluded from their places of residence pursuant to Executive Order 9066."<sup>202</sup> After such payments have been made, the remainder of the fund would be used for research and educational activities, including providing for "the general welfare of the Japanese American community."<sup>203</sup>

The Commission also provided a set of recommendations to address the treatment of Aleuts during the Second World War. The Aleuts, which included U.S. citizens and lawful permanent residents, had been forcibly removed from their homes on the

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195. *Id.*

196. PERSONAL JUSTICE DENIED: PART 2, *supra* note 193.

197. *Id.* at 8.

198. *Id.*

199. *Id.* at 8–9.

200. *Id.* at 9.

201. *Id.* at 9 n.1 (one member of the Commission dissented from this recommendation).

202. *Id.*

203. *Id.* at 10.



Aleutian and Pribilof Islands. Unlike the treatment of individuals of Japanese ancestry, “[t]he Commission found no persuasive showing that evacuation of the Aleuts was motivated by racism or that it was undertaken for any reason but their safety.”<sup>204</sup> Rather, the evacuation orders were a legitimate wartime measure.<sup>205</sup> Notwithstanding, the Aleuts suffered the loss of their freedom as well as the loss of land and property.<sup>206</sup> The Commission recommended the establishment of a \$5 million fund to be used for community and individual purposes, including education, cultural, and historical rebuilding, as well as for medical or social services.<sup>207</sup> In addition, the Commission proposed that Congress should appropriate funds to rebuild and restore churches damaged or destroyed in the Aleutian Islands during the Second World War and should remove any debris remaining from the war.<sup>208</sup> Congress should also declare that the island of Attu be conveyed to the Aleuts.<sup>209</sup> Finally, surviving Aleuts who had been evacuated by the federal government should receive a payment of \$5,000.<sup>210</sup>

The Commission concluded its report by acknowledging the importance of accepting responsibility for past injustices. “It is our belief that, though history cannot be unmade, it is well within our power to offer help, and to acknowledge error.”<sup>211</sup>

While there was strong support for the Commission’s findings, the issue of financial compensation generated extensive controversy.<sup>212</sup> There was concern that providing reparations to Japanese Americans would create a precedent for other groups such as Native Americans and African Americans.<sup>213</sup> It was also argued that it would be unfair to require current citizens to pay for the misdeeds of prior generations.<sup>214</sup> An alternative approach to reparations, a class action lawsuit filed on behalf of victims of internment, proved

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204. *Id.*

205. *Id.*

206. *Id.* at 10–11.

207. *Id.* at 11–12.

208. *Id.* at 12.

209. *Id.*

210. *Id.*

211. *Id.* at 13.

212. See ROGER DANIELS, PRISONERS WITHOUT TRIAL 98–102 (1993) (describing the controversy).

213. *Id.* at 99; see also MAKI ET AL., *supra* note 184, at 141, 182 (generally discussing that other groups might be entitled to reparations).

214. *Japanese-American Evacuation Redress: Hearing on S. 1520 Before the Subcomm. on Admin. Practice and Procedure of the S. Judiciary Comm.*, 98th Cong. 118 (1983) (statement of Representative Daniel E. Lundgren).

unsuccessful.<sup>215</sup> A different set of legal proceedings, however, were successful and spurred renewed calls for reparations.

In 1983, Gordon Hirabayashi and Fred Korematsu filed separate *coram nobis* petitions in federal court seeking to vacate their earlier convictions on account of governmental misconduct.<sup>216</sup> They asserted the U.S. government had known that Japanese Americans posed no security threat during the Second World War and that this information had been suppressed during their criminal proceedings. Both petitions were eventually granted.<sup>217</sup> A third petition for *coram nobis* filed by Minoru Yasui, who had been convicted of violating the curfew order, was denied although the district court vacated his conviction.<sup>218</sup> These decisions offered powerful support to the growing movement for redress.<sup>219</sup> As noted by Judge Marilyn Patel in her decision to vacate Korematsu's conviction.

*Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.<sup>220</sup>

The legitimacy of the *Hirabayashi* and *Korematsu* decisions was further undermined by an acknowledgement in 2011 from the Office of the Solicitor General that it had failed to inform the Supreme Court of relevant evidence in these cases.<sup>221</sup> According to Acting Solicitor General Neal Katyal, the Solicitor General had failed to

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215. *Hohri v. United States*, 847 F.2d 779 (Fed. Cir. 1988).

216. DANIELS, *THE JAPANESE AMERICAN CASES*, *supra* note 153, at 170–73 (describing how the case was filed); YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATIONS*, *supra* note 159, at 280.

217. *Hirabayashi v. United States*, 828 F.2d 591, 594 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

218. *Yasui v. United States*, 772 F.2d 1496, 1497 (9th Cir. 1985).

219. MAKI ET AL., *supra* note 184, at 136.

220. *Korematsu*, 584 F. Supp. at 1420.

221. *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUST. (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.

provide candid representations to the Court in these cases, and this was a mistake.

### C. *The Civil Liberties Act of 1988*

After several years of heated negotiations, Congress adopted the Civil Liberties Act of 1988.<sup>222</sup> Its adoption was the result of extensive lobbying by Japanese American advocacy groups and the influence of several members of Congress who had themselves been interned during the Second World War.<sup>223</sup> The Act, which implemented the Commission's recommendations, was signed by President Ronald Reagan on August 10, 1988. When President Reagan signed the Act, he acknowledged the importance of accepting responsibility for the injustices of the internment program. He said, "[N]o payment can make up for those lost years. So, what is most important in this bill has less to do with property than with honor. For here we admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law."<sup>224</sup> The Act offered a formal apology to U.S. citizens and permanent residents of Japanese ancestry for the injustices caused by the evacuation, relocation, and internment programs implemented during the Second World War.<sup>225</sup>

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and

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222. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2, 102 Stat. 903 (codified at 50 U.S.C.A. § 4202 (West. 2017)).

223. See DANIELS, PRISONERS WITHOUT TRIAL, *supra* note 212, at 88–106; MAKI ET AL., *supra* note 184, at 64–188. Not all Japanese Americans supported the legislation. Some argued that no payments could adequately compensate them for their suffering. See MAKI ET AL., *supra* note 184, at 140–41; YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 159, at 324.

224. Ronald Reagan, President of the U.S., Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians (Aug. 10, 1988), <http://www.presidency.ucsb.edu/ws/?pid=36240>.

225. Civil Liberties Act of 1988 § 2(a).

intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.<sup>226</sup>

Congress offered a similar apology to Aleut civilian residents for their relocation and mistreatment.<sup>227</sup>

The Act authorized the Attorney General to review cases where U.S. citizens or permanent residents of Japanese ancestry were convicted of violating Executive Order No. 9066 or any other order or law involving the evacuation, relocation, or internment of individuals solely on the basis of their Japanese ancestry and where the convictions occurred because these individuals had refused to comply with such discriminatory treatment.<sup>228</sup> The Attorney General was authorized to recommend appropriate cases to the President for pardon, and the President was requested to offer pardons to those individuals.<sup>229</sup> In addition, federal departments and agencies were required to review with liberality the applications by individuals for reinstatement of positions, status, or entitlements that were lost in whole or in part because of “any discriminatory act of the United States Government against such individual[s] which was based upon the individual’s Japanese ancestry and which occurred during the evacuation, relocation, and internment period.”<sup>230</sup>

The Act established the Civil Liberties Public Education Fund.<sup>231</sup> It also authorized the appropriation of \$1.25 billion for the Fund.<sup>232</sup> The Attorney General would use the Fund to pay eligible individuals \$20,000 in reparations.<sup>233</sup>

[T]he term “eligible individual” means any individual of Japanese ancestry [or the spouse or a parent of an individual of Japanese ancestry] who is living on the date of the enactment of this Act and who, during the evacuation, relocation, and internment period—

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226. *Id.*

227. *Id.* § 2(b).

228. *Id.* tit. I, § 102(a).

229. *Id.* tit. I, § 102(b)–(c).

230. *Id.* tit. I, § 103(a).

231. *Id.* tit. I, § 104(a).

232. *Id.* tit. I, § 104(e).

233. *Id.* tit. I, § 105(a)(1).

(A) was a United States citizen or a permanent resident alien; and

(B)(i) was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of—

(I) Executive Order Numbered 9066, dated February 19, 1942;

(II) the Act entitled “An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones”, approved March 21, 1942 (56 Stat. 173); or

(III) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry; or

(ii) was enrolled on the records of the United States Government during the period beginning on December 7, 1941, and ending on June 30, 1946, as being in a prohibited military zone;

except that the term “eligible individual” does not include any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country;<sup>234</sup>

If an eligible individual was deceased, payment would be provided to their spouse, children, or parents who were living at the time of payment.<sup>235</sup> If such individuals did not exist, no payment would be authorized. It took two years before Congress actually appropriated the funds authorized by the Civil Liberties Act.<sup>236</sup>

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234. *Id.* tit. I, § 108(2). As enacted in 1988, the Act limited eligibility to those of Japanese descent. The 1992 amendments added the following language: “or the spouse of a parent of an individual of Japanese ancestry.” Civil Liberties Act Amendments of 1992, Pub. L. 102-371, § 3, 106 Stat. 1167, 1067.

235. *Id.* tit. I, § 105(a)(7).

236. See MAKI ET AL., *supra* note 184, at 199–210 (describing the two year process).

The Civil Liberties Act also established the Civil Liberties Public Education Fund Board of Directors.<sup>237</sup> The President was authorized to appoint the Board with Senate advice and consent.<sup>238</sup> The Board was authorized to use the Public Education Fund:

[T]o sponsor research and public educational activities, and to publish and distribute the hearings, findings, and recommendations of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood . . . .<sup>239</sup>

To implement the Civil Liberties Act, the Department of Justice established the Office of Redress Administration (ORA) within the Civil Rights Division.<sup>240</sup> ORA's primary responsibility was to oversee the reparations administration process, which included identifying and authorizing payments to eligible individuals. To identify potential claimants, it engaged in extensive outreach to the Japanese American community in the United States.<sup>241</sup> It publicized the program in various newspapers and scheduled information sessions to further promote its work. It even engaged in outreach to Japan and throughout Latin America.<sup>242</sup> Individuals were not required to apply for reparations although they could affirmatively notify ORA of their eligibility.<sup>243</sup> ORA was responsible for reviewing the eligibility of individuals for reparations and disbursing payments.<sup>244</sup> It also established an appeals process to consider the claims of individuals who were deemed ineligible for reparations.<sup>245</sup>

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237. Civil Liberties Act of 1988, tit. I, § 106(a).

238. *Id.* tit. I, § 106(c)(1).

239. *Id.* tit. I, § 106(b)(1).

