

2006

Extraordinary Rendition and the Torture Convention

David Weissbrodt
University of Minnesota Law School, weiss001@umn.edu

Amy Bergquist

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

David Weissbrodt and Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006), available at https://scholarship.law.umn.edu/faculty_articles/283.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Extraordinary Rendition and the Torture Convention

DAVID WEISSBRODT[†]

AMY BERGQUIST[‡]

I.	Extraordinary Rendition Violates the Convention Against Torture and the Federal Torture Statute	599
A.	U.S. Acceptance of the Convention Against Torture	600
B.	Scope of the Statutory Prohibition of Torture	606
C.	Extraordinary Rendition Constitutes a Criminal Conspiracy to Commit Torture.....	611
D.	Defenses of Extraordinary Rendition Are Inadequate.....	621
II.	Mechanisms in U.S. Law Can Challenge the Practice of Extraordinary Rendition.....	625
A.	Criminal Prosecution.....	625
B.	Habeas Corpus.....	626
1.	Jurisdiction	626
a.	Territorial Jurisdiction	627
b.	The “In Custody” Requirement	629
2.	Merits of the Habeas Claim.....	631
a.	Constitutional Claims	631
b.	Treaty Claims	632
c.	Claims Based in Federal Law.....	636
3.	Practical Considerations	639
C.	Additional Measures.....	641
III.	Conclusion.....	647

[†] Regents Professor and Fredrikson & Byron Professor of Law, University of Minnesota Law School. © 2006 David Weissbrodt & Amy Bergquist.

[‡] J.D. anticipated, University of Minnesota Law School, May 2007. The authors would like to thank Mary Rumsey for her invaluable assistance with this Article.

Criminals have historically crossed boundaries in an effort to escape the reach of law enforcement. In response, governments have pursued extradition policies whereby a person who is charged with a crime in one jurisdiction may be brought to justice with the aid of the jurisdiction where the accused is found.¹ While such solutions are generally effective in a domestic context,² international extradition has been more problematic.³ Because of the absence of extradition treaties, delays in effecting extradition, or other barriers, prosecutors and their proxies have devised an alternative strategy to bring persons accused of crimes to justice.⁴ In the United States, officials dubbed the strategy “extraordinary rendition,”⁵ an officially recognized but covert policy authorized by several presidential directives, whereby the U.S. government or its agents could capture a person accused of a crime and bring the person to the United States to stand trial.⁶ There were two

1. For a thorough examination of U.S. extradition policy and practice, see MICHAEL ABBELL, *EXTRADITION TO AND FROM THE UNITED STATES* (2004); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (4th ed. 2002). For a historical perspective on U.S. extradition law, see CHRISTOPHER H. PYLE, *EXTRADITION, POLITICS, AND HUMAN RIGHTS* (2001).

2. A legal basis for inter-state extradition is found both in the U.S. Constitution and in federal statute. See U.S. CONST. art. IV, § 2, cl. 2; 18 U.S.C. § 3182 (2006). *But see* *Frisbie v. Collins*, 342 U.S. 519, 520 (1952) (relating that Michigan police officers, in violation of the Federal Kidnapping Act, came into Chicago and “forcibly seized, handcuffed, [and] blackjacked” the defendant and then took him to Michigan); Austin W. Scott, Jr., *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 91 (1953) (noting that “the police practice of out-of-state kidnapping” is “flourishing with some vigor”).

3. The Supreme Court’s first modern encounter with government-sanctioned transnational kidnapping as an alternative to extradition was the case of *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). For purposes of this Article, it is no small irony that Alvarez-Machain was accused of facilitating the torture of a DEA agent in Mexico. *Id.* at 657.

4. See, e.g., *Alvarez-Machain*, 504 U.S. at 657; *Ker v. Illinois*, 119 U.S. 436, 437–38 (1886). In *Alvarez-Machain*, the Mexican government evidently intended to prosecute the defendant itself, and therefore did not wish to extradite him. 504 U.S. at 670–71 (Stevens, J., dissenting). *But see* PYLE, *supra* note 1, at 282 (suggesting that Mexican officials withdrew cooperation after a deal fell apart that would have called for the United States to deport to Mexico a person wanted by the Mexican government for stealing \$500 million from Mexican politicians).

5. The term is, of course, a euphemism for abduction and subsequent transfer designed to circumvent ordinary extradition procedures. The term was apparently in use at the Department of Justice by the late 1980s. See Richard Sisk & Patrice O’Shaughnessy, *Streetwise Safir’s Turn*, DAILY NEWS (N.Y.), Apr. 14, 1996, at 7; see also M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 189–90 (2d rev. ed. 1987).

6. See PYLE, *supra* note 1, at 275; DeNeen L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian’s Case Called Typical of CIA*, WASH. POST, Nov. 5, 2003, at A1; Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1. The directives authorizing rendition remain classified. See Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 1. It is unclear

categories of renditions: (1) renditions in which agents of the state where the person was present seized the individual and surrendered him or her to agents of another state without using formal or legal processes and (2) renditions in which other persons conducted the seizure with or without the awareness or approval of that state.⁷ The Supreme Court has long held that the use of means that are illicit, illegal, or in circumvention of an existing extradition treaty to bring a person into a court's jurisdiction poses no inherent impediment to assertion of *in personam* jurisdiction in criminal cases.⁸ Perhaps the most famous international case to affirm this principle was *Attorney-General of Israel v. Eichmann*,⁹ in which Israeli courts cited U.S. case law to support the conclusion that Adolf Eichmann's abduction in Argentina did not strip Israeli courts of jurisdiction to try him for war crimes.¹⁰ In the 1992 case of *United States v. Alvarez-Machain*,¹¹ the Supreme Court's most recent decision validating this traditional form of extraordinary rendition, the Court was dismissive of the relevance of the principles of international law:

Respondent...may be correct that respondent's abduction was "shocking," and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes.... We conclude, however, that respondent's abduction was not in violation of the

exactly who initiated the rendition program. *Compare National Security Threats, Hearing Before the Senate Armed Servs. Comm.*, 109th Cong. (Mar. 17, 2005) (statement of CIA Director Porter Goss) [hereinafter *National Security Threats*] (observing that rendition "is a process that's been going on for more than 20 years"), and Bruce Zagaris, *U.S. Extraordinary Renditions Subject to Foreign and U.S. Investigations and Oversight*, 21 INT'L ENFORCEMENT L. REP. 188 (2005) (stating that Reagan first authorized rendition in 1986), with Stephen Grey, *America's Gulag*, NEW STATESMAN, May 17, 2004 [hereinafter Grey, *Gulag*] (contending that rendition was "invented" by President Clinton's National Security Adviser, Sandy Berger).

7. See BASSIOUNI, *supra* note 1, at 249.

8. *Alvarez-Machain*, 504 U.S. at 657 (1992). The doctrine applied in the case is "*mala captus bene detentus*," defined as the process "whereby national courts will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured." BASSIOUNI, *supra* note 1, at 250.

9. *Attorney-General v. Eichmann*, [1961] IsrDC 45(3), translated in 36 INT'L L. REP. 5 (1968), *aff'd* *Attorney-General v. Eichmann*, [1962] IsrSC 16(2033), translated in 36 INT'L L. REP. 277 (1968).

10. *Id.* at 45-52; see also PYLE, *supra* note 1, at 272-73. The court's jurisdiction over Eichmann was facilitated, because West Germany used his alleged involvement in crimes against humanity as "a welcome pretext for withholding the customary protection due its citizens abroad," and therefore did not intervene on Eichmann's behalf. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* 240 (1964).

11. 504 U.S. 655 (1992).

Extradition Treaty between the United States and Mexico, and therefore...[t]he fact of respondent's forcible abduction does not...prohibit his trial in a court in the United States for violations of the criminal laws of the United States.¹²

This cavalier disregard for international law would soon bear fruit in unexpected ways.

As the United States attempted to strengthen its efforts in the so-called war on terror,¹³ officials transformed and expanded the tactic of extraordinary rendition. This new form of extraordinary rendition typically targets a person who is not formally charged with any crime in the United States. Instead, U.S. agents or their proxies seize the person abroad for transport to the custody of a third country.¹⁴ Today, the term "extraordinary rendition" is used exclusively as a euphemism to describe abduction of terror suspects *not* in order to bring them to

12. *Id.* at 669–70.

13. *See General: "War on Terror" Is "Inaccurate" Label for War on Insurgency*, INSIDE THE NAVY, June 20, 2005 ("This war has a popular label and a political label but it's not accurate," said [Lieutenant General Wallace] Gregson[, commander of the U.S. Marines in the Pacific].... This is no more a war on terrorism than World War II was a war on submarines."). *But see* Richard W. Stevenson, *President Makes It Clear: Phrase Is "War on Terror,"* N.Y. TIMES, Aug. 4, 2005, at A12 (noting that President Bush has rejected alternative terms).

14. The individual may be seized directly by the CIA, or arrested by local authorities, and then handed over to the CIA. *See infra* note 18. "High-value" suspects typically remain in custody in secret detention facilities operated directly by the CIA, and are not transferred to the custody of third countries. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 [hereinafter Priest, *Secret Prisons*]; James Risen & Thom Shanker, *The Struggle for Iraq: Terror Captives; Hussein Enters Post-9/11 Web of U.S. Prisons*, N.Y. TIMES, Dec. 18, 2003, at A1; *see also* Richard Stevenson, *White House Says Prisoner Policy Set Humane Tone*, N.Y. TIMES, June 23, 2004, at A1. A thorough discussion of such "ghost detainees" held at "black sites" is beyond the scope of this Article. Reports that the United States is participating in enforced disappearances, however, in which U.S. officials deny detainees access to monitoring agencies, counsel, and their families, raise grave concerns about the risk of torture and other cruel, inhuman, or degrading treatment. *See* Louise Arbour, U.N. High Commissioner for Human Rights, *On Terrorists and Torturers*, Human Rights Day Statement (Dec. 7, 2005), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/3B9B202D5A6DCDBCC12570D00034CF83?opendocument> (last visited Apr. 20, 2006). Additionally, the secretive nature of extraordinary rendition makes it difficult to know whether a person who has disappeared has been transferred to the custody of another country or whether the person remains in secret CIA custody. While the issues are intertwined, the primary focus of this Article is rendition of terror suspects to the custody of third countries. The Council of Europe has initiated an investigation of secret detention facilities on the territory of its member states under the authority of Article 52 of the European Convention on Human Rights. *See Alleged Secret Detention Centres in Council of Europe Member States*, Standing Comm. Eur. Parl. Ass'n Doc. No. 10748 (2005) [hereinafter Standing Committee Statement].

justice in the United States, but rather to transfer them to a third country.¹⁵

Not only has the purpose of extraordinary rendition evolved, but so have the procedures regulating the rendition process. Prior to 2001, strict procedures governed the program. First, the receiving country had to have issued an arrest warrant for the person.¹⁶ Second, the administration scrutinized each rendition before senior government officials granted approval.¹⁷ Third, the CIA notified the local government, and obtained an assurance from the receiving government that it would not ill-treat the individual.¹⁸ The administration has not disclosed the exact number of renditions, but there is a wide consensus that the program has expanded since September 2001.¹⁹ The expansion

15. See, e.g., Comm. on Int'l Human Rights, Ass'n of the Bar of the City of N.Y., *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* 60 RECORD 13, 24-25 (2005) [hereinafter N.Y. City Bar] (defining "Extraordinary Rendition" as the "transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment"); see also Bob Herbert, Op-Ed, *It's Called Torture*, N.Y. TIMES, Feb. 28, 2005, at A19 (defining extraordinary rendition); Danielle Knight, *Outsourcing a Real Nasty Job*, U.S. NEWS & WORLD REP., May 23, 2005, at 34.

16. See Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14, 2005, at 106. Mayer notes that in some cases in the 1990s the United States successfully pressured potential receiving countries to issue arrest warrants. *Id.*

17. See *All Things Considered: Terrorist Witness Got Low U.S. Protection* (National Public Radio broadcast Feb. 4, 1992) (quoting a Justice Department spokesperson who confirmed that extraordinary rendition is "decided on a case-by-case basis") (reporter Neal Conan); Tracy Wilkinson & Bob Drogin, *Missing Imam's Trail Said to Lead from Italy to CIA*, L.A. TIMES, Mar. 3, 2005, at A1 ("Each one had to be built almost as if it's a court case in the United States," said [Michael] Scheuer, who from January 1996 to July 1999 ran the [Central Intelligence Agency's clandestine unit searching for Osama bin Laden. 'I always assumed if I had 15 lawyers' signatures, it was probably fine.'"). According to Scheuer, each rendition under the Clinton administration was conducted under the close scrutiny of the White House. See Michael Scheuer, Op-Ed, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23.

18. See Wilkinson & Drogin, *supra* note 17. In some cases, formal approval was sought from the country where the person was taken. That country frequently provided assistance to transfer those individuals. E.g., Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 (describing Albanian cooperation with the United States in 1998 to transfer suspected members of the Egyptian Islamic Jihad to Egypt); cf. Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan; Italy Allegedly Mised on Cleric's Abduction*, WASH. POST, Dec. 6, 2005, at A1 (reporting that in 2003 the CIA deliberately deceived Italian authorities to facilitate the extraordinary rendition of Abu Omar).

19. See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 ("Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said."). Representative Markey remarked on his repeated requests of the CIA to provide an accurate count of the number of people transferred. Mayer, *supra* note 16 (reporting that the CIA has repeatedly refused

can partly be attributed to President Bush's approval of expedited procedures, which afford additional flexibility to the CIA.²⁰ For example, while U.S. officials may maintain a facade of rendering suspects to justice, sometimes the receiving country brings charges only after the CIA seizes the suspect and requests cooperation.²¹ Egypt appears to be the most frequently used receiving country,²² and other participants include Jordan, Morocco, Saudi Arabia, Syria, Uzbekistan, and Yemen.²³

Representative Markey's request to provide an accurate count of the number of people transferred). For evidence that the use of extraordinary rendition has increased since September 11, 2001, see Shannon McCaffrey, *Canadian Sent to Syrian Prison Disputes U.S. Claims Against Torture*, Knight Ridder Newspapers, Aug. 1, 2004; Craig Whitlock, *Europeans Investigate CIA Role in Abductions; Suspects Possibly Taken to Nations that Torture*, WASH. POST, Mar. 13, 2005, at A1 [hereinafter Whitlock, *Europeans Investigate*]; Wilkinson & Drogin, *supra* note 17, at A1. Administration officials have confirmed CIA rendition of 100–150 terror suspects since September 2001. *Torture by Proxy*, Editorial, L.A. TIMES, Mar. 11, 2005, at B12.

20. See Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1; Jehl & Johnston, *supra* note 6. Jehl and Johnston note that this broader CIA authority was derived from legal opinions and a series of classified amendments to Presidential Decision Directives. *Id.* Today extraordinary renditions are allowed simply for purposes of detention and interrogation; criminal charges are not required. See *id.* Some countries are pressured to seize suspects on their own, and then turn them over to the CIA. See, e.g., Chandrasekaran & Finn, *supra* note 18 (describing Indonesia's participation in the rendition of Muhammad Saad Iqbal Madni). Such arrests may not be entirely legitimate. See John Crewdson et al., *Italy Charges CIA Agents*, CHI. TRIB., June 25, 2005, at 1 (“[T]here are arrests, and then there are arrests,” a senior American intelligence official said with a laugh....”). These pro forma domestic arrests are effected in an attempt to absolve the CIA of responsibility for unlawful seizure. *Id.* In the case of Syrian-born German national Mohammed Haydar Zammar, Moroccan authorities refused to hand the suspect over to U.S. authorities because the United States had not filed charges against him. See Peter Finn, *Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others' Accounts*, WASH. POST, Jan. 31, 2003, at A14. In the case of Wahab al-Rawi, British intelligence agency MI5 lacked sufficient evidence to arrest the Iraqi-born British citizen for reported associations with an al Qaeda suspect in London. See Grey, *Gulag*, *supra* note 6. When al-Rawi left London for the Gambia on a business trip in November 2002, however, MI5 tipped off the CIA, and he was subsequently arrested and detained by Gambian secret police and questioned by a U.S. agent. See *id.* He was then flown to Syria on a CIA-chartered Gulfstream jet. See Stephen Grey, *U.S. Accused of 'Torture Flights'*, SUNDAY TIMES (London), Nov. 14, 2004, at 24 [hereinafter Grey, *Torture Flights*].

21. See Priest & Gellman, *supra* note 19.

22. See, e.g., Chandrasekaran & Finn, *supra* note 18; Mayer, *supra* note 16. But see Arieh O'Sullivan, *Jordanian Intelligence Usurps Mossad as CIA's Best Regional Ally*, JERUSALEM POST, Nov. 13, 2005, at 3 (describing Jordan's intelligence services as “a hub for ‘extraordinary renditions’” and quoting a former CIA official saying that Jordan “is at the top of our list of foreign partners”).

23. See Finn, *supra* note 20 (Syria); Grey, *Torture Flights*, *supra* note 20 (Pakistan); Priest & Gellman, *supra* note 19 (Jordan, Saudi Arabia); Don Van Natta Jr., *Threats and Responses: Interrogations; Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at 1 [hereinafter Van Natta, *Questioning*] (Morocco); Don Van Natta Jr., *U.S. Recruits a Rough Ally to be a Jailer*, N.Y. TIMES, May 1, 2005, at 1 [hereinafter Van Natta, *Recruits*]

The Bush administration has asserted that renditions are vital to the nation's defense.²⁴ One former CIA official argued that "the rendition program has been the single-most successful American counterterrorism program since 1995."²⁵ The CIA expanded its use of extraordinary rendition to send suspects to third countries in the mid-1990s, when the Clinton administration gave it responsibility for dismantling al Qaeda cells.²⁶ Because the CIA lacked police powers and detention facilities, and because the White House did not want to bring the suspects into the U.S. legal system, the CIA enlisted the assistance of allies to arrest and detain terror suspects.²⁷ Today the official purposes of rendition appear to be immobilizing terrorism suspects and "facilitating interrogation."²⁸ Under both the Clinton and Bush administrations, officials have been willing to accept assurances from the receiving country that suspects will be treated fairly and not tortured.²⁹ Officials claim that foreign allies facilitate interrogation:

(Uzbekistan); Amnesty Int'l, United States of America / Yemen, Secret Detention in CIA "Black Sites," Nov. 2005, at 1, 7-8, 17 (Yemen, Jordan).

24. Zagaris, *supra* note 6.

25. *Talk of the Nation: Policy of Extraordinary Rendition* (National Public Radio broadcast Apr. 7, 2005) (Michael Scheuer) [hereinafter Scheuer, *Talk of the Nation*]. Scheuer was chief of the CIA's bin Laden unit under the Clinton administration. *Id.*

26. *See id.*

27. *See id.* ("[T]he program was assigned by President Clinton and Mr. Berger, Richard Clarke to the CIA in 1995....[a]nd we said, 'Where would you like them taken?...We don't have police authority. We don't have prisons. Where do you want them to go?' And they said, 'Over to you.' So...they left it up to us.").

28. Jack Goldsmith, Draft Memorandum, Permissibility of Relocating Certain 'Protected Persons' from Occupied Iraq, Mar. 19, 2004, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 367, 368 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS]; Helen Thomas, 'Ghost Detainees' Should Haunt CIA, SEATTLE POST-INTELLIGENCER, May 5, 2005, at B6 (quoting President Bush); *All Things Considered: Legal No Man's Land Created by the Detention of Terror Suspects by U.S. Authorities* (National Public Radio broadcast Mar. 8, 2005) [hereinafter *All Things Considered*, 3/8/05] ("[I]f they have information that can help us prevent attacks from happening in the first place, we have an obligation to learn more about what they know.") (statement of White House Spokesman Scott McClellan); Condoleezza Rice, Secretary of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005), <http://www.state.gov/secretary/rm/2005/57602.htm> (last visited Apr. 20, 2006) [hereinafter Rice, 12/5/05] ("For decades, the United States...[has] used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.").

29. *See* Condoleezza Rice, Secretary of State, Press Availability at the Meeting of the North Atlantic Council (Dec. 8, 2005), <http://www.state.gov/secretary/rm/2005/57805.htm> (last visited Apr. 20, 2006) ("[I]t is our obligation if we have a concern, to seek assurances from any place to which we are transferring people that they will not be tortured."); Scheuer, *supra* note 17 (observing that when CIA agents told Clinton White House officials that rendition to Egypt or other countries may result in improper treatment, "[t]hey usually listened, nodded, and then inserted a legal nicety by insisting that each country to which the agency delivered a detainee

not because of their coercive questioning techniques, but because of their cultural affinity with the captives.... [T]heir intelligence services can develop a culture of intimacy that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.³⁰

Officials offer other justifications for extraordinary renditions. Some diplomats argue that in predominantly Muslim countries, secrecy avoids potential fundamentalist backlash that could arise if the public were to learn that the United States was involved in an extradition.³¹ Others argue that rendition avoids lengthy court battles and reduces the likelihood that the suspect's associates will learn of the capture.³² Rendition is also endorsed as a cost-saving alternative to housing suspects in U.S.-run facilities.³³

More realistically, rendition may arguably be a next-best alternative when criminal prosecution in the United States would be undesirable. Criminal prosecution could require the government to disclose closely guarded intelligence.³⁴ Even if intelligence is not at risk, prosecution could become altogether legally impossible if no U.S. officer could swear in court that the suspect was never ill-treated subsequent to

would have to pledge it would treat him according to the rules of its own legal system."); R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A3. Similar safeguards are required in traditional extradition cases, but they too are criticized as inadequate. See PYLE, *supra* note 1, at 319.

