

# SUBSTITUTE JUSTICE? CHALLENGES TO AMERICAN COUNTERTERRORISM ACTIVITIES IN NON-AMERICAN COURTS

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## INTRODUCTION

President Bush's original military order with respect to detention and trial at Guantanamo Bay provided that the detainees could not seek remedies in "any court of any foreign nation" as well as in "any international tribunal."<sup>1</sup> Recent plea

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agreements reached in some of the cases at Guantanamo echo this desire to preclude litigation in non-American courts by providing that those who plead guilty agree that they will “[n]ot initiate or support any litigation or challenge, in any forum in any Nation, against the United States or any official in their personal or official capacity with regard to . . . [the] capture, detention, [or] prosecution [of the accused].”<sup>2</sup> This Article will demonstrate that these attempts to preclude Guantanamo-related litigation in non-American courts have failed. It will also explore why American courts have produced a demand for substitute justice litigation in non-American courts by sheltering American national security activities from effective judicial review and remedies.

In examining and assessing substitute justice litigation, I will focus on litigation in the domestic courts of three countries that are close allies of the United States: Australia, Canada, and the United Kingdom. There is nothing new about similar issues being litigated in the courts of different nations. In the terrorism context, there are examples of various domestic courts indirectly reviewing various European Union and United Nations Security Council Resolutions on issues ranging from European arrest warrants to terrorist listings.<sup>3</sup> What is unique about the litigation examined in this Article is how it originates in a refusal of American courts to review much American counterterrorism activities on their merits and a search for substitute justice in non-American courts.

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<sup>1</sup> Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,831, 57,835-36.

<sup>2</sup> Offer for Pre-trial Agreement at 2, United States v. Omar Ahmed Khadr (Oct. 13, 2010), <http://www.defense.gov/news/Khadr%20Convening%20Authority%20Pretrial%20Agreement%20AE%20341%2013%20Oct%202010%20%28redacted%29.pdf>.

<sup>3</sup> Craig Forcese & Kent Roach, *Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217 (2010); Kim Lane Scheppelle, *The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Public Space*, 28 PENN ST. INT'L L. REV. 451, 455-56 (2010).

Although a considerable amount of substitute justice litigation has been launched in non-American courts, such litigation faces significant challenges that are in part related to U.S. actions. Former or present detainees at Guantanamo or Bagram have often been unable to obtain effective remedies in non-American courts. The most dramatic example is the decision of the British courts to release British officials from a habeas corpus order after the American military refused to produce Yunis Rahmatullah, a former detainee of the United Kingdom in Iraq, from U.S. detention at Bagram. The U.K. Supreme Court recently affirmed that the court was correct to issue habeas corpus, but also dismissed Rahmatullah's appeal that the United Kingdom should do more to persuade the United States to release him from military detention at Bagram.<sup>4</sup> It is one thing for non-American courts to make pronouncements about Guantanamo or Bagram, but it is quite another for those courts to have someone released from such military detention centers.

One interesting exception, however, is a recent case where the Canadian courts refused to extradite a suspected terrorist from Canada to face material-support-of-terrorism charges in the United States because of American abuses in his capture and initial detention in Pakistan.<sup>5</sup> This exception may, however, prove the rule because it is the only case examined in this Article where a non-American court had the power to enforce a personal remedy relating to the liberty of the litigant. Non-American courts may provide a venue for litigation about the legality and human-rights consequences of American counterterrorism, but they are unlikely to be in a position to guarantee effective remedies for any abuses. This poses questions about the legal and political purposes of

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<sup>4</sup> *Rahmatullah v. Sec'y of State for Defence*, [2012] E.W.C.A. (Civ.) 182, ¶¶ 16-18 (Eng.), *aff'd*, [2012] U.K.S.C. 48. Two judges dissented and argued that the U.K. government should reengage with the U.S. government and more clearly assert the United Kingdom's right to have Rahmatullah returned to their custody under memorandums of understanding (MOUs) signed between the United Kingdom and the United States with respect to the transfer of detainees from Iraq and under the applicable Geneva Convention. They argued "when liberty is at stake, it is not the court's job to speculate as to the political sensitivities at stake." *Id.* ¶ 129.

<sup>5</sup> *Canada (Att'y Gen.) ex rel. United States v. Khadr*, 2011 CanLII 358, ¶ 24 (Can. Ont. C.A.), available at <http://canlii.ca/t/f1902>.

substitute justice litigation and the relation between rights and remedies.

Another challenge faced in these substitute justice cases is that the Australian, British, and Canadian governments have all settled important cases brought against them by former Guantanamo detainees rather than risk that courts might order the disclosure of sensitive information about their own, and perhaps more importantly, American security operations. The most dramatic example was the decision of the U.K. government to settle claims brought by Binyam Mohamed and other former Guantanamo detainees after it became apparent that British courts<sup>6</sup> might be less deferential to secrecy claims than American courts.<sup>7</sup> The U.S. government's threat<sup>8</sup> to decrease intelligence sharing with the U.K. if sensitive American material was disclosed by British courts also likely played a role in the settlement. Confidential settlements may achieve a form of compensation and corrective justice for individuals, but they will fail to reveal the truth and to achieve accountability and deterrence of misconduct.

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<sup>6</sup> R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs, [2010] E.W.C.A. (Civ.) 65, ¶ 168 (Eng.); R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs, [2010] E.W.C.A. (Civ.) 158, ¶ 2 (Eng.). The government objected to disclosure of parts of both the Divisional Court and Court of Appeal's judgments about the mistreatment of Binyam Mohamed in American custody, but after much litigation, these parts of the judgments were eventually disclosed. For criticism of the British courts for deferring to executive claims that disclosure would threaten security, see Adam Tomkins, *National Security and the Due Process of Law*, 64 CURRENT LEGAL PROBS. 215, 223-43 (2011).

<sup>7</sup> Mohamed's lawsuit against American officials and private contractors alleging torture from his extraordinary rendition was dismissed on state-secrets grounds even to the extent that it relied on information that had otherwise been publically exposed. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011). For criticism of this case as overly formalistic and deferential to the executive and in comparison to the parallel British litigation, see D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012); Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629 (2012).

<sup>8</sup> The U.K. government objected to the use of the term "threats" to describe the communications of the U.S. government, but the Divisional Court concluded, "[I]n the language of everyday life that was undoubtedly what it was," and it carefully distinguished such threats or consequences from the separate principle of respecting an agency's control over shared intelligence. R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs, [2009] E.W.H.C. (Admin.) 2549, ¶ 15 (Eng.).

The aftermath of the Binyam Mohamed case also indicates how substitute justice may result in a pushback that could ultimately harm non-American legal systems that have taken on the indirect review of American counterterrorism activities. After the settlement, the U.K. government appointed an inquiry into whether British officials had been complicit with torture, but with the government having a veto over what information the inquiry could make public.<sup>9</sup> Given these conditions, the inquiry lacked credibility and was eventually abandoned. The government next issued a Green Paper,<sup>10</sup> and now a Justice and Security Bill,<sup>11</sup> that responds to substitute justice litigation by authorizing the government to use secret evidence to defend itself in national security litigation and to prohibit the disclosure of information about the misconduct of third parties such as American agencies and officials in such litigation. This type of pushback reveals not only the power of substitute justice litigation but also the danger that non-American governments will limit such litigation in response to concerns of the U.S. government that non-American courts may review operations and disclose material that American courts would not review or disclose.

The first part of this Article will outline the conditions of American legal exceptionalism that have made indirect challenges to American counterterrorism activities necessary. As is well known, the American state secrets doctrine has shut down lawsuits based on extraordinary renditions.<sup>12</sup> One of the first and still most famous cases in this regard was Khalid El-Masri's unsuccessful attempt to sue CIA officials and private companies that were implicated in his extraordinary rendition from Macedonia to Afghanistan where he was tortured before eventually being released on the basis that he had mistakenly

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<sup>9</sup> DETAINEE INQUIRY, <http://www.detaineeinquiry.org.uk/> (last visited Mar. 2, 2013).

<sup>10</sup> SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, at xi-xv (U.K.), available at <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2011/green-paper.pdf>

<sup>11</sup> Justice and Security Bill, 2012-13, H.L. Bill [27] (U.K.).

<sup>12</sup> Sudha Setty, *Litigating Secrets: Comparative Perspectives on State Secrets Privilege*, 75 BROOK. L. REV. 201 (2009).

been captured.<sup>13</sup> Mr. El-Masri explained that he brought the litigation not “to harm America” but because “I want to know why America harmed me. I don’t understand why the strongest nation on Earth believes that acknowledging a mistake will threaten its security.”<sup>14</sup> Subsequent attempts to extradite CIA officials to face trial in Germany were thwarted because of American diplomatic pressure.<sup>15</sup> Mr. El-Masri has persisted. The Grand Chamber of the European Court of Human Rights has held that Macedonia violated Article 3 of the European Convention on Human Rights prohibiting torture or inhumane and degrading treatment by its complicity in the CIA’s rendition of Mr. El-Masri, including his “disappearance,” his “hooding,” his “forced undressing,” and the painful and involuntary administration of a suppository in his anus.<sup>16</sup> They awarded him 60,000 Euros in damages, but the case was most notable for its review and condemnation of U.S. extraordinary rendition practices on the basis of a wide variety of public sources, including media and European Parliamentary Reports.<sup>17</sup> Given what he experienced, Mr. El-Masri litigated his case in any available venue. As he has noted, “[I]t seems that the only place in the world where my case cannot be discussed is in a U.S. courtroom.”<sup>18</sup>

American legal exceptionalism does not end with its broad state secrets doctrine. It includes a host of other legal doctrines that have the effect of precluding or limiting review of national security activities. I have argued elsewhere that these doctrines combine to create American “extra-legalism.”<sup>19</sup> Extra-legalism refers not to a black hole where law does not exist, but rather to a

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<sup>13</sup> El-Masri v. United States, 479 F.3d 296, 300-01 (4th Cir. 2007).

<sup>14</sup> Khaled El-Masri, *I Am Not a State Secret*, L.A. TIMES (Mar. 3, 2007), <http://www.latimes.com/news/la-oe-emasri3mar03,0,5731364.story>.

<sup>15</sup> Scott Horton, *The El-Masri Cable*, HARPER’S (Nov. 29, 2010), <http://harpers.org/archive/2010/11/hbc-90007831>.

<sup>16</sup> El-Masri v. The former Yugoslav Republic of Macedonia, Application No. 39630/09 (Eur. Ct. H.R. Dec. 2012), ¶¶ 208-10, 221, 221, 240 & 270.

<sup>17</sup> *Id.*

<sup>18</sup> El-Masri, *supra* note 14.

<sup>19</sup> KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM 163-69, 235-37, 436-38 (2011) [hereinafter ROACH, 9/11 EFFECT]; Kent Roach, *Uneasy Neighbors: Comparative American and Canadian Counter-Terrorism*, 38 WM. MITCHELL L. REV. 1701, 1724-28 (2012) [hereinafter Roach, *Uneasy Neighbors*].

process where legalistic and positivistic claims of legal authority are used to prevent courts from reviewing state actions on their merits. This approach to rule by law allows American courts to refuse to review or provide remedies for what is often seen as extra-legal conduct such as extraordinary rendition, indeterminate detention without trial, and targeted killing. American extra-legalism creates the conditions under which substitute justice in non-American courts is necessary.

The second part of this Article will examine substitute justice litigation in Australian courts by two former Guantanamo detainees—David Hicks and Mamdouh Habib. Australia might seem to be a particularly inhospitable environment for substitute justice litigation given its lack of a national bill of rights, but Australian courts have resisted attempts by the Australian government to shut down substitute justice litigation on the basis that it improperly asked courts to review the conduct of the United States. At the same time, however, it will be seen that the Australian litigation never got beyond its preliminary stages. In particular, the government's settlement of Mamdouh Habib's claims precluded litigation that may have thrown light on his rendition to Egypt and subsequent detention at Guantanamo.

The third part of this Article will review substitute justice litigation in Canadian courts. The Canadian litigation, especially with regards to Omar Khadr who was imprisoned in Guantanamo since his capture in 2002, at fifteen years of age, to late September 2012, has been extensive, resulting in two separate decisions by the Supreme Court of Canada. At the same time, however, the Canadian courts stopped short of ordering the Canadian government to request Omar Khadr's repatriation from Guantanamo.

The remedial weaknesses of substitute justice litigation will be demonstrated in this section by contrasting the Omar Khadr cases with litigation brought by his older brother Abdullah Khadr, which resulted in Canadian courts permanently staying his extradition to the United States on material-support-of-terrorism charges. The different remedial outcome of these cases can be explained by the fact that Abdullah Khadr was returned to Canada and the Canadian courts could ensure that he would not be extradited to the United States, whereas Omar Khadr

remained in Guantanamo at the time of the Canadian litigation. Both Omar Khadr<sup>20</sup> and Australian David Hicks<sup>21</sup> have found guilty pleas before military commissions to be a more effective vehicle for obtaining release from Guantanamo than litigation in Australian or Canadian courts.

The fourth part of this Article will examine substitute justice litigation in the United Kingdom. The post-9/11 phenomena of substitute justice litigation started in the United Kingdom with a 2002 decision that denounced Guantanamo as a legal black hole while at the same time refusing to order the United Kingdom to make diplomatic representations to the United States in an attempt to obtain the release of Guantanamo detainees.<sup>22</sup> The British experience with substitute justice litigation is more extensive than Australia's or Canada's. The Binyam Mohamed lawsuit is particularly interesting because it shows British courts having to contend with not only secrecy claims made by the U.K. government with respect to American materials but also threats by the United States that disclosure of such material might jeopardize intelligence sharing between the two close allies.

Although British courts were rightly skeptical about extravagant threats of decreased American intelligence sharing, given that the material related to misconduct and torture, and not to secret sources and ongoing investigations, the U.K. government has been very concerned about them. In response, it settled the lawsuit of Binyam Mohamed and other British Guantanamo detainees and has made policy and legislative proposals designed to limit the danger of British courts disclosing information about American misconduct in the future. The U.K. experience demonstrates that substitute justice litigation is vulnerable to governmental pushback.

This section will also examine the Yunis Rahmatullah case. The extraordinary saga of this case pushes substitute litigation aimed at the United States in non-American courts as far as it will go and to the breaking part. After having first denied

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<sup>20</sup> See *infra* note 114 and accompanying text.

<sup>21</sup> See *infra* note 57 and accompanying text.

<sup>22</sup> R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] E.W.C.A. (Civ.) 1598, ¶ 64 (Eng.).

Rahmatullah's habeas corpus application on the ground that British officials did not have control over their former prisoner once he had been transferred from British custody in Iraq to American custody at Bagram Air Base in Afghanistan,<sup>23</sup> the Court of Appeal, in late 2011, decided to grant the great writ in part because of allegations that Rahmatullah's transfer had violated MOUs between the United Kingdom and the United States and the Geneva Conventions.<sup>24</sup> No doubt, the Court of Appeal was also influenced by the nature of indeterminate military detention without trial and the fact that American courts have refused to extend habeas to the thousands of detainees at Bagram.<sup>25</sup> In February 2012, however, the British courts were forced to release their own officials from the habeas order in the face of the U.S. government's refusal to cooperate.<sup>26</sup> Both the U.K. government and Rahmatullah unsuccessfully appealed to the U.K. Supreme Court. It decided that the lower court was right to issue habeas corpus but also that the U.K. government had done enough to satisfy the writ of habeas corpus by unsuccessfully asking the United States to return Rahmatullah to British custody.<sup>27</sup> This case dramatically reveals the difficulties of obtaining concrete remedies in substitute justice litigation. That said, such litigation may provide a vehicle to publicize the claims of those adversely affected by American counterterrorism who would not be able to litigate their case on the merits in American courts, let alone obtain an effective remedy.

The last part of this Article will provide an assessment of substitute justice litigation. It will suggest that substitute justice litigation is by and large a positive development. It affirms that the United States cannot preclude litigation in foreign courts. Moreover, non-American courts have been more willing indirectly

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<sup>23</sup> *Rahmatullah v. Sec'y of State for Defence*, [2011] E.W.H.C. (Admin.) 2008, ¶¶ 34-35 (Eng.).

<sup>24</sup> *Rahmatullah v. Sec'y of State for Defence*, [2011] E.W.C.A. (Civ.) 1540, ¶¶ 33-37 (Eng.).

<sup>25</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

<sup>26</sup> *Rahmatullah v. Sec'y of State for Defence*, [2012] E.W.C.A. (Civ.) 182, ¶¶ 16-18 (Eng.), *aff'd*, [2012] U.K.S.C. 48.