240. Redress Provisions for Persons of Japanese Ancestry, 54 Fed. Reg. 34,157-01 (Aug. 18, 1989) (codified at 28 C.F.R. pt. 74); *see also* Redress Provisions for Persons of Japanese Ancestry, 54 Fed. Reg. 25,291-01 (June 14, 1989) (codified at 28 C.F.R. pt. 74).

241. Redress Provisions for Persons of Japanese Ancestry, 54 Fed. Reg. at 34,157.

242. Press Release, U.S. Dep't of Justice, Ten Year Program to Compensate Japanese Americans Interned During World War II Closes Its Doors (Feb. 19, 1999), <https://www.justice.gov/archive/opa/pr/1999/February/059cr.htm>.

243. Redress Provisions for Persons of Japanese Ancestry, 54 Fed. Reg. at 34,160.

244. *Id.* at 34,157.

245. *Id.* at 34,161. ORA also considered whether it was appropriate to expand the scope of eligibility for reparations, including Peruvian Japanese who were brought to the United States during World War II, minors who were repatriated to Japan during World War II, and voluntary evacuees who did not complete "Change of Residence" cards. *See* Individuals of Japanese Ancestry Who Were Interned During World War II, 53 Fed. Reg. 41,252-01 (Oct. 20,

The first reparation payments were made on October 9, 1990 and were presented by the Attorney General to nine elderly survivors at a formal ceremony in the Great Hall of the Department of Justice.<sup>246</sup> Each survivor received a check for \$20,000 and an acknowledgement letter from President George H.W. Bush.<sup>247</sup> In subsequent years, Congress adopted several amendments to the Civil Liberties Act. In the Civil Liberties Act Amendments of 1992, Congress increased the amount of the Fund from \$1.25 billion to \$1.65 billion.<sup>248</sup> It broadened the scope of eligibility.<sup>249</sup> It added a provision that would give claimants the benefit of the doubt in situations where there was “an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of eligibility.”<sup>250</sup> And, it added a judicial review provision allowing unsuccessful claimants to seek judicial review before the United States Claims Court (which was subsequently revised to the U.S. Court of Federal Claims).<sup>251</sup> Upon signing the Civil Liberties Act Amendments, President Bush recognized the significance of the legislation but also its limitations by acknowledging that “[n]o monetary payments can ever fully compensate loyal Japanese Americans for one of the darkest incidents in American constitutional history. We must do everything possible to ensure that such a grave wrong is never repeated.”<sup>252</sup>

While the Civil Liberties Act authorized the establishment of the Civil Liberties Public Education Fund Board of Directors, it took several years before the Board was formally established. In 1996, President Bill Clinton appointed eight individuals to serve on the Board.<sup>253</sup> Pursuant to the Civil Liberties Act, the Board was charged

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1988) (codified at 28 C.F.R. pt. 74); *see also* Redress Provisions for Persons of Japanese Ancestry: Guidelines for Individuals Who Relocated to Japan as Minors During World War II, 61 Fed. Reg. 51,008-01, 51,110 (Sept. 30, 1996) (codified at 28 C.F.R. pt. 74); Redress Provisions for Persons of Japanese Ancestry, 61 Fed. Reg. 17,667, 17,669 (Apr. 22, 1996) (codified at 28 C.F.R. pt. 74).

246. MAKI ET AL., *supra* note 184, at 213.

247. *See* DANIELS, THE JAPANESE AMERICAN CASES, *supra* note 153, at 161. Some commentators have indicated that President Bush’s letter did not include a formal apology. In contrast, they point out that President Bill Clinton’s letter to internees included an explicit apology. *E.g., id.* at 161–62.

248. Civil Liberties Act Amendments of 1992, Pub. L. No. 102-371, § 2, 106 Stat. 1167.

249. *Id.* § 7.

250. *Id.* § 4(a).

251. *Id.* § 4(b).

252. George H.W. Bush, President of the U.S., Presidential Statement on Signing the Civil Liberties Act Amendments of 1992 (Sept. 27, 1992), <http://www.presidency.ucsb.edu/ws/?pid=21521>.

253. MAKI ET AL., *supra* note 184, at 226.

with funding research and public education activities relating to internment.<sup>254</sup> Eventually, the Fund was used to support a variety of projects, including “curriculum, landmarks/exhibits, art/media, community development, research, research resources, and national fellowships.”<sup>255</sup> Substantively, the projects addressed numerous issues, including the stories of “Nisei veterans, the role of Nisei women, Japanese Latin Peruvians, those interned in Department of Justice camps, the effects of incarceration on Sansei and Yonsei, the experience of Hawaiians during World War II, the role of the Military Intelligence Services, those who resisted incarceration, and the redress movement.”<sup>256</sup> Project recipients included “museums, resource libraries, state arts and humanities councils, K-12 school teachers, universities, research institutes, community colleges, National Asian American organizations, artists and theater groups, graduate students, those who were incarcerated and other talented individuals knowledgeable about the lessons learned from the incarceration.”<sup>257</sup> In total, the Board distributed 132 grants totaling \$3.3 million.<sup>258</sup> In addition, it scheduled a National Day of Remembrance on February 19, 1998, and a national conference for all grant recipients in June 1998.<sup>259</sup> It also transcribed the earlier hearings of the Commission on Wartime Relocation and Internment of Civilians and re-published *Personal Justice Denied*.<sup>260</sup>

Over \$1.6 billion was eventually distributed from the Fund.<sup>261</sup> There were 82,219 individuals of Japanese ancestry who were forcibly evacuated, relocated, and interned that received reparation

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254. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 106(b)(1), 102 Stat. 903, 908 (1988).

255. *CLPEF Background*, CLPEF NETWORK, <http://www.momomedia.com/CLPEF/backgrnd.html> (last visited Oct. 22, 2017). The grant records for the Civil Liberties Public Education Fund Grant Program are located at the Japanese American National Museum. *Finding Aid for the Civil Liberties Public Education Fund Grant Program Records*, ONLINE ARCHIVE CAL., <http://www.oac.cdlib.org/findaid/ark:/13030/kt3c6033q1/> (last visited Oct. 22, 2017).

256. *CLPEF Background*, *supra* note 255.

257. *Id.* See also YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 159, at 324–25.

258. MAKI ET AL., *supra* note 184, at 227.

259. *CLPEF Background*, *supra* note 255.

260. *Id.*; see also PERSONAL JUSTICE DENIED, *supra* note 191.

261. Mark K. Hanasono, Note, *Stranded in Japan and the Civil Liberties Act of 1988 Recognition for an Excluded Group of Japanese Americans*, 6 ASIAN AM. L.J. 151, 154 (1999); Press Release, U.S. Dep’t of Justice, Ten Year Program to Compensate Japanese Americans Interned During World War II Closes Its Doors, *supra* note 242. Not all individuals subject to detention during World War II were offered redress. See Hanasono, *supra*, at 154 (1999); Joseph C. Mauro, Note, *Wartime Prejudice Against Persons of Italian Descent: Does the Civil Liberties Act of 1988 Violate Equal Protection?*, 15 MICH. J. RACE & L. 445, 448 (2010).



payments of \$20,000 and a presidential apology.<sup>262</sup> Upon completing its work, the Office of Redress Administration officially closed on February 5, 1999.<sup>263</sup> At the time, Assistant Attorney General Bill Lann Lee acknowledged the success of the reparations program. In a public statement, Lee noted that “[t]his is a great example of a program that worked . . . . We set out to locate every possible claimant who was interned nearly half a century ago. And through our efforts, we have accounted for almost 99% of them. That’s a remarkable accomplishment.”<sup>264</sup> In subsequent years, the United States took additional steps to memorialize the ignominy surrounding Japanese internment. In 2006, for example, Congress authorized government funds “to provide for the preservation of the historic confinement sites where Japanese Americans were detained during World War II.”<sup>265</sup> Activists such as Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui were each awarded the Presidential Medal of Freedom for their actions opposing the discriminatory policies that affected thousands of innocent Americans during the Second World War.<sup>266</sup>

#### D. *Extending the Reparations Program*

One of the final battles of the reparations movement concerned the plight of individuals of Japanese ancestry living in Latin American countries during the Second World War and who were detained and brought to the United States at the request of the U.S. government.<sup>267</sup> These individuals were not U.S. citizens or permanent residents. Most were nationals of Latin American countries. Significantly, they posed no threat to the United States or even their home countries. Rather, their relocation and internment was “motivated by a desire to increase the number of persons who could

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262. Press Release, U.S. Dep’t of Justice, *Ten Year Program*, *supra* note 242.

263. *Id.*

264. *Id.*

265. Preservation of Historic Japanese Confinement Sites, Pub. L. No. 109-441, 120 Stat. 3288 (2006).

266. Frances Kai-Hwa Wang, *Minoru Yasui to Receive Presidential Medal of Freedom*, NBC NEWS (Nov. 17, 2015, 1:05 PM), <https://www.nbcnews.com/news/asian-america/minoru-yasui-receive-presidential-medal-freedom-n464971>. Unlike Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui, Mitsuye Endo was not awarded the Presidential Medal of Freedom.

267. See generally P. SCOTT CORBETT, *QUIET PASSAGES* 139–66 (1987); C. HARVEY GARDINER, *PAWNS IN A TRIANGLE OF HATE* (1981); Ayako Hagihara & Grace Shimizu, *The Japanese Latin American Wartime and Redress Experience*, 28 *AMERASIA J.* 203 (2002) (concluding by calling for the United States to provide redress to an estimated 2,000 Japanese Latin Americans who were still denied equitable redress in 2002).

potentially be exchanged for U.S. civilians and military personnel in Japanese custody.”<sup>268</sup> Approximately 2,300 individuals of Japanese descent from thirteen Latin American countries were eventually detained in the United States.<sup>269</sup> The United States then exchanged hundreds of these individuals for U.S. citizens and military personnel who were being held as prisoners of war in Japan.<sup>270</sup> When the exchange program ended, over 1,000 Japanese Latin Americans remained interned in the United States.<sup>271</sup> At the end of the war, the United States deported the majority of these individuals to Japan, a country most of them had never visited.<sup>272</sup>

During the negotiations for the Civil Liberties Act, Congress briefly considered the eligibility of Japanese Latin Americans for reparations.<sup>273</sup> Because these individuals were not U.S. citizens or permanent residents at the time of their internment, they were eventually found to be ineligible. On May 20, 1997, five of these individuals brought a class action lawsuit in the U.S. Court of Federal Claims seeking reparations under the Civil Liberties Act. In *Mochizuki v. United States*, the U.S. government agreed to a proposed settlement that would provide class members with a reparations payment of \$5,000 and a presidential apology.<sup>274</sup> When the court approved the final settlement, it acknowledged the tragic experiences of the plaintiffs and the suffering they endured.<sup>275</sup> Eventually, 145 individuals were provided reparation payments of \$5,000 and received a presidential apology.<sup>276</sup> There was significant dissatisfaction with the terms of the settlement, however, including by those individuals who were approved for reparations. Some argued that they should be entitled to the same amount received by

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268. S. REP. NO. 111-112, at 2 (2009).

