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Kidnapping Terrorists:

Extraterritorial Forcible Abductions in the Global War on Terrorism

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ABSTRACT

For those who have an interest in targeting, neutralizing, detaining, and adjudicating terrorists amidst the Global War on Terrorism (GWOT), few tools are more poorly understood than the acquisition and subsequent movement of the alleged terrorists. Rendition is that process by which the body of an individual is taken from State A to State B. It may occur in either a “regular” or an “irregular” form. *Regular rendition* occurs when the individual is moved pursuant to the express terms and procedures of a given extradition treaty. *Irregular rendition*, on the other hand, is principally comprised of the rare instances in which an individual is moved in lieu of, outside of, or in spite of an extradition treaty. These irregular forms of rendition can generally be classified into four categories: (a) Luring/Trickery, (b) Deportation as *de facto* Extradition, (c) Forcible Abductions for Prosecution, and (d) 3rd Party Interrogative Renditions. Although many of the irregular rendition models have strong similarities in law, each has its own unique twists. The following thesis aims to draw further upon the legal authorities relative to two of these irregular rendition models and provide a legal and political framework for their use within the analytical context of the GWOT. Comprised of two distinct monographs, this thesis project first addresses state-sponsored forcible abductions as they are utilized within the criminal field for prosecution and then moves to review their use within the intelligence arena for the purposes of interrogation. Where extraterritorial forcible abductions have been lawfully used by members of the law enforcement community since the late nineteenth century, the shift in paradigm toward their use for interrogations carried out by a third party under the Clinton Administration is more questionable both politically and jurisprudentially.

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- PREFACE -

I have long since possessed something of an unhealthy fascination with terrorism; with the strategic and tactical aspirations of disenchanting zealotry untethered in an orgy of violence. The fluency with which transnational criminal networks converge in a world metaphorically under the one we know, and the irregular methods by which our institutions attempt to fight back, present an endlessly multidimensional problem in a contextual political system dominated by states. How can society neutralize these threats? What instruments are available?

11 September 2001 did not construct the landscape anew. Instead, what changed was the awareness of the threats and of the countermeasures long used to defeat them. Thumbing through a dilapidated 1973 edition of M. Cherif Bassiouni's *International Terrorism and Political Crimes* four years ago, I came across an interesting entry: *state-sponsored kidnapping*. Needless to say, I was intrigued. It resonated with a dictatorial tone, sounding something akin to what might have been expected from the Libyans in the mid-1980s or long pursued by the North Korean regime in selective retaliation against the South. And yet this authoritative volume was from a time well before. Little did I know that state-sponsored kidnapping was an activity utilized by the American law enforcement community since the middle of nineteenth century. And that the recent genesis of its use as an antiterrorism measure had bequeathed an altogether more elusive concept, forcible kidnapping for clandestine interrogations in another part of the

world. Through a felicitous marriage between the lure of international terrorism and the practical pull of a legal framework, I found a topic worth investigating.

Research formally began in December of 2003. Engaging in intellectual inquiry in a topic as multifaceted and complex as this is difficult at any level, but without formal legal training a jurisprudential review was itself an especially daunting task from the outset. Thus began my groundwork in a systematic outlining and study of Professor Banks' full *National Security Law* casebook, in addition to a thorough reading and outlining of Louis Fisher's *Presidential War Power*, over nights and weekends. The sheer number of evenings spent at the local Starbucks could undoubtedly credit me with single-handedly securing a full-time position for a fellow college student working behind the counter. Once I had a relatively sturdy comprehension of the legal base, I moved on to learning about the law of international extradition and mutual legal assistance. With time, over the following year, as I balanced work, school, and a insatiable appetite for reeling through volume after volume on al-Qa'eda and related topics with gaining the requisite background for producing the project now before you, I became sufficiently versed in the topic that I could engage practitioners in and out of government around the country, and indeed around the world. And so I did. Talking with members of the American defense establishment, special agents with the FBI, academics, and American and British lawyers, I quickly got a handle on the topic from myriad perspectives.