<sup>27</sup> *Sec'y of State for Foreign & Commonwealth Affairs v. Rahmatullah*, [2012] U.K.S.C. 48.

to review American counterterrorism efforts on their merits than American courts. Normatively, non-American courts should review claims on the merits and Australian, British, and Canadian courts have been right to reject the idea that they should not decide cases brought against their governments simply because it may result in indirect and negative conclusions about American counterterrorism activities, most notably detention at Guantanamo. That said, substitute justice remains an awkward and second-best strategy. It has generally not resulted in concrete personal remedies for those adversely affected by American counterterrorism. It has, however, helped publicize their plight and assisted in successful negotiations for the return of litigants from American military detention. Given the transnational nature of counterterrorism, there is a need to rethink the place of traditional understandings of the need for a tight connection between rights violations and remedies in Anglo-American constitutionalism. It will be suggested that the remedial process in substitute justice cases is more like the remedial process used in international law, which stresses publicity and persuasion rather than coercive processes that produce a right to a remedy. Such a remedial process may be more appropriate for achieving complex forms of transnational justice than more traditional and domestic approaches that insist on a tight connection between rights and remedies.

Non-American courts have been creative in finding a variety of domestic and international law grounds to review the conduct of their own governments as they have interacted with American officials in cooperative counterterrorism and military endeavors. Even though these courts understandably do not purport to be able to review the conduct of American officials, they have done so indirectly. The power of substitute justice processes to conduct such indirect review and to order the disclosure of material that the U.S. government would rather not be disclosed, however, has not gone unchecked. Secrecy claims made by governments for the nondisclosure of material shared by the United States may often prevent substitute justice litigation from fully engaging on the merits of the impugned transnational practice. The U.S. government's refusal to release Yunis Rahmatullah from Bagram forced British courts to release their own officials from a habeas

corpus order and may deter similar litigation in the future. In short, the U.S. government is an important player in substitute justice litigation even though it is not a party to such litigation.

#### I. THE NEED FOR SUBSTITUTE JUSTICE: AMERICAN EXTRA-LEGALISM

More than a decade after 9/11, the exceptionalism of the American response to terrorism is entrenched and increasing. One example is the National Defense Authorization Act for Fiscal 2012,<sup>28</sup> authorizing indeterminate military detention and military trials of noncitizens suspected of involvement in al Qaeda and continuing legislative restrictions on the transfer of Guantanamo detainees.<sup>29</sup> The exceptionalism of the American response to terrorism among democracies relates not only to the use of military detention and trials of suspected terrorists but also to the resistance of American courts to reviewing the national security activities of the executive and to awarding remedies for executive misconduct.

As I have suggested at greater length elsewhere, the resistance of American courts to review of the national security activities of the American executive can be understood as American “extra-legalism.”<sup>30</sup> Extra-legalism is not the creation of a lawless black hole criticized by many, but rather a more sophisticated and positivistic practice in which a highly legalistic system resists judicial review of national security activities. American courts employ a variety of legal doctrines, including assigning political questions to the unreviewable discretion of elected branches of government,<sup>31</sup> judicial deference towards Congress and the military,<sup>32</sup> qualified immunity doctrines,<sup>33</sup> the

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<sup>28</sup> H.R. 1540, 112th Cong. § 1022 (1st Sess. 2012).

<sup>29</sup> *Id.* § 1027.

<sup>30</sup> ROACH, 9/11 EFFECT, *supra* note 19; Roach, *Uneasy Neighbors*, *supra* note 19, at 1724-28.

<sup>31</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 740 (1975) (applied in *Khadr v. Bush*, 587 F. Supp. 2d. 225, 230-34 (D.D.C. 2008)).

<sup>32</sup> *Nixon v. United States*, 506 U.S. 224, 237 (1993) (en banc) (applied in *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (articulating concerns about the judicial branch second-guessing the strategic decision to deploy troops)), *cert. denied*, 131 S. Ct. 997 (2011).

*Ker/Frisbie*<sup>34</sup> doctrine of not examining irregular renditions, narrow standing,<sup>35</sup> broad state secrets,<sup>36</sup> and various forms of remedial abstention, and deference in extending *Bivens*<sup>37</sup> damage claims.

Despite the prolonged and eventually successful battles fought over whether detainees at Guantanamo could have access to habeas corpus, the record of American courts in providing actual remedies for national security abuses is weak. Even before Congress restricted them from doing so, the D.C. Circuit held that the courts lacked the power to release Uighurs detained at Guantanamo into the United States.<sup>38</sup> The United States Supreme Court has refused to consider a number of restrictive precedents from the D.C. Circuit that have made it difficult for the remaining detainees to obtain relief.<sup>39</sup> There are also a significant number of cases where habeas corpus has been granted but the prisoners

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<sup>33</sup> *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (upholding objectively reasonable use of material-witness warrant on qualified-immunity grounds even if used for pretextual and improper means); *Ashcroft v. Iqbal*, 556 U.S. 662, 680-84 (2009) (officials not liable for post-9/11 pretextual use of immigration law). *See generally* Stephen I. Vladeck, Essay, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012) (discussing reluctance of American courts to grant remedies in national security cases).

<sup>34</sup> *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

<sup>35</sup> *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (standing denied to U.S. persons, including those representing Guantanamo detainees, to challenge electronic surveillance, because they could not establish with certainty that their communications with foreign persons were monitored).

<sup>36</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2242 (2011).

<sup>37</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971). *See generally* Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333 (2010); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) (discussing the reluctance of American courts to grant remedies in cases not involving national security).

<sup>38</sup> *Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009), *vacated on other grounds*, 130 S. Ct. 1235 (2010). The same court also held that it would not second-guess a decision that transfer of the Uighur detainees to a third country would not result in torture. *Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009).

<sup>39</sup> *Latif v. Obama*, 132 S. Ct. 2741 (2012), *denying cert. to* 666 F.3d 746 (D.C. Cir. 2011) (presumption that intelligence reports are reliable and regular).

have not been released.<sup>40</sup> Habeas corpus has not been extended to the detainees at Bagram Air Base in Afghanistan,<sup>41</sup> a factor that has played into some substitute justice litigation on behalf of Yunis Rahmatullah, who is detained at Bagram where reportedly 3000 people are also detained.<sup>42</sup>

American courts have summarily rejected attempts to judicially review targeted-killing decisions even with respect to American citizens.<sup>43</sup> The United States Supreme Court has recently refused to consider the civil claim by American citizen Jose Padilla<sup>44</sup> arising from his military detention and mistreatment. Justice Wilkinson stressed that special factors justified refusing to extend *Bivens* claims to Padilla's claim. These factors included that:

The Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government.<sup>45</sup>

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<sup>40</sup> Although habeas corpus has been granted in thirty-seven of fifty-seven cases brought by Guantanamo detainees, the detainee has not been released in thirteen of those cases because of concerns that repatriation would result in torture. *Guantanamo Bay Habeas Decision Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://www.ccrjustice.org/GTMOscorecard> (last visited Sept. 12, 2012).

<sup>41</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

<sup>42</sup> Recent transfers of some of these detainees to Afghan custody raise a host of issues, including issues of possible transfer to torture or human rights abuses. See *Times Topics: Bagram Detention Centre (Afghanistan)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram\\_air\\_base\\_afghanistan/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html) (last visited Sept. 12, 2012).

<sup>43</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). This case can be compared with the willingness of Israeli courts to review targeted killing. See ROACH, 9/11 EFFECT, *supra* note 19, at 124-28.

<sup>44</sup> *Lebron v. Rumsfeld*, 132 S. Ct. 2751 (2012), *denying cert. to* 670 F.3d 540 (4th Cir. 2012) (civil lawsuit for \$1 precluded on grounds that Congress did not intend to extend damage remedies to such sensitive national security contexts).

<sup>45</sup> *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012).

Similar reasoning had previously been used to deny civil claims brought by non-American citizens, such as Maher Arar, who were rendered to Syria and tortured there.<sup>46</sup>

Much national security litigation has been foreclosed by conclusions that Congress did not intend to allow *Bivens*<sup>47</sup> damage claims in sensitive national security areas. In other democracies, however, similar allegations of mistreatment and torture would trigger concerns that the person had a right to an effective remedy based on either specific right to a remedy provisions<sup>48</sup> or inherent in the very existence of the independent courts.<sup>49</sup>

Padilla's claims against John Yoo, one of the authors of the torture memos, was dismissed on qualified immunity grounds.<sup>50</sup> Despite widespread publicity and litigation of the issue, no torture related suit has moved beyond summary judgment in the United States.<sup>51</sup> Paradoxically, the very volume of lawsuits in the United States encourages American judges to be cautious in allowing lawsuits. Justice Kennedy, for example, has defended qualified immunity with respect to the pretextual use of material witness warrants on the basis that:

If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequence of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security . . . [N]ationwide security operations should not have to grind to a halt even when an appellate

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<sup>46</sup> Arar v. Ashcroft, 585 F.3d 559, 563, 574 (2d Cir. 2009) (en banc).

<sup>47</sup> 403 U.S. 388, 395-97 (1971).

<sup>48</sup> Article 13 of the European Convention on Human Rights (ECHR) provides, "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." ECHR Art. 13 (1950), available at <http://www.hri.org/docs/ECHR50.html#C.Art13>. Section 24(1) of the Canadian Charter of Rights and Freedoms has been interpreted as ensuring that the superior courts will always be able to hear remedial claims. See *Vancouver v. Ward*, [2010] 2 S.C.R. 28 (Can.).

<sup>49</sup> *Habib v. Commonwealth*, (2010) 183 F.C.R. 62, 99-100 (Austl.).

<sup>50</sup> *Padilla v. Yoo*, 678 F.3d 748, 763-64 (9th Cir. 2012).

<sup>51</sup> *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1159 (2009).

courts find those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.<sup>52</sup>

Justice Scalia, in his opinion for the Court, stressed that “[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.”<sup>53</sup> Qualified immunity would protect Attorney General Ashcroft even if his use of material-witness warrants was unconstitutional.<sup>54</sup>

The deference of American courts towards review of national security claims is longstanding and not a product of 9/11. It is also not limited to claims by noncitizens as is revealed by decisions denying relief to American citizens such as Jose Padilla, who was subject to military detention and mistreatment, Abdulla al-Kidd, an American citizen subject to detention under a material-witness warrant, and the family of Anwar Al-Aulaqi, subject to targeted killing. Although the United States has served as a model of judicial review in many other countries, its own practices of judicial review are quite constrained in the national security context.

American extra-legalism that has precluded judicial review of national security activities or denied access to damages and other remedies in American courts has created a demand for litigation of related matters in non-American courts. As will be seen in the following sections, such substitute justice litigation does not directly target American conduct and officials but does so indirectly by claiming that other governments who cooperated with American officials and who continue to interact with them have breached various domestic and international legal standards. Transnational counterterrorism cooperation has been widely encouraged since 9/11, and it mirrors the transnational nature of terrorism. As will be seen below, however, it also increases the number of venues for litigation over alleged abuses of counterterrorism.

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<sup>52</sup> Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2087 (Kennedy, J., concurring).

<sup>53</sup> *Id.* at 2085.

<sup>54</sup> *Id.*

## II. AUSTRALIAN SUBSTITUTE JUSTICE LITIGATION

*A. David Hicks*

Australian citizen David Hicks was captured by American forces in December 2001 in Afghanistan and subsequently detained at Guantanamo. He sought both habeas corpus and judicial review proceedings of the decision of the Australian government not to request the United States to return him to his home country. As will be seen, litigation over similar issues was also brought by Guantanamo detainees in both Canada and the United Kingdom. Such litigation raises difficult issues about the degree to which courts should interfere with the government's conduct of diplomacy. In all the cases examined in this Article, non-American courts refused to see such litigation as raising non-justiciable political questions best left to the elected branches of government. At the same time, the non-American courts were all reluctant to issue mandatory remedies to require their governments to make diplomatic representations with the United States with respect to Guantanamo detainees.

The Australian government sought summary judgment to have Mr. Hicks's lawsuit dismissed on the basis of the act of state doctrine. Such an argument can be seen as a form of political-questions argument that asks courts not to entertain litigation that concerns the conduct of another sovereign state. Judge Tamberlin rejected the government's summary judgment motion. The judge stressed that "this case concerns the fundamental right to have cause shown as to why a citizen is deprived of liberty for more than five years in a place where he has not had access to the benefit of a duly constituted court without valid charge."<sup>55</sup> He also applied an exception in the act of state doctrine for violations of international human rights. He stressed that:

The courts have consistently held that questions of personal liberty are of primary importance and of the utmost urgency and, arguably, if Mr. Hicks can make good the facts in his Statement of Claim, trial by the new Military Commission

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<sup>55</sup> Hicks v. Ruddock, (2007) 156 F.C.R. 574, 600, ¶ 90 (Austl.); see Marley Zelinka, *Hicks v Ruddock versus The United States v Hicks*, 29 SYDNEY L. REV. 527 (2007).

and its procedures may be found to be contrary to the requirements of international law.<sup>56</sup>

Substitute justice in this case had the potential to subject both Guantanamo Bay and the use of military commissions to trial in Australian courts.

In a prelude to an issue that would resurface in the Rahmatullah case, Judge Tamberlin also rejected the Australian government's argument that summary judgment should be granted because habeas corpus would not issue because Australian officials had no control over Hicks, who was detained at Guantanamo. The judge stressed the importance of the writ and relied on a precedent where the British courts granted habeas corpus with respect to a prisoner detained in Dublin, Ireland.<sup>57</sup> Some judges of the U.K. Supreme Court, in another substitute justice case, expressed skepticism about such a broad interpretation of English jurisprudence. Lord Phillips concluded that there is no authority for granting habeas corpus where, as in David Hicks's case, the issuing country has no claim of control over the detainee.<sup>58</sup>

Consistent with the idea that Australian courts have in some respect been bolder in substitute justice litigation than their British counterparts, Judge Tamberlin of the Federal Court of Australia also distinguished a 2002 English case that stopped short of ordering the government to make diplomatic representations to the United States for the release of a Guantanamo detainee on the basis that "the injustice in this case could be seen to be substantially greater than that in *Abbasi*, given the internment of the applicant for over five years and the fact that there has been no alleviation of his predicament . . ." <sup>59</sup>

The Hicks lawsuit did not, however, proceed. David Hicks made a decision to plead guilty to material support of terrorism

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<sup>56</sup> *Hicks*, (2007) 156 F.C.R. at 600, ¶ 90.

<sup>57</sup> *Id.* at 590, ¶ 47.

<sup>58</sup> Sec'y of State for Foreign & Commonwealth Affairs v. Rahmatullah [2012] U.K.S.C. 48, ¶ 105 (Lord Phillips).

<sup>59</sup> *Id.* at 599, ¶ 86.

before a military commission at Guantanamo.<sup>60</sup> He served the remaining nine months of his sentence and was prohibited by the terms of the plea agreement from speaking to the media for a year. He has, however, subsequently explained his decision to plead guilty on the basis of his belief that he could not obtain a fair trial or an acquittal at Guantanamo.<sup>61</sup> The Australian courts were prepared to hear Hicks's claims about his detention at Guantanamo, but it was ultimately the decision of American authorities to extend a plea agreement that ended his actual detention.

### *B. Mamdouh Habib*

The Australian courts have also refused to strike out a lawsuit against Australian officials by Mamdouh Habib who was captured in Pakistan shortly after 9/11. He was subsequently transferred to Egyptian custody and then to Bagram Air Base in Afghanistan before arriving in Guantanamo in May 2002, where he stayed until his release in January 2005. Habib did not sue American officials for his alleged mistreatment, which included allegations of torture. If he had, the lawsuit would likely have not been decided on the merits either on the basis of state secrets, qualified immunity, or determinations that courts should exercise caution in extending *Bivens* damage claims in the national security context.<sup>62</sup> In a pattern also seen with respect to British and Canadian detainees at Guantanamo, Habib sued his own country's officials who interrogated him at Guantanamo.

As in the Hicks matter, the Australian government unsuccessfully tried to dispose of the litigation by seeking

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<sup>60</sup> Hicks also tried to forum shop with respect to substitute justice venues by claiming British citizenship. See *Sec'y of State for the Home Dep't v. Hicks*, [2006] E.W.C.A. (Civ.) 400 (Eng.).

<sup>61</sup> David Hicks, *Pressure to Plead Guilty*, 29(4) HUMAN RIGHTS DEFENDER (2010).