269. PERSONAL JUSTICE DENIED, *supra* note 191, at 305.

270. *Id.*

271. *Id.* at 311.

272. *Id.* at 311–12; *see also* Hagihara & Shimizu, *supra* note 267, at 212–13.

273. MAKI ET AL., *supra* note 184, at 222; YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 159, at 345; Hagihara & Shimizu, *supra* note 267, at 210–13.

274. *Mochizuki v. United States*, 41 Fed. Cl. 54, 55–57 (1998).

275. *Mochizuki v. United States*, 43 Fed. Cl. 97, 97 (1999). The court included the personal statements of the class members to the opinion, “so that their account of those trying times can be more widely known.” *Id.*

276. Press Release, U.S. Dep’t of Justice, Japanese Latin Americans to Receive Compensation for Internment During World War II (June 12, 1998), <https://www.justice.gov/archive/opa/pr/1998/June/276.htm.html>; *Search the Compensation and Reparations for the Evacuation, Relocation, and Internment Index (Redress Case Files)*, NAT’L ARCHIVES, <https://www.archives.gov/research/japanese-americans/redress#ora> (last updated Feb. 22, 2017) (providing information on the 145 individuals receiving reparation payments). *See generally* MAKI ET AL., *supra* note 184, at 222; YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 159, at 344–50; Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275 (1998).

Japanese Americans who had been detained. Others argued that more individuals should have received reparation payments. As a result, several efforts were made to establish a new commission to investigate the relocation, internment, and deportation of “Latin Americans of Japanese descent” and to recommend appropriate remedies.<sup>277</sup> In 2009, the Senate Committee on Homeland Security and Governmental Affairs conducted hearings on the treatment of Latin Americans of Japanese descent during the Second World War.<sup>278</sup> The Committee acknowledged that “further work remains” and proposed the establishment of a commission to “investigate and determine facts and circumstances surrounding the relocation, internment, and deportation to Axis countries of Latin Americans of Japanese descent.”<sup>279</sup> Despite these pronouncements, Congress took no further legislative action. Litigation on behalf of Japanese Latin Americans in U.S. courts and before international tribunals has also proven unsuccessful.<sup>280</sup>

In the United States, the Civil Liberties Act of 1988 remains the best example of official redress for past injustices.<sup>281</sup> A handful of other redress movements have occurred in the United States.<sup>282</sup> Some of these movements were successful; most were not. But as President Bush indicated in his letter to the recipients of reparations under the Civil Liberties Act, even the most successful examples of official redress must acknowledge the limits of legislation.

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation’s resolve to rectify injustice and to uphold the rights of

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277. See, e.g., S. 69, 111th Cong. (2009); H.R. 42, 111th Cong. (2009).

278. See S. 2553, 102d Cong. (1992); see also *Treatment of Latin Americans of Japanese Descent, European Americans, and Jewish Refugees During World War II: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Security, and Int’l L. of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Japanese Latin Americans Hearing*] (the House also conducted hearings on the issue).

279. S. REP. NO. 111-112, at 1, 3 (2009).

280. *Japanese Latin American Hearing*, *supra* note 278, at 94; see, e.g., *Shibayama v. United States*, 55 Fed. Cl. 720 (2002); *Shima v. Ashcroft*, 11 Fed. Appx. 923 (9th Cir. 2001); *Kato v. United States*, 1 Fed. Appx. 630 (9th Cir. 2001); *Shibayama v. United States*, Case 434-03, Inter-Am. Comm’n H.R. Report No. 26/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2007).

281. Canada adopted a similar reparations program to address its own mistreatment of Japanese Canadians during the Second World War. ROBINSON, A TRAGEDY OF DEMOCRACY, *supra* note 160, at 301–02. In addition, both California and Washington adopted legislation providing payments to individuals who had been terminated from state jobs because of their Japanese ancestry during the Second World War. MAKI ET AL., *supra* note 184, at 117–21.

282. Other examples include the reparations movements for African Americans and Native Americans. See generally WHEN SORRY ISN’T ENOUGH 233–438 (Roy L. Brooks ed., 1999); YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 159, at 331–78.

individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done . . . .<sup>283</sup>

### III. A LEGISLATIVE PROPOSAL: THE CIVIL REDRESS AND HISTORICAL MEMORY ACT OF 2029

The Civil Redress and Historical Memory Act of 2029 appears in full as an Appendix to this Article. It is modeled after the Civil Liberties Act of 1988 and also incorporates several provisions from the Commission on Wartime Relocation and Internment of Civilians Act of 1980.<sup>284</sup> The Act is designed to address the cases of El-Masri, Arar, Meshal, and many others—individuals who were wrongfully detained and abused by the U.S. government or by other countries with the complicity of the United States during the War on Terror, and yet who were innocent and were never offered any redress by the United States.

#### A. *The Need for Redress and Memory*

Echoing the words of the Civil Liberties Act of 1988, the Civil Redress and Historical Memory Act would acknowledge the fundamental injustices committed by the United States during the War on Terror and accept responsibility for these actions. Congress should adopt this legislation for several reasons.<sup>285</sup>

First, many individuals detained and abused during the War on Terror were innocent. They committed no crime and posed no threat to the United States. They lost their freedom and the ability to live a life of their own choosing. They lost time with family and friends. They certainly should not have been subjected to mistreatment. These individuals suffered physical and mental abuse during

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283. Letter from President George H.W. Bush, President of the U.S. to Internees (Oct. 1991) (on file with California State University—Sacramento, Department of Special Collections and University Archives).

284. In *Mohamed v. Jeppesen Dataplan Inc.*, the Ninth Circuit cited the reparation program offered to Japanese Latin Americans who were abducted and interned in the United States during the Second World War as an example of how the United States could compensate individuals subjected to rendition. *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070, 1091 (9th Cir. 2010).

285. On the various reasons for providing redress, see Wexler & Robbenolt, *supra* note 8, at 149–67.

their detention.<sup>286</sup> Some were even tortured.<sup>287</sup> For many of these individuals, their suffering continues long after their release.<sup>288</sup>

Individuals who have been harmed in such a manner should be provided redress.<sup>289</sup> An apology acknowledges their suffering and accepts responsibility for it. In fact, the failure to acknowledge such suffering and accept responsibility perpetuates the anguish of victims, who may feel dismissed in the face of such denial.<sup>290</sup> Reparations offer financial compensation for the physical and mental suffering of the victims.<sup>291</sup> Reparations can also provide financial assistance to individuals who may have incurred medical bills and similar expenses as a result of their mistreatment. While compensation seldom offers full satisfaction for lost freedom and is a poor proxy for pain and suffering, it is a common remedy and important nonetheless.<sup>292</sup> In approving the final settlement for those individuals of Japanese ancestry who had been deported from Latin American countries and interned in the United States, the U.S. Court of Federal Claims acknowledged both the importance and the limits of financial compensation.

No settlement is ever perfect. No compensation is ever equivalent to a serious human loss. Who among us would ever trade our eyes or legs for \$5,000 or \$20,000 or a hundred

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286. See, e.g., Matt Apuzzo et al., *U.S. Torture Leaves a Legacy of Detainees with Damaged Minds*, N.Y. TIMES (Oct. 9, 2016), <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html>; Editorial, *Torture and its Psychological Aftermath*, N.Y. TIMES (Oct. 21, 2016), [https://www.nytimes.com/2016/10/21/opinion/torture-and-its-psychological-aftermath.html?\\_r=0](https://www.nytimes.com/2016/10/21/opinion/torture-and-its-psychological-aftermath.html?_r=0).

287. See *supra* note 286.

288. Post-traumatic stress disorder (PTSD) and other physical and medical conditions are often experienced by survivors of torture. See Alexander C. McFarlane, *Assessing PTSD and Comorbidity: Issues in Differential Diagnosis*, in *BROKEN SPIRITS* 81 (John P. Wilson et al. eds., 2004); Angela Nickerson et al., *Emotional Suppression in Torture Survivors: Relationship to Post-traumatic Stress Symptoms and Trauma-Related Negative Affect*, 242 *PSYCHIATRY RES.* 233 (2016); Raija-Leena Punamäki et al., *Nature of Torture, PTSD, and Somatic Symptoms Among Political Ex-Prisoners*, 23 *J. TRAUMATIC STRESS* 532 (2010); Thomas Wenzel et al., *The DSM 5 and the Istanbul Protocol: Diagnosis of Psychological Sequels of Torture*, 25 *TORTURE* 51 (2015).

289. See generally DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 19–20 (3d ed. 2015); Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 451, 455–61 (Pablo de Greiff ed., 2006); Wexler & Robbennolt, *supra* note 8.

290. See de Greiff, *supra* note 289, at 460–61; Trudy Govier, *What is Acknowledgment and Why is it Important?*, in *DILEMMAS OF RECONCILIATION* 65, 85 (Carol A.L. Prager & Trudy Govier eds., 2003) (“When there is no acknowledgement of the wrongdoing, the initial wound develops into ‘the second wound of silence . . . .’”); Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE* 235, 242 (Robert I. Rotberg & Dennis Thompson eds., 2000).

291. SHELTON, *supra* note 289, at 18–19.

292. See, e.g., Noel King, *For Men Tortured by Chicago Police, Payments Only Go So Far in Repairing Lives*, NAT’L PUB. RADIO, (July 27, 2016, 5:15 AM), <http://www.npr.org/2016/07/27/487577902/for-men-tortured-by-chicago-police-payments-only-go-so-far-in-repairing-lives>.

times that much? Money damages can never undo the loss of life, false imprisonment or the passage of years. Money, however, is the medium which the law must use as it seeks to right wrongs. It must use this medium with the full recognition that it is never truly adequate.<sup>293</sup>

The right to a remedy is well established in both domestic and international law. It is, in fact, required under international law. For example, the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by the United States, requires compensation for wrongful detention.<sup>294</sup> Specifically, Article 9(5) provides that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”<sup>295</sup> And, more broadly, Article 2(3) provides that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, . . .”<sup>296</sup> The right to a remedy is codified in other international agreements and has attained the status of customary international law.<sup>297</sup> While the United States has deemed the ICCPR to be non-self-executing, meaning its provisions are not enforceable in U.S. courts, this does not mitigate its international status.<sup>298</sup> The United States is thus obligated to provide reparations to victims.

Second, the legislation would affirm the importance of international law and human rights. The Act acknowledges the United States is bound to respect and protect the human rights of individuals who are under its control regardless of where they are located or their nationality. The Act also acknowledges such obligations even extend to situations where individuals are held by other countries if the United States is complicit or otherwise responsible in their detention or mistreatment. Acknowledging responsibility and providing reparations would strengthen the credibility of U.S. commitments to respect international law and human rights. These actions would also legitimize U.S. statements denouncing human rights violations committed by other countries. The credibility of the U.S. commitment to respect human rights has been damaged

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293. *Mochizuki v. United States*, 43 Fed. Cl. 97, 97 (1999).