And then, something happened. Much to my dismay, the story broke of a clandestine program for the rendering of suspects to other countries for purposes

of interrogation, dubbed by the media “extraordinary rendition.” What was once a scarcely known area of intelligence and criminal extradition law quickly became an international incident, plastered across the front pages of every reputable newspaper around the Western world. Disgruntled that I might have missed my one opportunity to provide among the first full analyses of the topic, I decided to dig in. Having now read through thousands of pages of reports, news articles, books, cases, and law journal articles, bantered with experts, and walked the streets of northern Milan, where one incident is said to have occurred, I found myself drowning for air in a sea of information. Sometimes, I learned, too much information can be problem without the hard reality of time to give it form.

What results below makes no claim to exhaustive review. That would require a full book. It is, instead, merely one narrow perspective seeking principally to answer whether forcible abductions *can* be used, as a matter of law, and then an evaluation of whether they *should* be used, as a matter of policy. For it is within the confluence of legal objectivism and political subjectivity that practical choices are made.

Extraterritorial Forcible Abductions for Prosecution

The following is the first monograph of a two part series on the use of extraterritorial “forcible abductions” within the Global War On Terrorism (GWOT). This monograph discusses their use to effectuate criminal prosecution within the United States.

I. Introduction

A. Methods of Forcible Abductions

Perhaps the most widely discussed irregular form of rendition is that of forcible abduction; that is, the kidnapping of an individual in one country for purposes of transferring him to a second country to be tried for certain alleged criminal conduct.¹ This rendition may occur in one of four ways: (a) with the assistance or connivance of agents in which the action takes place, (b) by officers of one state acting within the territorial boundaries of another state, (c) by vigilante private citizens working in a private capacity, or (d) by private citizens working at the behest of the seeking state.

The first of these methods is that form of forcible abduction which comes by way of assistance or connivance by agents of the *host state* –that is, the state from where the suspect would be rendered. Typically this method is reserved as a form of “informal extradition,” in which the *host state* desires to provide extradition where the specific terms of the given extradition treaty would otherwise prohibit it, or where no treaty of extradition exists.² The legal basis for this form of rendition rests in law enforcement’s customary authority to locate and arrest criminals pursuant to indictment, or in the rare circumstances of pre-

¹ Dycus, et al, ed, National Security Law, 3rd Edition, Aspen Publishers, New York, New York, 2002. p.851

² Id.

indictment detention as combatants, under the material witness statute,³ or under general *probable cause* requirements of warrantless arrest.⁴ Consequently, when conducting forcible abductions abroad, federal agents act under color of law as authorized agents of the law enforcement community, typically taking place only with authorization of the Attorney General or his designee.

The second method of forcible abduction is also carried out by officers of the *seeking state* acting within the territorial boundaries of the *host state*, but without its consent.⁵ Like the actions which include *host state* connivance, this form of abduction is derived from the extension of extraterritorial law enforcement powers. Indeed, the only material distinction between this form of abduction and the previous form is its overt infringement upon the territorial sovereignty of the *host state*. Taking such action is undoubtedly politically precarious and poses difficult questions of legality.

The third method of forcible abductions comes by way of vigilante private citizens working in a private capacity.⁶ On a practical level, as can be expected, this form of abduction may itself be further distinguished, between those private individuals who are citizens of the *host state* and those who come from outside of its territory to carry out the operation. But as a matter of law, at least as far as the

³ 18 U.S.C. § 3144; See also: McNabb Associates, P.C., “When Intelligence Agents Come Calling... You May Be Held Under the Material Witness Statute,” accessed online via: http://www.nationalsecuritycrimes.com/material-witne_ss.htm.

⁴ See generally: Federal Rules of Criminal Procedure Rule 4(c); also discussed below.

⁵ Bassiouni, M. Cherif, International Extradition: United States Law and Practice, 4th 2002 Edition, Oceana Publications, Dobbs Ferry, New York, 1996. p.217-295

⁶ Id.