<sup>62</sup> See, e.g., *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009) (former Guantanamo detainees could not sue American officials in respect of their detention because of qualified immunity and restrictions on the extra-territorial application of constitutional rights to noncitizens), *cert. denied*, 130 S. Ct. 1013 (2010); see also *Talal Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010) (dismissing lawsuit brought on behalf of former Guantanamo detainees who were force fed and subsequently committed suicide at the military detention facility).

summary judgment. It again relied on the act of state doctrine articulated by the United States Supreme Court in 1897. That doctrine proclaims that:

Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>63</sup>

Relying on the principle of *Marbury v. Madison*,<sup>64</sup> however, Judge Perram in the Federal Court of Appeal concluded that the act-of-state doctrine “has no application where it is alleged that Commonwealth officials have acted beyond the bounds of their authority under Commonwealth law.”<sup>65</sup> In other words, judicial obligations to determine the legality of actions by Australian officials should prevail over those of deference to the government’s national security activities and comity toward other nations.

Despite not having a constitutional or national bill of rights, the Australian Federal Court of Appeal accepted the proposition that the legislature could not deprive courts of jurisdiction to hear the claim. Judge Perram stated that “the decision in *Marbury v. Madison* was concerned with judicial review of legislative action but in this country it is established that the doctrine also explains the capacity of the judiciary to review the legality of administrative action.”<sup>66</sup> The Court of Appeal stressed that such an approach was a requirement of both the rule of law and the constitutionally guaranteed role of courts.

Judge Perram concluded that the justiciability of Mr. Habib’s allegations “is axiomatic and could not be removed by Parliament still less the common law. No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by

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<sup>63</sup> *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>64</sup> 54 U.S. 135 (1803).

<sup>65</sup> *Habib v. Commonwealth*, (2010) 183 F.C.R. 62, 72, ¶ 24 (Austl.).

<sup>66</sup> *Id.*

Parliament.”<sup>67</sup> In this way, the Australian courts were much bolder than American courts that have refused to extend *Bivens* causes of action in various national security contexts in the absence of clear Congressional authorization.<sup>68</sup> Ironically for a country without a national bill of rights,<sup>69</sup> the Australian courts demonstrated greater fidelity to the promise of the rule of law in *Marbury v. Madison* than American courts in similar cases.

The Habib decision is also significant because of its claims that Australian officials, who were alleged to have interrogated Mr. Habib twelve times at Guantanamo, were complicit in torture. All of the judges who heard the case emphasized that torture was contrary to Australia’s international legal commitments and a crime under Australian law and on that basis provided a domestic ground for the lawsuit to proceed.<sup>70</sup> As Adam Tomkins has noted, an important factor driving the post-9/11 willingness of non-American courts to engage in substitute justice litigation about American counterterrorism is the gravity of the allegations made in these cases, almost all of which include allegations of torture.<sup>71</sup>

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<sup>67</sup> *Id.* at 77, ¶ 37.

<sup>68</sup> *See, e.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 581 (2d Cir. 2009).

<sup>69</sup> This is not to say that Australia’s approach to terrorism in other respects has not been affected by the absence of a bill of rights. *See* George Williams, *Anti-terror Legislation in Australia and New Zealand*, in *GLOBAL ANTI-TERRORISM LAW AND POLICY* 541 (Victor V. Ramraj et al. eds., 2d ed. 2012).

<sup>70</sup> Chief Justice Black emphasized:

Torture offends the ideal of a common humanity and the Parliament has declared it to be a crime wherever outside Australia it is committed. Moreover, and critically in this matter, the *Crimes (Torture) Act* is directed to the conduct of public officials and persons acting in an official capacity irrespective of their citizenship and irrespective of the identity of their government. The circumstance that a prosecution may only be brought against an Australian citizen or a person present in Australia and requires the consent of the Attorney-General of the Commonwealth has evident practical consequences, but prohibited conduct is not thereby deprived of its character as a crime nor is the strength of the Parliament’s emphatic disapproval of such conduct in any way thereby diminished.

The *Crimes (Torture) Act* reflects the status of the prohibition against torture as a peremptory norm of international law from which no derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy.

*Habib*, 183 F.C.R. at 67, ¶¶ 8-9.

<sup>71</sup> Adam Tomkins, *supra* note 6, at 223, 226.

As one commentator has observed, the Federal Court's "muscular resolve complements decisions which have recently emerged from other jurisdictions."<sup>72</sup> The Habib decision is consistent with decisions by English courts in the Binyam Mohamed case. Much like the Australian court, the British court concluded that concerns about national security and comity "should not automatically trump a public interest in open justice which may concern a degree of facilitation by U.K. officials of interrogation by U.S. officials using unlawful techniques which may amount to torture or cruel, inhuman, or degrading treatment."<sup>73</sup> At the same time, the difficulties of establishing such claims of mistreatment should not be underestimated. The Habib lawsuit, like that of Binyam Mohamed, was settled on secret terms and without admission of liability by either Australian or British officials.<sup>74</sup> Non-American governments who rely on American intelligence may have great incentives to settle lawsuits that could result in the disclosure of sensitive American material. An American government that enjoys a broad state secrets doctrine at home may expect similar benefits abroad. Even as substitute justice litigation seeks to avoid American courts and indirectly review American counterterrorism actions, it may also be indirectly influenced by practices in American courts.

The settlement of the lawsuit in the Habib case also suggests that even when substitute justice litigation serves the ends of compensation and corrective justice, it may not ensure accountability for the actions of national security actors. Fortunately, the Australian government appointed an independent executive watchdog body, the Inspector General of Intelligence and Security, to examine the conduct of Australian intelligence, policing, and foreign affairs officials in the Habib

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<sup>72</sup> Stephen Tully, *Habib v Commonwealth: Clarifying the State of Play for Acts of State*, 32 SYDNEY L. REV. 711, 716 (2010); see also Natalie Klein, *David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of Its Citizens Abroad*, 35 MELB. U. L. REV. 134, 144 (2011) (suggesting that courts might enforce a duty of diplomatic representations in cases where an Australian national would suffer human rights violations abroad).

<sup>73</sup> *R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs*, [2010] E.W.C.A. (Civ.) 65, ¶ 290 (Eng.) (May L.J.).

<sup>74</sup> Tully, *supra* note 72, at 716, 721.

case. The Inspector General issued both secret and public reports that in general did not find Australian officials complicit in torture but made several recommendations for better coordination of the whole of government response to terrorist suspects held abroad.<sup>75</sup> The Habib litigation in Australia, like the Binyam Mohamed case in the United Kingdom, may have created public pressures that helped persuade the government to appoint inquiries to determine if officials had been complicit with torture by American and other officials. Even when substitute justice lawsuits are settled by governments anxious to avoid revealing secrets, they may help create conditions that demand the use of other accountability mechanisms.

### C. Summary

The fact that David Hicks and Mamdouh Habib were able to commence litigation in Australian courts that indirectly challenged their detention at Guantanamo is striking given the absence of a bill of rights in Australia. The Australian Federal Court of Appeal's invocation of *Marbury v. Madison*<sup>76</sup> as a justification for allowing the lawsuit to proceed is particularly ironic given that it is almost certain that American courts would not have allowed a lawsuit based on his detention at Guantanamo to be litigated on the merits. The Australian courts are not known for their activism. Australia, especially under Prime Minister

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<sup>75</sup> See INSPECTOR GEN. OF INTELLIGENCE & SEC., INQUIRY INTO THE ACTIONS OF AUSTRALIAN GOVERNMENT AGENCIES IN RELATION TO THE ARREST AND DETENTION OVERSEAS OF MR MAMDOUH HABIB FROM 2001 TO 2005 1, 46-50, 106 (2011) (Austl.), available at <http://www.igis.gov.au/inquiries/docs/habib-inquiry.pdf>.

<sup>76</sup> See *Habib v. Commonwealth*, (2010) 183 F.C.R. 62, 72, ¶ 25 (Austl.) (invoking *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and specifically Chief Justice Marshall's statement that "[i]t is, emphatically, the province and duty of the judicial department to say what the law is"). Justice Perram added that "[t]he doctrine in *Marbury v. Madison* is one of the constitutional norms of this country for 'in our system the principle in *Marbury v. Madison* is accepted as axiomatic.'" *Id.* (quoting *Australian Communist Party v. Commonwealth*, [1951] H.C.A. 5; (1951) 83 C.L.R. 1 at 262). On the relevance of the Australian Communist Party case, in which the Australian High Court invalidated a law banning the Communist Party to common law constitutionalism that can be used to constrain executive antiterrorism powers, see DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 72 (2006).

Howard, was one of the United States' closest allies in the war against terror. Nevertheless, in both the Hicks and Habib cases, Australian courts rejected governmental arguments that the litigation should not be entertained under the act of state doctrine because it would involve Australian courts opining about American conduct. These cases demonstrate the growth of substitute justice in a nonfertile climate.

At the same time, the Australian cases also make apparent the limits of substitute justice litigation. David Hicks did not continue with his judicial review of the Howard government's refusal to request his repatriation from Guantanamo. Even if he had, British and Canadian cases suggest that the Australian courts may have been similarly reluctant to order the government to make diplomatic representations to the United States. In the end, David Hicks found that a guilty plea before a military commission was the best way to secure his release from Guantanamo and return to Australia.

Mamdouh Habib settled his lawsuit with the Australian government on confidential terms. This suggests that non-American governments may have considerable incentive to settle substitute justice cases in order to shut down the possibility that sensitive information about both their own security, and perhaps more importantly American security operations, will be disclosed. As will be seen below, a similar move towards settlement happened in the Binyam Mohamed case in the United Kingdom. Settlements in these cases also suggest that substitute justice litigation may not be a reliable means of ensuring accountability and deterrence for misconduct by governments. They may not be able to plug the accountability gaps created as governments in the post-9/11 world increasingly take both a whole-of-government and a transnational approach to the prevention of terrorism.<sup>77</sup> At the same time, litigation by Habib in this and other cases<sup>78</sup> may have contributed to the public awareness about his case. This in turn

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<sup>77</sup> On the concept of accountability gaps, see ROACH, 9/11 EFFECT, *supra* note 19, at 455-59.

<sup>78</sup> Mr. Habib also brought a number of libel actions related to statements made about his connection to terrorism. *See, e.g.*, Habib v. Nationwide News Pty Ltd, [2010] N.S.W.C.A. 34 (Austl.).

led a new government to task the Inspector General of Security into investigating the actions of Australian officials in relation to his case.

### III. CANADIAN SUBSTITUTE JUSTICE LITIGATION

#### *A. Maher Arar and Other Canadians Detained and Tortured in Syria*

Substitute justice litigation that indirectly reviews American counterterrorism activities is possible in part because many countries understandably cooperated and shared information with the United States in the wake of the horrors of 9/11. Canada in particular made special efforts to cooperate with the United States in part because of false but widespread rumors that some of the 9/11 attackers had entered the United States through Canada and because of the Ahmad Ressam case, in which a terrorist was apprehended by alert American officials when entering the United States from Canada.<sup>79</sup> Canadian cooperation with the United States in the immediate aftermath of 9/11 resulted in Canadian police officers sharing whole investigative files with American officials that unfortunately included inaccurate information that identified Maher Arar as an Islamic extremist associated with al Qaeda. The dual Canadian-Syrian citizen was detained in New York City in September 2002 as he was returning to Canada. Mr Arar was rendered from the U.S. to Syria where he was held for almost a year and tortured.

The Canadian government appointed a public inquiry in 2004 after Arar returned to Canada. In 2006, it issued a three-volume report detailing the actions of various Canadian officials in his case. The inquiry recommended that Canada register a formal complaint about Arar's treatment with both the United States and Syrian governments, and that it consider Arar's claims for compensation in light of its extensive findings about the sharing of

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<sup>79</sup> Parts of the discussion of Canadian cases in this section draws on Roach, *Uneasy Neighbors*, *supra* note 19.

inaccurate information without restrictions on its use and failure to engage in a unified effort to repatriate Arar.<sup>80</sup>

Shortly after the public inquiry report was released, the Canadian government settled a lawsuit brought by Maher Arar for \$10.5 million with respect to the role of Canadian officials in his case. Arar's Canadian lawsuit can be seen as a form of substitute justice for his inability to bring a suit against American, as well as Syrian, officials.<sup>81</sup> At the same time, the settlement in that case, like the Habib settlement, only fulfilled corrective-justice and compensatory objectives and does not appear to have changed the conduct of officials, especially in the United States.<sup>82</sup> Maher Arar remains on American watchlists because of his inability to see and challenge the information that is the basis for his watchlisting.<sup>83</sup> He attempted to sue various American officials, but the Second Circuit held that the lawsuit could not be determined on the merits because Congress had not clearly extended a *Bivens* action to renditions as a sensitive national security matter.<sup>84</sup>

Another recommendation of the Arar commission was that a subsequent inquiry be appointed to examine Canadian conduct in relation to three other Canadian citizens who were detained in Syria on suspicion of being involved in terrorism. These cases did not involve direct U.S. involvement in the form of renditions, as did the Maher Arar case. The subsequent inquiry found that Canadian officials had improperly shared information with Syrian

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<sup>80</sup> COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 361-63 (2006) (Can.).

<sup>81</sup> Arar sued Syria in Canadian courts, but the claim was struck out on the grounds of Canadian legislation that made foreign states absolutely immune from even claims based on torture. *Arar v. Syrian Arab Republic*, 2005 CanLII 4945, ¶¶ 3, 7 (Can. Ont. Super. Ct. J.), available at <http://canlii.ca/t/1jvwvx>.

<sup>82</sup> Even in Canada, the government has rejected recommendations made by the Arar Commission about the need for enhanced review of national security activities and, in particular, information sharing. It has recently indicated that it will share information, even when there is a risk of torture, and has repealed reforms in the R.C.M.P. that were supposed to exercise more centralized control over terrorism investigations. See ROACH, 9/11 EFFECT, *supra* note 19, at 361-425; Kent Roach, *The Dangerous Game of Complicity in Torture*, 58 CRIM. L.Q. 303, 303-06 (2012).

<sup>83</sup> Roach, *Uneasy Neighbors*, *supra* note 19, at 1739-48.

<sup>84</sup> *Arar v. Ashcroft*, 585 F.3d 559, 581 (2d Cir. 2009) (en banc).

officials, including questions to be asked of the detainees.<sup>85</sup> The men have commenced civil lawsuits against the Canadian government, and these lawsuits can be seen as a form of substitute justice, albeit substitute justice that will indirectly review the actions of the Syrian as opposed to the U.S. government. The lawsuits, like other substitute justice litigation, have encountered obstacles as the Canadian government has made several secrecy claims in relation to relevant material.<sup>86</sup> Canadian law is less restrictive than American law in this respect, because it allows judges to balance the harms of disclosing secret information to national security and international relations against the need for disclosure.<sup>87</sup> Canadian law also allows for the appointment of security-cleared special advocates to see and challenge secret information that may not be disclosed to the plaintiffs or their lawyers.<sup>88</sup> Nevertheless, the difficulties and expense of litigating these cases demonstrates some of the challenges of substitute justice litigation.<sup>89</sup>

The Canadian litigation is slowly proceeding. It will not be foreclosed on the more absolutist grounds used by the majority of the en banc Second Circuit to preclude Maher Arar's civil lawsuit against American officials on the basis that Congress had not clearly extended *Bivens* damage claims into sensitive national security areas and that he did not have standing to make his constitutional claims because he was unlikely to be subject to such

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<sup>85</sup> INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN 364-65, 411, 449 (2008) (Can.).

<sup>86</sup> Canada (Att'y Gen.) v. Almalki, 2011 CanLII 199, ¶¶ 18-20 (Can. Ont. F.C.A.), available at <http://canlii.ca/t/flwvr>.

<sup>87</sup> Canada Evidence Act, R.S.C. 1985, ch. C-5, § 38.06 (Can.). The exclusive jurisdiction of specially designated Federal Court judges to determine the appropriate balance has been challenged but upheld in this litigation. Abou-Elmaati v. Canada (Att'y Gen.), 2011 CanLII 95, ¶¶ 24-30 (Can. Ont. C.A.), available at <http://canlii.ca/t/2flfv>.

<sup>88</sup> Canada (Att'y Gen.) v. Almalki, 2011 CanLII 54, ¶ 5 (Can. Ont. F.C.A.), available at <http://canlii.ca/t/fkqjv>.