294. International Covenant on Civil and Political Rights art. 9(5), Dec. 16, 1966, 999 U.N.T.S. 171.

295. *Id.*

296. *Id.* art. 2(3)(a).

297. See Rep. of the Working Group on Arbitrary Detention, U.N. Doc. WGAD/CRP.1/2015 (2015).

298. See, e.g., Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51 (2012).

because of its behavior during the War on Terror. As a result, many countries have condemned the United States for its human rights record, from Abu Ghraib to Guantanamo.<sup>299</sup> Several international organizations and human rights monitoring bodies have also expressed grave concern about U.S. policies and actions.<sup>300</sup> And numerous human rights organizations have similarly denounced the United States for its conduct during the War on Terror.<sup>301</sup> The Act offers a meaningful response to these concerns.

Third, the legislation would provide a historical record of the abuses committed by the United States during the War on Terror. To individual victims, a record offers an explanation for their suffering.<sup>302</sup> Moreover, it gives them the opportunity to clear their name.<sup>303</sup> But a detailed record also serves a broader audience.<sup>304</sup> It is an acknowledgment to the American polity and the international community. And, it is a statement to both present and future generations. It documents the truth and removes the facts from contention.<sup>305</sup> Like the right to a remedy, the right to truth is also recognized under international law.<sup>306</sup> An honest record explains

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299. See, e.g., Joerg Wolf, *German Chancellor Calls for Closure of Guantanamo*, ATLANTIC REV. (Jan. 9, 2006), <http://atlanticreview.org/archives/247-German-Chancellor-calls-for-closure-of-Guantanamo.html>.

300. See, e.g., Inter-Am. Comm. on Human Rights, *Towards the Closure of Guantanamo Bay*, O.A.S. Doc. OAS/Ser.L/V/II (June 3, 2015); Comm. against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014); Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

301. See, e.g., Human Rights Council, *New Call from National and International Rights Groups on the Need to Ensure Accountability for the U.S. CIA Torture Program*, U.N. Doc. A/HRC/29/NGO/119 (June 24, 2015).

302. See generally SUSAN F. HIRSCH, IN THE MOMENT OF GREATEST CALAMITY (2006); M. Brinton Lykes & Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency, and Rethreading Social Realities*, in THE HANDBOOK OF REPARATIONS 589 (Pablo de Greiff ed., 2006).

303. Savage, *supra* note 13, at SR-7.

304. See generally SHELTON, *supra* note 289, at 22–37; LARRY WESCHLER, A MIRACLE, A UNIVERSE 4 (1990); Pok Yin S. Chow, *Memory Denied: A Commentary on the Reports of the U.N. Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, 48 INT'L L. 191 (2015); Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in THE HANDBOOK OF REPARATIONS 560 (Pablo de Greiff ed., 2006); Patrick Macklem, *Rybná 9, Praha I: Restitution and Memory in International Human Rights Law*, 16 EUR. J. INT'L L. 1 (2005).

305. Hafetz, *supra* note 12, at 431 (“[R]esistance to accountability helps propagate a competing narrative surrounding torture that legitimi[z]es utilitarian arguments, undermines categorical moral judgements and perpetuates a national security exceptionalism.”).

306. See generally Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT'L L. 526 (2015); Dermot Groome, *The Right to Truth in the Fight Against Impunity*, 29 BERKELEY J. INT'L L. 175 (2011); Yasmin Naqvi, *The Right to Truth in International Law: Fact or Fiction?*, 88 INT'L

what caused the violations to occur and identifies both victims and perpetrators. A historical record also offers clear evidence that torture and other forms of abuse are counterproductive.<sup>307</sup> Acknowledgement is thus important to both the victim and the perpetrator.<sup>308</sup>

Finally, redress and memory can prevent future abuses.<sup>309</sup> Redress attaches a financial cost to wrongs and may prevent them by monetizing the consequences of rule violations.<sup>310</sup> Similarly, memories of the past guide a country on how to act in the future. A clear historical record aids accurate recollection of the past and discourages countries from discounting the cost of abuses. This reminder makes it harder to repeat the mistakes of the past.<sup>311</sup> Of course, such efforts cannot guarantee abuses will never occur again. Indeed, the Civil Liberties Act of 1988 did not prevent the abuses perpetrated during the War on Terror. However, the alternative is even worse. The failure to denounce abuses may create a culture of impunity that encourages repetition of these acts.

Because of their own experiences, it is not surprising that Japanese Americans who were interned during the Second World War have criticized the treatment of detainees during the War on Terror. On several occasions, these survivors have denounced restrictions on civil liberties and human rights, including the indefinite detention of foreign nationals.<sup>312</sup> In 2004, for example, Fred Korematsu submitted an amicus brief to the Supreme Court in *Rasul v. Bush* challenging the detention of detainees at Guantanamo and the refusal to provide them with due process and judicial

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REV. RED CROSS 245 (2006); Thomas M. Antkowiak, Note, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977 (2002).

307. See SHANE O'MARA, WHY TORTURE DOESN'T WORK (2015); Douglas A. Johnson et al., *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America*, FOREIGN AFF., Sept.–Oct. 2016, at 121; William H. Taft IV, Opinion, *Reveal What U.S. Torture Cost Us*, WASH. POST (Dec. 12, 2013), [https://www.washingtonpost.com/opinions/reveal-what-us-torture-cost-us/2013/12/12/b23bf570-61c4-11e3-bf45-61f69f54fc5f\\_story.html?utm\\_term=.4c67fa9045e6](https://www.washingtonpost.com/opinions/reveal-what-us-torture-cost-us/2013/12/12/b23bf570-61c4-11e3-bf45-61f69f54fc5f_story.html?utm_term=.4c67fa9045e6).

308. Wexler & Robbennolt, *supra* note 8, at 149–66.

309. See generally BURYING THE PAST (Nigel Biggar ed., 2003); NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING (2013).

310. See SHELTON, *supra* note 289, at 22, 28; JEREMY SARKIN, COLONIAL GENOCIDE AND REPARATIONS CLAIMS IN THE 21ST CENTURY 144 (2009).

311. See generally Groome, *supra* note 306 (describing the various ways in which the right to truth promotes accountability and combats impunity).

312. See, e.g., Brief of Amici Curiae Ken Korematsu, Jay Hirabayashi, and Holly Yasui in Support of Appellants, *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015) (No. 14-1688), 2014 WL 3572026; Brief of Amici Curiae Karen and Ken Korematsu; Holly, Iris, and Laurel Dee Yasui; Jay Hirabayashi, Sharon Mitsu Yuen, and Marion Setsu Oldenburg in Support of Plaintiffs-Appellees and Affirmance, *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013) (Nos. 12-3176 and 12-3644), 2012 WL 6622648.



review.<sup>313</sup> Korematsu based the submission on his own unique experience in having his civil liberties restricted in a time of conflict.

Although certain aspects of the “war against terrorism” may be unprecedented, the challenges to constitutional liberties these cases present are similar to those the nation has encountered throughout its history. The extreme nature of the Government’s position here is all too familiar as well. When viewed in its historical context, the Government’s position is part of a pattern whereby the executive branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny. Only later are errors acknowledged and apologies made.<sup>314</sup>

Korematsu called on the United States to not repeat the mistakes of the past and to provide detainees with the right to challenge their detentions in federal court.<sup>315</sup>

The importance of redress and memory to victims of abuse is best exemplified in the personal experiences of Maher Arar and Khaled El-Masri. Following an exhaustive public inquiry, the Canadian government formally apologized to Maher Arar for its role in his rendition, detention, and torture and provided him \$10 million in reparations.<sup>316</sup> Since then, Arar has been able to move forward, to renew his life with his family, and to give back to his community.<sup>317</sup> According to Arar, “my ordeal made me want to create something that is useful for the world. I want to help improve the situation we are in.”<sup>318</sup> Regrettably, El-Masri’s experience has been far different. When he explained the reasons for his lawsuit against the United States, he expressed a desire to clear his name and to receive an apology for the suffering he endured.<sup>319</sup> According to EL-

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313. See Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 103832.

314. *Id.* at 2.

315. *Id.* at 3.

316. Julie Ireton, ‘This is Who I Am’: *The Reinvention of Maher Arar*, CBC NEWS (Apr. 22, 2016, 4:00 PM), <http://www.cbc.ca/news/canada/ottawa/maher-arar-reinvention-1.3541273>.

317. See Colby Itkowitz, *From Tortured Terrorist Suspect to Entrepreneur: How This Canadian Father Got His Life Back*, WASH. POST (Apr. 27, 2016), [https://www.washingtonpost.com/news/inspired-life/wp/2016/04/27/from-accused-terrorist-to-canadian-entrepreneur-maher-arar-is-finally-getting-his-life-back/?utm\\_term=.9c0603b49dc9](https://www.washingtonpost.com/news/inspired-life/wp/2016/04/27/from-accused-terrorist-to-canadian-entrepreneur-maher-arar-is-finally-getting-his-life-back/?utm_term=.9c0603b49dc9).

318. Ireton, *supra* note 316.

319. Khaled El-Masri, *I Am Not a State Secret*, L.A. TIMES (Mar. 3, 2007), <http://www.latimes.com/news/la-oe-elmasri3mar03-story.html> (“Above all, what I want from the lawsuit is a public acknowledgement from the U.S. government that I was innocent, a mistaken victim of its rendition program, and an apology for what I was forced to endure.”).

Masri, “[w]ithout this vindication, it has been impossible for me to return to a normal life.”<sup>320</sup> And yet, he never received this vindication. His personal struggles reveal the life of a “broken man;” one who was never able to recover from the trauma he endured.<sup>321</sup> The U.S. government’s refusal to provide any remedy to El-Masri is particularly outrageous because the CIA has acknowledged that he was wrongfully detained.<sup>322</sup>

### B. *The Civil Redress and Historical Memory Act of 2029*

The Civil Redress and Historical Memory Act has several purposes, which are acknowledged at the outset of the legislation. The Act’s purposes are to:

- (1) authorize a commission of inquiry to investigate and determine the facts surrounding cases involving the detention and mistreatment of individuals during the War on Terror;
- (2) acknowledge the fundamental injustices committed against those individuals who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups and yet were detained and mistreated abroad by the United States, or by another country with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who were subsequently released and never charged or convicted by the United States;
- (3) apologize on behalf of the people of the United States for these actions;
- (4) provide reparations to these individuals;
- (5) offer recommendations so that the causes and circumstances regarding these cases are better understood and never repeated; and

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320. *Id.*

321. Assoc. Press, *Attorney: CIA Torture to Blame for Arson*, WASH. POST (Dec. 10, 2007, 10:53 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/10/AR2007121002257.html>; Matthew Schofield, *Yet No Apology: CIA’s Mistaken Detention Destroyed German Man’s Life*, MCLATCHY DC (Dec. 13, 2014, 3:17 PM), <http://www.mcclatchydc.com/news/nation-world/world/article24777424.html>.