30. Priest & Gellman, *supra* note 19. Another commentator observed that foreign interrogators may be able to exact "emotional leverage" that U.S. interrogators cannot, and that such leverage may be produced with the use of "family pressure." David Ignatius, Op-Ed, 'Rendition' Realities, WASH. POST, Mar. 9, 2005, at A21. Reference to the use of family members to facilitate interrogation is disturbing in light of the most recent State Department Country Report for one of the countries participating in the rendition program, which noted, "There were reports that security personnel forced prisoners to watch relatives being tortured in order to extract confessions." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, SYRIA (2005) [hereinafter Syria Country Report].

31. See Chandrasekaran & Finn, *supra* note 18.

32. See *id.*

33. See Herbert, *supra* note 15 ("U.S. taxpayers should not necessarily be on the hook for their judicial and incarceration costs.") (quoting Pete Jeffries, communications director for House Speaker Dennis Hastert, when asked why Hastert does not support a bill to prohibit extraordinary rendition); Jehl & Johnston, *supra* note 6, at 1. One editorial responded to these arguments with disgust: "The idea that this is a productivity initiative would be comical if the issue were not so tragically serious." *Torture by Proxy*, Editorial, N.Y. TIMES, Mar. 8, 2005, at A22.

34. See Scott Shane, *Detainee's Suit Gains Support from Jet's Log*, N.Y. TIMES, Mar. 30, 2005, at A1.

arrest.³⁵ The U.S. legal system prohibits the government from admitting evidence obtained through torture or other ill-treatment, and therefore post-rendition criminal prosecution would present problems.³⁶

The most consistent and pointed charge against extraordinary rendition is that it is a means of “outsourcing torture.”³⁷ Many former CIA officials concede that they were aware that renditions resulted in torture; some admit that a goal of rendition was to use interrogation techniques that were beyond the legal authority of U.S. questioners.³⁸

35. Scheuer, *Talk of the Nation*, *supra* note 25 (discussing limited knowledge U.S. officials have of circumstances surrounding arrests).

36. *See, e.g.*, *Rogers v. Richmond*, 365 U.S. 564, 540–41 (1961); 10 U.S.C. § 984r(b) (2006). *But see* 10 U.S.C. § 984r(c) (authorizing in some circumstances the use of statements obtained through coercion); S. 576, 110th Cong. § 6 (2007) (prohibiting military tribunals from using statements obtained by coercion); Douglas Jehl & Eric Lichtblau, *Shift on Suspect Is Linked to Role of Qaeda Figures*, N.Y. TIMES, Nov. 24, 2005, at A1 (reporting that Administration officials decided to charge Jose Padilla with lesser crimes because of “insurmountable” concerns about the use of testimony from al Qaeda leaders who had been ill-treated during questioning). Likewise, British courts do not admit evidence obtained in violation of international law. *A and Others v. Sec. of State for the Home Dep’t*, [2005] UKHL 71, ¶ 34 (appeal taken from [2004] CA EWCA Civ. 1123) (rejecting use of “the fruits of torture inflicted in breach of international law”) (lead opinion of Lord Bingham). *But see* *Atuar v. United States*, No. 04-7731, 2005 WL 3134081 at *5–6 (4th Cir. Nov. 23, 2005) (holding that coerced testimony may be considered in extradition hearings); *United States v. Abu Ali*, 395 F. Supp. 2d 338, 373 (E.D. Va. 2005) (denying defendant’s motion to suppress statements made to Saudi officials while in Saudi custody, rejecting his claim that Saudi officials used torture to coerce his testimony); *Detainees: Panel I of a Hearing of the Senate Judiciary Committee*, 109th Cong. (June 15, 2005) (colloquy between Senator Russ Feingold and J. Michael Wiggins, Deputy Attorney General responsible for the Department of Justice Civil Division, in which Wiggins stated that “tribunals are free to test the weight of [the] evidence” that is procured through torture). Recent reports indicate that Guantánamo defendants may face difficulties in demonstrating that evidence was obtained through torture. *See* Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005 (“[Air Force Prosecuting Attorney at Guantánamo] Captain [John] Carr’s e-mail message also said that some evidence that at least one of the four defendants [at Guantánamo] had been brutalized had been lost and that other evidence on the same issue had been withheld.”). When confronted by a representative from the U.K. consulate in Uzbekistan about the use of intelligence resulting from torture in Uzbek prisons, the CIA head of station in Uzbekistan said that the CIA didn’t see that as a problem. *CBS News: CIA Flying Suspects to Torture?* (CBS television broadcast, Mar. 6, 2005) (reporting statements during a 60 Minutes broadcast) [hereinafter *CBS News*]; Regardless of the context in which it may be used, evidence obtained through torture is inherently suspect. *See* Ignatius, *supra* note 30.

37. *See, e.g.*, Knight, *supra* note 15; *Torture by Proxy*, L.A. TIMES, *supra* note 19; *Torture by Proxy*, N.Y. TIMES, *supra* note 33.

38. *See* Stephen Grey & Andrew Buncombe, *How Britain Helps the CIA Run Secret Torture Flights*, INDEPENDENT (London), Feb. 10, 2005, at 8; Jehl & Johnston, *supra* note 6; Priest & Gellman, *supra* note 19; *see also* Suzanne Goldenberg, *CIA Rendition Flights: US Defence of Tactic Makes No Sense Says Legal Expert*, GUARDIAN (London), Dec. 6, 2005, at 5 (“Rendition doesn’t become a tool in the war against terror unless people are being sent to a place where they can be interrogated harshly.”) (quoting Professor David Luban). While Egypt was an early and eager partner in the Clinton administration’s rendition program, *see* Mayer, *supra* note 16,

Nonetheless, CIA officials defend the practice as consistent with the law.³⁹

The unspoken subtext to the administration's defense of extraordinary rendition is the mistaken assumption that torture and other forms of cruel, inhuman, and degrading treatment may extract useful information from detainees.⁴⁰ Yet intelligence experts and specialists

President Clinton subsequently cut off funding and cooperation with Egypt's general intelligence service due to the country's failure to respect lawful boundaries. Priest & Gellman, *supra* note 19. One Bush administration official relating this history quipped, "You can be sure...that we are not spending a lot of time on that now." *Id.* According to one U.S. official who has been directly involved in transferring suspects into foreign hands, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them." *Id.*; see also John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 ("[Former CIA Director George] Tenet suggested [to Congress] it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods."); Brown & Priest, *supra* note 6; Chandrasekaran & Finn, *supra* note 18. Former CIA agent Bob Baer, who was a covert agent in the Middle East in the mid-1990s, explained that certain countries served distinct purposes in the rendition scheme: "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt." Grey, *supra* note 6.

39. See, e.g., Brown & Priest, *supra* note 6; Jehl & Johnston, *supra* note 6; Dana Priest, *Ex-CIA Official Defends Detention Policies; Careful Vetting, Approval Cited*, WASH. POST, Oct. 27, 2004, at A21; Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1; Thomas, *supra* note 28. In spite of asserted benign intentions underlying rendition, the Defense Department has officially approved of an interrogation technique called "false flag," in which a questioner misleads a detainee to create the impression that the detainee is in the hands of a third country. One memorandum describes as a "Category I" technique: "Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees." Jerald Phifer, Request for Approval of Counter-Resistance Strategies, Joint Task Force, Memorandum for Commander, 170, Oct. 11, 2002, reprinted in THE TORTURE PAPERS, *supra* note 28, at 227. This tactic was approved by Secretary of Defense Rumsfeld. See William J. Haynes II, Counter-Resistance Techniques, Memorandum for Secretary of Defense, Nov. 27, 2002, reprinted in THE TORTURE PAPERS, *supra* note 28, at 236. The memorandum was signed and approved by Rumsfeld on December 2, 2002. *Id.* While approval for other tactics was later rescinded, Category I techniques remain permissible. See Donald Rumsfeld, Counter-Resistance Techniques, Memorandum for Commander USSOUTHCOM, Jan. 14, 2003, reprinted in THE TORTURE PAPERS, *supra* note 28, at 239; see also Priest & Gellman, *supra* note 19 (confirming CIA use of the false flag tactic). Use of this method of interrogation implicitly acknowledges that all parties involved recognize that rendition itself is likely to result in torture.

40. See, e.g., Scott McClellan, White House Spokesman, Press Briefing (Dec. 6, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051206-3.html> (last visited Apr. 20, 2006) (failing to answer after being asked six times in succession to explain the purpose of rendition, while maintaining that "intelligence saves lives"); Rice, *supra* note 28 ("We must question them to gather potentially significant, life-saving, intelligence."); *Pre-9/11 Intelligence Failures: Hearing Before the House and Senate Intelligence Comms.*, 107th Cong. (Sept. 26, 2002) (statement of former chief of CIA Counter-Terrorist Center, Coffer Black) ("Operational

who work with torture victims repeatedly confirm that torture does not work.⁴¹ In fact, torture runs the risk of creating more enemies and steeling the resolve of the victims' friends, family, and other individuals who may already oppose the United States.⁴² Torture also is likely to generate false leads that officials may use to justify additional torture to extract information from others.⁴³ Additionally, the administration may rely on information derived from torture to justify otherwise suspect foreign policy operations. For example, a rendition to Egypt produced flawed intelligence on Iraq's weapons programs which U.S. officials cited when they attempted to garner support for the 2003 war in Iraq.⁴⁴

Some observers argue that by abandoning the original purpose of extraordinary rendition—bringing a person accused of a crime to a

flexibility: This is a very highly classified area. All I want to say is that there was 'before' 9/11 and 'after' 9/11. After 9/11 the gloves come off. Nearly 3,000 al-Qa'ida terrorists and their supporters have been detained."), available at http://www.fas.org/irp/congress/2002_hr/092602black.pdf (last visited Apr. 20, 2006); *National Security Threats*, *supra* note 6 (CIA Director Porter Goss) ("I can't say in every circumstance....I can't say in every instance that somebody who is tortured gives you good or bad information.").

41. See, e.g., U.S. Dep't of the Army, Field Manual No. 34-52, *Intelligence Interrogation*, ch. 1, available at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/> [hereinafter *Army Field Manual*]:

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government.... [T]he use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.

See also *Oversight of the Federal Bureau of Investigation: Hearing of the Senate Judiciary Committee*, 109th Cong. (July 27, 2005) (statement of Senator Durbin) (noting that the FBI criticizes torture as ineffective); *National Security Threats*, *supra* note 6 ("I would agree that torture is not proper interrogation, and it doesn't give you the results that professional interrogation would bring you."); *Nomination of Alberto Gonzales to be the Attorney General of the United States: Hearing of the Senate Judiciary Comm.*, 109th Cong. (Jan. 6, 2005) (statement of Douglas Johnson, executive director of the Center for Victims of Torture) [hereinafter *Gonzales Nomination Hearing*] ("[T]orture does not yield reliable information.... [T]orture will not be used only against the guilty."); Letter from General Joseph Hoar et al., to John McCain (Oct. 3, 2005), <http://www.globalsecurity.org/military/library/news/2005/10/051003-letter-to-sen-mccain.htm> (last visited Apr. 20, 2006) (describing the Army Field Manual as "the gold standard"). Even speculations about the "ticking time bomb" scenario, see *Gonzales Nomination Hearing*, *supra*, that some may use in an attempt to justify torture, are not applicable to extraordinary rendition, which does not involve an urgent need for information.

42. See Michael Ignatieff, *Lesser Evils*, N.Y. TIMES MAG., May 2, 2004, at 46 ("If you want to create terrorists, torture is a pretty sure way to do so."); Michael Ignatieff, *Evil Under Interrogation*, FIN. TIMES (London), May 15, 2004, at 25 ("Torture may help, if not to create terrorists, then to harden them in their hostility to the state responsible for their suffering.").

43. See *Gonzales Nomination Hearing*, *supra* note 41, at 522 (statement of Douglas Johnson) (observing that people give up names of innocent people in order to stop their own torture).

44. See Douglas Jehl, *Qaeda-Iraq Link U.S. Cited Is Tied to Coercion Claim*, N.Y. TIMES, Dec. 9, 2005, at A1.

country to face trial—the United States has painted itself into a corner. While the administration pressured the CIA to capture and incapacitate terror suspects, “the policy guys hadn’t thought through what we’re going to do with these people for the rest of their lives.”⁴⁵ Interrogation subsequent to extraordinary rendition is only potentially useful for identifying future terror plots and additional suspects to detain; rendition is not designed for criminal prosecution.⁴⁶ Hence, extraordinary rendition serves multiple purposes: it gets suspects out of U.S. hands, purportedly facilitates investigation of terror plots, and indefinitely incapacitates⁴⁷ suspected terrorists. Extraordinary rendition

45. *All Things Considered*, 3/8/05, *supra* note 28 (Mike Scheuer); see also Priest, *Secret Prisons*, *supra* note 14 (quoting a former CIA officer describing the ‘secret detention system as “reactive” and lacking a “grand strategy”).

46. See, e.g., *All Things Considered: Terrorism Cases: Highly Complex and a Bit Bizarre* (Minnesota Public Radio broadcast July 25, 2005), http://news.minnesota.publicradio.org/features/2005/07/25_stawickie_prosecuting/ (last visited Apr. 20, 2006) (quoting a former CIA attorney, who explained that high-level al Qaeda operatives are being interrogated, and that “the U.S. deals with [them] outside the criminal system”) (reporter Elizabeth Stawicki); Mayer, *supra* note 16 (“The criminal prosecution of terrorist suspects has not been a priority for the Bush Administration.”).

47. See Dana Priest, *Long-Term Plan Sought for Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1. Indefinite detention is subject to several limitations under U.S. and international law. The Second Circuit has held, for example, that the Material Witness Statute, 18 U.S.C. § 3144 (2006), does not allow for indefinite detention. *United States v. Awadallah*, 349 F.3d 42, 62 (2d Cir. 2003). In spite of this restriction on indefinite detention, § 412(a)(6) of the USA PATRIOT Act potentially allows the indefinite detention of persons ordered removed who “threaten the national security of the United States or the safety of the community or any person.” 8 U.S.C. § 1226a(a)(6) (2006). The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), suggested that while prisoners may be detained until the end of hostilities, “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”

Indefinite detention is also prohibited under international law. The Geneva Conventions impose limits on detention of POWs and civilians. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 118; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 43. The European Court of Human Rights has found that some forms of detention are in violation of Article 5 of the European Convention on Human Rights, which limits indefinite and secret detention. In *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) ¶¶ 2, 55 (1988), the Court held that detention may violate Article 5 if a suspect is not promptly brought before a judge after detention begins. Indefinite detention also falls within the U.N. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49, art. 9 (1992), which sets forth the “right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty.” The International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 9, entered into force Mar. 23, 1976, establishes that persons detained are entitled to be brought promptly before a court and that they must be released either if no trial

attempts to compensate for the administration's failure to foresee an end-game when it abandoned the goal of criminally prosecuting terror suspects in U.S. courts.⁴⁸

The CIA may resort more frequently to underground techniques, like extraordinary rendition, due to increasing political scrutiny of CIA and Defense Department counter-terrorist programs.⁴⁹ First, the CIA is facing unwanted attention. The public increasingly is concerned about CIA interrogation tactics, the United Nations launched an investigation of the CIA's secret detention facilities, and the Senate has called for heightened congressional oversight of those facilities.⁵⁰ Also, CIA officials fear that changes in administrative standards on permissible interrogation techniques may leave agents responsible⁵¹ for acts that they were led to believe had been thoroughly vetted by top administration lawyers. Moreover, the Defense Department is taking steps to reduce the prisoner population at Guantánamo,⁵² and the Pentagon perceives that increasing "red tape" is entangling its own interrogations.⁵³ Public and Congressional⁵⁴ concerns about reports of

takes place within a reasonable time or if the detention is otherwise unlawful. Amnesty International has noted that some forms of indefinite detention constitute torture. See Amnesty Int'l, *supra* note 23, at 14.

48. See *supra* note 45 and accompanying text.

49. See Reuel Marc Gerecht, *What's the Matter with Gitmo?*, WKLY. STANDARD, Jul. 4, 2005 [hereinafter Gerecht, *Gitmo*] ("[T]he current liberal outcry against Abu Ghraib and Guantanamo could well increase the use of rendition...."). Professor Bassiouni, writing in an updated edition of his text in November 2001, demonstrated great foresight in predicting the connection between political events and the use of extraordinary rendition: "The tragic events of September 11, 2001 in the terror-violence attacks in New York and Washington have unleashed a 'war' on terrorism. This will likely mean that the abduction of 'terrorists' will be seen as justifiable. This consequence of terrorism will be a loss to the rule of law." BASSIOUNI, *supra* note 1, at 251-52.

50. See Noah Feldman, *Ugly Americans: The Laws of a War Against Evil*, NEW REPUBLIC, May 30, 2005, at 23 (discussing public concern about CIA interrogation tactics); Douglas Jehl, *Senate Is Set to Require White House to Account for Secret Prisons*, N.Y. TIMES, Dec. 15, 2005 [hereinafter Jehl, *Secret Prisons*]; Daniel McGrory, *American "Ghost Prisoners" May Yield Vital Clues*, TIMES (London), Aug. 2, 2005, at 6 (discussing U.N. intention to investigate U.S. secret prisons).

51. It is unclear whether responsibility includes civil liability under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2006). See, e.g., *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992); *infra* notes 281-287 (discussing liability issues for CIA agents and private contractors).

52. See *Empty Beds, Empty Stomachs; Guantánamo Bay*, ECONOMIST, Sept. 24, 2005 (noting that U.S. officials are increasingly transferring detainees into the custody of their home countries).

53. See Heather Mac Donald, *How to Interrogate Terrorists*, CITY J., Winter 2005, available at http://www.city-journal.org/html/15_1_terrorists.html (last visited Apr. 20, 2006).

54. A group of Republican Senators led by Senator John McCain introduced a series of amendments to the 2006 defense authorization bill that would require all defense personnel

ill-treatment at Abu Ghraib and Guantánamo may force the Bush administration to pursue alternatives that attempt to evade public attention, including an expanded rendition program.⁵⁵

In this context, it is critically important to examine the legality of extraordinary rendition. This Article establishes that extraordinary rendition violates the Convention Against Torture and domestic prohibitions on torture and conspiracy to commit torture.⁵⁶ It is now U.S. officials who are attempting to evade the long arm of the law.

throughout the world to follow the guidelines in the Army Field Manual, *supra* note 41, when interrogating detainees, and would prohibit defense personnel from engaging in cruel, inhuman, and degrading treatment of prisoners, regardless of where they are detained. *See* Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. §§ 8154–55 (as engrossed in the Senate, 2005); Amendment to Provide for Uniform Standards for the Interrogation of Persons Under the Detention of the Department of Defense, S. Amdt. 1557, to amend National Defense Authorization Act for 2006, S. 1042, 109th Cong., 151 CONG. REC. S12380 (daily ed. Nov. 4, 2005); and Amendment to Prohibit Cruel, Inhuman, or Degrading Treatment or Punishment of Persons Under the Custody or Control of the United States Government, S. Amdt. 1556, to amend National Defense Authorization Act for 2006, S. 1042, 109th Cong., 151 CONG. REC. S12380 (daily ed. Nov. 4, 2005). President Bush threatened to veto any legislation that imposes such conditions, and the White House engaged in intense lobbying in an attempt to block introduction of the amendments, but ultimately the McCain amendments prevailed. *See* Brian Knowlton, *Bush and McCain Reach Deal on Treatment of Terror Suspects*, N.Y. TIMES, Dec. 15, 2005; Reuters, *Bush Signs Anti-Terrorism, Prisoner Treatment Laws*, Dec. 31, 2005. The amendments might not affect the practice of extraordinary rendition. *See* Helen Thomas, *Bush Plays Hardball in Refusing to Stop Abuse of Detainees*, REC. (Kitchener–Waterloo, Ontario), July 29, 2005, at A11 (“Unfortunately, [the McCain proposals] would not cover the CIA’s shameful practice of ‘extraordinary rendition’ in which we send detainees to other countries for possible torture.”); *see also* Eric Schmitt & Tim Golden, *Pentagon Plans Tighter Control of Interrogation*, N.Y. TIMES, Nov. 8, 2005 (reporting that newly approved Defense Department interrogation guidelines would only apply to CIA officers who are interrogating military prisoners). The Bush Administration advocated a CIA exemption to the McCain Amendment’s prohibition on the use of torture and cruel, inhuman, or degrading treatment or punishment. *See* Jonathan Weisman, *Senators Agree on Detainee Rights*, WASH. POST, Nov. 15, 2005, at A1. During negotiations in the Senate, the McCain amendment was linked to another amendment that would strip Guantánamo detainees of access to U.S. courts under the habeas statute. *See id.*

55. *See* Amnesty Int’l, *supra* note 23, at 5; Gerecht, *Gitmo*, *supra* note 49 (“For a Bush administration under siege, rendition may well seem a safer, quieter way of doing what the CIA and the military deem necessary.”); Reuel Marc Gerecht, *Why the CIA Shouldn’t Outsource Interrogations to Countries that Torture*, WKLY. STANDARD, May 16, 2005 [hereinafter Gerecht, *CIA*] (“[R]endition eliminates the Guantanamo detention problem.”). *But see* Carol D. Leonnig & Eric Rich, *US Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006 (noting that soon after the United States transferred fourteen “high value” detainees to Guantánamo, Congress enacted the Military Commissions Act, which purported to strip those detainees of the right to gain access to U.S. courts).