<sup>89</sup> Jasminka Kalajdzic, *Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases*, 41 OTTAWA L. REV. 289, 293 (2009); Jasminka Kalajdzic, *Access to Justice for the Wrongfully Accused in National Security Investigations*, 27 WINDSOR Y.B. ACCESS JUST. 171, 176, 177 (2009).

conduct in the future.<sup>90</sup> Even some of the judges on the Second Circuit who dissented from this ruling recognized that it was “extremely unlikely”<sup>91</sup> that Arar’s case could ever be litigated on the merits given the state secrets doctrines and that Congress could clearly preclude such litigation if it enacted a specific law to that effect.<sup>92</sup>

### *B. Omar Khadr*

The experience with prolonged litigation in Canada on behalf of Omar Khadr—a person captured by American Forces in Afghanistan in 2001 at fifteen years of age and detained at Guantanamo until 2012—underlines that it was not possible for the United States to restrain foreign litigation over Guantanamo. As will be seen, extensive litigation was conducted in Canadian courts on Omar Khadr’s behalf. Omar Khadr enjoyed more success in Canadian courts than in his habeas corpus and military commission litigation in the United States.<sup>93</sup> Nevertheless, the Canadian litigation underlines the limited powers that foreign courts will have over American military detention.

In 2005, a Canadian judge issued a temporary injunction that prevented Canadian intelligence officials from continuing to go to Guantanamo to question Khadr. The judge stressed that he was not reviewing the conduct of American officials<sup>94</sup> but that continued Canadian intelligence gathering at Guantanamo risked causing irreparable harm to Omar Khadr, especially because it might be used against him in military proceedings at Guantanamo.<sup>95</sup> This approach reflects the Janus-faced nature of

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<sup>90</sup> Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009) (en banc).

<sup>91</sup> *Id.* at 583.

<sup>92</sup> *Id.* at 630.

<sup>93</sup> See Khadr v. Bush, 587 F. Supp. 2d 225, 234 (D.D.C. 2008) (denial of habeas corpus on deference-to-military grounds); O.K. v. Bush, 377 F. Supp. 2d 102, 103, 112 (D.D.C. 2005) (denying injunction against torture on standing and deference-to-the-executive grounds). For an assessment of Khadr’s litigation in the United States, see Roach, *Uneasy Neighbors*, *supra* note 19, at 1759-69. The following section draws on the above article.

<sup>94</sup> Khadr *ex rel.* El-Samnah v. The Queen (2005), [2006] 2 F.C.R. 505, ¶ 12 (Can.) available at <http://canlii.ca/t/1lc75>.

<sup>95</sup> *Id.* ¶ 23.

much substitute justice litigation, in which non-American courts purport not to review American conduct but then make rulings that are implicitly critical of such activity. This 2005 litigation was effective in part because the Canadian court could enforce effective remedies against Canadian security officials who complied with the injunction.

The Supreme Court of Canada twice held that Canadian interrogations of Omar Khadr at Guantanamo, in 2003 and 2004, violated both the Canadian Charter of Rights and Freedoms and international law.<sup>96</sup> In both cases, the Court had to find a violation of international law in order to apply the Canadian Charter of Rights and Freedoms, Canada's constitutional bill of rights, extra-territorially.<sup>97</sup> This approach to extra-territorial application of the Charter raised the possibility of the Canadian court potentially embarrassing the United States by concluding that conditions at Guantanamo violated international law. As will be discussed in greater detail below, a 2002 decision of the Court of Appeal for England and Wales denounced Guantanamo as a "legal black-hole."<sup>98</sup> A finding by a domestic court that American actions violate international law may have greater persuasive force on the global community than one that only finds a violation of domestic law. The Supreme Court of Canada took a more diplomatic approach in both its *Khadr* cases than the British court. After briefly reviewing the United States Supreme Court's decisions in *Rasul v. Bush*<sup>99</sup> and *Hamdan v. Rumsfeld*,<sup>100</sup> the Supreme Court of Canada held, in 2008, that it was not necessary to pronounce on the legality of Guantanamo because "with the benefit of a full factual record, the United States Supreme Court held that the detainees had illegally been denied access to *habeas*

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<sup>96</sup> Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125, ¶ 23 (Can.); Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44, ¶ 16 (Can.).

<sup>97</sup> Hape v. The Queen, [2007] 2 S.C.R. 292, ¶ 52 (Can.).

<sup>98</sup> R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] E.W.C.A. (Civ.) 1598, ¶ 64 (Eng.); see also R (Al Rawi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2006] E.W.H.C. (Admin.) 972, ¶ 29 (Eng.).

<sup>99</sup> 542 U.S. 466 (2004).

<sup>100</sup> 548 U.S. 557 (2006).

*corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*.”<sup>101</sup>

Having found that the Canadian interrogation at Guantanamo violated both the Charter and international law in the 2008 case, the Supreme Court ordered that Canada disclose to Khadr the information that it had obtained and had shared with American officials.<sup>102</sup> An effective remedy was possible because the Canadian court could enforce such a remedy against Canadian officials. At the same time, the Supreme Court remanded the case to a Federal Court judge who ruled on how much of the classified information could be disclosed to Khadr. These proceedings were subsequently carried out with Judge Mosley concluding that, while disclosure of some of the information

may cause some harm to Canada-U.S. relations, that effect will be minimized by the fact that the use of such interrogation techniques by the U.S. military at Guantanamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.<sup>103</sup>

This case demonstrates a commitment to comparing and balancing the harms of both disclosure and nondisclosure of information claimed by the government to be secret that is often not reached in American state-secrets cases.<sup>104</sup>

The information disclosed as a result of the 2008 court case demonstrates the ability of substitute justice litigation to place more information in the public domain and thus to increase opportunities for accountability. A synopsis of an interview conducted in February 2003 was disclosed as a result of the litigation. It included statements by Omar Khadr claiming he was

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<sup>101</sup> *Khadr*, [2008] 2 S.C.R. at 125, ¶ 21.

<sup>102</sup> *Id.* ¶ 34.

<sup>103</sup> *Khadr v. Canada* (Att’y Gen.), 2008 Can LII 807, ¶ 89 (Can. Ont. F.C.), available at <http://canlii.ca/t/1z69n>. Other parts of the judgment balanced the public interests for and against disclosure by, for example, allowing Khadr to obtain videotapes made of the Canadian interrogations but with the faces of the intelligence officers and other sensitive material edited out.

<sup>104</sup> Setty, *supra* note 12, at 204.

tortured at Bagram when first captured and pleading with Canadian officials, “[P]romise you’ll protect me from the Americans.”<sup>105</sup> The disclosures also revealed that Canadian officials were aware that Omar Khadr had been placed on a so-called “frequent flyer” program of sleep deprivation, in which for three weeks he was not allowed more than three hours in any one location before the 2004 interviews.<sup>106</sup> As in the Australian and British cases, the Canadian judge favored more disclosure in large part because of the gravity of the misconduct of American officials. He also resisted claims by the government that disclosure of the American use of sleep deprivation would harm Canadian-U.S. relations.

In subsequent litigation, Omar Khadr claimed that the Canadian government’s decision not to request his repatriation from Guantanamo violated the Charter. After reviewing both the Canadian interviews at Guantanamo and Khadr’s claims to protection, not only as a Canadian citizen, but also as a person who was fifteen years of age when captured, a trial judge ordered that the only appropriate remedy was to require Canada to request his repatriation.<sup>107</sup> Judge Reilly stressed that there was no evidence of the harm that a repatriation request would cause to Canadian-American relations. The Supreme Court upheld most of this decision on appeal and stressed that the questioning of Khadr when he was sixteen years of age and had no access either to counsel or courts “offends the most basic Canadian standards about the treatment of detained youth suspects.”<sup>108</sup> The Supreme Court relied on its 2008 decision to hold that the interrogations also violated international law. It focused on conditions at Guantanamo in 2003 while noting that “the regime under which Mr. Khadr is currently detained has changed significantly in recent years.”<sup>109</sup>

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<sup>105</sup> DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE, AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS REPORT OF INVESTIGATIVE ACTIVITY, INTERVIEW OF KHADR, OMAR AHMED (2003) (Can.), available at <http://graphics8.nytimes.com/packages/pdf/world/20080711Khadr.pdf>.

<sup>106</sup> J. Gould, *Umar Khadr*, N.Y. TIMES, Apr. 20, 2004, at 2.

<sup>107</sup> *Khadr v. Canada (Prime Minister)* (2009), [2010] 1 F.C.R. 34, ¶¶ 76-89 (Can.).

<sup>108</sup> *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, ¶ 25 (Can.).

<sup>109</sup> *Id.* ¶ 7.

Although it held that the 2003 and 2004 interviews violated both international law and the Charter, the Supreme Court of Canada reversed the trial judge's order that required Canada to request Khadr's repatriation from the United States on the grounds that the remedy interfered with the government's prerogatives over diplomacy.<sup>110</sup> The Court stressed that the situation was dynamic and it was hesitant to interfere with Canadian-American relations by requiring the Canadian government to request Omar Khadr's repatriation. Although consistent with British and South African decisions that have stopped short of requiring governments to make diplomatic representations on behalf of their citizens,<sup>111</sup> the Court's approach discounted the trial judge's conclusion that there was no alternative remedy but a repatriation request and the Court's own prior rejection of non-justiciable political questions.<sup>112</sup> One of the dangers of substitute justice litigation is that, in its attempts to adjust to the transnational complexity of the context, it may erode domestic norms of insisting that there be effective remedies for rights violations.

Although it initially appeared that the Canadian government might do nothing in response to the Supreme Court's 2010 declaration that Omar Khadr had still not received an effective remedy for the violation of his Charter rights in 2003 and 2004, the Canadian government eventually responded by issuing a diplomatic note requesting that the United States not use evidence obtained by Canadian officials. The U.S. government issued a nonresponsive diplomatic note in reply, which simply stated that the military commission would decide under the Military Commission Act what evidence would be admissible. It appears that some use was made of the videotaped interrogation conducted by Canadian security officials in Khadr's pretrial military-commission proceedings.<sup>113</sup> This case reveals, albeit in a

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<sup>110</sup> *Id.* ¶¶ 27-47.

<sup>111</sup> *R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] E.W.C.A. (Civ.) 1598, ¶ 4 (Eng.); *Kaunda v. President of the Republic of South Africa*, 2005 (4) S.A. 235 (C.C.) ¶ 23 (S. Afr.).

<sup>112</sup> *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, ¶ 38 (Can.).

<sup>113</sup> *Khadr v. Canada (Prime Minister)*, [2010] 4 F.C.R. 36, ¶¶ 85-87 (Can.).

less dramatic fashion as the Yunus Rahmatullah case, that substitute justice litigation may be unable to produce effective remedies for the affected person controlled by the United States if the U.S. government exercises its sovereign right not to cooperate.

The Omar Khadr litigation is a noteworthy example of substitute justice litigation because of his lawyers' persistence in seeking a remedy. Unsatisfied with Canada's diplomatic note and the American refusal to follow it, Khadr's lawyers commenced new litigation alleging that he had still not received an effective remedy for the violations of his rights in 2003 and 2004 when he was interrogated by Canadian officials. A lower court concluded that Khadr still had not received an effective remedy for these violations. Judge Zinn ruled that he could, if necessary, order the government to request Khadr's repatriation if that was the only effective remedy.<sup>114</sup> Even under this bolder approach to remedies, it goes without saying that a Canadian court could not order the United States to release Khadr to Canadian officials.

Judge Zinn never ruled on what was an appropriate remedy because the Canadian government successfully sought a stay of his judgment pending appeal. The appeal court judge who issued the stay expressed doubts about whether courts could order the government to request Khadr's repatriation in light of the Supreme Court's 2010 decision overturning that remedy as not respectful enough of the government's prerogative with respect to diplomacy.<sup>115</sup> This issue was a critical but ambiguous one. Parts of the Supreme Court of Canada's 2010 decision suggested that the Court was only saying that an order requiring Canada to make diplomatic representations on Khadr's behalf was not appropriate at this time (and despite his long term detention at Guantanamo). Other parts of the Supreme Court's judgment did, however, suggest that it would always be inappropriate for courts to order that the government make diplomatic representations to another country on behalf of a litigant. If accepted, this would represent a partial acceptance of an American-style political questions doctrine that would preclude judicial remedies that require the

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<sup>114</sup> *Id.*

<sup>115</sup> *Canada (Prime Minister) v. Khadr*, 2010 CanLII 199, ¶¶ 32-34 (Can. Ont. F.C.A.), available at <http://canlii.ca/t/2bt16>.

government to make diplomatic representations.<sup>116</sup> This demonstrates how substitute justice litigation might erode domestic norms that assert the need for meaningful and effective remedies for any rights violation.<sup>117</sup> A remedial norm that would prohibit courts from ordering their own executives to make diplomatic representations to other countries would temper the quality of substitute justice that could be received in non-American courts because the main (albeit not the only) remedial request in all of these cases has been to ask local governments to make diplomatic requests of American officials.

In any event, the Canadian courts will not decide whether they have the power to order diplomatic representations because they declared the case moot in light of Omar Khadr's subsequent guilty pleas before an American military commission.<sup>118</sup> Like David Hicks, Omar Khadr eventually gave up on attempts to seek substitute justice in non-American courts and decided it was in his best interest to plead guilty before an American military commission. He agreed to a plea bargain that eventually allowed him to leave Guantanamo and serve the remainder of his sentence in a Canadian prison.<sup>119</sup> The Omar Khadr litigation underlines that while Guantanamo detainees can engage in extensive litigation in non-American courts, American officials still hold the keys to their release.

The Omar Khadr case, like the Australian cases of fellow Guantanamo detainees David Hicks and Mamdouh Habib,

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<sup>116</sup> See generally Kent Roach, "The Supreme Court at the Bar of Politics": *The Afghan Detainee and Omar Khadr Cases*, 28 NAT'L J. CONST. L. 115, 115-16 (2010) (criticizing such an interpretation of the decision for reading in a political-questions doctrine at the remedial stage that the Canadian courts have emphatically rejected with respect to determining rights violations).

<sup>117</sup> The Canadian Supreme Court has asserted the need for effective remedies for Charter violations in a number of other purely domestic cases. See *Canada (Att'y Gen.) v. PHS Cmty. Serv. Soc'y*, [2011] 3 S.C.R. 134, ¶ 144 (Can.); *Vancouver v. Ward*, [2010] 2 S.C.R. 28, ¶¶ 1-2 (Can.); *Doucet-Boudreau v. Nova Scotia (Att'y Gen.)*, [2003] 3 S.C.R. 3, ¶¶ 87-88 (Can.).

<sup>118</sup> *Canada (Prime Minister) v. Khadr*, 2011 CanLII 92, ¶¶ 1-3 (Can. Alta. F.C.A.), available at <http://canlii.ca/t/fkg8d>.

<sup>119</sup> He received an eight-year sentence that was much lower than a forty-year sentence that the jury of military personal rendered after hearing emotional victim testimony. Roach, *Uneasy Neighbors*, *supra* note 19, at 1766-67.

demonstrates how non-American courts have been prepared to allow litigation to proceed that in fact revolves around American practices at Guantanamo. All three cases were attempts to put Guantanamo on trial even though the litigation focused on the actions of Australian or Canadian officials. In all three cases, however, litigants faced great hurdles in gaining effective remedies. The Omar Khadr case was litigated more extensively than the Australian cases, but in the end the Supreme Court of Canada refused to order the Canadian government to make diplomatic representations to the U.S. government. A similar pattern will be seen in the British cases. Even if non-American courts were prepared to require their governments to make such diplomatic representations, American authorities can always decline to follow another country's diplomatic request, as indeed was done when the United States did not follow Canada's request that information obtained by Canadian officials at Guantanamo not be used in Omar Khadr's military commission proceedings. Substitute justice in non-American courts has been more effective in highlighting questions of rights, including allegations of torture, than in obtaining effective and personal remedies for litigants.

### *C. Abdullah Khadr*

Abdullah Khadr is a Canadian citizen who is one of Omar Khadr's older brothers. He was captured by the Inter-Services Intelligence Directorate (I.S.I.) in Pakistan in October 2004 after the United States posted a \$500,000 bounty for his capture.<sup>120</sup> He was held for fourteen months in a secret detention center in Pakistan without access to counsel or courts. He was denied consular access to Canadian officials until January 2005.<sup>121</sup> Canadian courts, in subsequent proceedings to extradite Khadr from Canada to face material-support charges in the United States, found that Pakistan and the United States acted "in concert" to deny consular access in order to facilitate interrogation

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<sup>120</sup> Canada (Att'y Gen.) *ex rel.* United States v. Khadr, 2011 CanLII 358, ¶ 7 (Can. Ont. C.A.), available at <http://canlii.ca/t/fl902>.