322. See S. REP. NO. 113–288, at 128-29 (2014).

- (6) establish a public education fund to finance efforts to publicize the Commission's findings and highlight the significance of human rights.

The Act offers a formal apology issued by Congress to affected individuals on behalf of the United States.

The Congress recognizes a fundamental injustice was done to individuals who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups and yet were detained and mistreated abroad by the United States, or by other countries with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who were subsequently released and never charged or convicted by the United States. For these fundamental violations of basic civil liberties and human rights, the Congress apologizes on behalf of the nation.

Title I of the Act establishes the Commission on Civil Redress and Historical Memory (Commission).<sup>323</sup> The Commission would be composed of nine members with lifetime appointments. To promote its legitimacy and bipartisanship, three members would be appointed each by the President, the Speaker of the House, and the President Pro Tempore of the Senate. The congressional appointments would be based on the joint recommendations of the majority and minority leaders of the respective houses of Congress. Officers or employees of the U.S. government would not be eligible for Commission appointments. Commissioners would serve without compensation although they would be reimbursed for travel and business-related expenses. The Commission would be authorized to employ such personnel as needed in the performance of its duties. Any employee of the federal government may be detailed to assist the Commission. Congress is authorized to appropriate \$20 million to fund the operations of the Commission. Such funds would remain available, without fiscal year limitation, until expended.

The Commission would hold its first meeting within ninety days from the enactment of the Act. At this initial meeting, the members of the Commission would select a Chairperson and Vice Chairperson. The Commission is authorized to:

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323. The structure and language of the Act, including the formation and format of the Commission, are based on the Commission on Wartime Relocation and Internment of Civilians Act of 1980 and the Civil Liberties Act of 1988.

- (1) investigate and determine the facts in cases of individuals who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups and yet were detained and mistreated abroad by the United States, or by other countries with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who were subsequently released and never charged or convicted by the United States;
- (2) provide reparations to these individuals;
- (3) offer recommendations so that the causes and circumstances regarding these cases are better understood and never repeated;
- (4) distribute its findings and recommendations to the general public; and
- (5) develop and implement a public education program to inform the public about human rights.

The Commission thus incorporates the work performed by the Commission on Wartime Relocation and Internment of Civilians and the Civil Liberties Public Education Fund Board of Directors.

To fulfill its responsibilities, the Commission would hold public hearings both in the United States and abroad. At its discretion, the Commission may also hold private and confidential hearings. The Commission would have the authority to issue subpoenas to compel the appearance of witnesses as well as the production of documents or other evidence. The Commission may request information from any federal department or agency that is necessary to perform its duties. Upon request, the appropriate department or agency head would furnish such information to the Commission. The Clerk of the House of Representatives and the Secretary of the Senate are also authorized to make available any congressional records for use by the Commission. Subject to appropriate clearance requirements and security procedures, the Commission would be provided access to classified documents. If any department or agency refuses to comply with the Commission's request for information or the production of documents, it would create a rebuttable presumption that the information would have benefitted the individual in determining eligibility. This provision is meant to address the problems faced by victims whose efforts to pursue legal claims have been thwarted by the assertion of state secrets, immunity, or other privileges.

The Commission is responsible for identifying and locating eligible individuals for reparations. The Commission may delegate the identification and location of eligible individuals to the Attorney General although the Commission would make the final decision on eligibility. Individuals may notify the Commission that they are candidates for eligibility. In addition, a spouse or domestic partner, child, or parent may also notify the Commission on behalf of an individual who is deceased or incapacitated. The identification and location of all eligible individuals would begin with the Commission's first meeting and would be completed within twelve months of that initial meeting. All payments to eligible individuals would be completed within twenty-four months of the Commission's initial meeting.

An eligible individual is defined as any individual who did not engage in hostilities during the War on Terror and was neither a terrorist nor associated with any terror groups and yet was detained and mistreated abroad by the United States or by another country with the complicity of the United States, any time between September 1, 2001 and the date of enactment of the Act, and who was subsequently released and never charged or convicted by the United States. Thus, the United States is responsible even when individuals are held by other countries if the United States is complicit or otherwise responsible for their detention or mistreatment. For purposes of the Act, mistreatment is defined as the violation of any internationally recognized human rights, including arbitrary detention, forced disappearance, torture, or cruel, inhuman or degrading treatment.<sup>324</sup> Individuals who have accepted and received payment pursuant to an award of a final judgment or a settlement on a claim against the United States for such detention and mistreatment would not be eligible. The Commission has exclusive authority to determine whether someone is an eligible individual. When there is an approximate balance of positive and negative evidence regarding the merits of an issue that is material to the determination of eligibility, the Commission would offer the benefit of the doubt to the individual in resolving such issue. Decisions on eligibility would require a majority vote of the

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324. These international norms appear in various federal statutes. *See, e.g.*, 18 U.S.C. § 2340A (2012) (criminal prosecution for torture); 22 U.S.C. § 2151-1 (2012) (restrictions on development assistance when countries violate internationally recognized human rights, including torture, cruel, inhuman, or degrading treatment, and prolonged detention without charge); 28 U.S.C. § 1350 (note) (2012) (civil liability for torture and extrajudicial killing); *see also* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015 app. A (2015), <https://www.state.gov/documents/organization/253263.pdf>.

Commission. The Commission would compile an administrative record that documents its decision-making regarding each individual it considers for eligibility.

Anyone whose claim is denied by the Commission may seek judicial review of such denial solely in the U.S. Court of Federal Claims. Judicial review of such denials would be based on the administrative record. The court would set aside the denial if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Within twelve months of its first meeting, the Commission would submit an initial report to Congress describing its work and the status of its inquiry. Within twenty-four months of its first meeting, the Commission would submit a second report to Congress that examines the causes and circumstances regarding these cases of arbitrary detention and mistreatment committed by the United States during the War on Terror. It would include recommendations that address how such acts can be prevented from occurring. Thereafter, the Commission would submit periodic reports to Congress every twelve months and a final report within five years of its first meeting.

During this time frame, the Commission would also develop and implement a public education program to inform the public about human rights. This work can comprise a variety of activities, including developing educational programs for primary, secondary, and university students and providing competitive grants for academic research, artistic displays, and community outreach. These projects can take place in the United States and abroad, and project applicants need not be U.S. citizens. Substantively, the projects can encompass numerous issues, ranging from civil and political rights to economic, social, and cultural rights. They can include conflict resolution, community building, leadership development, and the promotion of social inclusion, tolerance, and respect. These projects can address the rights and responsibilities of both state and non-state actors, including individuals. The Commission would coordinate its public education program with federal agencies and departments, including the Department of Justice, Department of State, and Department of Education.

The duties of the Commission would terminate one year after its final report is submitted to Congress. All documents, personal testimony, and other records created or received by the Commission would be kept and maintained by the Archivist of the United States and would be stored in the National Archives. These records would be available to the general public for review, both at the National

Archives and online. Classified documents would not be released. However, the Commission would request declassification by the appropriate government agencies of all relevant documents.

Title II of the Act establishes the Civil Redress and Historical Memory Fund (Fund). Congress is authorized to appropriate \$100 million for the Fund.<sup>325</sup> Any appropriated amounts would remain available, without fiscal year limitation, until expended. The Fund would be established in the Treasury of the United States and would be administered by the Secretary of the Treasury. The Fund would be used for two purposes. First, it would be used to provide reparation payments to eligible individuals identified by the Commission. Any remaining amounts in the Fund would be used to assist the Commission in distributing its findings and recommendations and to develop and implement a public education program about human rights.

When possible, the Commission would make payments from the Fund to eligible individuals in the order of date of birth (beginning with the oldest individual on the date of the enactment of the Act) until all eligible individuals have received payment in full. Eligible individuals would receive payment in the sum of \$150,000, which would be paid out from the Fund.<sup>326</sup> The surviving spouse or domestic partner, child, or parent of an eligible individual who is deceased or incapacitated may receive payment on behalf of the eligible individual. The Commission would notify all eligible individuals in writing of its decisions. Such notice would inform eligible individuals that acceptance of payment would be considered full settlement for all claims against the United States arising out of the acts that formed the basis for their claims. Amounts paid to eligible individuals from the Fund would be treated as damages for human suffering by the Internal Revenue Service and would not be included as income or resources for purposes of determining eligibility for any federal or state government services, benefits, or entitlements. If an eligible individual refuses to accept payment, the amount of that payment would remain in the Fund.

The Fund would terminate after all amounts that have been authorized for appropriation have been expended, including income earned on such amounts, or six years from the Commission's first meeting, whichever is earlier. If all the amounts in the Fund have

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325. By comparison, the Civil Liberties Act of 1988 appropriated \$1.25 billion for reparations; this was eventually increased to \$1.65 billion. 50 U.S.C.A. §§ 4211–20 (West 2017); *cf.* 50 U.S.C.A. § 4201 (West 2017).

326. *Cf.* 50 U.S.C.A. § 4201 (this amount is significantly higher than the \$20,000 payment offered by the Civil Liberties Act of 1988).

not been expended by the end of the six-year period, these amounts would be deposited in the miscellaneous receipts account in the Treasury.

The following timeline offers a graphic illustration of the implementation schedule for the Act's key provisions.

TIMELINE FOR IMPLEMENTATION OF THE CIVIL REDRESS AND  
HISTORICAL MEMORY ACT OF 2029

Date of Act's enactment	Within 90 days of enactment	One year from date of first meeting	Two years from first meeting	Three years from first meeting	Four years from first meeting	Five years from first meeting	Six years from first meeting
To be determined	First Commission meeting	Submission of Initial Report to Congress	Submission of Second Report to Congress	Submission of Third Report to Congress	Submission of Fourth Report to Congress	Submission of Final Report to Congress	Termination of Fund
		Completion of identification of eligible individuals	Completion of payment to eligible individuals				Termination of Commission

The Act maintains an aggressive schedule for implementation. Eligible individuals have already experienced significant delays in their search for redress. By requiring the identification of eligible individuals and the completion of payments within two years, the Act ensures that these individuals are not subject to further delays. By requiring the Commission to submit a report to Congress that offers recommendations for preventing such acts in the future within two years, the Act seeks to influence policy in a prompt manner. By requiring the Commission to undertake and complete its public education campaign within six years, the Act also ensures that meaningful activities are promptly undertaken. Overall, this schedule increases the likelihood that the Act will serve the needs of victims, influence the historical record, and promote respect for human rights without undue delay.