56. For discussion of other domestic and international laws applicable to the practice of extraordinary rendition, see David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

Part I of this Article describes the Convention Against Torture and its provisions, and then examines the scope of the prohibition on torture under U.S. law. Then Part I demonstrates that extraordinary rendition constitutes a criminal conspiracy to commit torture. Part I concludes by addressing the policy justifications for extraordinary rendition and the use of diplomatic assurances to evade criminal liability under the torture statute. Part II examines the domestic mechanisms available in the United States to address extraordinary rendition, primarily focusing on the use of habeas corpus to challenge extraordinary rendition. The Conclusion addresses the legal climate that led to justifications for extraordinary rendition, and the unintended consequences of the policy for U.S. officials and the global community.

I. EXTRAORDINARY RENDITION VIOLATES THE CONVENTION AGAINST TORTURE AND THE FEDERAL TORTURE STATUTE

The United Nations General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, and the Convention entered into force in 1987.⁵⁷ It defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”⁵⁸ The pain or suffering must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁵⁹ Article 3 of the Torture Convention prohibits States Parties from “expel[ing], return[ing] (*refouler*) or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁶⁰ Article 15 requires States Parties to “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.”⁶¹ Further, Article 16 requires every State Party to “undertake to prevent in any territory under its jurisdiction other acts of

57. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, *entered into force* June 26, 1987 [hereinafter *Convention Against Torture*].

58. *Id.* art. 1.

59. *Id.*

60. *Id.* art. 3.

61. *Id.* art. 15; *accord* A & Others v. Sec. of State for the Home Dep't, [2005] UKHL 71 (appeal taken from [2004] CA EWCA (Civ.) 1123), ¶ 39 (articulating the rationale for excluding evidence obtained by means of torture).

cruel, inhuman or degrading treatment or punishment which do not amount to torture.”⁶²

The Torture Convention calls for States Parties to take steps to implement the Convention. Article 2 requires “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [the State Party’s] jurisdiction.”⁶³ Article 4 obligates States Parties to criminalize not only all acts of torture, but also all “attempt[s] to commit torture” and “an act by any person which constitutes complicity or participation in torture.”⁶⁴ Perhaps most importantly, Article 2 prohibits States Parties from invoking any exceptional circumstances to justify torture.⁶⁵

A. *U.S. Acceptance of the Convention Against Torture*

The United States ratified the Torture Convention in October 1994, having enacted legislation to implement the Convention. The Senate made several explicit reservations, understandings, and declarations in its advice and consent to the Convention. On the suggestion of the Clinton administration, the Senate adopted a reservation limiting U.S. obligations under Article 16 to “prohibitions as defined by the 5th, 8th, and/or 14th amendments to the U.S. Constitution.”⁶⁶ The United States further submitted an understanding to the Convention stating:

(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

62. Convention against Torture, *supra* note 57, art. 16.

63. *Id.* art. 2, ¶ 1.

64. *Id.* art. 4.

65. *Id.* art. 2, ¶ 2.

66. S. REP. NO. 102-30, at 21 (1991).

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.⁶⁷

The Senate also declared that the United States understands the "substantial grounds" standard in Article 3 to be limited to situations where it is "more likely than not" that the person will be tortured.⁶⁸ In another declaration, the Senate stated that Articles 1 through 16 of the Convention are not self-executing, but noted that "[t]he majority of the obligations to be undertaken by the United States are already covered by existing law."⁶⁹

The Senate rejected one important understanding originally proposed by President Reagan. He had suggested a clarification that the United States "understands that paragraph 2 of Article 2," the non-derogability provision of the Torture Convention, "does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."⁷⁰ The Senate's rejection of this proposal indicates that the United States fully accepts the non-derogability of the prohibition on torture. Therefore, critics must view any attempt to carve exceptions out of U.S. obligations under the Convention in light of the fact that the United States accepted in full that "[n]o exceptional circumstances whatsoever...may be invoked as a justification of torture."⁷¹

67. CONG. REC. S17486-01 (daily ed., Oct. 27, 1990) (U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

68. Convention Against Torture, *supra* note 57. This standard is applied in both removal and extradition proceedings. *See id.* arts. 8, 12. It is also the stated standard guiding the Department of State in its role in the transfer of Department of Defense detainees from Guantánamo to the custody of other countries. *See* Pierre-Richard Prosper, Declaration, *el-Mashad v. Bush*, Civ. Action No. 05-0270 (JR), at 5, ¶ 8, *available at* <http://www.state.gov/documents/organization/45849.pdf> (last visited Apr. 20, 2006). The U.S. standard is arguably much narrower than the language of Article 3, which reads, "No State party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, *supra* note 57, art. 3(1).

69. S. REP. NO. 102-30, at 21 (1991).

70. George P. Shultz, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Letter of Submittal to the President, May 10, 1988, *reprinted in* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 6 [hereinafter Torture Convention Transmittal Document].

71. Convention Against Torture, *supra* note 57, art. 2(2). This interpretation contradicts U.S. policy on torture from 2002 to 2004. *See* Jay S. Bybee, Memorandum for Alberto R. Gonzales Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, Aug. 1, 2002, *reprinted in* THE TORTURE PAPERS, *supra* note 28, 172, 207–13 (outlining

A reservation, to be valid, must be consistent with the object and purpose of a treaty.⁷² The United Nations Committee Against Torture expressed concern that the “reservation lodged to article 16, in violation of the Convention would have the effect of limiting application of the Convention.”⁷³ In 2000, the United States responded to this concern by stating that it made the reservation because it found the term “degrading treatment” to be ambiguous.⁷⁴ In 2005, however, the U.S. response to this continuing concern was somewhat more hostile:

The Committee’s use of the phrase “in violation of the Convention” is confusing as a matter of international treaty law. By their nature, reservations alter the scope of treaty obligations assumed by States Parties. Accordingly, reservations that are not prohibited by a treaty or by the applicable international law rules relating to reservations are not violations of that treaty. As the Torture Convention does not prohibit the making of a reservation and as the reservation in question is not incompatible with the object and purpose of the Convention, there is nothing in the U.S. reservation that would be unlawful or otherwise constitute a violation of the Convention.⁷⁵

The intent of the U.S. reservation to Article 16 is unclear. While the government states that the Convention’s provision is vague, the Supreme Court’s own standard is to prohibit actions which “shock...the conscience” of the Court under the Fifth and Fourteenth Amendments.⁷⁶

legal arguments in favor of use of the defenses of necessity and self-defense as defenses to the statutory prohibition on torture). The defenses were repudiated in a memorandum issued on December 30, 2004. See Daniel Levin, Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Dec. 30, 2004, at 17, available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> (last visited Apr. 20, 2006); see also Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1703–09 (2005) (describing the Bybee memorandum’s “definitional shenanigans”).

72. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980, art. 19.

73. Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶¶ 175–80, U.N. Doc. A/55/44, (May 15, 2000).

74. Consideration of Reports Submitted by States Parties under Article 19 of the Convention, United States of America, ¶¶ 303–04, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

75. See Second Periodic Report of the United States of America to the Committee Against Torture, Submitted to the Committee Against Torture, May 6, 2005, ¶ 73, <http://www.state.gov/g/drl/rls/45738.htm> (last visited Apr. 20, 2006) [hereinafter Second U.S. Report to Torture Committee].

76. *Rochin v. People of California*, 342 U.S. 165, 172 (1952).

This standard has been sharply criticized,⁷⁷ and has led to the puzzling conclusion that while pumping a person's stomach to obtain proof of drug possession shocks the conscience,⁷⁸ a mandatory blood test to prove alcohol consumption does not.⁷⁹ It is unclear whether these precedents are any less vague than the language of Article 16 itself.

The reservation may be used in an attempt to limit the provisions of Article 16 to conduct within the territory of the fifty states of the United States. If this reason constitutes the newly concocted foundation for the U.S. reservation to Article 16, then the reservation is inconsistent with the purpose of the treaty, which is to prohibit torture everywhere and other forms of cruel, inhuman, and degrading punishment and treatment within the jurisdiction of the ratifying nation. The U.S. military's choice of Guantánamo Bay, Cuba, as the detention site for terror suspects is inherently suspect in this regard because the United States has claimed that Guantánamo is not within the territory or jurisdiction of the United States.⁸⁰ Given the publicized reports of ill-treatment at the detention site and disclosures of secret CIA detention facilities located overseas, it seems likely that the United States attempted to evade both the scope of the Constitution and of Article 16 by selecting those locations for detention. Accordingly the reservation to Article 16 is not valid because it violates the object and purpose of the treaty, which aims to prohibit all forms of torture and other cruel, inhuman, and degrading treatment resulting from the acts of States Parties to the Convention.

The Senate determined that Congress needed only minimal enacting legislation to comply with the Convention, because "any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States."⁸¹ At the time of ratification, however, existing law was not "sufficiently far-reaching to

77. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., dissenting).

78. *Rochin*, 342 U.S. at 172.

79. *Breithaupt v. Abram*, 352 U.S. 432, 435-36 (1957).

80. See Brief for the Respondents at 21-25, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343); see also Glenn Kessler & Josh White, *Rice Seeks to Clarify Policy on Prisoners*, WASH. POST, Dec. 8, 2005, at A1 (reporting that the administration policy is to abide by Article 16 extraterritorially, "even if such compliance is not legally required"); So, *What's All the Fuss?* ECONOMIST, Dec. 8, 2005 (noting that Condoleezza Rice's statements suggest that the administration has asserted the existence of a loophole allowing the CIA to transfer detainees for the purpose of interrogation using cruel, inhuman or degrading treatment).

81. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, ¶ 101, U.N. Doc. CAT/C/23/Add.5 (Feb. 9, 2000) [hereinafter First U.S. Report to Torture Committee].

satisfy the additional requirements of [A]rticle 5 concerning jurisdiction over acts of torture by United States nationals wherever committed or over such offences committed elsewhere.”⁸² Therefore, Congress enacted the Torture Statute, codified at 18 U.S.C. §§ 2340 and 2340A.⁸³ Section 2340 defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering...upon another person within his custody or physical control.”⁸⁴ According to the Senate Report on the legislation, the definition “emanates directly from [A]rticle 1 of the Convention.”⁸⁵ Section 2340A extends criminal jurisdiction in accordance with Article 5 of the Torture Convention:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.⁸⁶

The Senate Report strongly suggests that the Senate intended the geographic scope of jurisdiction to be all-encompassing; the statute was only necessary for areas outside the reach of existing state and federal laws prohibiting acts which constitute torture.⁸⁷ The statute affords jurisdiction for the offense if the offender is a U.S. national, or if the offender is present in the United States.⁸⁸ Further, Section 2340A specifies that a person found guilty of conspiring to commit torture is subject to almost all of the same penalties as a person committing torture.⁸⁹

82. *Id.* ¶ 44.

83. *See id.* ¶ 188.

84. 18 U.S.C. § 2340(1) (2006).

85. Foreign Relations Authorization Act, S. REP. NO. 103-107, at 58 (1993), *reprinted in* 1994 U.S.C.C.A.N. 302, 366.

86. 18 U.S.C. § 2340A(a).

87. *See* S. REP. NO. 103-107, at 59:

[Section 2340A] applies only to acts of torture committed outside the United States. Since “United States” is defined to include any registered United States aircraft or ship, the provision is not applicable to these particular conveyances when they are outside of the geographical territory of the United States. These places would, as would acts of torture committed within the United States, be covered by existing applicable federal and state statutes.

88. § 2340A(b).

89. § 2340A(c) (excepting the death penalty from the possible sanctions for conspiracy). This section was added in a 2001 amendment. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT

Congress also enacted legislation to implement Article 3 of the Torture Convention. The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) articulated this policy:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.⁹⁰

FARRA also directed executive agencies to prescribe regulations to implement Article 3; as a result, the Department of Homeland Security, the Department of Justice, and the State Department issued regulations implementing Article 3 in the context of removal and extradition proceedings.⁹¹ Those regulations, as interpreted by subsequent judicial opinions, extend the definition of torture to include “acts of torture committed by or at the acquiescence of a public official or other person acting in an official capacity.”⁹² Acquiescence requires the official to have awareness of the activity constituting torture prior to its occurrence, and then to breach his or her legal responsibility to intervene.⁹³ “Willful blindness” may be sufficient to constitute acquiescence when the official’s government is able to stop the torture.⁹⁴

Act), Pub. L. No. 107-56, § 811(g), 115 Stat. 272, 381 (2001) (codified at 18 U.S.C. 2340A(c) (2006)).

90. Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), in Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277 (1998).

91. *See id.* § 2242(b); 8 C.F.R. §§ 208.16-208.18, 208.30, 208.31, 235.8; 22 C.F.R. pt. 95. Also relevant to an analysis of domestic compliance with the Convention Against Torture is the Torture Victim Protection Act of 1991, which was enacted prior to Senate advice and consent to the Torture Convention, and allows U.S. citizens to bring civil actions seeking damages for torture committed against them by individuals acting under authority of foreign nations. 28 U.S.C. § 1350 note (2006). Discussion of the Torture Victim Protection Act is beyond the scope of this Article.

92. *See* MICHAEL JOHN GARCIA, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING REMOVAL OF ALIENS 5 (Cong. Research Serv., CRS Report for Congress Order Code RL32276, Mar. 11, 2004) (emphasis omitted) *available at* <http://fpc.state.gov/documents/organization/31351.pdf> (last visited Apr. 20, 2006).

93. *Id.* For relevant case law, *see id.* at 5 n.29.

94. *Id.* at 5.

B. Scope of the Statutory Prohibition of Torture

In spite of the legislative branch's intention to provide universal criminal jurisdiction over acts of torture committed by U.S. nationals, there are arguably at least two gaps in the scope of U.S. efforts to comply with the nation's obligations under the Torture Convention.

The first gap appears to be a fluke. In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act (MEJA), which extended criminal jurisdiction over some civilians who commit acts outside of the United States.⁹⁵ Then, as part of the USA PATRIOT Act of 2001, Congress amended a provision of the United States Code defining the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States.⁹⁶ This amendment expanded the definition of the SMTJ, but not for offenses covered by MEJA.⁹⁷ By expanding the definition of SMTJ to include the premises of the U.S. military in foreign states, "the SMTJ statute had the effect of narrowing the reach of the extraterritorial criminal torture statute," which applies only to torture committed "outside the United States."⁹⁸ At the same time, the expanded definition of SMTJ did *not* correspond with expansion of the scope of federal criminal law, including the prohibitions on assault and battery, to non-military persons as applied under MEJA. As a result, starting from October 26, 2001, 18 U.S.C. §§ 2340 and 2340A no longer applied to non-military actors in places such as the premises of U.S. military or other U.S. government missions or entities in foreign states.⁹⁹ Congress subsequently corrected this discrepancy as part of the National Defense

95. Military Extraterritorial Jurisdiction Act, Pub. L. No. 106-523, § 1, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261-67 (2006)). The Act was primarily designed to criminalize acts committed by people not governed by the Uniform Code of Military Justice who accompany U.S. Armed Forces outside of the United States. See Second Periodic Report of the United States of America to the Committee Against Torture, Submitted to the Committee Against Torture (May 6, 2005), ¶ 43, available at <http://www.state.gov/g/drl/rls/45738.htm> (last visited Apr. 20, 2006) [hereinafter Second U.S. Report to Torture Committee].

96. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), § 804, Pub. L. No. 107-56, 115 Stat. 272, 377 (2001) (codified at 18 U.S.C. § 7(9) (2006)).

97. See Second U.S. Report to Torture Committee, *supra* note 95, ¶ 44 ("This paragraph [§ 7(9)], however, does not apply with respect to an offense committed by a person described in section 3261(a) of Title 18, United States Code, which codifies the provision of the Military Extraterritorial Jurisdiction Act described above.").

98. *Id.* ¶ 46. The Torture Statute, 18 U.S.C. § 2340, at the time defined "the United States" by reference to 18 U.S.C. § 7. Compare Pub. L. No. 103-236, Title V, § 506(a), 108 Stat. 463 (1994), with Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1089, 118 Stat. 1811, 2067 (2004).

99. See Second U.S. Report to Torture Committee, *supra* note 95, ¶¶ 44-46.

Authorization Act for Fiscal Year 2005¹⁰⁰ by amending 18 U.S.C. §§ 2340(3) to narrow the definition of the United States and thereby restore the scope of the torture statute.¹⁰¹ Therefore, between October 26, 2001 and October 28, 2004, 18 U.S.C. §§ 2340 and 2340A arguably did not regulate the actions of U.S. nationals who may have committed acts of torture on the premises of U.S. military missions overseas.¹⁰² Any attempt to exploit this discrepancy, however, clearly runs contrary to legislative intent, to the Torture Convention itself, which requires States Parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,” and to *jus cogens* principles against torture recently reaffirmed by the U.S. Supreme Court.¹⁰³

The second gap relates to the scope of Article 3’s prohibition against the expulsion, return (“*refouler*”), or extradition of a person to another country where there is a likelihood of torture. Under U.S. law, torture per se is not illegal within the United States, but the Senate indicated in its advice and consent to the Convention that existing law prohibited all acts of torture, including criminal prohibitions on assault, battery, and

100. Pub. L. No. 108-375.

101. See Second U.S. Report to Torture Committee, *supra* note 95, ¶ 46.

102. The Department of State, in its Second Periodic Report to the Committee Against Torture, refers to this discrepancy as an “unintended legislative anomaly.” Second U.S. Report to Torture Committee, *supra* note 95, ¶ 45. It is unclear whether attorneys for the administration were aware of the discrepancy when they gave advice to the CIA regarding the torture statute. See, e.g., Bybee, *supra* note 71, at 174 n.2 (noting that the definition of the “United States” under § 2340 includes all places “subject to the jurisdiction of the United States,” including the SMTJ). Bybee was not charged with addressing the meaning of the phrase “outside the United States” within the context of the torture statute, and therefore he does not discuss the issue beyond this footnote. *Id.* at 174. Other documents indicate a growing awareness of the discrepancy. See Working Group Report on Detainee Interrogations in the Global War on Terrorism, Mar. 6, 2003, reprinted in THE TORTURE PAPERS, *supra* note 28, at 241, 244 & n.10 (quoting relevant sections of 18 U.S.C. § 7(3) and § 7(1), and observing that “the Torture Statute does not apply to the conduct of U.S. personnel at GTMO”). This Working Group Report concludes that the Torture Statute “would apply to U.S. operations outside U.S. jurisdiction, such as Afghanistan.” *Id.* at 245. A Working Group Report issued less than one month later does quote 18 U.S.C. § 7(9). See Working Group Report on Detainee Interrogations in the Global War on Terrorism, Apr. 4, 2003, reprinted in THE TORTURE PAPERS, *supra* note 28, at 286, 291 [hereinafter Working Group Report]. The conclusion of this Working Group Report is more ambiguous: “Although Section 2340 does not apply to interrogations at GTMO, it could apply to U.S. operations outside U.S. jurisdiction, depending on the facts and circumstances of each case involved.” *Id.* at 292.