<sup>121</sup> *Id.* ¶ 57.

by U.S. intelligence.<sup>122</sup> Abdullah Khadr alleged he was tortured by Pakistani officials, but a Canadian extradition judge found that these allegations of torture were not established because of inconsistencies in Khadr's story.<sup>123</sup> The extradition judge found that Khadr was physically abused by Pakistani officials but not by the FBI when they also interviewed him in Pakistan.<sup>124</sup>

Abdullah Khadr was eventually released to Canadian officials and allowed to return to Toronto, Canada, but only after American officials unsuccessfully attempted to persuade Pakistani authorities to release him to their custody so he could be rendered to the United States to face material-support-of-terrorism charges based on allegations that he supplied arms and money to terrorist groups in Pakistan and Afghanistan.<sup>125</sup> If Abdullah Khadr had been rendered to the United States without legal process, the process used to bring him to the United States and his mistreatment in Pakistan would not have been relevant under the *Ker/Frisbie* doctrine<sup>126</sup> with respect to any terrorism trial in the U.S. As suggested above, this approach is part of the American practice of extra-legalism that has produced a demand for substitute justice litigation in non-American courts.

The fact that the United States paid Pakistani authorities a \$500,000 bounty for Abdullah Khadr's capture was secret until it was revealed by a Canadian judge in state-secrets proceedings related to an American extradition request to Canada.<sup>127</sup> The judge stressed that, while the United States had not agreed to the release of information about the bounty, "[i]t is now more than

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<sup>122</sup> *Id.* ¶¶ 116, 120.

<sup>123</sup> Canada (Att'y Gen.) *ex rel.* United States v. Khadr, 2010 CanLII 4338, ¶ 61 (Can. Ont. Super. Ct. J.), available at <http://canlii.ca/t/2bxx8>.

<sup>124</sup> *Id.* ¶ 105.

<sup>125</sup> When the FBI interviewed Khadr in Pakistan, he apparently admitted to supplying al Qaeda with machine gun rounds, grenades, rockets, and explosive material to be used against American and coalition forces. The Canadian extradition judge found that the statements obtained from the Pakistan interview should be excluded as manifestly unreliable because they were conducted in a "hostile and oppressive environment." *Id.* ¶ 161.

<sup>126</sup> *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

<sup>127</sup> *Khadr v. Canada* (Att'y Gen.), 2008 CanLII 549, ¶ 107 (Can. Ont. F.C.), available at <http://canlii.ca/t/1wzvr>.

three years since the information was received by Canadian officials, the general practice is in the public domain, no human source would appear to be at risk and the circumstances in Pakistan have changed since these events took place.”<sup>128</sup> Judge Mosley, in this case, did not accept the control principle as an absolute restriction on the disclosure of shared intelligence and was prepared to balance the competing cases for disclosure and nondisclosure. This decision reveals how substitute justice litigation in non-American courts can result in the disclosure of information that might otherwise be protected under broad state secrets doctrines in American courts.

The Canadian courts in both the Abdullah Khadr and the Omar Khadr cases refused to accept executive claims of injury to national security and international relations at face value. As such, they were bolder than the British courts, which, while skeptical about the harms of disclosure in the Binyam Mohamed case, ultimately accepted executive claims that disclosure would injure national security and violate the control principle over shared intelligence.<sup>129</sup> Substitute justice litigation is vulnerable to governmental claims that the disclosure of material will harm both national security and international relations by revealing secret cooperation with American officials, but the Canadian cases demonstrate a significant amount of judicial pushback despite Canada’s heavy reliance on U.S. intelligence.

An important contrast between the Omar and Abdullah Khadr cases is the different remedial postures taken by the Canadian courts. In the Abdullah Khadr case, the Canadian courts imposed a strong remedy of a stay of proceedings that prevented Khadr from being extradited to the United States. The general reluctance of non-American courts to order concrete remedies is one of the weaknesses of the substitute justice approach discussed in this Article. As discussed above, the Supreme Court of Canada reversed a mandatory order that Canada request Omar Khadr’s return from the United States on the basis that it did not give adequate weight to governmental prerogatives in conducting

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<sup>128</sup> *Id.* ¶ 111.

<sup>129</sup> For criticism of the approach of the British courts see Adam Tomkins, *supra* note 6, at 223-43.

Canadian-American diplomacy.<sup>130</sup> In the Abdullah Khadr case, however, the extradition judge found that a stay of proceedings was warranted.<sup>131</sup> In reaching this conclusion, the extradition judge relied on a 2001 Supreme Court of Canada judgment that stayed extradition proceedings after an American prosecutor had threatened a fugitive with a maximum sentence and hinted at the possibility of rape in an American prison if the fugitive contested extradition to the United States.<sup>132</sup>

Although traditionally deferential to extradition requests because of concerns about comity, Canadian courts have become more active in recent years in reviewing extradition requests.<sup>133</sup> Extradition proceedings involve transnational cooperation, but they increasingly provide a forum for litigants to seek a form of substitute justice that will not be found in the requesting state. Indeed a case is pending in Canada that may require Canadian courts to rule whether a person can be extradited from Canada on terrorism charges without a waiver of the option of military custody and trial under the National Defense Authorization Act for Fiscal 2012.<sup>134</sup>

The Canadian government appealed the stay of extradition proceedings in the Abdullah Khadr case, but the Ontario Court of

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<sup>130</sup> Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44 (Can.).

<sup>131</sup> Canada (Att'y Gen.) v. Khadr, 2010 CanLII 4338, ¶ 150 (Can. Ont. Super. Ct. J.), available at <http://canlii.ca/t/2bxx8>.

<sup>132</sup> Cobb v. United States, [2001] 1 S.C.R. 587 (Can.).

<sup>133</sup> In 2001, the Canadian Supreme Court reversed a decision of a decade earlier and held that the Charter would require assurances that the death penalty not be applied before a person was extradited. Canada (Justice) v. Burns, [2001] 1 S.C.R. 283 (Can.). Subsequently, the Canadian Supreme Court has ruled that while evidence presented by foreign requesting states will be accorded a presumption of regularity, the presumption can be displaced should the fugitive be able to demonstrate the unreliability of the foreign evidence. Ferras v. United States, [2006] 2 S.C.R. 77, ¶¶ 49-50 (Can.).

<sup>134</sup> H.R. 1540, 112th Cong. § 1022 (2d Sess. 2012). The case involves a Canadian citizen who is in the process of being extradited to face terrorism charges in the United States stemming from alleged involvement in bombings in Iraq that killed twelve people, including five American soldiers. See United States v. Muhammad 'Isa, 2012 A.B.Q.B. 344 (Can.) (denial of disclosure request relating to alleged torture of fugitive in Iraq); Canada (Att'y Gen.) *ex. rel.* United States v. Muhammad 'Isa, 2012 A.B.Q.B. 645 (Can.), available at <http://canlii.ca/t/ftjrp> (test of a prima facie case for extradition satisfied without consideration of possible military detention and trial if fugitive is extradited to the United States).

Appeal upheld the remedy. It relied in part on British authority that stayed proceedings in a case of an irregular extradition,<sup>135</sup> a result quite different than reached by the United States Supreme Court under the *Ker/Frisbie* doctrine.<sup>136</sup> The Canadian courts were not prepared, as the American courts would be, to wash their hands of mistreatment in bringing a person before the court. The Ontario Court of Appeal stressed that “the rule of law must prevail, even in the face of the dreadful threat of terrorism” and even when it “serves in the short term to benefit those who oppose and seek to destroy” such values.<sup>137</sup> The judgment eloquently reaffirms the importance of protecting rights and judicial integrity, even in a case involving terrorism. It also reveals that the substitute justice approach will be most robust in cases where the non-American court already has jurisdiction over the person requesting relief and the ability to ensure the effectiveness of the remedy. As will be seen in the next section, a British court that issued habeas corpus to secure the release of a detainee held by the American military at Bagram Air Base soon learned that the order could not be enforced because American officials refused to cooperate.

#### *D. Summary*

The Omar Khadr case takes similar litigation brought by fellow Guantanamo detainee David Hicks and a number of U.K. citizens and permanent residents to its logical conclusion in requesting that the Canadian government request that the United States release him from Guantanamo. All of these cases are nominally not directed at the United States but rather at the

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<sup>135</sup> Canada (Att’y Gen.) *ex rel.* United States v. Khadr, 2011 CanLII 358, ¶ 48 (Can. Ont. C.A.), available at <http://canlii.ca/t/fl902> (citing R v. Horseferry Road Magistrates’ Court *ex parte* Bennett, [1994] 1 A.C. 42 (H.L.) 62-68 (appeal taken from Eng.) (where Lord Bridge in particular expressed a preference for Justice Stevens’s dissenting opinion in United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (Stevens, J., dissenting))).

<sup>136</sup> *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 441-44 (1886) (followed in the terrorist cases of United States v. Yunis, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991) and United States v. Yousef, 927 F. Supp. 673, 677-78 (S.D.N.Y. 1996)); see also *Alvarez-Machain*, 504 U.S. at 660-62.

<sup>137</sup> *Khadr*, 2011 CanLII at 358, ¶ 76.

conduct of other governments, but they are all part of campaigns that argued that the United States was wrong to imprison people indefinitely at Guantanamo. This was particularly the case in Canada, where the imprisonment of Omar Khadr for something he was alleged to have done as a fifteen-year old was widely seen as an infringement of human rights and the imprisonment of a “child soldier” who, given his family, had little choice but to participate in hostilities in Afghanistan.<sup>138</sup> In many respects, substitute justice litigation may seem to be misdirected as it focuses on alleged, but comparatively minor, misconduct by Australian, Canadian, and British governments, whereas it is the United States that is directly responsible for detention and trial at Guantanamo.

The availability of habeas corpus relief in the Federal Courts of the United States as well as extensive litigation in the military commission process may, for some, increase the sense that Omar Khadr misdirected his efforts by suing his own Canadian government. Omar Khadr did not, however, neglect his opportunity to litigate in these American venues. He brought several motions in habeas corpus both with respect to alleged mistreatment at Guantanamo and with respect to his detention. He also litigated many issues relating to alleged mistreatment and his alleged status as a child soldier in front of military judges at Guantanamo. All of these claims were rejected, at times with narrow positivistic reasons that included assertions that even if mistreated in the past, he did not have standing to litigate issues of future mistreatment and that his age was irrelevant because the Military Commissions Act made no allowance for the age of those tried under it.<sup>139</sup> In other words, Omar Khadr attempted to find justice in American venues, but failed to find it. Just as the post-9/11 war against terror was heavily lawyered,<sup>140</sup> so too were

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<sup>138</sup> There is extensive support for Omar Khadr in Canada. *See, e.g.*, JANICE WILLIAMSON, *OMAR KHADR, OH CANADA* (2012). But for arguments that Canada should not accept Omar Khadr back, despite his Canadian citizenship, see EZRA LEVANT, *THE ENEMY WITHIN TERROR, LIES AND THE WHITEWASHING OF OMAR KHADR* (2012).

<sup>139</sup> For an analysis of this litigation, see Roach, *Uneasy Neighbors*, *supra* note 19, at 1759-69.

<sup>140</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129-34 (2007).

the worlds of the Guantanamo detainees. The “jurisdictional redundancy” that Robert Cover identified in the early 1980s<sup>141</sup> has multiplied in a globalized and human-rights-sensitive world. It also reveals the utter futility of President Bush’s 2001 order that attempted to preclude litigation by Guantanamo detainees, not only in American courts, but also in foreign and international tribunals.

The Omar Khadr litigation demonstrates that even when courts are prepared to enjoin their own security officials from going to Guantanamo to interrogate their own citizens, they will be reluctant to order governments to make diplomatic representations. Although the 2010 decision of the Supreme Court of Canada to reverse an order that the Canadian government request Omar Khadr’s repatriation from the United States can be criticized, especially given that Court’s rejection of the notion of any non-justiciable political questions, it is consistent with both British and South African decisions that all stop short of ordering governments to make representations in the sensitive and polycentric world of diplomacy. More broadly, the Omar Khadr case reveals the soft remedial underbelly of substitute justice litigation. Non-American courts are increasingly prepared indirectly to review American counterterrorism activities, but they lack the power to order remedies against the American government. They are often reluctant to order strong remedies against their own governments for fear of interfering with sensitive security-related negotiations between their own governments and the United States. They may also be reluctant to make orders that their own governments cannot comply with without American cooperation. The reluctance of the Supreme Court of Canada to order the Canadian government to ask the United States to return Omar Khadr may be related not only to the importance and delicacy of Canadian-American relations, but also a worry that even a strong remedy, such as the mandatory order by the trial judge, may seem inefficacious if the U.S.

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<sup>141</sup> Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

government exercises its sovereign right to say no to the Canadian diplomatic request.

The Abdullah Khadr case is a fascinating contrast to the Omar Khadr case because it demonstrates how Canadian courts were prepared to issue the strongest of remedies—a permanent stay of proceedings—to prevent the extradition of a far less sympathetic person to the United States where he had been indicted on material-support-of-terrorism charges. The remedial posture of the Canadian courts in the two cases are diametrically opposed but can be explained by the fact that Canadian courts had jurisdiction over Abdullah Khadr and could be sure that their order would be efficacious. That said, the diplomatic repercussions of the Abdullah Khadr case may have been every bit as great as those of the Omar Khadr cases, especially given Canada's refusal so far to prosecute Abdullah Khadr on terrorism charges in Canada. The Abdullah Khadr case also illustrates how extradition proceedings may increasingly become an important substitute justice forum. The National Defense Authorization Act for Fiscal 2012<sup>142</sup> recognizes that American conduct may be reviewed by non-American courts in extradition proceedings and allows the President to waive the option of military custody and trial of non-American al Qaeda suspects when necessary to obtain another country's cooperation. In this sense, American law itself recognized the reality of substitute justice processes and has wisely provided a safety valve that allows waiver of the exceptional option of military custody and trial when necessary to obtain transnational counterterrorism cooperation.

#### IV. BRITISH SUBSTITUTE JUSTICE LITIGATION

##### *A. The Diplomatic Representations Cases*

The first significant example of substitute justice litigation in the post-9/11 era came in a 2002 decision by the Court of Appeal in *Abbasi v. Secretary of State*.<sup>143</sup> In that case, a British citizen

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<sup>142</sup> H.R. 1540, 112th Cong. § 1022 (2d Sess. 2012).

<sup>143</sup> *R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] E.W.C.A. (Civ.) 1598, ¶ 6 (Eng.). As in the Omar Khadr case, security agents from the United Kingdom interrogated Abbasi, but this was not the subject of the litigation.

captured in Afghanistan and detained at Guantanamo sought judicial review to require the U.K. government to make diplomatic representations to the United States on his behalf. The Court of Appeal noted that Abbasi's lawyer had:

great difficulty in advancing his claim to relief in a form which could readily be transposed into an order of the court. The essence of his submissions was that Mr. Abbasi was subject to a violation by the United States of one of his fundamental human rights and that, in these circumstances, the Foreign Secretary owed him a duty under English public law to take positive steps to redress the position, or at least to give a reasoned response to his request for assistance.<sup>144</sup>

This statement indicates how remedies may be a particular difficulty in substitute justice cases. The Court of Appeal reaffirmed the difficulties of obtaining effective remedies when it stated that "it is clear that there can be no direct remedy in this court. The United States Government is not before the court, and no order of this court would be binding upon it . . . ,"<sup>145</sup> while noting that the United Kingdom had no direct responsibility for Abbasi's detention.

The Court of Appeal had little trouble rejecting the U.K. government's argument that Abbasi's lawsuit should be rejected because it would violate the act of state doctrine by requiring the court to pronounce on the legality of the actions of another sovereign state. The Court of Appeal applied a human rights exception to the act of state doctrine and relied on a 1976 decision where courts refused to enforce a Nazi law that deprived Jews who left Germany of their citizenship and property,<sup>146</sup> thus underlining post-World War II concerns about international human rights. The Court of Appeal went on to examine Abbasi's unsuccessful attempts to assert habeas corpus in American courts and the indeterminate nature of his detention without trial. In a phrase that was to obtain wide currency, the Court of Appeal

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<sup>144</sup> *Id.* ¶ 25.

<sup>145</sup> *Id.* ¶ 67.

<sup>146</sup> *Id.* ¶¶ 52, 57 (citing *Oppenheim v. Cattermole*, [1976] A.C. 249 (H.L.) (appeal taken from Eng.)).

concluded that Abbasi was “at present arbitrarily detained in a ‘legal black-hole.’”<sup>147</sup> This statement, though not a judicial remedy, was the most important part of the case. It likely played a role in the U.K. government’s obtaining assurances from the United States in 2003 that the death penalty would not be applied to Mr. Abbasi and his subsequent release and return to the United Kingdom in 2005.<sup>148</sup>

The Court of Appeal went on to hold that the European Convention on Human Rights did not apply in this case because of the United Kingdom’s lack of control over Abbasi’s detention. At the same time, the Court of Appeal decided that the common law doctrine of legitimate expectations would apply to decisions by the government on whether to make representations. It was quick to stress the “very limited nature of the expectation,” which only promised that the government would “consider” making representations.<sup>149</sup> The Court of Appeal stressed, “Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State.”<sup>150</sup> In the end, the Court of Appeal concluded that it would not provide Abbasi any remedy because it was clear that the United Kingdom had considered his request for diplomatic protection and it would not be appropriate for a court to interfere in delicate diplomacy with the United States, “even in the face of what appears to be a clear breach of a fundamental human right.”<sup>151</sup> From the point of view of rendering effective remedies, the decision is disappointing. At the same time, the decision was very influential as a very early judicial denunciation of Guantanamo as a “legal black hole.”