United States may be concerned, this distinction is not altogether fruitful; a vigilante is a vigilante, in either case.⁷

A final method, much like the vigilante, is the abduction of a suspect by private citizens working at the behest of the *seeking state*.⁸ This model of abduction is something of an amalgam between the second and third, in which the individual actor is both a private citizen but also an agent of the *seeking state*. Typical use occurs when the *seeking state* wishes to act under the guise of *plausible deniability*, arguing publicly that it didn't actively try to get the suspect, but when it "happens to have him" in custody, a criminal prosecution may proceed.

B. Genesis of Forcible Abductions

Forcible abductions are not new. In fact, it can be said, the United States has relied on forcible abductions to effectuate arrests in some form or fashion since the middle of the nineteenth century. The Supreme Court first faced the issue in 1876, when American law enforcement arrested alleged John Wilkes Booth co-conspirator John Surratt after fleeing to Alexandria, Egypt.⁹ Such an instance was again seen before the court a decade later, where an individual charged with white collar crimes in Illinois was forcibly abducted from Lima,

⁷ This may not be entirely true in the case of bounty hunters who act domestically (see: *Taylor v. Taintor*, 83 U.S. 366 (1872)) but it does apply with regard to extraterritorial arrests (see: *Reese v. United States*, 76 US 13, 19 L.Ed. 541 (1869)). As a vigilante conducting a forcible abduction extraterritorially, one may be particularly subject to criminal prosecution in the *host state*, and may be extradited from the United States for that purpose (see: *Kear v. Hilton*, 4th Cir., 699 F.2d 181 (1983)).

⁸ *Id.*

⁹ *Shuey v. United States*, 92 U.S. 73 (1875).

Peru.¹⁰ Some sixty-six years after the *Ker* decision, the Supreme Court would hear a third case involving forcible abductions, this time between two American states.¹¹ These cases, when taken together, established a firm orthodoxy in American legal practice, known as the *Ker-Frisbie* doctrine, under which forcible abductions became an accepted instrument of long-arm criminal law enforcement. Due Process, under this original rule, was conceived as applying only to those elements which make for a fair trial, rather than the manner in which one is brought to court.¹² Since its establishment however, the scope of Due Process protection has expanded immensely, now covering not only the right to a fair trial, but even pre-indictment and pre-trial considerations which bar either prosecution or the use of particular evidence.¹³ This expansion of general Due Process has generally not been extended to overcome the *Ker-Frisbie* doctrine. During this time though, use of forcible abductions was truly irregular. Neither policy nor doctrine suggested its use. It was, as a result, an exception carved largely as incident rather than policy. Threats of international terrorism shifted this posture.

Throughout the mid-1980s, Department of Justice policy fell in accordance with an internal legal memorandum, finding that Executive branch officials “have no law enforcement authority in another nation unless it is the product of that nation’s consent.”¹⁴ Abductions, under this jurisprudence, were not to be conducted without the consent of the *host state*. Experience with

¹⁰ *Ker v. People of the State of Illinois*, 119 U.S. 436, 7 S.Ct. 225 (1886).

¹¹ *Frisbie v. Collins*, 342 US 519 (1952).

¹² *Supra Ker v. Illinois*

¹³ *Supra Bassiouni*

¹⁴ Department of Justice, Office of Legal Counsel Memorandum 543, March 13, 1980, as quoted by: Jenkins, Vlad, “Bringing Terror to Justice: The Extra-Territorial Arrest of Fawaz Yunis,” Kennedy School of Government Case Program, C16-90-960.0, p.5.

international terrorism during the Reagan years corroded that presumption. Fresh from fiascos like the hijacking of the *Achille Lauro*¹⁵ and Germany's unwillingness to extradite TWA Flight 847 hijacker Mohammad Hamadei,¹⁶ a growing sense of frustration built over apparent foreign governments' unwillingness to cooperate in antiterrorism law enforcement. Some policymakers also feared that suspected terrorists in some states could not be extradited, due to a liberal interpretation of the political offense exception found in most treaties.¹⁷ Drawing from the long historical record of forcible abductions and an emergent Congressional push to expand extraterritorial jurisdiction in cases of international terrorism,¹⁸ some within the Reagan Administration sought to reverse the Justice Department's position.¹⁹ In 1989, the Office of Legal Counsel at the Department issued a second memorandum, authorizing the FBI to "use its statutory authority to investigate and arrest individuals for violating United States law, even if the FBI's actions contravene customary international law."²⁰ Growing jurisprudential acceptance of forcible abductions in cases of terrorist prosecutions finally surfaced in the administration of George H.W. Bush. Under still classified National Security Directive 77 (NSD-77), President Bush provided procedural