103. See Convention Against Torture, *supra* note 57, art. 2(1); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–33 (2004). Additionally, the recent indictment of a CIA contractor alleged to have beaten a prisoner to death in June 2003 at a U.S. detention facility in Afghanistan suggests that this gap is not being exploited, because individuals can still be prosecuted for assault under the expanded SMTJ jurisdiction, even if they technically cannot be prosecuted under the Torture Statute. See Second U.S. Report to Torture Committee, *supra* note 95, ¶ 49.

murder.¹⁰⁴ Congress explicitly criminalized torture occurring outside of the territory of the United States, but did not expressly extend the obligations of Article 3 (*nonrefoulement*) to people subject to transfer from U.S. custody when not present in U.S. territory.¹⁰⁵ In fact, FARRA expressly bars jurisdiction for consideration of any determinations made pursuant to the explicit policy prohibiting involuntary return regardless of whether a person is physically present in the United States.¹⁰⁶ Ignoring precedents which minimize the effect of such prohibitions,¹⁰⁷ some courts have held that FARRA does not extend legal rights beyond the removal setting,¹⁰⁸ including cases alleging fear of extraordinary rendition.¹⁰⁹

A recent study by the Congressional Research Service (CRS) suggests that this gap in statutory coverage may in part result from the language of Article 3 of the Torture Convention itself:

[I]t could be argued that the provisions of...Article 3 do not apply to extraordinary renditions occurring outside the United

104. See *Convention Against Torture: Hearing Before the S. Comm. on Foreign Rels.*, 101st Cong. 5 (1990) (statement of Abraham D. Sofaer, Department of State Legal Adviser) (“We do agree that there is no need for the legal protections of the convention against torture in the United States. Existing U.S. law makes any act falling within the convention’s definition of torture a criminal offense as well as a violation of various civil statutes.”).

105. See N.Y. City Bar, *supra* note 15, at 94 (“[N]either the regulations governing extradition nor those governing removal proceedings under FARRA are designed to apply to persons being transferred by, or with the complicity of, U.S. actors *outside the United States* to third states.”).

106. Foreign Affairs Reform and Restructuring Act of 1998, § 2242(d) (“Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section....”).

107. See DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 311–12 (5th ed. 2005) (noting that courts narrowly construe such purported bars to jurisdiction).

108. See *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1086 (9th Cir. 2004), *motion granted for rehearing en banc* 386 F.3d 938 (9th Cir. 2004), *vacated and remanded with instructions to dismiss as moot* 389 F.3d 1307 (9th Cir. 2004) (“While § 2242(d) plainly contemplates judicial review of final orders of removal for compliance with the Torture Convention and the FARR Act, it just as plainly does not contemplate judicial review for anything else.”). The precedential value of this decision is nil. See *Cornejo-Barreto*, 386 F.3d at 938 (“The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit.”); *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974) (holding that a decision subsequently vacated, remanded, and found to be moot had no precedential value); *cf. O’Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (observing that a Supreme Court decision vacating an appeals court judgment deprives the appeals court judgment of precedential effect). Nonetheless, the opinion has been cited favorably by at least one other court. See *O.K. v. Bush*, 377 F. Supp. 2d 102, 118 n.17 (D.D.C. 2005).

109. *O.K.*, 377 F. Supp. 2d at 118 n.17 (“FARRA is quite explicit that no legal rights can be derived from its rules outside of the removal setting, by analogy or otherwise.”).

States. Article 3 states that no party shall “expel, return (‘refouler’) or extradite a person” to a country where there are substantial grounds to believe that he will be tortured. It could be argued, however, that extraterritorial, irregular renditions are not covered by this provision. Seizing a person in one country and transferring him to another would arguably not constitute “expelling” the suspect. So long as these persons were rendered to countries where they had not previously resided, it also could not be said that the United States “returned” these persons to countries where they faced torture. In addition, if such renditions were not executed via an extradition agreement, it could be argued they did not constitute extraditions for the purposes of Article 3.¹¹⁰

Such arguments demonstrate an attempt to defeat the purpose of the Convention, and potentially run afoul of the non-derogability provision in Article 2(2).¹¹¹ Guidance from the Committee Against Torture and the U.N. High Commissioner for Refugees suggests that the *non-refoulement* obligation extends more broadly to include at least some forms of indirect transfer.¹¹²

110. GARCIA, *supra* note 92, at 18; *see So, What's All the Fuss?*, *supra* note 80 (positing that the administration is not applying the “substantial grounds” standard to extraterritorial transfers). *But see* Press Release, Office of Press Sec’y, President Meets with World Health Organization Director-General (Dec. 6, 2005) (Statement of George W. Bush, President of the United States), <http://www.whitehouse.gov/news/releases/2005/12/20051206-1.html> (last visited Apr. 20, 2006) (“We do not render to countries that torture.”). For further articulation of these arguments, *see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229–31 (2004) (arguing that Article 3 does not apply to extraterritorial transfers).

111. *See* GARCIA, *supra* note 92, at 18. Additionally, many people are transferred to their country of birth through extraordinary rendition, which would seem to be in violation of the prohibition on “return,” at least as the Congressional Research Service interprets the term. For the purposes of the Refugee Convention and Protocol, the U.S. Supreme Court has interpreted the prohibition on return (*refouler*) to mean that an individual is only entitled to a determination of refugee status (and therefore subject to the protection against *refoulement*) when the person has arrived at the shores of the United States. *See* *Sale v. Haitian Centers Council*, 509 U.S. 155, 186 (1993). This decision has been sharply criticized as undermining the intent and purpose of the Convention and Protocol. *See, e.g.*, Harold Honju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT’L L.J. 1, 15–17 (1994).

112. *See* *Motumbo v. Switzerland*, Communication No. 13/1993, U.N. Doc. A/49/44, at 45 (1994) (holding that the principle of *nonrefoulement* prohibits return of persons to third countries in which they run a real risk of being returned to a country where they would be in danger of being subjected to torture); Executive Committee of the High Commissioner’s Programme, *Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, Conclusion No. 58 (XL) (1989) (indicating that if an asylum-seeker leaves a safe asylum country, he or she may be returned there under certain conditions); *see also* Suzanne Gluck, Note, *Intercepting Refugees at Sea: An Analysis of the*

The CRS report read Article 4 in combination with the 2001 amendments to the Torture Statute. Article 4 calls on States Parties to criminalize *all* acts of torture, including complicity in torture.¹¹³ The 2001 amendments to the Torture Statute added criminal penalties for conspiracy to commit torture outside of the United States.¹¹⁴ The CRS report concluded that “U.S. officials could not conspire with foreign intelligence services to torture persons seized outside of the United States.”¹¹⁵ Nonetheless, the express language of FARRA precludes an individual from “raising a claim” under the Convention unless it is pursuant to a final order for removal. To that extent, a gap might remain in the scope of the Torture Convention’s potential applicability under U.S. law. As argued below, traditional tools of interpretation provide clear guidance to close this purported gap.

United States’ Legal and Moral Obligations, 61 FORDHAM L. REV. 865, 888 (1993) (noting that the High Commissioner has interpreted the *nonrefoulement* obligation to include the requirement that asylum-seekers be allowed to present a request to competent authorities and that the request must be examined prior to return); cf. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A), ¶ 91 (1989) (holding that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, is implicated when there is a real risk that a person will be subjected to such treatment or punishment upon return); *Ahmad v. Wigen*, 726 F. Supp. 389, 414 (E.D.N.Y. 1989) (“*Soering* constitutes an important precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration or lack of due process at trial in the requesting country. It reflects a persuasive though non-binding international standard.”). The *Soering* case is particularly instructive with regard to the U.S. judicial system’s relationship with other human rights bodies. Jens Soering was a German national subject to extradition to Virginia, where the prosecutor had stated he would seek the death penalty. Applying a two-part test, the European Court of Human Rights determined that there was a real risk that Soering would be sentenced to death, and then found that there was a real risk Soering would be subjected to inhuman or degrading treatment on death row. After the decision, the Virginia prosecutor amended the charges to avoid the death penalty and Soering was extradited. For a discussion of *Soering*, see DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 642–43 (3d ed. 2001). The same grounds would arguably apply to the Covenant on Civil and Political Rights, which the United States has ratified.

113. Convention Against Torture, *supra* note 57, art. 4.

114. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 811(g), 115 Stat. 272, 381 (2001) (codified at 18 U.S.C. § 2340A(c) (2006)).

115. GARCIA, *supra* note 92, at 19. Professor Yoo contends that U.S. officials participating in extraterritorial transfers could violate the Torture Statute, but not “so long as the individuals ultimately ordering a transfer do not intend for a detainee to be tortured post-transfer....” Yoo, *supra* note 110, at 1233. This proposition is overly narrow and runs contrary to the non-derogability principle embodied in the Convention. See also *infra* notes 153–158 and accompanying text (describing the requisite intent for conspiracy).

C. *Extraordinary Rendition Constitutes a Criminal Conspiracy to Commit Torture*

The drafting history of the Torture Convention¹¹⁶ and decisions of the Committee Against Torture¹¹⁷ can guide U.S. courts in ascertaining whether extraordinary rendition violates U.S. obligations under the Convention, as codified by U.S. law.¹¹⁸

The drafters of the Torture Convention devoted considerable debate to Article 3.¹¹⁹ Article 3 prohibits expulsion, return (*refoulement*) and extradition to torture, but the prohibition does not directly apply to the lesser forms of cruel, inhuman or degrading treatment or punishment in Article 16.¹²⁰ The drafters considered a more expansive version of Article 3 that would have included cruel, inhuman or degrading treatment or punishment, but ultimately did not embrace the proposal.¹²¹

During the Convention drafting process, participants debated the relationship between Article 3 and pre-existing extradition treaties, which could be incompatible with the obligations imposed on States Parties by the prohibition of extradition to torture.¹²² The negotiators recognized that a State Party may make a valid reservation or declaration upon ratification of the Convention that it did not “consider

116. See generally J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1988) (providing the drafting history of the Convention).

117. The Committee Against Torture was established in Articles 17–24 of the Convention Against Torture. As is its prerogative under the Convention, the United States does not recognize the competence of the Committee to investigate complaints by individuals claiming to be victims of U.S. violations of the Convention. See Second U.S. Report to Torture Committee, *supra* note 95, ¶ 90.

118. This history and jurisprudence are also relevant, of course, for other judicial bodies which, pursuant to Article 5, may have cause to evaluate U.S. practices. Article 5 requires States Parties to establish jurisdiction over acts of torture when the acts take place in their jurisdiction and when the alleged offender is present in any territory under their jurisdiction. See Convention Against Torture, *supra* note 57, art. 5. Article 5 also allows States Parties to take similar measures when the victim is a national of their state. *Id.* Additionally, if a State Party is the country where the extraordinary rendition begins, and the State Party assists or allows the extraordinary rendition to take place, that State Party may be in violation of Article 3. *Id.*, art. 3. Hence, States Parties may be obligated to take measures against U.S. participation in extraordinary rendition resulting from U.S. “complicity” in torture in violation of Article 4. The scope of Article 4, it should be noted, is not limited to the jurisdiction of the State Party.

119. See BURGERS & DANIELIUS, *supra* note 116, at 31–113.

120. See Convention Against Torture, *supra* note 57, art. 16 (“In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of reference to other forms of cruel, inhuman or degrading treatment or punishment.”).

121. See BURGERS & DANIELIUS, *supra* note 116, at 150.

122. See *id.* at 125–28.

itself bound by Article 3” if the article was incompatible with pre-existing extradition treaties with countries not parties to the Torture Convention.¹²³ With this potential conflict in mind, President Reagan’s transmittal letter to the Senate included a recommended reservation that would “eliminate the possibility of conflicting treaty obligations” by stating that the United States did not consider itself bound by Article 3 when the article’s obligations conflict with bilateral extradition treaties.¹²⁴ The Senate, however, did not include that reservation in its advice and consent to ratification.¹²⁵ Accordingly, it is reasonable to conclude that the United States deemed it entirely possible to comply both with Article 3 and with extradition treaties. Therefore, any alleged conflict between the two would not justify the practice of extraordinary rendition. The fact that FARRA requires extraditions from U.S. territory to follow specific procedures and affords the Secretary of State discretion to decide that extradition would violate Article 3 also supports the conclusion that the State Department must have at least a minimal level of oversight over *all* transfers.¹²⁶

The Convention history demonstrates that the drafters intended Article 3 to have extraterritorial effect. For example, although the drafters modeled the article after Article 33 of the Convention Relating to the Status of Refugees, they intended Article 3 to be broader in scope.¹²⁷ The prohibition in Article 3 originally referred only to expulsion and extradition, but the drafters ultimately added reference to “return (*refoulement*)” “in order to make the provision more complete.... As it now reads, the article is intended to cover all measures by which a person is physically transferred to another state.”¹²⁸ President Reagan, in his transmittal document, attempted to limit U.S. responsibility to comply with Article 3. He recommended a declaration

123. *See id.* at 127.

124. Torture Convention Transmittal Document, *supra* note 70, at 24.

125. *See* 136 CONG. REC. S17486, S17491–92 (daily ed. Oct. 27, 1990).

126. *See* N.Y. City Bar, *supra* note 15, at 45–48. Also relevant to an analysis of domestic compliance with the Convention Against Torture is the Torture Victim Protection Act of 1991, which was enacted prior to Senate advice and consent to the Torture Convention, and allows U.S. citizens to bring civil actions seeking damages for torture committed against them by individuals acting under authority of foreign nations. 28 U.S.C. § 1350 (2006). Discussion of the Torture Victim Protection Act is beyond the scope of this Article.

127. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6577, 606 U.N.T.S. 67 (incorporating arts. 2–34 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *entered into force* April 22, 1954); BURGERS & DANIELIUS, *supra* note 116, at 125.

128. BURGERS & DANIELIUS, *supra* note 116, at 126.

to specify that the “competent authorities” responsible for “tak[ing] into account all relevant considerations” in determining whether there are substantial grounds to believe that an individual would be in danger of being subjected to torture are limited to “the Secretary of State in extradition cases and to the Attorney General in deportation cases.”¹²⁹ The Senate rejected this declaration.¹³⁰ In addition, the United States entered no reservations, declarations, or understandings with respect to Article 4, which requires States Parties to criminalize complicity in torture, or to Article 2(2), which emphasizes that torture may never be justified. A broad interpretation of Article 3 is therefore consistent with Convention history and Senate consideration of proposed declarations. The Presidential transmittal document even emphasized with respect to Article 5 the importance to the United States of establishing universal jurisdiction to punish persons responsible for torture: “The United States strongly supported the provision for universal jurisdiction, on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences.”¹³¹ In this context, it seems reasonable to conclude that neither the framers of the Torture Convention nor the U.S. government at the time of ratification intended to allow government officials to escape responsibility for torture by seizing individuals in a foreign country and then delivering them to a third country where they would be subjected to torture. The first U.S. report to the Committee Against Torture, submitted by the Clinton administration, also emphasized:

No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a “state of public emergency”) or on orders from a superior officer or public authority, and the protective mechanisms of an

129. See Torture Convention Transmittal Document, *supra* note 70, at 26; Convention Against Torture, *supra* note 57, art. 3(2)

130. See 136 CONG. REC. S17486, S17491–92 (daily ed. Oct. 27, 1990).

131. Torture Convention Transmittal Document, *supra* note 70, at 31.

independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.¹³²

Even the second U.S. report to the Committee Against Torture, submitted by the Bush administration, while less definitive in its embrace of the Convention's non-derogability provision,¹³³ noticeably avoids discussion of rendition, except possibly with regard to the transfer of Guantánamo detainees to their home countries.¹³⁴ The absence of any attempt to address allegations of rendition to torture suggests that the administration understands that such attempts would violate U.S. responsibilities under Article 3.¹³⁵ The practice of

132. First U.S. Report to Torture Committee, *supra* note 81, ¶ 6.

133. The non-derogability language in the second report is more restrained:

The United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to commit torture....

All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. government does not permit, tolerate, or condone torture, or other unlawful practice, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.

Second U.S. Report to Torture Committee, *supra* note 95, ¶¶ 3–4. Removed from the Second Report is the following language: “Nor may any official condone or tolerate torture in any form.” See First U.S. Report to Torture Committee, *supra* note 81, ¶ 6; *supra* text accompanying note 81. Instead, the report revises that language with a qualification of particular relevance to extraordinary rendition: “The U.S. government does not permit, tolerate, or condone torture, or other unlawful practice, *by its personnel or employees* under any circumstances.” Second Report, *supra* note 95, ¶ 4 (emphasis added); see also Condoleezza Rice, Secretary of State, Press Availability with Ukrainian President Viktor Yushchenko (Dec. 7, 2005), <http://www.state.gov/secretary/rm/2005/57723.htm> (last visited Apr. 20, 2006) (“[T]he CAT...prohibits...cruel and inhumane and degrading treatment, [and] those obligations extend to U.S. personnel wherever they are....”).

134. See Second U.S. Report to Torture Committee, *supra* note 95, ¶¶ 27–40. The report does include a general statement that “The United States does not transfer persons to countries where the United States believes it is ‘more likely than not’ that they will be tortured.” Second U.S. Report to Torture Committee, *supra* note 95, ¶ 27. The report limits its discussion, however, to Article 3 in the removal context, *id.* ¶¶ 28–35, and in the extradition context, *id.* ¶¶ 36–40. Beyond this discussion, the only relevant information relating to Article 3 compliance is found in a tab to an annex detailing treatment of individuals under the control of U.S. Armed Forces. See *id.*, Annex I, tab 1. The tab consists of two hyperlinks to declarations of State Department officials regarding the legal process whereby Guantánamo detainees are sent to their home countries. *Id.*

135. The report deals at great length with allegations of torture committed by U.S. Armed Forces and even the CIA, and explains that allegations are being investigated and violators are

extraordinary rendition also suggests that the United States is violating its obligation under customary international law to perform its Convention obligations in good faith.¹³⁶

The Committee Against Torture has published two findings relevant to the U.S. practice of extraordinary rendition. First, in *Khan v. Canada*,¹³⁷ the Committee noted that sending a person to a country not a party to the Torture Convention would subject a person to a risk of torture, and also would strip the person of any possibility of applying for protection under the Convention.¹³⁸ This consideration is important, because the press has reported that the United States has transferred individuals to Syria, which was not a party to the Torture Convention until September 2004.¹³⁹

Agiza v. Sweden,¹⁴⁰ the second relevant Committee Against Torture decision, directly implicates the U.S. practice of extraordinary rendition. Ahmed Agiza, an Egyptian national, left Egypt in 1991, and sought

being punished. See Second U.S. Report to Torture Committee, *supra* note 95, ¶ 16; *id.*, Annex 1. The government's failure to establish an impartial body to conduct the investigations undermines its credibility. See, e.g., Michael Kirkland, *It's Time to Come Clean*, UPI, June 16, 2004. Article 12 of the Convention Against Torture requires each State Party to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Convention Against Torture, *supra* note 57, art. 12. This obligation to conduct a prompt and impartial investigation presumably extends even to allegations of extraordinary rendition. See *also infra* notes 271–274 and accompanying text (noting that the current CIA torture investigation does not extend to the practice of extraordinary rendition).

136. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (1987); see also MALCOLM N. SHAW QC, INTERNATIONAL LAW 811–12 (5th ed. 2003) ("This rule is termed *pacta sunt servanda* and is arguably the oldest principle of international law.").

137. Communication No. 15/1994, Committee Against Torture, U.N. Doc. A/50/44, at 46 (1994).

138. *Id.* ¶ 12.5.

139. See Treaty Body Database, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment [hereinafter Treaty Body Database], Syrian Arab Republic, <http://www.unhcr.ch/tbs/doc.nsf/Statusfrset> (last visited Apr. 20, 2006); N.Y. City Bar, *supra* note 15, at 71; see also Brown & Priest, *supra* note 6 (reporting that Syria "maintains a secret but growing intelligence relationship with the CIA"). While not technically a case of extraordinary rendition for the purposes of this Article, in 2002 the United States detained Maher Arar while Arar was transferring airplanes at JFK International Airport, and subsequently sent Arar to Syria, where he was tortured. See *id.*; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, available at <http://www.ararcommission.ca/eng/index.htm> (last visited Apr. 20, 2006). The Gambia is not a State Party to the Convention, see Treaty Body Database, *supra*, Gambia, and has also been used by the CIA for rendition, see Grey, *Torture Flights*, *supra* note 20; Grey, *Gulag*, *supra* note 6.

140. Communication No. 233/2003, May 20, 2005, U.N. Doc. CAT/C/34/D/233/2003 [hereinafter *Agiza*].

asylum in Sweden in 2000. In the meantime, Egyptian authorities tried him in absentia for terrorist activity, and sentenced him to twenty-five years' imprisonment. On December 18, 2001, the Swedish government rejected his asylum application, and ordered his immediate deportation.¹⁴¹ Under pressure from the U.S. government, Swedish police apprehended Agiza that same day, and then handed him over to U.S. security personnel at the Bromma airport.¹⁴² U.S. security personnel then subjected Agiza to "treatment in breach of, at least, Article 16 of the Convention," and took him to Egypt.¹⁴³ The United States provided transportation in an effort to expedite the deportation.¹⁴⁴

The Committee Against Torture held that:

[I]t was known, or should have been known, to [Sweden]'s authorities at the time of complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.¹⁴⁵

The Committee interpreted the harsh treatment of Agiza by U.S. agents at the airport as confirmation of "the natural conclusion" that Agiza was "at a real risk of torture in Egypt in the event of expulsion," and therefore Sweden had breached Article 3 of the Convention Against Torture.¹⁴⁶

141. *Id.* ¶¶ 2.2–2.5.