Diplomatic representations returned to the Court of Appeal in 2006 in a case involving Guantanamo detainees who had permanent resident but not citizenship status. The Court of Appeal rejected both the claimant’s discrimination and legitimate expectation claims. With regards to the latter, it ruled that

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<sup>147</sup> *Id.* ¶ 64.

<sup>148</sup> ROACH, 9/11 EFFECT, *supra* note 19, at 292.

<sup>149</sup> *R (Abbasi)*, [2002] E.W.C.A. (Civ.) at 1598, ¶ 99.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* ¶ 107.

legitimate expectations would only extend to British citizens. Even if the litigants could invoke the doctrine, their legitimate expectation has been satisfied because the government had considered the litigants' requests for diplomatic assistance.<sup>152</sup> The Court also rejected claims by family members of the detainees under the European Convention on Human Rights<sup>153</sup> on the basis that the United Kingdom was not responsible for the detention and disappearance of their family members and there was no evidence that diplomatic representations by the United Kingdom would be successful and restore their family life.<sup>154</sup> This case reveals the danger that courts in substitute justice cases may reason backwards and conclude, because they cannot issue an effective remedy, that no right was violated. Such an approach would be consistent with the traditional tight nexus between rights and remedies, but it could undermine the ability of substitute justice litigation to make influential declarations about rights.

Fortunately, the British courts in this case did examine the treatment of the plaintiffs, even while acknowledging that they could not order remedies that would involve their release. Both the Court of Appeal and the Divisional Court discussed the mistreatment of Guantanamo detainees—including the use of stress positions and individual phobias<sup>155</sup>—with the Court of Appeal, referring to this information as “hard information.”<sup>156</sup> The Divisional Court concluded that “[w]hether the three claimants have been tortured or are at risk of torture is undoubtedly a matter of great importance to both them and their families. But equally important, perhaps even more important, if that be the case, is that they be released from Guantanamo Bay as soon as possible.”<sup>157</sup> As in *Abbasi*, the court refused to grant a remedy and

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<sup>152</sup> R. (Al Rawi) v. Sec’y of State for Foreign & Commonwealth Affairs, [2006] E.W.C.A. (Civ.) 1279, ¶ 89 (Eng.).

<sup>153</sup> Orhan v. Turkey, Application, App. No. 25656/94 (Eur. Ct. H.R. June 18, 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60509>.

<sup>154</sup> R. (Al Rawi) v. Sec’y of State for Foreign & Commonwealth Affairs, [2006] E.W.H.C. (Admin.) 972, ¶¶ 74-86 (Eng.).

<sup>155</sup> *Id.* ¶ 20.

<sup>156</sup> *Id.* ¶ 27.

<sup>157</sup> *Id.* ¶ 97.

accepted the government's judgment that court-ordered representations might be ineffective and even counterproductive,<sup>158</sup> while at the same time making their disapproval of the treatment of the plaintiffs at Guantanamo abundantly clear. As in the early Abbasi case, this case was part of a successful campaign that saw the litigants released from Guantanamo a year after the litigation.

Even though the litigants' claims were denied in these two rounds of diplomatic-representation cases, the litigation helped raise awareness about the mistreatment of the plaintiffs at Guantanamo and played a role in successful campaigns that resulted in the release of the plaintiffs. Although domestic non-American courts will not have the power to order the United States to release their detainees, and they will often be reluctant to even order their own governments to make diplomatic representations seeking such release, domestic litigation may often have a higher profile than international litigation, which may involve communications from obscure committees and regional courts rather than pronouncements from well known and established courts. The diplomatic-representation cases before the Court of Appeal for England and Wales contributed to campaigns for British representations to the United States that were eventually successful in gaining the release of all the litigants from Guantanamo.

### *B. Civil Lawsuits by Guantanamo Detainees*

Litigation over detention at Guantanamo did not end with the release and return of detainees to the United Kingdom. A series of prolonged battles were fought in civil litigation by the detainees over secrecy and access to U.S. materials. The former detainees sought access to such materials under what is known as the *Norwich Pharmacal* principle,<sup>159</sup> which allows a civil court to order disclosure material that reveals the misconduct of a third party. The Divisional Court at first held that it would disclose

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<sup>158</sup> *Id.* ¶ 99.

<sup>159</sup> *Norwich Pharmacal Co. v. Customs & Excise Comm'rs*, [1974] A.C. 133 (H.L.) (appeal taken from Eng.).

material relating to the U.S. conduct in Binyam Mohamed's rendition from Pakistan to Morocco in large part because of concerns about torture.<sup>160</sup> The Secretary of State, however, issued a public-interest-immunity certificate claiming that the disclosure of forty-two documents as well as seven paragraphs of the Divisional Court's judgment would violate the control principle, under which an agency shares intelligence, while placing restrictions on its further disclosure. The Divisional Court asked the Secretary of State to reconsider the matter in light of the seriousness of the torture allegations,<sup>161</sup> but the executive affirmed its warnings that disclosure could harm national security and intelligence sharing between the United States and the United Kingdom.

In the end, the forty-two documents were disclosed in related habeas corpus proceedings brought by Mohamed in the United States.<sup>162</sup> In this sense, American litigation was more decisive with respect to disclosure than the British litigation. Nevertheless, the dispute continued over the seven paragraphs of the Divisional Court's judgment that revealed that U.S. officials had imposed sleep deprivation and conduct that amounted at least to cruel, inhuman, and degrading treatment of Binyam Mohamed. The Divisional Court somewhat inconsistently noted that the seven paragraphs in its judgment did not reveal confidential intelligence sources and methods while also deferring to the executive's claim of harm to national security.<sup>163</sup> It eventually ruled that the seven paragraphs would be made public, even in the face of the executive's representations that the U.S. government—even under the then new Obama Administration—would reconsider its intelligence-sharing relationship if the material was disclosed. The Court ruled that though there was a

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<sup>160</sup> R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs, [2008] E.W.H.C. (Admin.) 2048, ¶¶ 142-43 (Eng.). The following draws heavily on Adam Tomkins excellent analysis of this complex and protracted litigation in Tomkins, *supra* note 6, at 223-43.

<sup>161</sup> R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs, [2008] E.W.H.C. (Admin.) 2100 (Eng.).

<sup>162</sup> Tomkins, *supra* note 6, at 228.

<sup>163</sup> R (Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs (No 2), [2009] E.W.H.C. (Admin.) 152 (Eng.).

“small risk” of the United States not sharing intelligence, it was not a “serious risk.” Hence the public interest in disclosure, including the interest in open justice and the prohibition against torture, should prevail.<sup>164</sup> This decision was eventually affirmed by the Court of Appeal,<sup>165</sup> but not until after more disputes about what part of that court’s judgment could be disclosed.

The English courts were less receptive to state-secret claims made on behalf of the U.S. government than the U.S. courts. As were the Canadian courts, the British courts were prepared to balance the competing interests in disclosure and nondisclosure. This led to concerns on both sides of the Atlantic that disclosure of U.S. intelligence in the English litigation could lead to less information sharing, even though these concerns seem irrational given the widespread publicity already accorded the torture memos and similar American misconduct in counterterrorism.<sup>166</sup> In response to the decisions ordering disclosure over the face of objections by the U.K. and U.S. governments, the U.K. government settled its civil lawsuits with the Guantanamo detainees on confidential terms and without admitting liability.<sup>167</sup> This follows a pattern seen also in the Habib case in Australia and the Maher Arar case in Canada. The settlements in all three cases were likely motivated by concerns that continued litigation in non-American courts might result in the disclosure of sensitive information about American counterterrorism activities. The interests of the parties in confidentiality and compensation in all three cases trumped the interests of the public in transparency, accountability, and applying the values of domestic and international law to the impugned conduct.<sup>168</sup>

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<sup>164</sup> R (Mohamed) v. Sec’y of State for Foreign & Commonwealth Affairs (No 2), [2009] E.W.H.C. (Admin.) 2549 (Eng.); R (Mohamed) v. Sec’y of State for Foreign & Commonwealth Affairs, [2009] E.W.H.C. (Admin.) 2973 (Eng.).

<sup>165</sup> R (Mohamed) v. Sec’y of State for Foreign & Commonwealth Affairs, [2010] E.W.C.A. (Civ.) 65 (Eng.).

<sup>166</sup> See, e.g., JANE MAYER, *THE DARK SIDE* (2008).

<sup>167</sup> The heads of the British security services welcomed the settlements and stressed the burdens and risks that the litigation presented to their agencies. *Compensation to Guantanamo Detainees “Was Necessary,”* BBC NEWS (Nov. 16, 2010), <http://www.bbc.co.uk/news/uk-11769509>.

<sup>168</sup> Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984).

In civil proceedings claiming that British officials were complicit with torture at Guantanamo, the U.K. government invited the courts to go beyond public-interest immunity and nondisclosure orders of the type sought in the Binyam Mohamed litigation and allow the use of closed-material proceedings or secret evidence that would not be revealed to the plaintiffs or their lawyers but only security-cleared special advocates. The U.K. Supreme Court, however, ruled in its 2011 Al Rawi judgment that such proceedings would be contrary to the principles of natural justice and open justice and that such departures from common law principles must be specifically authorized in legislation.<sup>169</sup> The Supreme Court warned that it would be dangerous for courts to consider secret evidence not revealed to plaintiffs, even if the evidence was seen and challenged by security-cleared special advocates because of the difficulties that such advocates have in being instructed by the plaintiff after they have seen the secret material.<sup>170</sup> As will be seen, the U.K. Supreme Court did not have the last word in this matter and a bill has subsequently been introduced that would reverse this decision.

### *C. The Government's Pushback Against Substitute Justice Litigation*

The U.K. government responded vigorously to the threat of disclosure of secret material raised in both the Binyam Mohamed case and the Al Rawi case. It first issued a Green Paper in October 2011 that took aim at what has been identified in this Article as substitute justice litigation.<sup>171</sup> The Green Paper stressed the need

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<sup>169</sup> Al Rawi v. Security Serv., [2011] U.K.S.C. 34, [2012] 1 AC 531, ¶ 14 (appeal taken from Eng.).

<sup>170</sup> Lord Kerr stated that “truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.” *Id.* ¶ 93. On how special advocates have grown through a process of borrowing and migration between countries, see David Jenkins, *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, 42 COLUM. HUM. RTS. L. REV. 279 (2011).

<sup>171</sup> See generally SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, (U.K.), available at <http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf> (discussing the dangers of disclosure of domestic and foreign intelligence in British legal proceedings and examining various remedies).

to protect intelligence obtained from foreign partners from disclosure and the need to restrict disclosure under the *Norwich Pharmacal*<sup>172</sup> principle relating to misconduct by third parties. It was critical of the disclosure in the Binyam Mohamed case, arguing that “cases of this kind also have a disproportionate impact on our international, diplomatic and intelligence relationships with foreign governments” and have caused foreign government partners to “have less confidence than before that the courts will accept the view of Ministers on the harm to national security that would result from disclosure.”<sup>173</sup> The Joint Committee on Human Rights criticized the Green Paper on the basis that the government had not demonstrated the need for closed material proceedings and that the use of secret material could mislead the court. It did, however, accept the need for legislation with respect to disclosure of third party wrongdoing material, in part to respond to the concerns of the United States about disclosure of shared intelligence.<sup>174</sup>

Despite widespread criticism of the Green Paper, the U.K. government persisted and introduced a Justice and Security Bill<sup>175</sup> that would allow the use of closed material or secret evidence not seen by plaintiffs but only challenged by security-

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<sup>172</sup> *Norwich Pharmacal Co. v. Customs & Excise Comm’rs*, [1974] A.C. 133 (H.L.) (appeal taken from Eng.). The Green Paper warned that if no changes were made:

[T]he risk of sensitive disclosure overseas will reinforce the concern of foreign intelligence partners that the UK Government cannot safeguard their most sensitive material with any confidence. The UK courts will remain a forum of choice for speculative applicants, and *Norwich Pharmacal* applications for sensitive material will continue to have a disproportionate impact on the Government, primarily in terms of the risk to national security caused by disclosure and the expenditure of diplomatic capital in minimising the damage caused to international relationships. Accordingly, the Government would prefer to legislate to clarify how these principles should apply in the national security context.

SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, Cm. 8194, at ¶ 2.96 (U.K.), available at <http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf>.

<sup>173</sup> *Id.* ¶ 1.43.

<sup>174</sup> JOINT COMMITTEE ON HUMAN RIGHTS, THE JUSTICE AND SECURITY GREEN PAPER, 2012-13, H.L. & H.C., H.L. Paper 286 & H.C. 1777 (U.K.).

<sup>175</sup> Justice and Security Bill, 2012-13, H.L. Bill [27] (U.K.).

cleared special advocates.<sup>176</sup> The Bill would also establish a regime where the executive can designate that the disclosure of material about the wrongdoing of a third party would be harmful to national interests.<sup>177</sup> The courts would be able to review such designations, but only in a deferential manner.<sup>178</sup> The House of Lords Constitutional Affairs Committee has raised concerns that the Bill will make unwarranted incursions into the common law principles of both open and natural justice, especially because closed material proceedings will be triggered by harms to national security, but without judicial balancing of the need for open justice or the possibility of partial disclosure to the plaintiffs.<sup>179</sup>

It appears that the government will persist with the proposed legislation, though some amendments may be made before the bill becomes law. This saga illustrates the power of substitute justice litigation to result in disclosure of sensitive information concerning American misconduct and to rattle security agencies and the halls of power in London and Washington. At the same time, however, it also demonstrates the vulnerability of substitute justice litigation to executive and legislative assertions of the need for secrecy. Substitute justice litigation may lead to practices—such as allowing the government to defend itself of the basis of secret evidence not seen by the plaintiff or extreme remedial deference—that may erode the fairness of civil litigation far beyond the particular context of substitute justice litigation.

#### *D. Yunus Rahmatullah*

Yunus Rahmatullah, a Pakistani national, was captured by British forces in Iraq in February 2004 and subsequently transferred to American custody in Iraq. Without British approval, Mr. Rahmatullah, along with another suspected member of al Qaeda, was transferred by the United States to Bagram Air Base, Afghanistan, where he has been detained since

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<sup>176</sup> *Id.* cl. 6-11.

<sup>177</sup> *Id.* cl. 13.

<sup>178</sup> *Id.* cl. 14.

<sup>179</sup> JOINT SELECT COMMITTEE, HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, LEGISLATIVE SCRUTINY: TERRORIST ASSET-FREEZING ETC. BILL (PRELIMINARY REPORT), 2012-13, Cm. 8404, at 5 (U.K.).

June 2004. In June 2010 a detainee review board at Bagram found that he was “not an enduring security threat” and should be released to Pakistan.<sup>180</sup> Nevertheless, he was not released, with American officials explaining that such findings were only recommendations and that Rahmatullah could continue to be detained as part of the Taliban and al Qaeda under the 2001 Authorization of the Use of Military Force against those groups in response to 9/11.<sup>181</sup>

Upon learning about where Mr. Rahmatullah was detained, his cousin applied for habeas corpus in the British courts. Habeas corpus is a potentially powerful remedy in substitute justice cases because strong arguments are available that public-interest immunity should not limit the basic right to contest the legality of detention.<sup>182</sup> As discussed above, government claims of secrecy based on the harms of disclosure to national security and international relations have restrained civil litigation designed to achieve substitute justice for American counterterrorism activities.

In June 2011, the Divisional Court refused to grant the writ of habeas corpus against the Secretary of State to enable the court to inquire into the legality of Rahmatullah’s detention. Consistent with the rejection of the act of state doctrine in Australian and other British cases, the Court was not moved by the government’s argument that the matter was not justiciable because it involved the conduct of the United States as another sovereign nation. The

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<sup>180</sup> *Rahmatullah v. Sec’y of State for Foreign & Commonwealth Affairs*, [2011] E.W.H.C. (Admin.) 2008, ¶ 2 (Eng.).

<sup>181</sup> *Id.* ¶ 9.