*C. 2029 as Both Aspiration and Deadline*

While the Civil Liberties Act of 1988 serves as an instructive model, there are significant distinctions with the proposed Civil Redress and Historical Memory Act of 2029. The adoption of the Civil Liberties Act stemmed from several factors, most of which cannot readily be replicated.

The Civil Liberties Act was promoted by a coalition of community groups and prominent activists in the Japanese American



community along with several political leaders who worked to publicize the injustices perpetrated during the Second World War and place pressure on Congress to act. In fact, several members of Congress were detained in internment camps during the Second World War. Their eloquent pleas to their colleagues in Congress influenced the adoption of the Civil Liberties Act. No comparable group has yet emerged in Congress to lead the victims of the War on Terror in their own search for justice.

The Civil Liberties Act offered redress to individuals with strong connections to the United States, including U.S. citizens and permanent residents. In contrast, victims in the War on Terror have been predominantly foreign nationals.<sup>327</sup> This distinction does not mean they are less worthy of an apology, but it does mean that their plight has been less noticeable: their distance from the American polity has made it easier for Congress to disregard their suffering. Quite simply, these foreign nationals have no constituency to voice their claims or champion their cause.<sup>328</sup> And, while the racist elements of Executive Order No. 9066 have not been explicitly replicated, the majority of victims in the War on Terror have been Muslims.<sup>329</sup> Regrettably, this distinction has added even greater distance from some segments of the American polity.<sup>330</sup> In this respect, religious intolerance has replaced racial discrimination in perpetuating abuses.<sup>331</sup>

There is, however, one group of foreign nationals whose experiences during the Second World War can offer hope to foreign nationals who were detained and abused during the War on Terror. At the request of the United States, Latin American countries deported approximately 2,300 individuals of Japanese ancestry during the Second World War.<sup>332</sup> These Japanese Latin Americans were not U.S. citizens or permanent residents. They were not enemy aliens, and they did not pose any threat. Subsequently, the U.S. government placed them in internment camps and eventually

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327. While several victims in the War on Terror have been U.S. citizens, U.S. courts have also dismissed their claims.

328. As of October 2017, only two members of Congress are Muslim. *See, e.g.*, Lauren Victoria Burke, *Muslim Members of Congress Speak on Hate in Era of Donald Trump*, NBC NEWS (May 24, 2016, 5:57 PM), <https://www.nbcnews.com/news/nbcblk/muslim-members-congress-speak-hate-era-donald-trump-n579631>.

329. *See* Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 1 ALA. C.R. & C.L. L. REV. 31, 33 (2013).

330. *See* Hafetz, *supra* note 12, at 439.

331. *See, e.g.*, LAURENCE ANDRE DOBROT, STRATEGIC STUD. INST., *THE GLOBAL WAR ON TERRORISM* (2007), <https://ssi.armywarcollege.edu/pdffiles/PUB822.pdf>; Adam Serwer, *The War Over the War on Terror*, AM. PROSPECT (June 3, 2010), <http://prospect.org/article/war-over-war-terror-0>.

332. *See supra* note 264 and accompanying text.

deported many of them to Japan, even though they had not committed any hostile acts.

The JLAs [Japanese Latin Americans] were completely innocent of wrongdoing. Most were model citizens. They were kidnapped, torn from their families, imprisoned in another country, and held hostage by the United States—because of their race. . . . For a long time, the United States not only refused to deal with these consequences, it simply denied that it had orchestrated the debacle.<sup>333</sup>

While these Japanese Latin Americans were not eligible under the terms of the Civil Liberties Act, some of them eventually received an apology and reparations from the United States in the *Mochizuki* settlement. But, even these remedies have been criticized as both incomplete and discriminatory.<sup>334</sup>

Over forty years separated the end of the Second World War and the adoption of the Civil Liberties Act of 1988. Such temporal distance is absent with the Civil Redress and Historical Memory Act of 2029 even though this Article does not anticipate adoption of the Act for another twelve years. The human rights abuses committed during the War on Terror began soon after September 11, 2001. And, the conflict remains ongoing. Whether twelve years offers sufficient time for the United States to accept responsibility for its actions is unclear.

Despite these obstacles, there are compelling reasons for pursuing the Civil Redress and Historical Memory Act. By passing the proposed legislation, Congress would place significant pressure on the executive branch to offer victims redress. The executive branch has long had the ability to offer *ex gratia* (or *solatia*) payments to individuals harmed by the U.S. government without congressional or judicial authorization.<sup>335</sup> In fact, the United States has already

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333. Eric Yamamoto, *Reluctant Redress: The U.S. Kidnapping and Internment of Japanese Latin Americans*, in *BREAKING THE CYCLES OF HATRED* 132, 135 (Martha Minow ed., 2002).

334. See *Mochizuki v. United States*, 43 Fed. Cl. 97, 101 (1999) (Declaration of Kazuo Matsubayashi: “I am told there are some Peruvian Japanese who are demanding the full redress as the other American Japanese received. I agree with them, although I also agree with my family and cousins who all accepted being part of the settlement agreement. I do believe the Peruvian Japanese were just as wrongfully treated as the American Japanese, and some suffered a great deal.”); *id.* (Declaration of Sadaharu Sakamoto: “I support the settlement. However, I do feel bad about it because I think we should receive the same amount, if not more, as everyone else imprisoned in the U.S.”); see also *Japanese Latin Americans Hearing*, *supra* note 278, at 11–22.

335. See generally Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT’L L. 433 (2006). In 1999, for example, President Bill Clinton authorized a \$4.5 million payment to China that would be distributed to victims of the 1999 U.S. missile strike

offered *ex gratia* payments to a number of individuals harmed as a result of military operations in Iraq and Afghanistan.<sup>336</sup> Between 2005 and 2015, the United States disbursed approximately \$4.8 million to Afghan nationals in *ex gratia* payments.<sup>337</sup> These payments covered death and personal injury as well as economic and non-economic damages.<sup>338</sup> While the United States has offered hundreds of such payments to civilian casualties in combat operations, it has declined to offer comparable redress to other victims in the War on Terror. If the executive branch continues to refuse to act, Congress could do so.

In fact, the Civil Redress and Historical Memory Act would be preferable to the *ex gratia* payments that could be offered by the

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on the Chinese Embassy in Belgrade. See Sean D. Murphy, *State Responsibility for Injuries to Aliens*, 94 AM. J. INT'L L. 127 (2000). According to the U.S. State Department Legal Adviser, the "payment will be entirely voluntary and does not acknowledge any legal liability. This payment will not create any precedent." Michael Laris, *U.S. to Pay Embassy Bomb Victims*, WASH. POST, July 31, 1999, at A15. Subsequently, the United States and China concluded an agreement that would provide \$28 million to China for damages to the Chinese Embassy. Michael Laris, *U.S. China Reach Deal on Embassy Payments*, WASH. POST, Dec. 15, 1999, at A32. Unlike the prior payments to the Chinese victims, this payment would be authorized by Congress. In 1988, President Reagan offered compensation to the families of individuals killed by a U.S. missile strike on an Iran Air passenger jet in the Persian Gulf. See Marian Nash Leich, *Denial of Liability*, 83 AM. J. INT'L L. 319 (1989); Harold G. Maier, *Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325 (1989). In congressional testimony, the U.S. State Department Legal Adviser noted the use of *ex gratia* payments in international practice and such payments were recognized by international law. DEP'T ST. BULL., No. 2139, October 1988, at 58–59. In his testimony, the Legal Adviser also described the manner in which such payments would be calculated. "The level of compensation paid on an *ex gratia* basis is essentially within the discretion of the state offering such payments. Obviously we are interested in providing significant humanitarian relief to the families of the victims, and we will be guided in part by levels of *ex gratia* payments that have been made in the past." *Id.* at 59.

336. See, e.g., Cora Currier, *Our Condolences: How the U.S. Paid for Death and Damage in Afghanistan*, INTERCEPT (Feb. 27, 2015, 9:22 AM), <https://theintercept.com/2015/02/27/payments-civilians-afghanistan/>. See generally GAO, *MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN* (2007), <http://www.gao.gov/new.items/d07699.pdf>. Similar payments to casualties of U.S. combat operations in Syria have also been proposed. Kate Brannen, *Congress on Track to Extend Condolence Payments to Syrians*, JUST SECURITY (Dec. 5, 2016, 11:22 AM), <https://www.justsecurity.org/35200/congress-track-extend-condolence-payments-syria/>.

337. CTR. FOR CIVILIANS IN CONFLICT, *EX-GRATIA PAYMENTS IN AFGHANISTAN: A CASE FOR STANDING POLICY FOR THE U.S. MILITARY 1* (May 2015), [https://civiliansinconflict.org/wp-content/uploads/2017/08/CIVIC\\_Exgratia\\_payments\\_2015\\_Brief.pdf](https://civiliansinconflict.org/wp-content/uploads/2017/08/CIVIC_Exgratia_payments_2015_Brief.pdf); CTR. FOR CIVILIANS IN CONFLICT, *UNITED STATES MILITARY COMPENSATION TO CIVILIANS IN ARMED CONFLICT* (May 2010), [https://civiliansinconflict.org/wp-content/uploads/2017/09/CENTER\\_Condolence\\_White\\_Paper\\_2010.pdf](https://civiliansinconflict.org/wp-content/uploads/2017/09/CENTER_Condolence_White_Paper_2010.pdf).

338. See generally AMSTERDAM INT'L LAW CLINIC, *MONETARY PAYMENTS FOR CIVILIAN HARM IN INTERNATIONAL AND NATIONAL PRACTICE* (2013), [http://www.uva.nl/binaries/content/assets/subsites/amsterdam-international-law-clinic/valuation\\_oct1\\_final-front.pdf](http://www.uva.nl/binaries/content/assets/subsites/amsterdam-international-law-clinic/valuation_oct1_final-front.pdf); CTR. FOR CIVILIANS IN CONFLICT, *MONETARY PAYMENTS FOR CIVILIAN HARM IN INTERNATIONAL AND NATIONAL PRACTICE* (October 2013), [https://civiliansinconflict.org/wp-content/uploads/2017/09/Valuation\\_Graphics\\_Final\\_Oct\\_2013.pdf](https://civiliansinconflict.org/wp-content/uploads/2017/09/Valuation_Graphics_Final_Oct_2013.pdf).

executive branch. Unlike the ad hoc process required for *ex gratia* payments, the Act offers a broader and more systematic response. It establishes a formal process for identifying eligible individuals, investigating claims, and offering reparations and an apology to eligible individuals. Significantly, the Act removes reparation decisions from the executive branch and places them in a body whose goal is to promote redress and memory. It also creates a record of abuses, offers recommendations to prevent future abuses, and promotes an educational campaign to highlight the importance of human rights.