142. *See id.* ¶¶ 12.28–29; Craig Whitlock, *A Secret Deportation of Terror Suspects: 2 Men Reportedly Tortured in Egypt*, WASH. POST, July 25, 2004, at A1. Apparently, the Swedish government made efforts to keep the CIA role secret for three years, and only confirmed direct CIA involvement in March 2005. *See Swedish Government Investigator Condemns CIA Treatment of Prisoners*, PRESS TRUST OF INDIA, May 21, 2005 [hereinafter PRESS TRUST]. Several Swedish witnesses to the operation described the U.S. behavior as "professional"—indicating that this was not the first time they had participated in a rendition. *See, e.g., id.*; Craig Whitlock, *New Swedish Documents Illuminate CIA Action: Probe Finds 'Rendition' of Terror Suspects Illegal*, WASH. POST, May 21, 2005, at A1 [hereinafter Whitlock, *Swedish Documents*]; *see also* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1 [hereinafter Priest, *Mistake*] (describing the standard procedures of the Counterterrorist Center's Rendition Group at the CIA).

143. *Agiza*, *supra* note 140, ¶ 13.4.

144. *See* Whitlock, *Swedish Documents*, *supra* note 142.

145. *Agiza*, *supra* note 140, ¶ 13.4.

146. *Id.* ¶¶ 13.4, 14. Tomas Hammarberg, a former Swedish diplomat who pressed for an investigation of the rendition, noted, "American security agents just took over." He continued, "We know they were badly treated on the spot, that scissors and knives were used to take off their clothes. And they were shackled. And some tranquilizers were [inserted rectally], obviously in order to make them dizzy and fall asleep." *CBS News*, *supra* note 36. Mamdouh Habib's rendition from Pakistan to Egypt follows a similar pattern. *See* Mayer, *supra* note 16.

The Committee harshly criticized the lack of opportunity to review the decision to expel Agiza:

The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority...to be relevant to a finding of a violation of article 3....

In the present case...there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review.... [T]he Government's decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.¹⁴⁷

This discussion implicates *a fortiori* the lack of any oversight or review of U.S. decisions to engage in extraordinary rendition, because those decisions themselves are made by CIA and military officials who cannot ordinarily be held publicly accountable for such covert activities.¹⁴⁸ Additionally, by pressing for and facilitating Agiza's expedited removal within hours of the decision to deport him, the United States was complicit in the Swedish government's failure to meet its procedural obligations under Article 3.

Agiza has probably been tortured while in Egyptian custody, and he remains in an Egyptian prison.¹⁴⁹ The Committee's decision in *Agiza* provides several lessons to inform application of Article 3 to U.S. rendition policy. First, extraditing a terror suspect to Egypt is inherently suspect, and suspicions cannot be alleviated by obtaining assurances

147. *Agiza*, *supra* note 140, ¶¶ 13.7–13.8. Agiza's attorney did not receive notice of his departure until the day after Agiza's deportation. See Whitlock, *Swedish Documents*, *supra* note 142.

148. Sweden has scheduled open parliamentary hearings on the rendition. See PRESS TRUST, *supra* note 142. The director of Sweden's security police has promised never again to let foreign agents take charge of such a case. See Whitlock, *Europeans Investigate*, *supra* note 19.

149. See *Agiza*, *supra* note 140, ¶ 3.4; Whitlock, *Europeans Investigate*, *supra* note 19.

from the Egyptian government.¹⁵⁰ Second, Article 3 obliges governments to provide persons with an effective, independent, and impartial review of extradition decisions. Third, the “professional” practices used by CIA agents during rendition themselves constitute cruel, inhuman, or degrading treatment, and constitute evidence that the detainee will subsequently be subjected to torture. Most important, the rendition of Agiza from Sweden to Egypt, which the Committee Against Torture found to violate Article 3, happened with the support and assistance of the United States.

A report by the U.N. Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment indicates that extraordinary rendition undermines the principle of *nonrefoulement*:

The Special Rapporteur is seriously concerned about an increase in practices that undermine th[e] principle [of *nonrefoulement*]. One such practice is for the police authorities of one country to hand over persons to their counterparts in other countries without the intervention of a judicial authority and without any possibility for the persons concerned to contact their families or their lawyers. The Committee against Torture...found that practice to be in violation of article 3 of the Convention, as well as of the right to due process.¹⁵¹

This statement confirms that the practice of extraordinary rendition contravenes Article 3 of the Torture Convention.

In most instances extraordinary rendition also constitutes a criminal conspiracy to commit torture in violation of the Torture Statute. The general federal conspiracy statute provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.¹⁵²

150. *Agiza*, *supra* note 140, ¶ 13.4.

151. Theo van Boven, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Aug. 23, 2004, U.N. Doc. A/59/324, ¶ 29.

152. 18 U.S.C. § 371 (2006). The phrase “offense against the United States” does not require that the United States be the victim of the offense. *United States v. Falcone*, 960 F.2d 988, 990 (11th Cir. 1992).

The elements of conspiracy, which must be proven by the government beyond a reasonable doubt, are: “1) that two or more people agreed to pursue an unlawful objective; 2) that the defendant voluntarily agreed to join the conspiracy; and 3) that one or more members of the conspiracy committed an overt act in furtherance of the conspiracy.”¹⁵³ The second and third elements are not in dispute; the United States participates voluntarily in extraordinary rendition, and providing personnel and transportation certainly constitutes an overt act. The focus properly rests on the first element. Criminal conspiracy requires the existence of an agreement to commit an unlawful act.¹⁵⁴ The agreement does not need to be express or formal;¹⁵⁵ a tacit understanding is sufficient.¹⁵⁶ Additionally, the agreement may be inferred from the circumstances.¹⁵⁷ To avoid criminal liability, a defendant must complete his or her attempt to abandon the conspiracy, and must make the attempt to abandon in good faith.¹⁵⁸

Circumstantial evidence demonstrates the existence of a conspiracy to torture terror suspects by means of extraordinary rendition. Legal memoranda for the CIA advise that if officials are contemplating procedures that may constitute violations of U.S. law, “they will not be responsible if it can be argued that the detainees are formally in the custody of another country.”¹⁵⁹ Looking beyond this superficial formality, the CIA does retain control: the CIA expects governments accepting the prisoners to comply with CIA requests¹⁶⁰ and the CIA

153. *United States v. Loe*, 262 F.3d 427, 432–33 (5th Cir. 2001) (citing *United States v. Dien Duc Huynh*, 246 F.3d 734, 745 (5th Cir. 2001)).

154. *See United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

155. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997).

156. *See Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (holding that evidence of prolonged cooperation and a stake in the venture may constitute sufficient evidence of conspiracy).

157. *See Glasser v. United States*, 315 U.S. 60, 80 (1942).

158. *See Piquett v. United States*, 81 F.2d 71, 81 (7th Cir. 1936).

159. James Risen et al., *Harsh CIA Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1.

160. *See Amnesty Int'l*, *supra* note 23, at 17 (“When asked if the men would be released if the U.S. requested it, [the Yemeni Undersecretary of the Central Organ for Political Security] said, without hesitation, ‘yes.’”); Jehl, *supra* note 20 (noting that Pentagon officials assert that their transfers do not qualify as “renditions,” “because the governments that accept the prisoners are not expected to carry out the will of the United States”). Presumably, therefore, governments accepting prisoners in the CIA rendition program *are* expected to carry out the will of the United States. This distinction was reiterated in two rulings in the District Court for the District of Columbia when petitioners applied for injunctive relief to require 30 days’ notice before transfer out of Guantánamo. *See Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 195–96 (D.D.C. 2005);

collaborates with receiving authorities during interrogation.¹⁶¹ Many officials directly involved in the program have recognized that transferred suspects were likely to be tortured. Several officials suggested that the administration was “turning a blind eye” to this likelihood.¹⁶² Other statements by officials have gone even further, indicating that the purpose of rendition is to subject suspects to treatment that the CIA cannot legally use.¹⁶³ Additional evidence comes from the extensive legal documents drafted at the request of the CIA, which narrowly construe the statutory definition of torture.¹⁶⁴ This evidence suggests a CIA effort to evade or at least push the legal limits of treatment of detainees during interrogations. Additional circumstantial evidence indicates that the administration sought to carve out exceptions to overall policies of humane treatment, in deference to CIA attorneys.¹⁶⁵ Also, slight changes in the U.S. submissions to the

Almurbati v. Bush, 366 F. Supp. 2d 72, 79 (D.D.C. 2005). Other judges hearing similar cases have not been so trusting. See *infra* notes 254–255 and accompanying text.

161. See *United States v. Abu Ali*, 395 F. Supp. 2d 339, 343 (E.D. Va. 2005) (reporting that in Saudi Arabia U.S. officials provided questions to Saudi interrogators and observed live interrogations through a two-way mirror); Mayer, *supra* note 16 (reporting that CIA officials would give Egyptian interrogators a list of questions in the morning, and receive a list of answers the same evening); O’Sullivan, *supra* note 22 (“[T]he CIA had technical personnel ‘virtually embedded’ at [Jordan’s General Intelligence Directorate] headquarters.”); Priest & Gellman, *supra* note 19 (noting that the CIA gives intelligence services in Egypt, Jordan, and Morocco lists of questions it wants answered when it hands suspects over to authorities in those countries); Priest & Stephens, *supra* note 39 (“[Terror suspects’] fate [when detained in Saudi Arabia] is largely controlled by Saudi-based joint intelligence task forces, whose members include officers from the CIA, FBI and other U.S. law enforcement agencies.”); *infra* note 260 (describing unrefuted evidence of U.S.-Saudi collaboration in the case of *Abu Ali v. Ashcroft*). But see *Abu Ali*, 395 F. Supp. 2d at 381–83 (rejecting the allegation that U.S. and Saudi officials were engaged in a “joint venture” in arresting, detaining, and interrogating the defendant).

162. See *supra* note 38.

163. See Michael Isikoff, *Secret Memo—Send to Be Tortured*, NEWSWEEK, Aug. 8, 2005, at 7 (reporting that an FBI agent’s memo drafted in 2002 concluded that because the purpose of extraordinary rendition is to use interrogation techniques that violate U.S. law, the program “is a per se violation of the U.S. Torture Statute”); *supra* note 38.

164. See Bybee, *supra* note 71; Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A1 [hereinafter Priest, *Harsh Tactics*]. But see Arbour, *supra* note 14 (“An illegal interrogation technique ... remains illegal whatever new description a government might wish to give it.”).

165. See, e.g., *Gonzales Nomination Hearing*, *supra* note 41 (statement of Attorney General nominee Alberto Gonzales) (“It has always been the case that everyone should be treated—that the military would treat detainees humanely, consistent with the [P]resident’s February order.”); Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, §§ 1(a), 2(a), 3(b) (Nov. 13, 2001) (requiring that individuals subject to the order be “treated humanely” while detained by the Department of Defense, but providing that an individual is only subject to the order if “it is in the interest of the United States”); George W. Bush, Memorandum for the Vice President et al., Humane Treatment of al Qaeda and Taliban

Committee Against Torture from 1999 to 2005 suggest that the administration was attempting to limit its rejection of torture to those acts committed directly by U.S. personnel.¹⁶⁶ Further, the United States has received direct evidence that people it has transferred have been subjected to torture, and yet the government persists in pursuing the program, oftentimes to the same countries that have tortured transferred suspects in the past.¹⁶⁷

D. Defenses of Extraordinary Rendition Are Inadequate

Extraordinary rendition cannot be justified on policy grounds. U.S. authorities claim that cultural affinities, rather than torture, facilitate interrogation, but it is likely that the United States is able to train or hire

Detainees, Feb. 7, 2002, *reprinted in* THE TORTURE PAPERS, *supra* note 28, 134, 135 (“As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely....”); Status of Legal Discussions re Application of Geneva Convention to Taliban and al Qaeda, *reprinted in* THE TORTURE PAPERS, *supra* note 28, 130, 132 (quoting an unsigned record of a discussion among administration lawyers, “CIA lawyers believe that, to the extent that GPW’s protections do not apply as a matter of law but those protections are applied as a matter of policy, it is desirable to circumscribe that policy so as to limit its application to the CIA. The other lawyers involved did not disagree with or object to CIA’s view.”); Feldman, *supra* note 50 (observing that the memoranda focus on the Torture Statute because CIA is not bound by the Uniform Code of Military Justice); Dana Priest, *Memo Lets CIA Take Detainees out of Iraq; Practice Is Called Serious Breach of Geneva Conventions*, WASH. POST, Oct. 24, 2004, at A1 (noting that the CIA had requested the Goldsmith memorandum of March 2004) [hereinafter Priest, *Memo*]; Marty Lederman, Understanding the OLC Torture Memos (Part II), Balkinization, Jan. 7, 2005, <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html> (last visited Apr. 20, 2006) (“All of this is [fairly] strong evidence that the Administration has gone to significant lengths to preserve a significant CIA loophole.”). Lederman was an attorney-advisor at the Office of Legal Counsel from 1994–2002. See Marty Lederman, Understanding the OLC Torture Memos (Part I), Balkinization, Jan. 7, 2005, <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html> (last visited Apr. 20, 2006) [hereinafter Lederman, Part I].

166. See *supra* note 133.

167. See, e.g., *Detainees: Hearing Before the Senate Committee on the Judiciary*, *supra* note 36 (testimony of Joseph Margulies, attorney for Mamdouh Habib, describing Australian Mamdouh Habib’s rendition by U.S. agents from Pakistan to Egypt, subsequent transfer to Guantánamo, and testimony at a Guantánamo hearing that all evidence of his terrorist affiliations was produced as a result of torture in Egypt); Van Natta, *Recruits*, *supra* note 23 (reporting that intelligence officials estimate that dozens of suspects have been sent to Uzbekistan, and that during 2003 and 2004, CIA flights arrived in Tashkent twice a week); *Judge Says Agents of West Took Egyptian*, L.A. TIMES, May 20, 2005, at A13 (noting that in May 2005 Egyptian Prime Minister Ahmed Nazief said that the United States had transferred up to 70 terror suspects to Egypt via rendition, but asserted that none had been tortured in interrogations); *CBS News*, *supra* note 36 (quoting former British Ambassador to Uzbekistan Craig Murray that the Uzbek authorities are using “torture techniques straight out of the Middle Ages” and that “[t]he CIA definitely knows. I asked my deputy to go and speak to the CIA, and she came back and reported to me that...the CIA head of station...didn’t see that as a problem.”).

suitable interrogators. Also, professional intelligence procedures place heavy emphasis on maintaining control of the people subject to interrogation.¹⁶⁸ In addition, the need for secrecy does not justify extraordinary rendition; a person can be brought to the United States to stand trial without following traditional extradition procedures that might bring unwanted attention. Media reports demonstrate that extraordinary rendition is also not an effective cost-saving measure.¹⁶⁹ Administration assertions that renditions are vital to the nation's defense simply support the conclusion that the United States has a vested stake in the "venture" of extraordinary rendition, and therefore is motivated to conspire to commit torture.

The administration argues that it obtains diplomatic assurances that people will not be tortured when they are transferred. Professor John Yoo contends that seeking diplomatic assurances from the receiving country is a sufficient defense to charges that the United States is conspiring to commit torture:

Because an agreement, explicit or implicit, is a necessary element of a conspiracy, to avoid liability under the statute U.S. officials would need to ensure only that they did not in any way agree to or encourage the torturing of military detainees. The actual securing of assurances from other countries that transferred detainees will not be tortured is a significantly greater step than domestic law requires.¹⁷⁰

Yoo notes that "if adhered to such an 'agreement avoidance' policy would be sufficient to insulate U.S. officials from potential criminal liability."¹⁷¹

In light of the absence of any defensible justification for extraordinary renditions, such assurances seem to be sought not in good faith, but rather as a "legal nicety" to skirt criminal liability.¹⁷² The

168. See Gerecht, *CIA*, *supra* note 55.

169. See, e.g., *Italians Issue Warrant for CIA Snatch Team*, UPI, June 24, 2005 (reporting that the hotel and car rental charges for the rendition of Hassan Mustafa Osam Nasr from Italy amounted to over \$140,000).

170. Yoo, *supra* note 110, at 1235.

171. *Id.* at 1235 n.220.

172. Scheuer, *supra* note 17; see also *ABC Radio: Report Paints Disturbing Picture of Transfer of Islamic Militants* (ABC Australian radio broadcast May 11, 2005) (statement of Human Rights Watch Deputy Director Joe Stork) ("If you need to ask them to promise not to torture, then that's a country you shouldn't be sending them to in the first place."); cf. *supra* note 158 and accompanying text (noting that, to be valid, a co-conspirator's renunciation of a conspiracy must be made in good faith). For a thorough report on the administration's flawed

Committee Against Torture in *Agiza* rejected the use of diplomatic assurances to guard against an otherwise evident risk of torture under Article 3, and noted that due to the existence of the assurances, the Swedish official in Egypt responsible for monitoring compliance with the assurances concealed evidence of torture in his reports.¹⁷³ Likewise, the Special Rapporteur of the U.N. Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment has stated that “post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”¹⁷⁴ Assurances are highly suspect under circumstances when official State Department country reports confirm that the state uses or abides by torture frequently or systematically,¹⁷⁵ that the state employs torture as an interrogation technique,¹⁷⁶ that torture is particularly common for people suspected of participation in terrorism, extremism, or other political

reliance on assurances, see Julia Hall, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, 17 HUMAN RIGHTS WATCH 4 (2005), available at <http://hrw.org/reports/2005/eca0405/eca0405.pdf>.

173. See *Agiza*, *supra* note 140, ¶¶ 4.24, 8.1, 12.15, 13.10; *id.* ¶ 13.4 (“The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”).

174. The Secretary-General, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ¶ 46, Submitted to the General Assembly, U.N. Doc. A/60/316 (Aug. 30, 2005).

175. See, e.g., U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, EGYPT (2004) [hereinafter Egypt Country Report] (noting that “torture and abuse of detainees...remained common and persistent”); U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, JORDAN (2004) [hereinafter Jordan Country Report] (reporting a “climate of impunity” regarding allegations of torture); U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, MOROCCO (2004) [hereinafter Morocco Country Report] (citing an Amnesty International report which found “systematic torture and ill treatment” of detainees); U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SAUDI ARABIA (2004) [hereinafter Saudi Arabia Country Report] (reporting abuse of detainees); Syria Country Report, *supra* note 30 (citing “credible evidence” that torture is used “frequently,” sometimes resulting in death); U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, UZBEKISTAN (2004) [hereinafter Uzbekistan Country Report] (noting that torture is “common” and “systematic”). See generally Commission on Human Rights, Sub-Comm. On Promotion and Protection of Human Rights, *Transfer of Persons*, ¶ 4, U.N. Doc. E/CN.4/Sub.2/2005/L.12 (Aug. 4, 2005) (“[W]here torture or cruel, inhuman or degrading treatment is widespread or systematic in a particular State...there is a presumption that any person subject to transfer would face a real risk of being subjected to such treatment and...the presumption shall not be displaced by any assurance.”).

176. See, e.g., Egypt Country Report, *supra* note 175; Morocco Country Report, *supra* note 175; Saudi Arabia Country Report, *supra* note 175; Syria Country Report, *supra* note 30; Uzbekistan Country Report, *supra* note 175.

activities,¹⁷⁷ and that those governments demonstrate a pattern of denying the existence of torture in their countries.¹⁷⁸ Under such conditions, assurances create an incentive *not* to monitor and enforce compliance, resulting in a system called “don’t ask, don’t tell” by one Arab diplomat whose country has participated in renditions.¹⁷⁹

Assurances, instead of providing a defense to the agreement element of a conspiracy charge, may constitute additional evidence of the administration’s attempt to shield itself from criminal liability for a program that it asserts is vital to our nation’s defense. CIA agents and other officials involved with rendition suggest that assurances constitute a bad-faith attempt to avoid an impression of conspiracy. One official said, “You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they are making claims to the contrary.”¹⁸⁰ Another said, “They say they are not abusing them, and that satisfies the legal requirement, but we all know they do.”¹⁸¹ Others called the assurance system “a farce” and said it “has been ineffective

177. See, e.g., Egypt Country Report, *supra* note 175 (noting that torture is used to “coerce opposition figures to cease their political activities, and to deter others from similar practices”); Jordan Country Report, *supra* note 175 (observing that people alleged to be affiliated with Abu Musab al Zarqawi claimed that they had been subjected to torture and that their confessions had been obtained under duress); Morocco Country Report, *supra* note 175 (“A[mnesty] I[n]ternational” noted a sharp rise over the past 2 years in [torture and ill-treatment] in the context of ‘counter terrorism’ measures as well as the failure of government authorities to investigate these reports....”); Syria Country Report, *supra* note 30 (“The torture of political detainees was a common occurrence.”); Uzbekistan Country Report, *supra* note 175 (“Individuals arrested on suspicion of extremism often faced severe mistreatment, including torture, beatings, and particularly harsh prison conditions.”).