¹⁵ For more see: Bohn, Michael K., *The Achille Lauro Hijacking: Lessons in the Politics and Prejudice of Terrorism*, Potomac Books, Inc., 2005.

¹⁶ Supra Jenkins

¹⁷ Fitzpatrick, Joan, "Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond," *Loyola of Los Angeles International & Comparative Law Review*, 25 *Loy. L.A. Int'l & Comp. L. Rev.* 457, Summer 2003, p.5; See the European Convention on the Suppression of Terrorism (1977), *Europ. T.S. No. 90*, 15 *I.L.M.* 1272, for an example of a counterterrorism treaty void of a political offense exception. Note, a number of extradition treaties have been renegotiated to narrow the scope of the political offense exception. Likewise, there appears to be a trend toward reinterpreting what is meant by the political offense exception, so as to exclude terrorism as being "politically motivated." *Id.*

¹⁸ See Generally: 18 U.S.C. §2331 (establishing long-arm jurisdiction for the taking of U.S. hostages abroad, hijacking of U.S. aircraft, or actions which threaten American interests abroad) and 18 U.S.C. §1203 (providing for criminal jurisdiction over persons who committed terrorist acts abroad and are "found to be" present within the United States).

¹⁹ Supra Jenkins

²⁰ Office of Legal Counsel, Department of Justice, "Authority of the Federal Bureau of Investigation to Override International Law In Extraterritorial Law Enforcement Activities," June 21, 1989.

guidelines relative to the appropriate forceful measures to effectuate an extraterritorial non-consensual arrest.²¹ It was under this authority that forcible abductions of suspected narcotics dealers were executed in Mexico.²² President Clinton went one step further. Shortly after the 1995 Murrah Federal Building bombing in Oklahoma City, President Clinton issued Presidential Decision Directive 39 (PDD-39), clarifying the legal instruments available for deterring, defeating, and responding to acts of terrorism against the United States.²³ Under PDD-39, federal law enforcement is tasked to “vigorously apply extraterritorial statutes to counter acts of terrorism and apprehend terrorists outside of the United States,” as “a matter of the highest priority...”²⁴ Before the tool of forcible abduction may be utilized under PDD-39 however, law enforcement bureaus are compelled to “take appropriate measures to induce cooperation.”²⁵ Although the scope of what measures may be deemed sufficiently appropriate remains unclear, they may be interpreted to include economic and diplomatic sanctions.²⁶ Connivance of the *host state* would first be sought and, if those efforts failed, non-consensual abductions would follow. A clear reversal of previous policy.

One early application of this authority for counterterrorism took place at 7 AM on February 7, 1995, as four FBI Agents, one DEA agent, and seven heavily armed Pakistani special forces soldiers burst, guns drawn, into Room 16 of the

²¹ Although NSD-77 remains classified, inclusion within the below-discussed Presidential Decision Directive 39 of a reference to NSD-77 as providing the procedures for these activities serves to verify its content.

²² *United States v. Alvarez-Machain*, 504 US 655 (1992).

²³ Presidential Decision Directive-39, “U.S. Policy on Counterterrorism,” June 21, 1995.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Slater, Matthew A., “Trumpeting Justice: The Implications of U.S. Law and Policy for the International Rendition of Terrorists From Failed or Uncooperative States,” *International and Comparative Law Review*, University of Miami, 12 U. Miami Int’l & Comp. L. Rev. 151, p.6.