<sup>182</sup> Judith Farbey and R.J. Sharpe state that:

[I]t is a grave error, it is submitted, to suppose that public interest immunity has anything to do with whether or not the minister has justified the detention of a subject on habeas corpus. . . if the applicant has surmounted the initial hurdle and established prima facie grounds for doubting the validity of the detention, there can be no case for a claim of privilege. If the minister chooses not to disclose the basis for the order, the minister must be released.

JUDITH FARBEY & R.J. SHARPE, 3 *THE LAW OF HABEAS CORPUS* 123 (2011). *But see* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SEC. L. & POL’Y 1, 49-50 (2011) (discussing the ability of American courts to not disclose information submitted to them by petitioners in habeas corpus proceedings).

Court reasoned that “that the proper issue of the writ will not inhibit or embarrass the conduct of foreign relations; for if the necessary power is in truth gathered in the hands of the Crown, its exercise would not be constrained by diplomacy.”<sup>183</sup> In the end, the Court rejected the habeas petition not on grounds of justiciability, but on the basis that the Secretary of State did not have power to demand the production of the prisoner. The court stressed, prophetically as it would turn out, that “it is very far from clear that the American authorities would accede to a request from the Secretary of State for the claimant’s release.”<sup>184</sup>

This decision follows the pattern seen in the contrasting remedial approach in the two Canadian cases involving Omar and Abdullah Khadr: Courts will intervene in cases where they have control over the claimant but are reluctant to do so in cases where it is clear that the governments that they can enjoin do not have the control over the litigant. This approach follows the traditional pattern of Anglo-American constitutionalism that insists on a close fit between rights and remedies.<sup>185</sup> In other words, concerns that there could be no effective remedy involving the production or release of Mr. Rahmatullah from Bagram led the Divisional Court to deny his request for habeas corpus.

The Court of Appeal allowed an appeal from the above decision in December 2011.<sup>186</sup> Procedurally, it stressed the importance of the writ and precedents where it had been granted even in cases where the person was detained outside of the United Kingdom.<sup>187</sup> Substantively, it stressed that original

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<sup>183</sup> *Rahmatullah*, [2011] E.W.H.C. (Admin.) at 2008, ¶ 32.

<sup>184</sup> *Id.* ¶ 33.

<sup>185</sup> William Blackstone stated that “it is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it’s proper redress.” 3 WILLIAM BLACKSTONE, COMMENTARIES \*109. Similarly, A.V. Dicey argued that the “inseparable connection between the means of enforcing right and the right to be enforced” was a great strength of the English Constitution. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 199 (10th ed. 1965).

<sup>186</sup> *Rahmatullah v. Sec’y of State for Foreign & Commonwealth Affairs*, [2011] E.W.C.A. (Civ.) 1540 (Eng.).

<sup>187</sup> The Court of Appeal stated that:

memorandums of understanding signed between the United Kingdom and the United States contemplated that the United Kingdom could request the return of transferred prisoners. The same MOUs also demonstrated the need to comply with the Geneva Conventions, which contemplate the release of prisoners of wars after hostilities (here the war in Iraq) had ended. Thus the substantive basis for the court's concern about the legality of the detention was, as in other substitute justice cases, a mixture of domestic and international law. The Court of Appeal stressed:

[N]ow that the Iraq war is ended it seems to me at least strongly arguable (and, at least on the evidence and arguments which we have heard, correct) that the applicant should have been released by virtue of the provisions of Articles 49, 132, and 133 of Geneva IV. Mr Eadie makes no submissions to the contrary on behalf of the Secretaries of State, and, as it is not represented in these proceedings, the U.S. Government has not submitted to the contrary either.<sup>188</sup>

There was a strong substantive case that Yunis Rahmatullah was being detained contrary to international law and the MOUs signed between the United Kingdom and the United States about transferred prisoners.

The Court of Appeal gave less weight than the Divisional Court to statements by government witnesses that it would be futile to request the United States to hand over the applicant.<sup>189</sup> The Court of Appeal concluded that given the importance of the writ, habeas should be issued even though there was uncertainty as to whether the Secretary of State could produce the prisoner. It

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[W]hile it is important not to be seduced by romantic notions or purple prose, it remains the fact that *habeas corpus* has . . . been described as “perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement” and as “the most efficient protection yet developed for the liberty of the subject.”

*Id.* ¶ 43 (citations omitted). The Court of Appeal relied in part on the *O'Brien* case where habeas corpus was issued even though the prisoner was detained in Dublin. *See Sec'y of State for Home Affairs v. O'Brien*, [1923] A.C. 603 (H.L.) 609 (appeal taken from Eng.).

<sup>188</sup> *Rahmatullah*, [2011] E.W.C.A. (Civ.) at 1540, ¶ 33.

<sup>189</sup> *Id.* ¶ 39.

concluded that it “is not explained why use of such procedures would or might damage the foreign relations of this country. In my judgment, the Court should be studious to avoid a refusal to protect personal liberty by withholding a writ of *habeas corpus* on such flimsy grounds.”<sup>190</sup> Again, this suggests that courts are skeptical about governmental arguments that indirect review of American actions will harm foreign relations or involve them in an improper assessment of the affairs of another sovereign nation.

Although the Court of Appeal’s decision did not formally abandon the requirement that habeas corpus only be issued to those who control a prisoner, the willingness to issue the writ while acknowledging significant uncertainty about U.K. control over Mr. Rahmatullah moves the use of habeas corpus away from the traditions of Anglo-American constitutionalism that insist on a close connection between a right and a remedy. As in the diplomatic representation cases examined above, the Court’s concern about possible abuse of human rights by American officials seemed to motivate it to engage in a form of substitute justice that indirectly reviewed American counterterrorism. As in *Abbasi*, which was decided in 2002 at a time when American courts had not extended habeas corpus to Guantanamo, it is noteworthy that the British courts took this step in a context where American courts had refused to extend habeas corpus to detainees at Bagram Air Base.<sup>191</sup>

Innovative forms of substitute justice that do not insist on a tight connection between rights and remedies mirror the complex reality of transnational counterterrorism, but they also risk putting the authority of the courts at risk, at least to the extent that the authority depends on the ability of courts to ensure effective remedies. American officials refused to cooperate with the issuance of the British writ and the Court of Appeal was effectively forced to back off from its attempt to use the writ indirectly to review Mr. Rahmatullah’s continued detention at Bagram.<sup>192</sup> In a February 2012 judgment, the Court of Appeal

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<sup>190</sup> *Id.* ¶ 56.

<sup>191</sup> *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

<sup>192</sup> *Rahmatullah v. Sec’y of State for Foreign & Commonwealth Affairs*, [2012] E.W.C.A. (Civ.) 182, ¶ 17 (Eng.), *aff’d*, [2012] U.K.S.C. 48.

described how a return date of a week set in December 2011 had to be postponed because the American embassy indicated that it could not respond by that time. It then discussed how, in a letter in early February 2012, the U.S. government had implicitly declined to produce Mr. Rahmatullah. The letter bluntly rejected any argument that the United Kingdom had a right under either the memorandums of understanding or the Geneva Conventions to the production of Rahmatullah. Finally, the letter asserted the United States' right to detain Rahmatullah under the Authorization of the Use of Military Force and the laws of war. The letter seemed designed to stress that sovereign right of the United States to decide whom to detain.

In light of this letter, the Court of Appeal concluded that the "melancholy truth" of the matter is that the U.K. government's submissions that the issuance of habeas corpus from the English courts would be "a 'futile course of action' . . . turns out to have been right."<sup>193</sup> The Court nevertheless suggested that this result did not mean that the issuance of the writ had been "pointless" because:

[I]t performed its minimum function of requiring the U.K. Government to account for its responsibility for the applicant's detention, and to attempt to get him released. This case is an illustration of (i) the court performing perhaps its most vital role, namely to ensure that the executive complies, as far as it can, with its legal duties to individuals, in particular when they are detained, and (ii) the limits of the powers of the court, as a domestic tribunal, in that its reach cannot go beyond its jurisdiction, and that jurisdiction does not extend to the U.S. military authorities in Afghanistan.<sup>194</sup>

The above statement can be seen as succinct summary of the strengths and limits of substitute justice litigation.

The Court of Appeal released the British officials from the demands of the writ of habeas corpus, including the explicit threat in the actual court order that they could be found in contempt of court if they did not produce Rahmatullah to the Royal Courts of

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<sup>193</sup> *Id.* ¶ 16.

<sup>194</sup> *Id.* ¶ 17.

Justice in London.<sup>195</sup> The Court's judgment resulted in some public attention to the issue,<sup>196</sup> but more so in the United Kingdom than the United States. Rahmatullah's lawyer lodged a war crimes complaint against the United States with Scotland Yard,<sup>197</sup> but Rahmatullah remains detained at Bagram.<sup>198</sup>

The U.K. government unsuccessfully appealed the grant of habeas corpus to the U.K. Supreme Court. Lord Kerr, in a plurality judgment for the Court, stressed that the United Kingdom should have control over Rahmatullah under both the MOUs signed with the United States and under the fourth Geneva Convention. He thus rejected the United States' position that if

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<sup>195</sup> The actual writ of habeas corpus issued by the Court of Appeal on December 14, 2011, provided:

Whereas this Court has granted the writ of habeas corpus to the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence commanding them to produce the body of Yunus Rahmatullah before the said Court at the Royal Courts of Justice, Strand, London, on the day and time specified in the notice together with the day and cause of his being taken and detained. Take notice that you are required by the said writ to have the body of Yunus Rahmatullah before this Court on the 21<sup>st</sup> day of December, 2011 at 10 o'clock and to make a return to the said writ. In default thereof the said Court will then, or so soon thereafter as counsel can be heard, be moved to commit you to prison for your contempt in not obeying the said writ.

Notice To Be Served with Writ of Habeas Corpus Ad Subjiciendum, Dec. 14 2011 (Eng.), *available at* [http://www.reprive.org.uk/static/downloads/2011\\_12\\_20\\_PUB\\_Writ\\_endorsed\\_YR.pdf](http://www.reprive.org.uk/static/downloads/2011_12_20_PUB_Writ_endorsed_YR.pdf).

<sup>196</sup> Peter Finnand & Julie Tate, *Administration Looking into Repatriating Non-Afghan Detainees at U.S.-run Prison*, WASH. POST (Jan. 23, 2012), [http://www.washingtonpost.com/world/national-security/administration-looking-into-repatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ\\_story.html](http://www.washingtonpost.com/world/national-security/administration-looking-into-repatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ_story.html); Eric L. Lewis, *Britain Shouldn't Aid a Lawless America*, N.Y. TIMES (Feb. 13, 2012), <http://www.nytimes.com/2012/02/13/opinion/prisoners-are-not-pawns.html>; Clive Stafford Smith, *The U.S. Has Broken Its Promise over Yunus Rahmatullah*, THE GUARDIAN (Feb. 23, 2012), <http://www.guardian.co.uk/commentisfree/libertycentral/2012/feb/23/us-broken-promise-yunus-rahmatullah>.

<sup>197</sup> Ian Cobain, *Yunus Rahmatullah Case Complaint Lodged with Scotland Yard*, THE GUARDIAN (Feb. 20, 2012), <http://www.guardian.co.uk/world/2012/feb/20/yunus-rahmatullah-complaint-scotland-yard>.

<sup>198</sup> Richard Norton-Taylor, *Britain Must Secure Release of Bagram Detainee, Supreme Court Told*, THE GUARDIAN (July 3, 2012), <http://www.guardian.co.uk/law/2012/jul/03/bagram-yunus-rahmatullah-supreme-court>.

Rahmatullah was a member of al Qaeda, he would not be protected by the Convention.<sup>199</sup> At the same time, Lord Kerr stated that “[t]he illegality in this case centers on the [United Kingdom’s] obligations under the Geneva Conventions.” In other words, the Court was not reviewing the legality of the United States’ actions under the Conventions.<sup>200</sup> This underlines the indirect nature of challenges of American counterterrorism activities in substitute justice litigation.

Lord Kerr also formalistically rejected the government’s argument that the courts, by issuing habeas corpus, were intruding into foreign affairs by requiring the United Kingdom to ask the U.S. government to return Rahmatullah. He concluded that the grant of habeas corpus did not require the U.K. government “to act in any particular way in order to demonstrate whether they could or could not exert control.”<sup>201</sup> This is unconvincing given that the only realistic way to establish the United Kingdom’s control over Rahmatullah was to ask the United States to return him to U.K. custody from Bagram. Nevertheless, this approach reveals the same sort of caution about intruding into the conduct of foreign relations demonstrated by the Canadian Supreme Court when it reversed a lower court order that Canada ask the United States to return Omar Khadr from military detention in Guantanamo. The caution of courts in matters of foreign relations may restrain the remedial efficacy of substitute justice litigation.

That said, Lord Kerr, in his plurality judgment for two other judges, also indicated that habeas corpus would be a more powerful remedy than applications for declarations through judicial review, because habeas corpus is not discretionary and is issued as of right. Thus U.K. officials were obliged, on pain of

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<sup>199</sup> Lord Kerr concluded that there was “clear prima facie evidence that Mr. Rahmatullah was unlawfully detained” and relied on the U.K. government’s position that the Geneva Conventions applied to all detainees in Iraq, thus rejecting the position advanced by the United States through an opinion by Jack Goldsmith that Rahmatullah would not be a protected person under the Convention if he was a member of al Qaeda. Sec’y of State for Foreign & Commonwealth Affairs v. Rahmatullah, [2012] U.K.S.C. 48, ¶¶ 40, 34 (on appeal from Eng.).

<sup>200</sup> *Id.* ¶ 53

<sup>201</sup> *Id.* ¶ 60.

being held in contempt, to try to produce Rahmatullah, even if such actions would “cause difficulty in the [United Kingdom’s] relation with the [United States].”<sup>202</sup> The concurring judgments of the other four judges who sat on the appeal, however, qualified when the strong remedy of habeas corpus would apply. All of these judges stressed that habeas corpus should not have issued from the British courts if the MOUs did not establish a case that the United Kingdom still had control over Rahmatullah<sup>203</sup> or if British forces had not once controlled Rahmatullah.<sup>204</sup> Lord Phillips expressed skepticism about the Australian decision in the David Hicks case that suggested that habeas corpus might issue from an Australian court even though there was no legal claim that Australia had control over Hicks.<sup>205</sup> Lord Reed agreed with Lord Kerr that habeas corpus “could not be deflected by considerations of diplomacy”<sup>206</sup> but at the same time stressed that British courts would have no business granting habeas corpus had Rahmatullah not initially been detained by British forces.<sup>207</sup> In short, habeas corpus is a strong remedy that will be issued as of right and not tempered by considerations of diplomacy, but British courts may decline to grant it if there is not a good case that the United Kingdom legally has control over the person to be produced by the writ. This approach will limit the use of habeas corpus in substitute justice litigation where the country that issues the writ will often have no claim of control over the detainee.

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<sup>202</sup> *Id.* ¶ 74.

<sup>203</sup> *Id.* ¶ 90 (Lord Phillips); *id.* ¶ 119 (Lord Carnwath & Lady Hale).

<sup>204</sup> *Id.* ¶ 115 (Lord Reed); *id.* ¶ 122 (Lord Carnwath & Lady Hale).

<sup>205</sup> Lord Phillips concluded:

I know of no case in this jurisdiction where habeas corpus has issued in respect of a person, British or alien, held unlawfully outside the jurisdiction by a foreign State, on the simple ground that the United Kingdom was, or might be, in a position to prevail upon the foreign State to release him, although I note that the Federal Court of Australia has accepted that it was arguable that habeas corpus would lie in such circumstances in respect of an Australian citizen held by the United States in Guantanamo.

*Id.* ¶ 105 (citing *Hicks v. Ruddock*, (2007) 156 F.C.R. 574, 600 (Austl.)).

<sup>206</sup> *Id.* ¶ 114.

<sup>207</sup> *Id.* ¶ 115.