178. See, e.g., Jordan Country Report, *supra* note 175 (“Government officials denied allegations of torture and abuse.”); Morocco Country Report, *supra* note 175 (“[T]he Government denied the use of torture....”); Saudi Arabia Country Report, *supra* note 175 (“Canadian and British prisoners released in 2003 reported that they had been tortured during their detention; however, the Government denied these claims.”); Syria Country Report, *supra* note 30 (“As a matter of policy, the Government has denied to international human rights groups that it commits human rights abuses.”); Uzbekistan Country Report, *supra* note 175 (“[J]udges routinely ignored such claims [of torture] or dismissed them as groundless.”); Mayer, *supra* note 16 (describing one Egyptian official’s reaction to an Australian detainee’s allegations of torture in an Egyptian prison as “mythology”); Dana Priest, *CIA’s Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, WASH. POST, Mar. 17, 2005, at A1 [hereinafter Priest, *CIA Assurances*] (“‘We wouldn’t accept the premise that we would make a promise and violate it,’ said the Egyptian ambassador to the United States, Nabil Fahmy, whose country has accepted rendered terrorism suspects. He denied that Egyptian officers employ torture in interrogations.”).

179. See Priest, *CIA Assurances*, *supra* note 178.

180. McCaffrey, *supra* note 19 (quoting former CIA counterterrorism official Vincent Cannistraro).

181. Priest, *CIA Assurances*, *supra* note 178 (quoting a U.S. official who visited the foreign detention sites).

and virtually impossible to monitor.”¹⁸² These statements provide convincing evidence that U.S. officials involved with the extraordinary rendition program not only knew that suspects were being sent to countries where they would be tortured, but also intended that torture to occur, thereby demonstrating that these officials are guilty of conspiracy to commit torture under U.S. law.

II. MECHANISMS IN U.S. LAW CAN CHALLENGE THE PRACTICE OF EXTRAORDINARY RENDITION

The preceding section establishes that extraordinary rendition constitutes a criminal conspiracy to commit torture under 18 U.S.C. §§ 2340–2340A. As a practical consideration, however, the existence of this crime may not be particularly meaningful to people who are victims of extraordinary rendition.

A. *Criminal Prosecution*

In spite of strong evidence that extraordinary rendition violates federal law, it is highly unlikely that U.S. prosecutors will ever bring charges against the perpetrators. First, the very people who would be responsible for prosecuting the crimes in the current administration have been involved in drafting legal arguments challenging the applicability of the Torture Statute to U.S. actions in the so-called war on terror.¹⁸³ Second, even if there were a change in executive leadership, prosecutions would probably be unpopular, because these prosecutions would implicate U.S. officials. Third, officials could invoke several defenses to obstruct such prosecutions, including the state secrets privilege¹⁸⁴ and sovereign immunity.¹⁸⁵ The state secrets privilege “is an

182. See *id.* (quoting a CIA officer involved with renditions); Zagaris, *supra* note 6 (citing current and former intelligence officers, lawyers, and counter-terrorism officials involved in the rendition program).

183. See *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, 17 HUMAN RIGHTS WATCH 1, 83 (2005), available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf> (last visited Apr. 20, 2006); David Cole, *Accounting for Torture*, Comment, NATION, Mar. 21, 2005, at 4.

184. When a court ordered discovery to determine whether a U.S. citizen was being held by the government of Saudi Arabia at the direction of the United States, *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 68–69 (D.D.C. 2004), *dismissed as moot sub nom. Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005), the initial U.S. response was to file a secret motion to dismiss. Cole, *supra* note 183. When those efforts failed, the government brought the detainee to the United States and charged him with threatening to kill President Bush. See *Abu Ali*, 387 F. Supp. 2d at 17.

especially powerful weapon because federal judges, reluctant to challenge the executive branch on national security, almost never refuse the government's claim to confidentiality.¹⁸⁶ Indeed, the government invoked the state secrets doctrine to dismiss the suit of Canadian Maher Arar against John Ashcroft for Arar's removal to Syria.¹⁸⁷ As one Guantánamo attorney has noted, there are mechanisms in place to protect classified information in terrorism cases and still allow for a fair hearing.¹⁸⁸ Among these mechanisms is the Classified Information Procedures Act, which allows the government to delete or conceal specific items of classified information from a defendant seeking discovery of classified information.¹⁸⁹ Despite these safeguards, criminal prosecution appears unlikely.

B. *Habeas Corpus*

The appropriate means for persons in U.S. custody to challenge the legality of that custody is to invoke the writ of habeas corpus. In the case of extraordinary rendition, successful habeas petitions must navigate three difficult hurdles. First, the detainee must consider several jurisdictional issues to determine whether habeas is possible. Then, the detainee must be entitled to make substantive claims in the habeas petition. Further, the detainee faces several practical barriers to raising a habeas claim, because his or her identity and location are kept secret.

1. *Jurisdiction*

Before a court will consider the merits of a petitioner's habeas corpus challenge, the petitioner must demonstrate both that the court has

185. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 186–90 (2004).

186. Andrew Zajac, *Bush Wielding Secrecy Privilege To End Suits*, CHI. TRIB., Mar. 3, 2005, at 1. Ironically, years after the Supreme Court case that established the basis for the privilege, *United States v. Reynolds*, 345 U.S. 1 (1953), investigators discovered that the government in *Reynolds* had been concealing incriminating evidence with no connection to state secrets. See Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES, Apr. 14, 2004, at A1.

187. See Memorandum in Support of the United States' Assertion of State Secrets Privilege, *Arar v. Ashcroft*, CA No. 04-CV-249-DGT-VVP (2d Cir. Jan. 18, 2005), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_StateSecrets.pdf (last visited Apr. 20, 2006). The court dismissed the case on other grounds, and therefore found that the state secrets argument was moot. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

188. See *Detainees: Hearing Before the Senate Committee on the Judiciary*, supra note 36 (testimony of Guantánamo attorney Joseph Margulies).

189. 18 U.S.C. Appx. § 4 (2006).

territorial jurisdiction over the particular claim and that the petitioner is “in custody.”

a. Territorial Jurisdiction

Courts have distinguished between two kinds of habeas corpus.¹⁹⁰ The first is derived from the Suspension Clause of the Constitution,¹⁹¹ is generally available to U.S. citizens and persons present in the United States, and therefore does not apply in most detentions resulting from extraordinary renditions.¹⁹² The habeas statute establishes the second type, and reads in part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had....

....

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

190. See *Rasul v. Bush*, 542 U.S. 466, 476–78 (2004); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997); see also Randolph N. Jonakait, *Rasul v. Bush: Unanswered Questions*, 13 WM. & MARY BILL RTS. J. 1103, 1112–14 (2005) (describing the constitutional and statutory habeas analysis in *Rasul*).

191. U.S. CONST. art. I, § 9, cl. 2.

192. See *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

(5) It is necessary to bring him into court to testify or for trial.¹⁹³

Some have suggested that the habeas statute, while not limited to U.S. citizens, contains a clear territorial restraint.¹⁹⁴ The argument is based on the phrases “within their respective jurisdictions” and “the district court of the district wherein the restraint complained of is had” in § 2241(a), and a provision of 28 U.S.C. § 2242 that requires that petitions submitted to the Supreme Court must state reasons for not submitting the petition to “the district court of the district in which the applicant is held.”¹⁹⁵ A majority of the Supreme Court in 2004 rejected this argument in *Rasul v. Bush*,¹⁹⁶ holding: “No party questions the District Court’s jurisdiction over petitioners’ custodians. Section 2241, by its terms, requires nothing more.”¹⁹⁷ Courts have interpreted *Rasul* to require that detainees held at Guantánamo bring their habeas petitions to the District Court of the District of Columbia;¹⁹⁸ presumably, the same requirement extends to others held outside of the United States.¹⁹⁹ Additionally, while courts generally require people detained within the jurisdiction of a U.S. district court to bring their habeas petition in the district where their immediate custodian is located,²⁰⁰ an exception to the “immediate custodian rule” applies to people detained outside the

193. 28 U.S.C. § 2241 (2006). After this Article was written but before it went to press, the Military Commissions Act amended the habeas statute. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7; see also David Weissbrodt & Amy Bergquist, *Methods of the “War on Terror,”* 16 MINN. J. INT’L L. (forthcoming Summer 2007) (demonstrating that the Military Commissions Act’s revisions to the habeas statute have little effect on the availability of habeas for persons subjected to extraordinary rendition).

194. See, e.g., *Rasul*, 542 U.S. at 489–91 (2004) (Scalia, J., dissenting).

195. 28 U.S.C. § 2241(a); 28 U.S.C. § 2242 (2006).

196. 542 U.S. 466 (2004).

197. *Rasul*, 542 U.S. at 483–84 (citation omitted); cf. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004) *dismissed as moot sub nom. Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005) (“[T]he law is clear that the scattered references in the habeas statute... simply do not add up to a jurisdictional wall against habeas petitions for citizens detained overseas.”) (footnote omitted). A 2005 amendment to defense appropriations legislation attempts to reverse *Rasul*. See Lindsey Graham, *Rules for Our War*, WASH. POST, Dec. 6, 2005, at A29; Weisman, *supra* note 54. The amendment text, however, would only restrict habeas jurisdiction over persons detained at Guantánamo, and therefore would have a negligible effect on the claims of most people subjected to extraordinary rendition. See S. Amdt. 2524 (d)(1), 109th Cong. (2005).

198. See *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004); *Gherebi v. Bush*, 338 F. Supp. 2d 91, 96 (D.D.C. 2004) (“[*Rasul*] makes clear that this Court is the appropriate forum for the resolution of the Guantánamo Bay detainee cases.”).

199. See, e.g., *Abu Ali*, 350 F. Supp. 2d at 69 (authorizing jurisdictional discovery to determine whether the court could consider the habeas claim of a U.S. citizen held in Saudi Arabia).

200. See *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

territorial jurisdiction of any district court.²⁰¹ Hence, the habeas statute affords the District Court of the District of Columbia jurisdiction to hear habeas petitions of persons detained outside of the United States, as long as that court has jurisdiction over a supervisory official.

b. The “In Custody” Requirement

The habeas statute predicates the writ on certain conditions, including the requirement that the petitioner be in custody. Only § 2241(c)(1) requires that the person be held “under or by color of the authority of the United States.”²⁰² That requirement logically does not pertain to the remaining subsections, which provide additional bases for meeting the custody requirement. In other words, even if a person is not held “under or by color of the authority of the United States,” that person’s custody may still be within the scope of the statute if one of the other conditions is met. Accordingly, even if a person is not held under the terms of § 2241(c)(1), habeas is still available if the person’s “custody [is] in violation of the Constitution or laws or treaties of the United States,” as provided by § 2241(c)(3). Courts interpret the custody requirement loosely; actual physical custody is not required to establish habeas jurisdiction.²⁰³ As the Sixth Circuit noted:

[I]t is not necessary that the petitioner be in physical control of the respondent. It is enough that the imprisoning sovereign is the respondent’s agent; that his liberty is restrained by the respondent’s parole conditions; or that he can point to some continuing collateral disability which is the result of the respondent’s action.²⁰⁴

Nonetheless, “there must be some involvement of United States officials.”²⁰⁵

201. See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 498 (1973); *Gherebi*, 374 F.3d at 739; cf. *Padilla*, 542 U.S. at 436 n.9 (“We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court.”) (citation omitted). While no court has held specifically that the exception applies to non-citizens detained in parts of the world other than Guantánamo or the United States, it would be inconsistent with the holding of *Rasul* to argue otherwise.

202. 28 U.S.C. § 2241(c)(1) (2006).

203. *Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 300 (1984).

204. *Steinberg v. Police Ct. of Albany, N.Y.*, 610 F.2d 449, 453 (6th Cir. 1979) (citations omitted).

205. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 47 (D.D.C. 2004), *dismissed as moot sub nom. Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005).

This broad interpretation of the custody requirement under § 2241(c)(3) is consistent with the statutory expansion of the writ in 1867. First, the language of the Habeas Corpus Act of 1867 demonstrates that § 2241(c)(3) affords access to habeas “in addition to the authority already conferred by law.”²⁰⁶ The phrase refers to authority under existing statutory law,²⁰⁷ which, at that time, only allowed habeas relief where a person was in the custody of the federal government or, in very limited situations, where a prisoner was detained by a state government.²⁰⁸ The legislative history of the Act is not definitive, but immediately prior to its passage in the House of Representatives, legislators advocated the bill to “enlarge the privilege of the writ,” and described it as “a bill of the largest liberty.”²⁰⁹ As the Supreme Court subsequently confirmed, the impetus for the Act was to enable federal courts to secure the liberty of formerly enslaved persons still held by white landowners.²¹⁰ Hence, the provisions of § 2241(c)(3) can properly be construed as extending habeas jurisdiction to people held “in violation of the Constitution or laws or treaties of the United States” in a broad sense and regardless of the nature of the actual custodian.

A habeas petitioner detained as a result of an extraordinary rendition may demonstrate sufficient involvement of U.S. officials by submitting flight records of the CIA-leased airplane used to transfer the detainee²¹¹ and collaboration with interrogators in the receiving state. Official allegations that the United States is not presently holding a detainee may not withstand judicial scrutiny. In interpreting the habeas statute, courts have expressed skepticism regarding administration attempts to manipulate the location of a prisoner in order to avoid jurisdiction, including attempts to use foreign countries as proxies for the federal

206. Habeas Corpus Act of 1867, ch. 28, §1, 14 Stat. 385.

207. See Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1102–03 (1995).

208. See *Felker v. Turpin*, 518 U.S. 651, 659 (1996).

209. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 190 (1980); Forsythe, *supra* note 207, at 1111 (citation omitted).

210. *Id.* at 1111–12; see *Ex parte McCardle*, 6 Wall. 318, 322, 324–25 (1867). Senators were unclear as to the purpose of the bill, but their concerns primarily focused on the exemptions for military cases and the bill’s effect on the status of people confined as a result of the Civil War. See Forsythe, *supra* note 207, at 1113–15.

211. Such flight records have provided strong corroborating evidence in several rendition cases. See John Crewdson & Tom Hundley, *Jet’s Travels Cloaked in Mystery*, CHI. TRIB., Mar. 20, 2005, at 1; Grey, *Torture Flights*, *supra* note 20; Michael Hirsh et al., *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, at 32; Tim Reid, *Flight to Torture: Where Abuse Is Contracted Out*, TIMES (London), March 26, 2005, at 43.

government in order to evade habeas jurisdiction.²¹² Therefore, courts are likely to find that the custody requirement of the habeas statute does not bar consideration of a habeas petition brought by a person who has been subjected to extraordinary rendition.

2. *Merits of the Habeas Claim*

The historic purpose of the writ of habeas corpus “has been to relieve detention by executive authorities without judicial trial”²¹³ and “it is in that context that its protections have been strongest.”²¹⁴ The habeas statute allows petitioners to assert they are in custody “in violation of the Constitution or laws or treaties of the United States.” Therefore, there are three potential categories of merits claims: constitutional claims, claims based on treaties, and claims based on federal law. Because § 2241(c)(3) was added in its entirety in 1867, rules of statutory construction suggest that each of the three categories has a unique meaning and serves a unique purpose.²¹⁵

a. Constitutional Claims

Habeas claims traditionally focus on violation of a prisoner’s constitutional rights. While the Court in *Rasul* ruled that jurisdiction was appropriate over the Guantánamo petitioners’ habeas claims, it arguably did not establish that petitioners had any substantive constitutional rights to bring before the court.²¹⁶ Courts have frequently held that because non-citizens outside of the United States do not have any entitlement to life, liberty, or property with respect to the U.S. government, they do not have any rights under the U.S. Constitution.²¹⁷

212. See *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004); *id.* at 454 (Kennedy, J., concurring); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 41 (D.D.C. 2004) *dismissed as moot sub nom.* *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005) (“[T]he Court holds that the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen.”).

213. *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result).

214. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001).

215. See *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (articulating the canon that every phrase is presumed to have meaning).

216. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 39 (D.C. Cir. 2005), *rev’d*, 126 S. Ct. 2749 (2006) (noting that *Rasul* decided a narrow question of jurisdiction and did not establish judicially enforceable rights).

217. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

A person deprived of liberty by the United States, however, may have a valid due process claim, regardless of the location of detention.²¹⁸ When the government of the United States takes affirmative acts to restrain the liberty of a non-citizen, the writ of habeas corpus acts as a means to check executive abuses. At a minimum, substantive due process bars government actions that “shock the conscience.”²¹⁹ The government conduct involved in extraordinary rendition potentially shocks the conscience, and therefore detainees can raise a valid Fifth Amendment challenge to extraordinary rendition regardless of whether they have other constitutional rights. Habeas petitioners held abroad can establish that the government’s behavior shocks the conscience under the due process precepts of the Fifth Amendment, which focus on the actions of the government, and include the inherent entitlement of all persons to be free from outrageous government treatment such as torture.²²⁰

b. Treaty Claims

Even accepting, for the sake of argument, that non-citizens detained overseas have no valid constitutional claim, they still may challenge their custody as violating the treaties or laws of the United States. If habeas were limited to cases in which a prisoner’s constitutional rights were violated by the detention, then the words “or laws or treaties” in § 2241(c)(3) would be superfluous. Additionally, the Supreme Court has observed that the use of the writ at common law was not limited to challenging executive detention on the grounds of constitutional error.²²¹ In the immigration and deportation context, courts have addressed the possibility of raising habeas claims based not on constitutional rights, but on treaties.

218. *See Asahi v. Sup. Ct. of Calif., Solano Cty.*, 480 U.S. 102, 113 (1987) (holding that assertion of personal jurisdiction over a non-resident defendant with no minimum contacts with the forum state exceeded the limits of due process).

219. *See supra* notes 76–79 and accompanying text.

220. *Cf. Arar v. Ashcroft*, 414 F. Supp. 2d 250, 267–74 (E.D.N.Y. 2006) (declining to foreclose consideration of Arar’s constitutional claims in challenging his detention and removal to Syria while in transit through the United States); *id.* at 274–83 (finding that national security concerns precluded consideration of Arar’s substantive due process claims). Arar did not use the habeas statute to establish his claim, and therefore these holdings are not directly applicable to the conclusions of this section. *See id.* at 279 n.12 (“Precisely what, if any, remedy might have been available to Arar via habeas is uncertain.”).

221. *St. Cyr*, 533 U.S. at 302–03 (2001).

First, a court will examine the scope of the treaty. For the most part, the United States does not follow the primarily monist system of countries such as Austria, where most treaties, once ratified, automatically become national law. The U.S. system adopts some features of the dualist approach, in which a ratified treaty establishes affirmative obligations to the other parties to the treaties, but may not be used to assert claims in domestic courts without some form of statutory enactment.²²² In the United States, however, if a treaty's language is sufficiently clear to be enforced by a domestic court, a petitioner may use clauses from the treaty to petition a court directly for enforcement. As the Supreme Court explained in *Foster v. Neilson*:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.²²³

Therefore, when the Senate gives advice and consent to a treaty, it examines the provisions of the treaty under existing federal and state law to determine whether additional legislation is necessary to effect provisions of the treaty.²²⁴ Courts have looked to the intent of the treaty parties for guidance in determining whether a treaty is self-executing.²²⁵ The Senate, in giving its advice and consent to the Convention Against Torture, expressly stated that the agreement was not self-executing.²²⁶

222. For a discussion of the distinctions between the two tendencies, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864–66 (1987).

223. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

224. See *supra* notes 81–83 and accompanying text (discussing the Senate's advice and consent to the Convention Against Torture).

225. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833). For multilateral treaties, however, intent is not the most appropriate standard. See Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971). Other factors to consider include the language and purposes of the agreement as a whole, circumstances surrounding execution of the treaty, the nature of the obligations imposed by the agreement, the availability and feasibility of alternative enforcement mechanisms, the implications of permitting a private right of action, and the capability of the judiciary to resolve the dispute. See *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985).

226. The Senate made similar statements in providing advice and consent to the International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992), and

While the administration insists that such statements prohibit courts from recognizing independently enforceable private causes of action under those instruments,²²⁷ such statements may not always be dispositive.²²⁸ Moreover, some provisions of a treaty may be self-executing while others are not.²²⁹

The D.C. Circuit Court of Appeals, in overturning the district court's decision in *Hamdan v. Rumsfeld*, held that the 1949 Geneva Conventions do "not confer...a right to enforce its provisions in court."²³⁰ This opinion is based on a mistaken reading of Supreme Court precedent and a misunderstanding of habeas law. In *Johnson v. Eisentrager*, the Supreme Court held that the 1929 Geneva Convention

the Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S6601-01 (daily ed., June 8, 1994).