Su-Casa guesthouse in mid-town Islamabad.²⁷ Once in, they quickly tackled, bound, gagged, and hooded the suspect, and shortly thereafter placed him onto a U.S. Air Force 707 military jet headed directly for New York.²⁸ The suspect, a one Ramzi Ahmed Yousef, was an infamous professional international terrorist, an indicted co-conspirator of the 1993 World Trade Center bombing²⁹ and the mastermind of numerous other plots to, *inter alia*, assassinate an American President, assassinate Pope John Paul II, bomb national landmarks in New York and Washington, D.C., and detonate explosives aboard some twelve American airliners traveling over international waters around the world.³⁰ Pakistani government officials “bent over backwards” to assist American agents in the Yousef abduction, namely because then-Prime Minister Benzanir Bhutto wished to show that she was “tough on terrorism.”³¹ Of course, this instance of abduction was equally the product of American action as it was Pakistani action, but in some instances of connivance, the host state acts exclusively, though at the request of the *seeking state*. According to reports, similar plans were devised for the forcible abduction of lead terrorist operator Khalid Sheikh Mohammed (KSM) in Doha, Qatar and Usama bin Ladin (UBL) at Tarnak Farms, Afghanistan.³²

In May of 1998, the Clinton Administration again reiterated its recognition of extraterritorial forcible abductions as an instrument of counterterrorism by

²⁷ Reeve, Simon, The New Jackals: Ramzi Yousef, Osama Bin Laden, and the Future of Terrorism, Northeastern University Press, Boston, Massachusetts, 2002. p. 101-110.

²⁸Id.; Coll, Steve, Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden, From the Soviet Invasion to September 10, 2001, Penguin Books, New York, New York, 2004. p.272-274 .

²⁹ *United States v. Yousef*, 2d. Cir., 327 F.3d 56 (2003).

³⁰ Benjamin, Daniel and Steven Simon, Age of Sacred Terror, Random House Publishing, New York, NY, 2002.

³¹ *Supra* Reeve, p. 103

³² National Commission on Terrorist Attacks Upon the United States, “Diplomacy,” Staff Statement No. 5, p.2-4.

issuing PDD-62. Although still classified, open source material indicates that it includes ten policy agendas toward countering terrorism, among which the “Apprehension, Extradition, Rendition, and Prosecution” of international terrorists tops the list.³³ Through nearly a decade of growing pains, issuance PDD-62 marked a watershed point; forcible abductions had become an accepted policy instrument within the counterterrorism community.³⁴

11 September 2001 caused a fundamental pivot point in the genesis of the forcible abduction instrument. Prior to that time, counterterrorism fell largely within the sphere of criminal enforcement. Renditions of all stripes were exclusively comprehended as instruments for prosecution, not combatant detention or interrogative purposes. Although air piracy,³⁵ use of the four aircraft as weapons of mass destruction,³⁶ transnational terrorism,³⁷ murder of government officials,³⁸ destruction of government property,³⁹ and conspiracy⁴⁰ are all federal crimes, all three branches of government took those actions to qualify as acts of war.⁴¹ In this sense, then, the whole is of greater significance than the sum of its parts. The nation is at war, and at war with al-Qa’eda and those affiliate movements and organizations which directly threaten the United States and its interests. Because the war is understood to extend beyond those immediate actions and into the realm of general warfare, counterterrorism

³³ Id. p.7.

³⁴ Importantly, plans involving the Central Intelligence Agency’s use of forcible abductions for intelligence purposes also arose at this point, as discussed in the second monograph of this article.

³⁵ 49 U.S.C. App. 1472

³⁶ 18 U.S.C. §2332a

³⁷ 18 U.S.C. §2339b

³⁸ 18 U.S.C. §115

³⁹ 18 U.S.C. §1361

⁴⁰ 18 U.S.C. §371

⁴¹ Notably, Congress recognized this state of war by passing an Authorization for the Use of Military Force (AUMF) shortly after September 11th.

operations may lay within both the province of criminal law or that of armed conflict. To date, most activity conducted against the al-Qa'eda network favors intelligence, covert action, and armed conflict, rather than law enforcement. As a result, forcible abductions for the purposes of criminal prosecution within the context of the Global War on Terrorism (GWOT) may remain in temporary hiatus until such time as criminal law is again the favored instrument. In any case, the policy if not exercised, still remains. But, whatever the established practice, a legal synthesis is no less warranted.