Although the United Kingdom had a claim of control over Rahmatullah, the U.K. Supreme Court, in the end, accepted that the United Kingdom did not have effective control over him. The majority of the Court ruled that the U.K. government had adequately complied with the writ when it unsuccessfully asked the United States to return Rahmatullah from Bagram;<sup>208</sup> Lord Carnwath and Lady Hale dissented and would have allowed Rahmatullah's appeal. The United Kingdom, in its request to the United States, failed to assert that the United Kingdom had a right of control over the MOU. For the dissenters, the U.S. government's implicit rejection of this control argument was not sufficient in the "extreme circumstances with which we are faced," which included a detainee who would have been released once hostilities in Iraq had ended if he had remained in British custody and who was subject to indeterminate American military detention at Bagram.<sup>209</sup>

The *Rahmatullah* case confirms the limits of substitute justice by non-American courts for American counterterrorism activities including indeterminate military detention without trial. Non-American courts can make pronouncements about violations of rights by American officials, but they cannot enforce such pronouncements by releasing prisoners in American custody. Substitute justice can assist in advocacy campaigns, but the *Rahmatullah* litigation, so far, has been less successful than those previously undertaken on behalf of Guantanamo detainees with connections to the U.K. This may be related to a normalization of American military detention of suspected al Qaeda terrorists. That said, it may be too soon to draw a definitive conclusion as the release of the applicants in both *Abbasi* and *Al Rawi* occurred some time after the court rejected their substitute justice claims. The U.K. Supreme Court's judgment may assist by making it clear that there is at least a prima facie case that Rahmatullah's detention in Bagram violates the Geneva Conventions that applied as a result of his capture in Iraq. At the same time, the U.K. Supreme Court, by a five-to-two margin, dismissed

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<sup>208</sup> *Id.* ¶ 84.

<sup>209</sup> *Id.* ¶ 124.

Rahmatullah's appeal that the United Kingdom must do more for him. He must now seek substitute justice elsewhere, with reports of litigation before the Pakistani courts attempting to compel that government to seek his repatriation from the United States.<sup>210</sup>

Rahmatullah's search for substitute justice continues. At the end of the day, however, substitute justice can only produce indirect and limited remedies. The real justice problem is that Rahmatullah continues to be subject to indeterminate military detention without trial and without the ability to seek habeas corpus in American courts.

#### V. AN ASSESSMENT OF SUBSTITUTE JUSTICE LITIGATION

This Article has examined a significant number of decisions in Australian, British, and Canadian courts that have indirectly challenged American counterterrorism activities including renditions to torture and military detention at Guantanamo and Bagram. The demand for such litigation has been related to the reluctance of the American legal system to review or grant remedies for such conduct. Litigants such as Guantanamo detainees, Binyam Mohamed and Omar Khadr, and rendition victims, Khalid El-Masri and Maher Arar, have also litigated in the United States, but have had their claims denied in American courts on a variety of grounds related to state secrets, deference to the military, and a reluctance to extend *Bivens* damage claims in the national security context. In other cases, plaintiffs such as Mamdouh Habib and Yunus Rahmatullah have not sought relief in American courts in part because of accurate judgments that it would not be available given American doctrines of state secrets or the refusal to extend habeas corpus to the detainees at Bagram

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<sup>210</sup> There has been ongoing litigation in the Lahore High Court on behalf of Rahmatullah and other Pakistanis held at Bagram. The Pakistani government has told the High Court that the United States will release some of the detainees, but it is not clear if this will include Rahmatullah. *Six Pakistanis To Be Released from Bagram: Ministry of Foreign Affairs*, EXPRESS TRIBUNE (Oct. 16, 2012), <http://tribune.com.pk/story/452339/six-pakistanis-to-be-released-from-bagram-ministry-of-foreign-affairs/>.

Air Base in Afghanistan.<sup>211</sup> Both David Hicks and Omar Khadr pled guilty before American military commissions because of rational judgments that such guilty pleas were the quickest way to secure their release from Guantanamo and their respective return to Australia and Canada. The inability of the American legal system to review national security activities for rights violations and to provide remedies for proven rights violations has produced a lack of confidence in American legal processes and a demand for substitute justice litigation in other democracies, even if this litigation can only indirectly review American activities.

Non-American courts have been more willing than American courts to review national security activities of the executive. Australian and British courts have not applied the act-of-state doctrine to prevent indirect judicial review of American counterterrorism efforts. Even without a bill of rights, the Australian courts have relied on constitutional principles derived from *Marbury v. Madison* that courts have a constitutional obligation to review the actions of Australian officials with respect to complicity for torture. Both Australian and British courts have also been willing to apply exceptions for violations of international human rights to act of state doctrines that counsel courts not to review the legality of the conduct of foreign states. Somewhat similarly, Canadian courts have stressed that they will apply their constitutional bill of rights to actions of Canadian officials outside of Canada to the extent that those actions violate Canada's international human rights obligations. These cases have quite correctly rejected government arguments that Australian, British, and Canadian courts should not entertain litigation alleging fundamental human rights violations simply because a decision on the merits might require the courts to make adverse conclusions about the actions of the U.S. government as another sovereign state. One message of these cases is that there is a growing willingness of non-American courts to apply international human rights standards to Guantanamo and other counterterrorism

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<sup>211</sup> *Times Topics: Bagram Detention Center (Afghanistan)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram\\_air\\_base\\_afghanistan/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html) (last visited Feb. 29, 2012).

activities by American officials. International law has been applied in these cases as a gateway to domestic relief, as an independent ground of relief, or as a ground mixed with domestic law. This is a reminder that the United States cannot ignore international human rights. Even if American courts may be reluctant to apply domestic or international human rights in the national security context, the courts of other nations may not.

The significant numbers of substitute justice lawsuits in Australian, British, and Canadian courts demonstrate the futility of President Bush's November 2001 military order to preclude litigation by Guantanamo detainees not only in American but also in foreign courts. Just as the American courts, executive, and legislature cannot be bound by non-American legal authorities, reciprocity demands that non-American courts, executives, and legislatures enjoy sovereign autonomy and cannot be bound by orders of the President of the United States. Similarly the substitute justice cases examined in this Article cast doubts on the ability of the Obama administration to preclude litigation in foreign courts as a condition for plea agreements reached in Guantanamo. Starting with the 2002 decision of the Court of Appeal of England and Wales to denounce the military detention center as a "legal black hole,"<sup>212</sup> litigation over Guantanamo and other controversial American counterterrorism activities has gone global. Such litigation will continue and it will outlast the impugned activities. The transnational nature of both terrorism and counterterrorism provides those adversely affected by counterterrorism with multiple venues in which to make legal claims. Even without resort to international and regional tribunals, we live in a world of law without borders.

The *Rahmatullah* case suggests, however, that the United States can exercise its sovereign right to refuse to cooperate with the remedial orders of non-American courts with surprisingly little public attention and political costs. Such cases, however, strengthen perceptions held in many parts of the world about American exceptionalism and lawlessness with respect to

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<sup>212</sup> R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] E.W.C.A. (Civ.) 1598, ¶ 64 (Eng.).

terrorism, even though, as suggested in the first part of this Article, relief is often denied in American courts through a complex and positivistic process of American extra-legalism. As the Court of Appeal eventually recognized, the *Rahmatullah* case revealed “the limits of the powers of the court, as a domestic tribunal, in that its reach cannot go beyond its jurisdiction, and that jurisdiction does not extend to the U.S. military authorities in Afghanistan.”<sup>213</sup> American actions, including secrecy claims, may frustrate the ability of non-American courts to conduct a full merits-based review in substitute justice cases.<sup>214</sup> American action may also mean that non-American courts may only be able to issue declaratory and less-than-fully-effective personal remedies in cases brought by Guantanamo and Bagram detainees or others adversely affected by American counterterrorism.

American expectations of secrecy will influence substitute justice litigation in non-American courts. The U.K. government asserted secrecy claims in the Binyam Mohamed litigation in part because of concerns about the disclosure of American secrets and the effects that such disclosures might have on British-American security cooperation. Despite the evident skepticism of British judges about American threats with respect to information sharing, the U.K. government has taken such threats very seriously—to the point of settling lawsuits to avoid further disclosure, appointing an inquiry while retaining control over what information it could disclose, and proposing new legislation to allow the use of secret evidence in civil litigation and non-disclosure certificates issued by the executive with respect to material that reveals the misconduct of third parties, such as American security agencies and officials. Substitute justice cases are possible because of the sovereign autonomy of each country, but it would be a mistake to underestimate how countries are

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<sup>213</sup> *Rahmatullah v. Sec’y of State for Foreign & Commonwealth Affairs* (No 2), [2012] E.W.C.A. (Civ.) 182, ¶ 17 (Eng.), *aff’d*, [2012] U.K.S.C. 48.

<sup>214</sup> For arguments that such merits-based review by the European Court of Justice and domestic courts has not been possible in cases where such courts have indirectly reviewed U.N. terrorist listings, see Forcese & Roach, *supra* note 3, at 244-58, 265-70.

interdependent and how American actions in claiming secrecy will influence substitute litigation in other countries.

A striking feature of the substitute justice cases examined in this Article is that in most cases, non-American courts have been reluctant or unable to issue effective remedies. Both Canadian and English courts stopped short of ordering their governments to make diplomatic representations on behalf of Guantanamo detainees. The *Rahmatullah* case dramatically demonstrates that even in a case where English courts were prepared to be forceful and issue habeas corpus, the United States can simply refuse to release that person from indeterminate military detention without trial at Bagram. The Canadian Omar Khadr case also demonstrates a less dramatic unwillingness of American officials to comply with a Canadian request that information obtained by Canadian officials not be used in his military-commission proceedings. Non-American courts may be reluctant to order strong remedies in these substitute justice cases, in part because of concerns about interfering in their own countries complex and polycentric diplomatic relations with the United States. They may also be concerned that even the issuance of strong remedies may be inefficacious if the United States refuses to cooperate.

The exception of the remedial weaknesses of these substitute justice cases is the Canadian Abdullah Khadr case where Canadian courts were prepared to stop his extradition to the United States on terrorism charges because of abuses in the way he was captured and detained in Pakistan. This exception, however, proves the rule because the Canadian courts had the power to prevent Abdullah Khadr's extradition to the United States. In contrast, Canadian courts had much less power and issued much less effective remedies in the case of Abdullah Khadr's younger brother, Omar Khadr, who remains in American custody at Guantanamo. Although courts are increasingly and rightly prepared to dismiss traditional barriers, like act of state doctrines, and to assume jurisdiction over transnational terrorism cases, they may be unable to provide effective remedies if they do not have jurisdiction over the affected person.

The proposed British legislation designed to allow the secret evidence in civil litigation and to facilitate the nondisclosure of information about misconduct by third parties, such as the United

States, when it would damage the United Kingdom's interests in national security and international relations indicates that countries may seek to curb the type of substitute justice litigation outlined in this Article. The United Kingdom has had the most experience with substitute justice litigation, and in response to disclosures of American misconduct in the Binyam Mohamed case and threats by American officials to share less intelligence with them, the government has responded vigorously. This is a reminder that non-American courts and legislatures cannot ignore the impact of American laws and processes with respect to their attempts to obtain substitute justice. American practices of secrecy and extra-legalism cast a large shadow over the world.

The substitute justice cases discussed in this Article can be criticized as cases that have produced pronouncements about rights violations but without effective remedies. As such, they run contrary to the grain of traditional Anglo-American constitutionalism where commentators such as Blackstone and Dicey have insisted on the importance of remedies to make pronouncements about rights meaningful.<sup>215</sup> There is a related danger that cases like *Rahmatullah* may even undermine domestic norms by promoting a failure to abide by court order, even if that failure is caused by decisions made by American officials. One of the implicit reasons why non-American courts may have been reluctant to order their governments to make diplomatic representations on behalf of Guantanamo detainees may be concerns that the efficacy of any court order might be tarnished if American officials simply say, "No."

Despite these reservations, there seems to be no other practical alternatives in these cases for the litigants but to seek substitute justice. Given the nature of American extra-legalism, with its broad state secrets and qualified immunity doctrine and unwillingness to extend damage claims absent clear congressional authorization, litigants are left to seek substitute justice in non-

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<sup>215</sup> This tradition was recognized in *Marbury v. Madison*, 5 U.S. 137, 137 (1803), but the applicant in that case never received an effective remedy despite the United States Supreme Court's famous and influential pronouncements of its power of judicial review. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 13.

American courts. The choice then is not between litigation in American courts that would retain a tight nexus between rights violations and remedies and litigation in non-American courts with limited remedial powers. Rather the choice is between litigation in American courts that will not review executive counterterrorism action or provide effective remedies and litigation in non-American courts that are more willing to review conduct but often unable to order effective remedies in the particular case.

In the end, traditional understandings of the need for a close connection between rights and remedies may be unrealistic in a world where power is exercised in a transnational manner. The decisions of non-American courts in these substitute justice cases have been important in publicizing the cases of Guantanamo and Bagram detainees and placing pressure on the United States with respect to their treatment and detention. In this respect, the remedial processes used in these cases may be closer to the remedial process used in international law where adjudicative bodies without powers to enforce coercive remedies often rely on moral suasion and publicity to create pressures on domestic governments to comply with human rights. The fact that both David Hicks and Yunus Rahmatullah sought remedies in the courts of various countries also resembles international law litigation where a variety of bodies often rule on the same issue.<sup>216</sup> This adjustment of the remedial process recognizes the transnational reality that “national courts are not purely national anymore, if ever they were . . . [they] are being called to rule on matters that have implications far beyond a country’s border.”<sup>217</sup> Given this transnational complexity, we should not expect that traditional and solely domestic understandings of the relationship between rights and remedies will be found in substitute justice cases.

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<sup>216</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 32-33, 127 (1995); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 *TEX. INT’L L.J.* 537, 551 (2005).

<sup>217</sup> Scheppele, *supra* note 3, at 461.

## CONCLUSION

Despite United States' attempts to preclude litigation of matters arising from Guantanamo in foreign courts, Australian, British, and Canadian courts have accepted such litigation. Although such litigation is formally directed at Australian, British, or Canadian governments, it often seeks indirectly to review American counterterrorism activities. It seeks a form of substitute justice that is generally not available in American courts, which have often refused to review national security activities on a variety of grounds—including state secrets, qualified immunity, political questions, and remedial abstention. Non-American courts in these substitute justice cases have rightly rejected arguments that lawsuits should not proceed because they will require them to opine on the actions of the U.S. as another sovereign state. Such approaches are not appropriate, especially when violations of fundamental human rights have been alleged.

At the same time, non-American courts have often refused to order strong remedies, especially remedies that will require their governments to make diplomatic representations to the United States. In the rare cases where non-American courts have ordered strong remedies, such as the habeas corpus order that required British officials to produce Yunus Rahmatullah, a former British prisoner in Iraq now detained by the United States at Bagram, the courts have had to retreat in the face of the refusal of the United States to cooperate. The reluctance of British courts to accept secrecy claims in the Binyam Mohamed case was well justified and principled, but it set forth a form of government pushback that saw both the litigation settled to prevent the further disclosure of information and proposed new U.K. legislation that will allow the government to use secret evidence to defend itself in similar lawsuits. The proposed legislation would also allow the U.K. executive to restrict the disclosure of evidence that reveals wrongdoing by third parties to litigation, most notably the U.S. government.

In general, the substitute justice cases examined in this Article are a positive development. They reveal the resilience of the rule of law and human rights in the post-9/11 era. Non-American courts have stepped to the plate to make up for the unwillingness of American courts to review military detention at Bagram and the

willingness of American courts to shut down litigation about renditions on state-secrets and other grounds.

At the same time, however, substitute justice litigation is risky and vulnerable. Non-American courts may often be unwilling to issue strong remedies that will force their own government's hand with the United States. Even if they issue strong remedies, these remedies may be thwarted by a lack of American cooperation, such as the refusal to release Yunis Rahmatullah in the face of a British habeas corpus order that he be produced before the Royal Courts in London.

Substitute justice litigation may also not reach the merits if governments make broad secrecy claims, as in the Binyam Mohamed case, in order to protect American secrets from disclosure. Non-American courts have been less deferential than American courts in the face of such secrecy claims, but it will take a determined and bold judiciary to resist claims that it should not disclose material obtained from the United States in confidence especially when, as in the Mohamed case, the United States threatens that disclosure will threaten vital intelligence sharing and security operations. Even when non-American courts resist such claims and threats, they may not have the last word. The governments of Australia, Britain, and Canada have all settled substitute justice cases on confidential bases, in part in order to prevent the disclosure of material about the U.S.

Substitute justice litigation reveals that neither the legal systems of the United States or its allies are islands. Refusals by American courts to review American counterterrorism actions have generated similar claims in non-American courts. In turn, non-American courts have been affected by American resistance to such litigation, most notably American claims of secrecy. The Justice and Security Bill before the U.K. Parliament that will authorize the use of secret evidence and nondisclosure of material about the misconduct of third parties demonstrates that substitute justice litigation may be vulnerable to governmental pushback. The vulnerability of substitute justice litigation to secrecy claims and legislative pushback is unfortunate. The unwillingness of American courts to review much counterterrorism activities on the merits means that, in many cases, substitute justice will be the only chance of justice for those adversely affected by American military detention, renditions, and targeted killings. Substitute justice is not ideal. It is, however, better than no justice at all.