227. *Elimination of Racial Discrimination: Hearing Before the Senate Foreign Rel. Comm.*, 103d Cong. (May 11, 1994) (statement of Conrad K. Harper, Department of State Legal Adviser) ("By making clear that this convention is not self-executing, we ensure that it does not create a new or independently enforceable private cause of action in U.S. Courts.").

228. See Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 526 (1991) ("[T]he decision whether a treaty is self-executing is ordinarily made by the courts on the basis of criteria elaborated in court decisions."). One justification for disregarding the assertion that a treaty does not create an independently enforceable private cause of action is that the Senate frequently insists that the provisions of human rights instruments are already provided for under existing U.S. law. See *Elimination of Racial Discrimination*, *supra* note 227 (statement of Conrad K. Harper, Department of State Legal Adviser) ("As was the case with the earlier treaties, existing U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present convention.... [T]he qualifications on U.S. ratification...do not undermine the central tenets or purposes of the convention."). If it becomes apparent that the Senate underestimated the scope of U.S. law so that it undermines the purpose of a treaty, the courts may allow a private cause of action regardless of any express statement that a treaty is not self-executing. See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts*, 14 MICH. J. INT'L L. 1, 43 (1992). But see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004):

[A]lthough the [International] Covenant [on Civil and Political Rights] does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.... Accordingly, Alvarez cannot say that the [Universal] Declaration [of Human Rights] and Covenant themselves establish the relevant and applicable rule of international law.

For a thorough critique of these two sentences in *Sosa*, see Malvina Halberstam, *Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT'L SECURITY L. & POL'Y 89 (2005).

229. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 136, § 111 cmt. h. n.10.

230. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006). But see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2763-64 (2006) (declining to reach the issue of whether *Hamdan's* statutory or constitutional habeas rights had been violated).

was not judicially enforceable.²³¹ The circuit court neglected to note, however, that the Supreme Court in *Eisentrager* based its analysis on constitutional habeas, rather than on statutory habeas.²³² As noted above, constitutional habeas is generally reserved for citizens and others present in the United States, but statutory habeas is not so limited. The circuit court mistakenly concluded that *Eisentrager* was based on statutory habeas, disregarding the Supreme Court's recent clarification of that ruling in *Rasul*.²³³ A more accurate synthesis of precedent suggests that the word "treaties" in § 2241(c)(3) allows individuals directly to challenge their detention if that detention is in violation of a treaty.

There are several additional arguments in favor of this conclusion. First, a habeas claim is distinguished from a treaty-based "private right of action" that might be barred absent statutory provisions.²³⁴ Second, the language of the Convention Against Torture is sufficiently clear for a court to determine that someone is being held in violation of the terms of the treaty. Third, in *Wang v. Ashcroft*,²³⁵ the Second Circuit suggested that as long as Congress has enacted *some* legislation to implement a treaty, as it has for the Convention Against Torture, the treaty establishes rights enforceable through habeas petitions, unless Congress has expressly prohibited habeas.²³⁶ Fourth, to limit habeas challenges to "private rights of action" explicitly legislated by Congress would make the phrase "or laws or treaties" in the habeas statute redundant.

A habeas petitioner asserting treaty rights under the Convention Against Torture must overcome FARRA's attempt to impose strict limits on judicial review of claims brought under Article 3 of the Convention.²³⁷ The petitioner should draw upon the Supreme Court's holding in *Ex parte Yerger*: "We are not at liberty to except from

231. *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950).

232. *See Rasul v. Bush*, 542 U.S. 466, 478–79.

233. *Hamdan*, 415 F.3d at 40 ("*Eisentrager* also answers Hamdan's argument that the habeas corpus statute, 28 U.S.C. § 2241, permits courts to enforce the 'treaty-based individual rights' set forth in the Geneva Convention."); *cf. Rasul*, 542 U.S. at 478–79 (explaining that *Eisentrager* was not based on statutory habeas).

234. *See Atuar v. United States*, No. 04-7731, 2005 WL 3134081, at *6 n.12 (4th Cir. Nov. 23, 2005) ("[W]e recognize the possibility that a habeas corpus petition may require a court to review a particular detention in light of a non-self-executing but constitutionally ratified treaty.").

235. 320 F.3d 130 (2d Cir. 2003).

236. *See id.* at 141 n.16 ("Accordingly, the issue in this case—as in *St. Cyr*—is whether a statute has explicitly excluded a particular claim from the jurisdictional grant of § 2241."); *see also supra* note 193 (noting that the 2006 revisions to the habeas statute do not affect most cases of extraordinary rendition).

237. *See supra* note 106 and accompanying text.

[habeas corpus jurisdiction] any cases not plainly excepted by law.”²³⁸ Accordingly, in *St. Cyr* the Court held that a similar statutory restriction on judicial review of agency decisions did not bar habeas challenges unless the legislation explicitly stated such a prohibition.²³⁹ The Second Circuit, applying *St. Cyr*, held that § 2242(d) of FARRA does not bar habeas petitions under the Torture Convention.²⁴⁰ Therefore, a petitioner may successfully raise a Torture Convention claim under the treaty provision of the habeas statute.

c. Claims Based in Federal Law

Even if courts reject this application of the habeas writ to enforce a treaty, a detainee may also challenge the detention as violating the laws of the United States. The laws of the United States are comprised of both statutory and common law and common law includes customary international law.²⁴¹ The traditional rights-based use of habeas is rooted in the historical expansion of the writ to enable post-conviction challenges to the judgments of state courts.²⁴² In such situations, the prisoner does not usually accuse the government of violating the law or a treaty by means of detention; nobody would challenge a government’s right to detain a prisoner subject to a sentence by a court of law. Hence, cases in which persons held in custody in violation of the *laws* of the United States, while possibly not in violation of the Constitution, are understandably rare.²⁴³ Nonetheless, a detainee may invoke habeas when some aspect of the detention itself is a criminal act in violation of federal law. The Supreme Court has affirmed that habeas allows challenges to detentions based on “the erroneous application or interpretation of statutes.”²⁴⁴ The federal government’s interpretation of the scope of the Torture Statute to exclude culpability for extraordinary rendition constitutes such an erroneous interpretation of statute.

238. 75 U.S. 85, 102 (1869).

239. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001).

240. *Wang*, 320 F.3d at 141.

241. *See* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law.”).

242. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333 (1992); *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

243. If, for example, a person is kidnapped by state authorities and held incommunicado, the state authorities presumably have committed the crime of kidnapping, but they also have deprived the person of his or her Constitutional rights. Therefore, the Constitutional claim is the focus of such a habeas proceeding; the criminal aspect of the governmental behavior is not of particular relevance.

244. *St. Cyr*, 533 U.S. at 302.

The judicial and statutory restraints on the use of habeas, including the requirement that a petitioner exhaust all claims and opportunities for appeal prior to resorting to habeas, derive from petitioners using the writ to challenge the judgment of a court, or, in military settings, the jurisdiction of a court to hear a case.²⁴⁵ In the first instance, *res judicata* concerns justify constraining the use of habeas. In the second instance, courts defer to tribunals that have been established or authorized by Congress. Extraordinary rendition implicates neither of these concerns. The detainee typically has not been convicted of a crime, nor has any military tribunal ordered the detention or transfer. Hence, a court asserting habeas jurisdiction over an extraordinary rendition claim does not face the traditional worries about overstepping the authority of another court. Instead, the detainee has not accessed any tribunal at all. This warrants a broader review of the conditions of confinement. Justice Murphy, in his dissent in *Application of Yamashita*, explained this justification:

I do not feel that we should be confined by the traditional lines of review drawn in connection with the use of the writ by ordinary criminals who have direct access to the judiciary in the first instance. Those held by the military lack any such access; consequently the judicial review available by habeas corpus must be wider than usual in order that the proper standards of justice may be enforceable.²⁴⁶

Even in *Yamashita*, the petitioner challenged the validity of the military tribunal, like the claims in *Eisentrager* and *Hamdan*. Justice Murphy's arguments are even stronger when applied to extraordinary renditions, which are not governed by any judicial process.

Habeas may be used to challenge not only the fact of a person's confinement, but also the conditions of that confinement.²⁴⁷ In the case of extraordinary rendition, detainees are challenging a condition of their confinement—namely, that they have been, or soon will be, handed over to a third country where they are likely to be subjected to torture.

245. 28 U.S.C. § 2254(b)(1)(A); *Gusik v. Schilder*, 340 U.S. 128, 131–32 (1950) (“The policy underlying [28 U.S.C. § 2254] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed...any interference by the federal court may be wholly needless.”).

246. 327 U.S. 1, 31 (1946) (Murphy, J., dissenting).

247. *St. Cyr*, 533 U.S. at 303 (2001); *id.* at 303 n.14. *But see* *Demore v. Kim*, 538 U.S. 510, 521–22, 531 (2003) (holding that mandatory detention of certain deportable non-citizens does not violate the due process clause, even if it would be a violation for U.S. citizens).

As demonstrated above, such a transfer constitutes a criminal act under the Torture Statute. Normally, a detainee must exhaust all claims within the military or state court system before raising a claim in a federal district court.²⁴⁸ But when a person has no access to any court or tribunal whatsoever, and assuming for the sake of argument that the person may be lawfully detained as an “enemy combatant” for an indefinite period,²⁴⁹ courts should afford that person broad latitude in challenging the conditions of his or her confinement when those conditions are alleged to be in violation of the laws of the United States. The judicial role in habeas is particularly important when the executive branch facilitates or even imposes conditions of detention that Congress has expressly declared to be criminal.²⁵⁰ Further, the Supreme Court recently suggested that federal common law may enable federal courts to recognize private claims for torture.²⁵¹ Habeas compels the administration to show that the detention is not in violation of federal law,²⁵² and avoids issues of sovereign immunity.²⁵³

The habeas claims of Guantánamo detainees shed some light on the District Court of the District of Columbia’s understanding of habeas. Many Guantánamo detainees have filed habeas claims challenging the legality of the detention. Most judges hearing those claims have even been willing to grant injunctive relief requiring thirty days’ notice prior to transfer.²⁵⁴ The court usually justifies the injunction primarily as a means to maintain its jurisdiction, rather than to prevent extraordinary rendition.²⁵⁵ The government maintains that Guantánamo detainees, when transferred, are either released or handed over to the custody of another government, with no further involvement or control of the United States. Two judges have accepted this claim, maintaining that

248. See *Gusik*, 340 U.S. at 131–32.

249. *But see supra* note 47 and accompanying text.

250. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

251. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004).

252. See *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1039 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 310 F.3d 1153 (9th Cir. 2002).

253. See LARRY W. YACKLE, *FEDERAL COURTS* 313–15 (1999).

254. See, e.g., *Kurnaz v. Bush*, 2005 WL 839542 at *2–*3 (D.D.C. Apr. 12, 2005); *Al-Joudi v. Bush*, 2005 U.S. Dist. LEXIS 6265, at *21–*22 (D.D.C. Apr. 4, 2005); *Al-Marri v. Bush*, 2005 U.S. Dist. LEXIS 6259, at *1–*2 (D.D.C. Apr. 4, 2005); *Abdah v. Bush*, 2005 WL 711814, at *6–*7 (D.D.C. Mar. 29, 2005). *But see, e.g., Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 200 (D.D.C. 2005) (denying injunction); *Almurbati v. Bush*, 366 F. Supp. 2d 72, 73–74 (D.D.C. 2005) (denying injunction requiring thirty days’ notice but requiring the Pentagon to inform the court when transfer takes place).

255. See, e.g., *Abdah*, 2005 WL 711814 at 4.

such transfers do not constitute extraordinary rendition, because the United States does not maintain any degree of control over the prisoner after transfer.²⁵⁶ The administration also asserts that it has in place numerous procedural safeguards to ensure that detainees transferred into the custody of another country are not be tortured.²⁵⁷ Yet recent developments suggest that the Pentagon is unofficially transferring Guantánamo detainees into the custody of other governments.²⁵⁸ Lawyers for the Justice Department reportedly “waged an unusually aggressive fight for the right” not to be required to give thirty days’ notice for the Yemeni detainees at Guantánamo.²⁵⁹ Given a potential joint venture between the United States and some foreign jailors,²⁶⁰ the use of habeas to contest transfers from Guantánamo and foreign locations is increasingly important. The habeas statute may provide a means for detainees to challenge extraordinary rendition as a violation of federal laws criminalizing torture and conspiracy to commit torture.

3. *Practical Considerations*

256. *Almurbati*, 366 F. Supp. 2d at 79; *Al-Anazi*, 370 F. Supp. 2d at 191–92.

257. *See, e.g., Al-Anazi*, 370 F. Supp. 2d at 192.

258. *See supra* note 52. The Department of Defense press release indicates that only one detainee was handed over “to the government of Spain.” The other detainees were transferred “to Saudi Arabia” or to other countries, but not explicitly to the governments of those countries. *See* Press Release, U.S. Dep’t of Defense, Detainee Transfer Announced (July 20, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050720-4122.html> (last visited Apr. 20, 2006). Yet news reports confirm that at least one detainee who officially was transferred “to Saudi Arabia” was initially transferred to the custody of the Saudi government. *See* Thomas Adcock, *Paul Weiss Group Aids Detainee*, N.Y.L.J., Aug. 25, 2005, at 16.

259. *See* David Johnston, *Judge Limits the Transfer of 13 from Guantanamo*, N.Y. TIMES, Mar. 30, 2005, at A14.

260. *See, e.g., Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 68–69 (D.D.C. 2004), *dismissed as moot sub nom. Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005):

The case law indicates that this [custody] inquiry will entail a consideration of several factors, including whether: (i) Abu Ali was detained at the behest of United States officials; (ii) his ongoing detention is at the direction of the United States enlisting a foreign state as an agent or intermediary who is indifferent to the detention of the prisoner; (iii) he is being detained in the foreign state to deny him an opportunity to assert his rights in a United States tribunal; and (iv) he would be released upon nothing more than a request by the United States.... Where all of these factors are present...it blinks reality to conclude that the detainee is anything other than in the custody of the United States for purposes of habeas jurisdiction.

The evidence that petitioners have supplied is considerable in the absence of discovery, and speaks to each of these points. What is more, with a single narrow exception, the United States has not offered evidence to rebut any of the information supplied and inferences reasonably raised by petitioners, even though such evidence is in many instances directly in its control.

(footnotes and citations omitted).

Detainees subject to extraordinary rendition face tremendous challenges in bringing their claims to court. They are typically seized in secret, and the few detainees who had counsel prior to their rendition found that their attorneys were not notified until after the rendition was complete.²⁶¹ A habeas petition may be raised by the detainee's "next friend," but that person must first have some reason to believe that the detainee is, in fact, a detainee.²⁶² In some instances witnesses can verify the abduction,²⁶³ but in other cases the person simply "disappears."²⁶⁴ In many circumstances, the detainees' friends and family are entirely unaware that the person has even been taken into custody.²⁶⁵

At the point the next friend suspects that a person has been detained, the next friend may bring a habeas petition. The petition forces the detaining authority to confirm or deny whether the person is in custody, as broadly defined under the habeas statute.²⁶⁶

Another practical reality is the administration's assertion that judicial oversight relating to transfer of terror suspects could unreasonably hamper military efforts; this rationale was a basis for the Supreme Court's ruling in *Eisentrager*.²⁶⁷ Yet extraordinary rendition inherently involves moving suspects from one place to another. There is little additional burden imposed by ordering a custodian to keep the detainee in custody until either the court determines the detainee's right to release or the custodian releases the detainee. Additionally, the burden on the military appears negligible, because renditions are carried out

261. See, e.g., *Agiza*, *supra* note 140, ¶ 13.9; cf. Complaint and Demand for Jury Trial, ¶ 46, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (C.A. No. 04-CV-249-DGT-VVP) [hereinafter *Arar Complaint*] (documenting that the INS lied to Arar's attorney about his whereabouts two days prior to his removal).

262. The requirements for "next friend" standing are articulated in *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990). One commentator has advocated more relaxed interpretation of the next friend standards when military prisoners are detained overseas. See Caroline Nasrallah Belk, Note, *Next Friend Standing and the War on Terror*, 53 DUKE L.J. 1747 (2004).

263. See, e.g., Grey, *Torture Flights*, *supra* note 20; Mayer, *supra* note 16.

264. For example, when Abu Omar was abducted in Italy and then transferred to Egypt, his wife originally thought that he had simply left her. See Crewdson & Hundley, *supra* note 211.

265. See *id.*; *supra* note 14. Recall that one justification for rendition is to conceal the detention from the suspect's associates. See *supra* note 31 and accompanying text.

266. Presumably the administration could assert the state secrets defense at this point. It is unlikely, however, that courts would allow such broad executive authority, particularly when the claims raised in the petition indicate that members of the executive are potentially in violation of federal statute. In at least one case, the government refused to acknowledge a transfer for several months. See *Arar Complaint*, *supra* note 261, ¶ 60.

267. See *Eisentrager v. Johnson*, 339 U.S. 763, 778–79 (1950); Brief for the Respondents at 16–17, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

primarily by the CIA. Therefore, these potential practical obstacles would not necessarily bar a habeas claim.

In summary, the habeas statute is a potentially powerful tool to challenge extraordinary rendition. The broad jurisdictional reach of the habeas statute offers few impediments for a detainee held abroad to bring a habeas claim before a U.S. court. The merits of the habeas claim may be grounded in constitutional guarantees of substantive due process, treaty claims under the Convention Against Torture, and statutory prohibitions criminalizing torture and conspiracy to commit torture. As long as a qualified individual is able to bring the claim as the detainee's next friend, a court would have several legitimate substantive bases on which to order the detainee's release from custody.

C. *Additional Measures*

Habeas corpus is not the only viable mechanism to challenge the practice of extraordinary rendition. Congress has considered several measures to restrict government authority to subject individuals to torture, including funding restrictions, uniform interrogation standards, investigations of CIA misconduct, and explicit prohibitions on extraordinary rendition. After they are released from foreign detention, individuals may seek to bring tort claims against government officials involved in extraordinary rendition. In addition, the Convention Against Torture requires States Parties to initiate criminal prosecutions of persons responsible for extraordinary rendition; if the United States fails to initiate such prosecutions, other countries may undertake the task. Moreover, international bodies may hold accountable countries that assist in the U.S. extraordinary rendition program. This section addresses each of these mechanisms in turn.

Some members of Congress have proposed remedial measures which could potentially curb the use of extraordinary rendition. In 2005, Congress adopted a restriction on emergency spending legislation that no funds may be used to subject anyone in U.S. custody to torture or cruel, inhuman, or degrading treatment. It is unclear whether the condition applies to people who are subject to rendition or to non-citizens.²⁶⁸ One could argue that the restriction's "in custody" requirement actually *encourages* the use of extraordinary rendition.

268. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1031(a)(1), 119 Stat. 231 (2005); see also Knight, *supra* note 15.

Senator John McCain (R-Ariz.), the only member of Congress known to be a survivor of torture, introduced amendments to the 2006 Defense Authorization legislation that would have established uniform interrogation standards based on the U.S. Army Field Manual and prohibited torture and other forms of cruel, inhuman, or degrading treatment or punishment at the hands of U.S. personnel. As with the 2005 spending restrictions, these amendments would not have regulated the practice of rendition, and they might even have created incentives to use extraordinary rendition to avoid the interrogation restrictions.²⁶⁹ Hence, the McCain amendments would have failed to curtail the practice of extraordinary rendition. Moreover, McCain's capitulation to the Bush administration on the Military Commissions Act suggests that congressional leaders may lack the will to impose statutory restrictions on CIA interrogations.²⁷⁰

The CIA has announced that it is conducting its own internal investigation of possible misconduct in the treatment of terror suspects, but the investigation does not address extraordinary rendition.²⁷¹ Democratic congressional leaders are pressing for a congressional investigation, and after the 2006 midterm elections, they are likely to use their control of Congress to engage in heightened oversight.²⁷² A classified, bipartisan investigation of CIA abuses has commenced, but it is unclear whether the investigation will be independent or impartial.²⁷³ The Senate has called for the CIA to provide regular reports on its secret

269. See *supra* notes 54–55 and accompanying text. Moreover, Senator McCain abandoned his efforts by endorsing more relaxed interrogation standards in the Military Commissions Act. See Nat Hentoff, *Habeas Corpus Sellout: Why Did McCain and Company Back Bush Bill?*, WASH. TIMES, Oct. 9, 2006, at A19.

270. See Hentoff, *supra* note 269. But see Stephen Richard, *Interrogators Beware*, WASH. POST, Oct. 17, 2006 (contending that the Military Commissions Act imposes significant constraints on CIA interrogators).