The Civil Redress and Historical Memory Act is also preferable to litigation, where victims pursue individualized relief. Lawsuits provide an ad hoc mechanism for redress that require victims to initiate litigation, attorneys willing to represent them (on a pro bono or contingency basis), and a receptive judiciary. In contrast, the Act creates a separate process that removes most of the obstacles that now confront victims in their search for justice. Under the Act, there is no need for victims to find lawyers to represent them. Unlike complex and lengthy litigation, the Act offers a streamlined process for redress. Moreover, the Act also removes most of the procedural barriers that have prevented victims from seeking redress through litigation. For example, the Commission favors individuals when there is an approximate balance of positive and negative evidence regarding eligibility determinations. And, significantly, any department or agency's refusal to comply with the Commission's request for information or failure to produce documents will create a rebuttable presumption that the information would have been of benefit to the individual and would support their eligibility claim. Finally, the Act would provide more meaningful remedies, including an apology, a historical record, and the development of a public education program. Indeed, the public education program is particularly significant because it can promote meaningful change, both in the United States and abroad.

#### CONCLUSION

The struggle of victims in the War on Terror to seek redress for past harms is not unique. International practice reveals a sparse history of state reflection and redress in response to past injustices. As

evidenced by the Civil Liberties Act of 1988, there are some exceptions.<sup>339</sup> But typically, countries discount the past and seek to minimize their own misconduct.

The struggle to protect human rights must be both retrospective and prospective.<sup>340</sup> It is about accepting responsibility, acknowledging past injustices, and providing redress for harms that were inflicted.<sup>341</sup> It is also about creating a narrative of respect for human rights to prevent future harms. The Civil Redress and Historical Memory Act of 2029 serves both these ends. By adopting it, the United States would accept responsibility for harming innocent people who were detained and abused in the all-encompassing War on Terror. Not only does the Act offer an apology and reparations as an acknowledgment of responsibility, but it also forces us to remember. It seeks to learn from the past so that such harms are never repeated.

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339. See, e.g., STANLEY COHEN, STATES OF DENIAL 249–77 (2001); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS (2d ed. 2010); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 91–117 (1998); TAKING WRONGS SERIOUSLY 153–331 (Elazar Barkan & Alexander Karn eds., 2006) (detailing different case studies in acknowledging past injustices). The Holocaust restitution movement offers a distinct approach. See generally MICHAEL J. BAZLER, HOLOCAUST JUSTICE (2003); STUART E. EIZENSTAT, IMPERFECT JUSTICE (2003).

340. Numerous human rights organizations have called upon the United States to offer redress to victims in the War on Terror. See, e.g., GLOB. JUSTICE CLINIC, N.Y.U. SCH. OF LAW, REPARATION & APOLOGY (2015), [http://chrgj.org/wp-content/uploads/2015/10/IACHR\\_HR-Situation-of-People-Affected-by-RDI\\_Reparations-and-Apology-102315.pdf](http://chrgj.org/wp-content/uploads/2015/10/IACHR_HR-Situation-of-People-Affected-by-RDI_Reparations-and-Apology-102315.pdf); LISA MAGARELL & LORNA PETERSON, INT'L CTR. FOR TRANSITIONAL JUSTICE, AFTER TORTURE (2010), <https://www.ictj.org/sites/default/files/ICTJ-USA-Right-Redress-2010-English.pdf>.

341. See Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007).

## APPENDIX

## AN ACT

**TO ESTABLISH THE COMMISSION ON CIVIL REDRESS AND  
HISTORICAL MEMORY AND ACCOMPANYING FUND**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 101. SHORT TITLE

This Act may be cited as the “Civil Redress and Historical Memory Act of 2029.”

## SECTION 102. PURPOSES

The purposes of this Act are to:

- (1) authorize a commission of inquiry to investigate and determine the facts surrounding cases involving the detention and mistreatment of individuals during the War on Terror;
- (2) acknowledge the fundamental injustices committed against those individuals who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups and yet were detained and mistreated abroad by the United States, or by another country with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who were subsequently released and never charged or convicted by the United States;
- (3) apologize on behalf of the people of the United States for these actions;
- (4) provide reparations to these individuals;
- (5) offer recommendations so that the causes and circumstances regarding these cases are better understood and never repeated; and
- (6) establish a public education fund to finance efforts to publicize the commission’s findings and highlight the significance of human rights.

## SECTION 103. STATEMENT OF THE CONGRESS

The Congress recognizes a fundamental injustice was done to individuals who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups and yet were detained and mistreated abroad by the United States, or by other countries with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who were subsequently released and never charged or convicted by the United States. For these fundamental violations of basic civil liberties and human rights, the Congress apologizes on behalf of the nation.

## TITLE I – COMMISSION ON CIVIL REDRESS AND HISTORICAL MEMORY

## SECTION 101. ESTABLISHMENT OF THE COMMISSION

(a) *In General*

There is established the Commission on Civil Redress and Historical Memory (in this Act referred to as the Commission).

(b) *Composition*

The Commission shall be composed of nine members, who shall be appointed within sixty days from the date of the enactment of this Act, of whom—

- (1) three members shall be appointed by the President;
- (2) three members shall be appointed by the Speaker of the House of Representatives, on the joint recommendation of the majority leader of the House of Representatives and the minority leader of the House of Representatives; and
- (3) three members shall be appointed by the President Pro Tempore of the Senate, on the joint recommendation of the majority leader of the Senate and the minority leader of the Senate.

Commission members may not be officers or employees of the United States Government.

(c) *Compensation*

- (1) Members of the Commission shall serve without pay.
- (2) Members of the Commission shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out the functions of the Commission, in the same manner as persons employed intermittently in the United States Government are allowed expenses under section 5703 of Title 5, United States Code.

(d) *Period of Appointment; Vacancies*

Members shall be appointed for the life of the Commission. A vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment was made.

(e) *Meetings*

- (1) The President shall call, and the Commission shall hold, the first meeting of the Commission within ninety days from the date of the enactment of this Act.
- (2) Following its first meeting, the Commission shall meet at the call of the Chairperson of the Commission.

(f) *Quorum*

Five members of the Commission shall constitute a quorum, but a lesser number of members may hold hearings.

(g) *Chairperson and Vice Chairperson*

At its first meeting, the Commission shall elect a Chairperson and Vice Chairperson from among its members. The Chairperson and Vice Chairperson shall serve for the life of the Commission.



## SECTION 102. DUTIES OF THE COMMISSION

(a) *In General*

The Commission shall—

- (1) investigate and determine the facts in cases of individuals who did not engage in hostilities during the War on Terror and were neither terrorists nor associated with any terror groups and yet were detained and mistreated abroad by the United States, or by other countries with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who were subsequently released and never charged or convicted by the United States;
- (2) provide reparations to these individuals;
- (3) offer recommendations so that the causes and circumstances regarding these cases are better understood and never repeated;
- (4) distribute its findings and recommendations to the general public; and
- (5) develop and implement a public education program to inform the public about human rights.

(b) *Reporting Requirements*

- (1) Within twelve months of its first meeting, the Commission shall submit an initial report to Congress describing its work and the status of its inquiry.
- (2) Within twenty-four months of its first meeting, the Commission shall submit a report to Congress that examines the causes and circumstances regarding these cases of arbitrary detention and mistreatment committed by the United States during the War on Terror. The report shall include a set of recommendations that address how such acts can be prevented from reoccurring.
- (3) Thereafter, the Commission shall submit periodic reports to Congress every twelve months and a final report within five years of its first meeting.

## SECTION 103. REPARATIONS PROGRAM

*(a) Identification of Eligible Individuals*

- (1) The Commission is responsible for identifying and locating eligible individuals for reparations.
- (2) Individuals may notify the Commission that they are candidates for eligibility. A spouse, domestic partner, child, or parent may also make a notification on behalf of an individual who is deceased or incapacitated.
- (3) The Commission may delegate the identification and location of eligible individuals to the Attorney General although the Commission shall make the final decision on eligibility.
- (4) The identification and location of all eligible individuals shall begin with the first meeting of the Commission and shall be completed within twelve months of that initial meeting.
- (5) All payments to eligible individuals shall be completed within twenty-four months of the initial meeting of the Commission.

*(b) Definition of Eligible Individual*

- (1) An eligible individual is defined as any individual who did not engage in hostilities during the War on Terror and was neither a terrorist nor associated with any terror groups and yet was detained and mistreated abroad by the United States, or by another country with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who was subsequently released and never charged or convicted by the United States. For purposes of the Act, mistreatment is defined as the violation of any internationally recognized human rights, including arbitrary detention, forced disappearance, torture, or cruel, inhuman or degrading treatment.
- (2) Individuals who have accepted and received payment pursuant to an award of a final judgment or a settlement on a claim against the United States for such detention and mistreatment shall not be eligible.
- (3) The Commission has exclusive authority to determine whether someone is an eligible individual. The Commission

shall compile an administrative record that documents its decision-making regarding each individual it considers for eligibility.

- (4) When there is an approximate balance of positive and negative evidence regarding the merits of an issue that is material to the determination of eligibility, the Commission shall offer the benefit of the doubt to the individual in resolving such issue.
- (5) If any department or agency refuses to comply with the Commission's request for information or the production of documents, it shall create a rebuttable presumption that the information would have benefitted the individual in determining eligibility.
- (6) Decisions on eligibility shall require a majority vote of the Commission.

(c) *Judicial Review*

- (1) Anyone whose claim is denied by the Commission may seek judicial review of such denial solely in the United States Court of Federal Claims.
- (2) Judicial review of such denials shall be based on the administrative record.
- (3) The court shall set aside the denial if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(d) *Assistance of the Attorney General*

- (1) The Commission shall be assisted by the Attorney General in identifying and locating eligible individuals.
- (2) The Attorney General will use funds and resources that are regularly available to the Attorney General for these efforts.
- (3) In attempting to locate any eligible individual, the Attorney General may use any facility or resource of any public or nonprofit organization or any other record, document, or information that may be made available to the Attorney General.
- (4) No costs incurred by the Attorney General in carrying out its responsibilities under this section shall be paid from the

Fund or set off against, or otherwise deducted from, any payment under this section to any eligible individual.

- (5) The duties of the Attorney General shall cease one year after final payment is made to the last eligible individual identified by the Commission.

#### SECTION 104. PUBLIC EDUCATION PROGRAM

The Commission shall develop and oversee a public education program that will be used to inform the public about human rights. This work can comprise a variety of activities, including educational programs for primary, secondary, and university students and competitive grants for academic research, artistic projects, and community outreach. These projects can take place in the United States and abroad, and project applicants need not be U.S. citizens. The Commission shall coordinate its efforts with federal agencies and departments, including the Department of Justice, Department of State, and Department of Education.