271. See Thomas, *supra* note 28; *Human Rights; U.S. Restates Opposition to Torture; Other Developments*, FACTS ON FILE WORLD NEWS DIG., May 12, 2005; cf. Christopher Graveline, *Unlearned Lessons of Abu Ghraib*, WASH. POST, Oct. 19, 2006 (noting that the CIA never released the results of its internal investigation of abuses at Abu Ghraib).

272. See, e.g., Rep. Edward Markey, Press Release, Markey Calls on Bush Administration to Apologize to Maher Arar (Jan. 26, 2007), http://Markey.house.gov/index.php?option=com_content&task=view&id=2564&Itemid=137 (last visited Feb. 25, 2007); see also John Cavanagh, *Truth, Justice, and the Un-American Way*, CHRISTIAN SCI. MONITOR, Dec. 5, 2006, at 9; Dana Priest, *Democrats Seek Probes on CIA Interrogations*, WASH. POST, Mar. 2, 2005, at A7 [hereinafter Priest, *Democrats*]; Editorial, *Abuse in Secret*, WASH. POST, Mar. 6, 2005, at B6.

273. Providing for Consideration of H.R. 2475, Intelligence Authorization Act for Fiscal Year 2006, CONG. REC. H4829-40 (daily ed., June 21, 2005) (statement of Rep. Jane Harman (D-Cal.)).

detention facilities, but this oversight may not extend to facilities arguably run by foreign governments.²⁷⁴

Beyond fiscal and investigatory responses, two legislators in the 109th Congress introduced bills to combat extraordinary rendition. A bill sponsored by Representative Markey (D-Mass.) in the House of Representatives would have explicitly banned extraordinary rendition.²⁷⁵ A bill sponsored by Senator Leahy (D-Vt.) would have compelled the State Department to publish a list of countries known to torture, and then would have forbidden the United States from sending detainees to those countries.²⁷⁶ With the 110th Congress under the control of the Democratic Party, there is a greater likelihood that such legislation will be enacted.²⁷⁷ Yet such laws could lead to political pressure on the State Department to sanitize its human rights reports in order to assist the executive's so-called war on terror.²⁷⁸ The consequences of such a response would be far-reaching; not only would extraordinary rendition continue, but also many petitioners for asylum and Torture Convention relief, who depend on State Department reports to substantiate their claims,²⁷⁹ could be sent home to be subjected to human rights violations. Moreover, to the extent that these legislative proposals are perceived as imposing restraints on the CIA, they might face significant political opposition. Nonetheless, the 110th Congress is seriously considering legislation to reverse much of the Military Commissions Act, to restore accountability for the treatment of detainees, and to prohibit U.S. tribunals from using evidence obtained through coercion.²⁸⁰ These efforts suggest that the Democratic-controlled Congress will engage in stricter oversight over the CIA's extraordinary rendition program.

Private claims under the Alien Tort Claims Act against the private pilots or businesses involved with the chartered aircraft used in

274. See Jehl, *Secret Prisons*, *supra* note 50.

275. Torture Outsourcing Prevention Act, H.R. 952, 109th Cong. (2005); see also *Talk of the Nation: Policy of Extraordinary Rendition* (National Public Radio broadcast Apr. 7, 2005) (statement of Rep. Edward Markey (D-Mass.)).

276. Convention Against Torture Implementation Act of 2005, S. 654, 109th Cong. (2005); see also *Talk of the Nation*, *supra* note 275 (statement of Michael Hirsh, Newsweek reporter).

277. See, e.g., Markey, *supra* note 272.

278. Cf. L. Kathleen Roberts, *The United States and the World: Changing Approaches to Human Rights Diplomacy Under the Bush Administration*, 21 BERKELEY J. INT'L L. 631, 647 (2003) (noting several instances in which reports were "soften[ed]" to be less critical of allies in the so-called war on terror).

279. See Kirsten Schlenger, *The Nuts and Bolts of Representing an Asylum Applicant*, 1080 PLI/Corp. 209, 215 (1998).

280. See Restoring the Constitution Act of 2007, S. 576 (110th Cong.).

extraordinary renditions²⁸¹ may also provide a means of addressing rendition after it has occurred.²⁸² If those charter agencies are actually businesses covertly owned and operated by the CIA or Defense Department,²⁸³ they may attempt to assert a sovereign immunity defense.²⁸⁴ In the first civil suit challenging the practice of extraordinary rendition, German national Khaled el-Masri filed a complaint under the Alien Tort Statute against CIA chief George Tenet and two charter airline companies involved in his rendition to Afghanistan.²⁸⁵ The complaint specifically alleged that the defendants were responsible for torture and other cruel, inhuman, or degrading treatment inflicted on el-Masri during his detention.²⁸⁶ Secretary of State Condoleezza Rice has suggested that his rendition was a mistake,²⁸⁷ but even though el-Masri's civil complaint was dismissed on state secrets grounds, German prosecutors are pursuing criminal actions against officials involved with the rendition.²⁸⁸

Other countries can and should take action to stop extraordinary renditions. The Convention Against Torture explicitly requires States Parties to take action when the conventions are breached in any nation.

281. See *supra* note 211.

282. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

283. There are strong indications that many of the charter companies are CIA front corporations. See Scott Shane et al., *CIA Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005.

284. See *supra* note 51 (noting sovereign immunity barriers to use of the Alien Tort Claims Act); *Sosa v. Alvarez-Machain*, 542 U.S. 562, 712 (2004) (limiting the scope of the Federal Tort Claims Act waiver of sovereign immunity). But see *For CIA Agents, Insurance Sometimes Necessary: Morning Edition* (National Public Radio Broadcast Dec. 14, 2005), available at <http://www.npr.org/dmg/dmg.php?prgCode=ME&showDate=14-Dec-2005&segNum=15&mediaPref=RM&getUnderwriting=1> (last visited Apr. 20, 2006) (reporting that the CIA strongly encourages agents to obtain private liability insurance because the government frequently will not defend them if they are later sued or criminally prosecuted for actions during foreign missions); Tracy Wilkinson, *Ex-CIA Agent in Milan Asks for Immunity*, L.A. TIMES, Dec. 5, 2005, at A3 (reporting that an Italian judge rejected a former CIA agent's immunity defense).

285. See *Complaint, El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), available at http://www.aclu.com/images/extraordinaryrendition/asset_upload_file829_22211.pdf (last visited Apr. 20, 2006).

286. See *id.* ¶¶ 83–92.

287. See Condoleezza Rice, Press Availability with German Chancellor Angela Merkel, Dec. 6, 2005, <http://www.state.gov/secretary/rm/2005/57672.htm> (last visited Apr. 20, 2006) (quoting German Chancellor Merkel, “[T]he American Administration [] has admitted that this man had been erroneously taken and...is not denying that it has taken place.”); see also Priest, *Mistake*, *supra* note 142 (“The CIA inspector general is investigating a growing number of what it calls ‘erroneous renditions....’”).

288. See *El-Masri*, 437 F. Supp. at 535–39; Nat Hentoff, *Time to Halt Renditions: Congress Needs to Act*, WASH. TIMES, Feb. 19, 2007, at A19.

The Convention contains provisions obliging States Parties to “extradite or prosecute.” Under Article 5(2), every State Party must take “such measures as may be necessary to establish its jurisdiction over [the offenses of torture and complicity in torture] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8” to the jurisdiction where the offense was committed or to the jurisdiction where the alleged perpetrator or the accused is a national.²⁸⁹ Article 7 then directs a State Party with territorial jurisdiction over a person alleged to have committed torture, attempted torture, or complicity in torture either to extradite the person to the country where that person or the victim is a national, or to the country where the alleged acts occurred.²⁹⁰ A State Party may not simply wait for an extradition request before taking any action with respect to the alleged torturer or torture-conspirator; the parties involved in drafting the Torture Convention considered such proposals and rejected them.²⁹¹ In the case of extraordinary rendition, the other States Parties that could prosecute alleged torturer-conspirators are unlikely to assert jurisdiction.²⁹² The United States, as the country of which the alleged perpetrator is probably a national, is highly unlikely to take action against its own government agents. Due to the secrecy surrounding rendition, the country of the victim of the rendition may not even know that the person has been transferred; in some cases, however, prosecutors in other countries have brought indictments against U.S. officials involved with extraordinary renditions of their nationals.²⁹³ Yet because rendition victims are characterized as terrorists, a country may not wish to step forward and assert the rights of its own national.²⁹⁴ The

289. Convention Against Torture, *supra* note 57, art. 5(2).

290. *Id.* art. 7(1).

291. BURGERS & DANIELIUS, *supra* note 116, at 137.

292. See Francisco Forrest Martin, *The International Human Rights and Ethical Aspects of the Forum Non Conveniens Doctrine*, 35 U. MIAMI INTER-AM. L. REV. 101, 117 (2003–04) (explaining that there is strictly limited discretion in cases concerning gross human rights violations so as to ensure that there will be a judicial remedy); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368–69 (2001) (“Crimes subject to the universality principle occur...in situations in which the territorial State and State of the accused’s nationality are unlikely to exercise jurisdiction, because, for example, the perpetrators are State authorities or agents of the State.”).

293. See, e.g., Hentoff, *supra* note 288 (reporting that German prosecutors are preparing arrest warrants for over one dozen CIA agents involved in the extraordinary rendition of German national Khaled el-Masri).

294. *CNN Live From: Saudi Arabia Speaks Out About Terrorism* (CNN television broadcast May 16, 2003) (statement of Adel al-Jubeir, Saudi Foreign Affairs Advisor) (“We are on board 200 percent to find the criminals who did this [and] those who support them, and justify them,

country where the torture has taken place—generally the destination country for the rendition—is also highly unlikely to take any action to expose its interrogation practices to judicial scrutiny. Therefore, extraordinary rendition presents situations uniquely suited to a State Party asserting jurisdiction simply because the alleged perpetrator is physically located within its jurisdiction.

Once a State Party has determined that an alleged offender is located within its jurisdiction, the Torture Convention requires the State Party first to take the alleged offender into custody, and then immediately to make a preliminary enquiry into the facts.²⁹⁵ This initial act may be sufficient to prompt the United States to move to extradite the alleged offender. The Bush administration has been resistant to foreign courts asserting jurisdiction over U.S. personnel overseas; the administration could use extradition as a tool in response to a foreign government's assertion of jurisdiction.²⁹⁶ The United States could only compel extradition, however, if it could convince the sending state that the United States would follow through with prosecution.²⁹⁷ Accordingly, application of the extradite-or-prosecute provisions of the Torture Convention could force the hand of the U.S. government and compel a criminal inquiry into the practice of extraordinary rendition.

States Parties that participate in extraordinary rendition may also be held accountable for complicity, even for “seemingly innocuous acts” that facilitate extraordinary rendition, including allowing airplanes carrying detainees to refuel on their territory.²⁹⁸ The Council of Europe

and bring them to justice. We will work with the United States and every other country that can provide assistance in order to unravel this terrorist network.”); *cf. supra* note 10 (noting that West Germany chose not to intervene on behalf of Adolf Eichmann after he was abducted by Israeli agents in Argentina and brought to Israel to stand trial for war crimes). *But see* Richard Bernstein, *Germany Says It Pressed the U.S. over the Detention of Its Citizen*, N.Y. TIMES, Dec. 15, 2005, at A13 (reporting that the German government had made repeated requests for information from the U.S. government during the extraordinary rendition of German citizen Khaled el-Masri).

295. Convention Against Torture, *supra* note 57, art. 6(1)–(2).

296. See Harvey Rishikof, *Framing International Rights with a Janusism Edge—Foreign Policy and Class Actions—Legal Institutions as Soft Power*, 2003 U. CHI. LEGAL F. 247, 273 (2003); Jennifer Trahan, *Trying a Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 HOUS. J. INT'L L. 475, 495 n.100 (2002). If the United States declines to extradite twenty-two CIA operatives charged with kidnapping for a 2003 extraordinary rendition in Italy, the Italian prosecutor said he intends to try the agents in absentia. See John Crewdson, *Italy Prosecutor, Boss Clash over CIA Case*, CHI. TRIB., Nov. 23, 2005, at C6.

297. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 160 (2001).

298. See All Party Parliamentary Group Briefing Paper, *Torture by Proxy: International Law Applicable to 'Extraordinary Renditions'*, Dec. 2005, at 13. Some countries may be more concerned with the political and security ramifications of complicity or collaboration with the

initiated an inquiry into “illegal and inhuman practices in relation to the arrest, transportation and detention of persons” in its member and observer countries, and stated that, “If the allegations [are] proved correct, the member states would stand accused of having seriously breached their human rights obligations to the Council of Europe.”²⁹⁹ In early 2007, the Council of Europe adopted a final report in which it condemned the practice of extraordinary rendition and also condemned “the acceptance and concealing” of extraordinary rendition “on several occasions, by the secret services and governmental authorities of certain European countries.”³⁰⁰ Some European countries have already taken action to prosecute persons responsible for extraordinary renditions originating on their territory or involving their own nationals.³⁰¹ This attention suggests that international bodies may hold accountable U.S. partners in extraordinary rendition. Whether through habeas corpus petitions, congressional oversight, tort actions, or international initiatives, many vehicles exist to challenge the practice of extraordinary rendition.

III. CONCLUSION

When Congress criminalized torture, it probably never envisioned the necessity of using that law against people acting on behalf of the United States. Yet today the executive branch policy of extraordinary rendition violates the Torture Statute. The extraordinary rendition system which was originally designed to extend the ability of U.S. criminal courts to bring criminals to justice has been twisted into an international abduction and torture conspiracy. Today, the administration uses rendition both to bar detainees from gaining access to courts and to

U.S. extraordinary rendition program. See, e.g., Jeffrey Fleishman, *Individual Rights Must Be Upheld*, L.A. TIMES, Dec. 7, 2005, at A9 (reporting that Romania fears that its application for membership in the European Union may be jeopardized by links to CIA activities); Ken Silverstein, *U.S. Partnership with Jordan Was Targeted*, L.A. TIMES, Nov. 11, 2005, at A1 (reporting that suicide bombings in Amman, Jordan targeted the country’s intelligence partnership with the United States).

299. Dick Marty, *Alleged Existence of Secret Detention Centres in Council of Europe Member States*, Statement, Dec. 13, 2005, available at <http://assembly.coe.int/ASP/Press/StopPressView.asp?CPID=1714> (last visited Apr. 20, 2006); see also Katrin Bennhold, *Kidnapping Study Tends to Fault U.S. Agents*, N.Y. TIMES, Dec. 14, 2005, at A10; Standing Committee Statement, *supra* note 14, at 7.

300. See Eur. Parliament, Final Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, A6-9999/2007, ¶ 39 (Jan. 26, 2007).

301. See, e.g., Hentoff, *supra* note 288 (describing recent steps taken by German and Italian prosecutors).

evade judicial scrutiny over the detention conditions of persons whom the United States may subject to perpetual detention.

While the current extraordinary rendition policy was being developed, then-Chief White House lawyer Alberto Gonzales pushed his team of attorneys in the White House and the Department of Justice to be “forward leaning.”³⁰² The extraordinary rendition program demonstrates the effect of this “forward leaning” approach: administration officials distort and manipulate clear judicial, statutory, and treaty directives to reach conclusions that have no valid legal foundation. In reviewing White House memoranda relating to torture, some commentators have observed that attorneys providing advice to a client regarding how to circumvent the law may be held complicit in the resulting criminal conduct. Moreover, such attorneys may be violating their professional obligations to make a good-faith effort to determine the scope of the law, and to refer to relevant moral and ethical considerations when giving advice.³⁰³ A recent editorial comment in the *American Journal of International Law* took note of the heightened responsibilities of government attorneys in providing legal guidance on matters relating to foreign relations:

[G]overnment attorneys also have responsibilities and obligations of loyalty that go beyond those of private attorneys. Thus, the government lawyer’s “client” is not simply his or her administrative superior, but also the government agency...for which he or she works, the U.S. government as a whole, and indeed the American public and its collective interests and values. Moreover, government attorneys have a particular obligation to act responsibly in formulating advice or arguments regarding constitutional or international legal questions. For their opinions on such matters may often not be subject to definitive judicial or other impartial review; and even if government legal views are in theory subject to review, it is well known that national courts, other government agencies, and the Congress

302. Michael Isikoff et al., *Torture’s Path*, NEWSWEEK, Dec. 27, 2004, at 54.

303. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 692, 694 (2004); see also W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 70–71 (2005) (arguing that the “glaringly deficient legal analysis” in the memoranda resulted from the lawyers being “so fixated on working around legal restrictions on the administration’s actions”); Lederman, Part I, *supra* note 165 (observing that the Office of Legal Counsel memoranda failed to explore the broader legal context of the torture statute, and concluding that the purpose of the memoranda was to provide “legal cover for conduct of questionable legality”).

have traditionally been especially deferential to such opinions. Consequently, in practice there may be no “safety net” other than these attorneys’ own competence, care, integrity, and good faith; it is only these professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order.

Finally, foreign policy decisions are often highly political, and policymakers and others who influence policy are often skeptical concerning the relevance of international law. Thus, there may be strong pressures on government lawyers to “bend” or ignore the law in order to support policy decisions—pressures that responsible government attorneys have an obligation to resist. For unless public officials are given competent, objective, and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent policy judgments or properly balance the national interests involved.³⁰⁴

Additionally, government lawyers who provide legal cover for illegal and immoral acts foster a dangerous lack of conscience among those responsible for implementing government policy. One former CIA counter-terrorism official who was directly involved with the rendition program admitted that he knew people transferred to places such as Egypt would be tortured. When asked if that made the United States complicit in torture, he responded, “You’ll have to ask the lawyers.”³⁰⁵

The U.S. policy of extraordinary rendition has also undermined the rule of law and respect for human rights throughout the world. Professor Noah Feldman noted, “[I]f the United States aimed to demand accountability with international norms, it had better begin by actively and visibly upholding these norms itself. Whatever the merits of unilateralism in foreign policy, unilateralism in laws and morals is incoherent and dangerous.”³⁰⁶ When confronted about torture in Egypt, the Prime Minister of Egypt recently responded, “Well, you know, we

304. Bilder & Vagts, *supra* note 303, at 693; *see also* Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 *GEO. J. LEGAL ETHICS* 557 (2005) (examining whether the OLC memoranda violate the Model Rules of Professional Conduct); Feldman, *supra* note 50 (arguing that the torture memoranda “subverted the rule of law”).

305. *CBS News*, *supra* note 36 (Michael Scheuer, former CIA counterterrorism official).

306. Feldman, *supra* note 50; *see also* Arbour, *supra* note 14 (“[S]upport for human rights and the rule of law actually improves human security.”).

do what we have to, just like the United States.”³⁰⁷ The U.S. efforts to promote human rights are undermined when it criticizes countries such as Egypt, Syria, and Uzbekistan for torturing prisoners, while simultaneously delivering terror suspects to those countries for interrogation and detention.³⁰⁸

The tools of law may provide a solution. People subjected to extraordinary rendition may raise habeas claims in U.S. courts to challenge their transfers as violating the laws of the United States. The use of the habeas statute to challenge extraordinary rendition will strengthen judicial oversight when the executive is responsible for persons being detained in violation of treaties and criminal statutes.

Yet even if those claims do not succeed, the administration, in its effort to escape the reach of U.S. courts and potential criminal sanctions under U.S. law, will inevitably encounter other jurisdictions. The fact that such activities constitute crimes in the other countries and are causing injury to other states’ nationals provides one inherent safeguard to protect against the extraterritorial illegal activity of U.S. agents. A second safeguard is the international embarrassment that results when a country purporting to be a champion of democracy and human rights is known to be flagrantly violating its treaty obligations and to be conspiring with the very countries it publicly criticizes for human rights violations.³⁰⁹ Hence, by trying to avoid the reach of the U.S. legal system, the architects and perpetrators of extraordinary rendition may ultimately face significant legal and political repercussions beyond the borders of the United States.

307. *America’s Mission: Debating Strategies for the Promotion of Democracy and Human Rights: State Department Briefing*, Hudson Institute, June 20, 2005 (statement of Tom Malinowsky, Human Rights Watch); see also Peter Ford, *Controversy Grows in Europe over CIA Jail Network*, CHRISTIAN SCI. MONITOR, Dec. 1, 2005, at 1 (quoting Guillaume Parmentier, head of the French Center on the United States, “It makes the Americans look exceptionally hypocritical to say that democracy should be spread everywhere and then encourage their allies to do things outside the rule of law.”) O’Sullivan, *supra* note 22 (observing that Jordanian collaboration with the CIA has provided Jordan with “a free pass on human rights”).

308. See *America’s Mission*, *supra* note 307.

309. Cf. Smith, *supra* note 29 (reporting that the British Parliament has charged that the United States is responsible for grave human rights violations, the European Parliament and the Council of Europe have criticized U.S. detention policies, and that the Inter-American Commission for Human Rights has excluded the United States from its membership and called for hearings on conditions at Guantánamo).