#### SECTION 105. POWERS OF THE COMMISSION

##### (a) *Hearings*

The Commission or, at its direction, any subcommittee or member of the Commission, may, for the purpose of carrying out this Act—

- (1) hold such public or private hearings in such cities and countries, sit and act at such times and places, take such testimony, receive such evidence, and administer such oaths as the Commission or such subcommittee or member considers advisable; and
- (2) require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, documents, tapes, and materials as the Commission or such subcommittee or member considers advisable.

(b) *Issuance and Enforcement of Subpoenas*

(1) Issuance

Subpoenas issued under subsection (a) shall be approved by a majority of the members present at a meeting, shall bear the signature of the Chairperson of the Commission, and shall be served by any person or class of persons designated by the Chairperson for that purpose.

(2) Enforcement

In the case of contumacy or failure to obey a subpoena, the United States district court for the judicial district in which the person who is served the subpoena resides, is served, or may be found may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence required by the subpoena. Any failure to obey the order of the court may be punished by the court as a contempt of that court.

(c) *Witness Allowances and Fees*

Section 1821 of Title 28, United States Code, shall apply to witnesses requested or required by subpoena to appear at any hearing of the Commission. The per diem and mileage allowances provided under such section for witnesses shall be paid from funds available to pay the expenses of the Commission.

(d) *Information from Federal Agencies*

The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to perform its duties. Upon request by the Chairperson of the Commission, the head of such department or agency shall furnish such information to the Commission. Subject to appropriate clearance requirements and security procedures, the Commission shall be provided access to classified documents. If any department or agency refuses to comply with the Commission's request for information or the production of documents, it shall create a rebuttable presumption that the information would have been of benefit to the individual in determining eligibility.

*(e) Information from Congress*

- (1) The Clerk of the House of Representatives and the Secretary of the Senate are authorized to permit the Archivist of the United States to make available for use by the Commission any congressional records not classified for national security purposes relating to the detention and mistreatment of U.S. citizens and foreign nationals during the War on Terror. Subject to appropriate clearance requirements and security procedures, the Commission shall be provided access to classified documents.
- (2) This subsection is enacted as an exercise of the rulemaking powers of the House of Representatives and Senate, but is applicable only with respect to the availability of records to which it applies, and is enacted with full recognition of the constitutional right of the House and Senate to change their rules at any time, in the same manner and to the same extent as in the case of any other rule of the House or Senate.

*(f) Postal Services*

The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

## SECTION 106. PERSONNEL AND ADMINISTRATIVE PROVISIONS

*(a) Travel Expenses*

The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of Title 5, United States Code, while away from their homes or regular places of business in the performance of their duties for the Commission.

(b) *Staff*

## (1) In General

The Chairperson of the Commission may, without regard to the civil service laws and regulations, appoint and terminate the employment of such personnel as may be necessary to enable the Commission to perform its duties.

## (2) Compensation

The Chairperson of the Commission may fix the compensation of the personnel without regard to chapter 51 and subchapter III of chapter 53 of Title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for the personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

(c) *Detail of Government Employees*

Any employee of the Federal Government may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(d) *Procurement of Temporary and Intermittent Services*

The Chairperson of the Commission may procure temporary and intermittent services under section 3109(b) of Title 5, United States Code, at rates for individuals that do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(e) *Other Administrative Matters*

The Commission may—

- (1) enter into agreements with the Administrator of General Services to procure necessary financial and administrative services;
- (2) enter into contracts to procure supplies, services, and property; and

- (3) enter into contracts with Federal, State, and local agencies, and private institutions and organizations, for the conduct of research or surveys, the preparation of reports, and other activities necessary to enable the Commission to perform its duties.

#### SECTION 107. PRESERVATION OF DOCUMENTS IN NATIONAL ARCHIVES

All documents, personal testimony, and other records created or received by the Commission during its inquiry shall be kept and maintained by the Archivist of the United States who shall preserve such documents, testimony, and records in the National Archives of the United States. The Archivist shall make such documents, testimony, and records available to the public for research purposes. Classified documents shall not be released. However, the Commission will request declassification by the appropriate government agencies of all relevant documents.

#### SECTION 108. AUTHORIZATION OF APPROPRIATIONS

##### (a) *In General*

Congress authorizes the appropriation of \$20 million to fund the operations of the Commission and additional sums as may be necessary to carry out this Act. Any amounts appropriated pursuant to this section are authorized to remain available until expended.

##### (b) *Availability*

Any sums appropriated under the authorization contained in this section shall remain available, without fiscal year limitation, until expended.

#### SECTION 109. TERMINATION

The Commission shall cease to function one year after its final report is submitted to Congress.



## SECTION 110. DEFINITIONS

For purposes of this title:

- (1) The term “eligible individual” is defined as any individual who did not engage in hostilities during the War on Terror and was neither a terrorist nor associated with any terror groups and yet was detained and mistreated abroad by the United States, or by another country with the complicity of the United States, any time between September 1, 2001 and the date of enactment of this Act, and who was subsequently released and never charged or convicted by the United States.
- (2) The term “mistreatment” is defined as the violation of any internationally recognized human rights, including arbitrary detention, forced disappearance, torture, or cruel, inhuman or degrading treatment.
- (3) The term “Fund” is defined as the Civil Redress and Historical Memory Fund.
- (4) The term “Commission” is defined as the Commission on Civil Redress and Historical Memory.

## TITLE II – CIVIL REDRESS AND HISTORICAL MEMORY FUND

## SECTION 101. TRUST FUND

(a) *Establishment*

The Civil Redress and Historical Memory Fund shall be established in the Treasury of the United States and shall be administered by the Secretary of the Treasury.

(b) *Investment of Amounts in the Fund*

Amounts in the Fund shall be invested in accordance with section 9702 of Title 31, United States Code.

(c) *Uses of the Fund*

Amounts in the Fund shall be available—

- (1) to provide reparations payments to eligible individuals as authorized by the Commission; and
- (2) to develop and implement the public education program to publicize the commission's findings and inform the public about human rights.

(d) *Authorization of Appropriations*

Congress authorizes the appropriation of \$100,000,000 for the Fund. Any amounts appropriated pursuant to this section are authorized to remain available until expended.

(e) *Termination*

The Fund will terminate after all amounts that have been authorized for appropriation have been expended, including income earned on such amounts, or six years from the first meeting of the Commission, whichever is earlier. If all the amounts in the Fund have not been expended by the end of the six-year period, such amounts shall be deposited in the miscellaneous receipts account in the Treasury.

SECTION 102. REPARATIONS

(a) *Payment to Eligible Individuals*

(1) In General

Subject to paragraph (5) and the availability of funds appropriated for such purpose, the Commission shall pay out of the Fund to each eligible individual the sum of \$150,000, unless such individual refuses to accept the payment, in the manner described in paragraph (3).

(2) Notice from the Commission

The Commission shall, when funds are appropriated to the Fund for payments to an eligible individual under this section, notify that eligible individual in writing of his or her eligibility for payment

under this section. Such notice shall inform the eligible individual that—

- (A) acceptance of payment under this section shall be in full settlement of all claims against the United States arising out of acts described in section 103(1); and
- (B) each eligible individual who does not refuse, in the manner described in paragraph (3), to accept payment under this section within 12 months after receiving such written notice shall be deemed to have accepted payment for purposes of paragraph (4).

### (3) Effect of refusal to accept payment

If an eligible individual refuses, in a written document filed with the Commission, to accept any payment under this section, the amount of such payment shall remain in the Fund and no payment may be made under this section to such individual at any time after such refusal.

### (4) Payment in full settlement of claims against the United States

The acceptance of payment by an eligible individual under this section shall be in full settlement of all claims against the United States arising out of acts described in section 103(1). This paragraph shall apply to any eligible individual who does not refuse, in the manner described in paragraph (3), to accept payment under this section within eighteen months after receiving the notification from the Commission referred to in paragraph (3).

### (5) Exclusion of certain individuals

No payment may be made under this section to any individual who accepted or received payment pursuant to an award of a final judgment or a settlement on a claim against the United States for acts described in section 103(1), or to any surviving spouse, domestic partner, child, or parent of such individual to whom paragraph (6) applies.

## (6) Payments in the case of deceased persons

- (A) In the case of an eligible individual who is deceased at the time of payment under this section, such payment shall be made only as follows:
- (i) If the eligible individual is survived by a spouse or domestic partner who is living at the time of payment, such payment shall be made to such individual.
  - (ii) If there is no surviving spouse or domestic partner as described in clause (i), such payment shall be made in equal shares to all children of the eligible individual who are living at the time of payment.
  - (iii) If there is no surviving spouse or domestic partner as described in clause (i) and if there are no children described in clause (ii), such payment shall be made in equal shares to the parents of the eligible individual who are living at the time of payment.
  - (iv) If there is no surviving spouse or domestic partner, children, or parents as described in clauses (i), (ii), and (iii), the amount of such payment shall remain in the Fund, and may be used only for the purposes set forth in section 101(c)(2).
- (B) After the death of an eligible individual, this subsection and subsection (c) shall apply to the individual or individuals specified in subparagraph (A) to whom payment under this section will be made, to the same extent as such subsections apply to the eligible individual.
- (C) For purposes of this paragraph—
- (i) a “child” of an eligible individual includes a recognized natural child, a stepchild who lived with the eligible individual in a regular parent-child relationship, and an adopted child; and
  - (ii) a “parent” of an eligible individual includes fathers and mothers through adoption.

(b) *Order of Payments*

The Commission shall endeavor to make payments under this section to eligible individuals in the order of date of birth (beginning with the oldest individual on the date of the enactment of this Act) until all eligible individuals have received payment in full.

(c) *Clarification of Treatment of Payments Under Other Laws*

Amounts paid to an eligible individual—

- (1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering; and
- (2) shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of Title 31, United States Code or available under any other law administered by the Secretary of Veterans Affairs, or for purposes of determining the amount of such benefits.

(d) *Liability of United States Limited to Amount in Fund*

(1) General Rule

An eligible individual may be paid under this section only from amounts in the Fund.

(2) Coordination with Other Provisions

Nothing in this title shall authorize the payment to an eligible individual by the United States Government of any amount authorized by this section from any source other than the Fund.

(3) Order in Which Unpaid Claims to be Paid

If at any time the Fund has insufficient funds to pay all eligible individuals at such time, such eligible individuals shall, to the extent permitted under paragraph (1), be paid in full in the order specified in subsection (b).

SECTION 103. DEFINITIONS

For purposes of this title:

- (1) The term “eligible individual” is defined as any individual who did not engage in hostilities during the War on Terror and was neither a terrorist nor associated with any terror groups and yet was detained and mistreated abroad by the United States, or by another country with the complicity of

the United States, any time between September 1, 2001 and the date of enactment of this Act, and who was subsequently released and never charged or convicted by the United States.

- (2) The term “Fund” is defined as the Civil Redress and Historical Memory Fund.
- (3) The term “Commission” is defined as the Commission on Civil Redress and Historical Memory.