II. Constitutional Framework

In executing extraterritorial forcible abductions against international terrorists within the GWOT, the President relies upon four distinct Constitutional authorities: (a) Chief Executive, (b) Commander-in-Chief, (c) Customary Executive Practice, and (d) Foreign Relations Authority.

A. Chief Executive Authority and Extraterritorial Forcible Abductions

Law enforcement is, without a doubt, an essential part of the Executive function. The scope of that authority's exercise extraterritorially is defined in part by its jurisdiction. As it relates in most contexts, it is a "longstanding principle of American law" that legislation passed by Congress is presumed not to apply extraterritorially unless expressly stated otherwise.⁴² Within the province of

⁴² Courts also maintain the authority to hear *habeas corpus* claims in spite of a territorial nexus, see generally: *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 114 L.Ed.2d 274, 11 S.Ct. 1227 (1991).

criminal enforcement, extraterritorial jurisdiction is recognized in one of four contexts,⁴³ following the protective principle, the nationality principle, the passive personality principle and that of universality.⁴⁴

Under the protective principle of extraterritorial jurisdiction, a state is granted the right of prosecution when the actions of an alleged criminal threaten its critical functions. Although the scope of the principle is decidedly subjective, dependent upon interpretation of state interests, it is often best defined as listed within treaties of extradition and issue-specific conventions.⁴⁵ Given the nature of threat posed by international terrorism, the protective principle has been deemed applicable.⁴⁶ The nationality principle, otherwise known as the principle of active personality,⁴⁷ permits a state to assert jurisdiction over its own nationals acting abroad. It is not the general practice of Congress to include, or imply, criminal jurisdiction on this score, though use of general extraterritorial clauses may be read to do so.⁴⁸ Whereas the active personality principle asserts jurisdiction relative to the nationality of the alleged criminal offender, the principle of passive personality asserts jurisdiction relative to the nationality of the victim.⁴⁹ Although early 20th century exercise of this principle was opposed ardently by common law

They may also stretch to find such jurisdiction, see generally: *Rasul v. United States*, 72 U.S.L.W 4596 (2004).

⁴³ The chief form of jurisdiction falls within the principle of territoriality. As one court has noted, “[a]ll the nations of the world recognize the principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done,” *Rivard v. United States*, 5th Cir., 375 F.2d 882, 887 (1967). Territoriality has been conceptually expanded by significant proportions, particularly when applying conspiracy statutes. See generally: *United States v. Ricardo*, 5th Cir., 619 F.2d 1124 (1980). A second species of territoriality, namely *objective territoriality*, is also recognized, although is generally considered inapplicable to terrorism related offenses. See: *Supra Dycus et al*, p.842.

⁴⁴ Restatement (Third) of Foreign Relations Law of the United States § 402 (1986), RESTAT FOREIGN REL THIRD 432; See also: *Chua Han Mow v. United States*, 730 F.2d. 1308 (1984).

⁴⁵ *United States v. Birch*, 470 F.2d 808 (4th Cir. 1972); *United States v. Gonzalez*, 776 F.2d 931 (1985).

⁴⁶ *Supra United States v. Yousef*

⁴⁷ *Supra Bantekas* p.151; See also *United States v. Walczak*, 783 F.2d 852 (1986).

⁴⁸ Watson, G.R. “Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction,” *Yale Journal of International Law*, 17 *Yale J. Int’l L.* (1992).

⁴⁹ *Supra Bantekas* p.152-154; See also: *United States v. Roberts*, 1 F.Supp.2d 601 (1998).

countries,⁵⁰ Congress enacted the Omnibus Diplomatic Security and Anti-Terrorism Act in 1986 granting federal courts jurisdiction in cases of extraterritorial murder of American citizens.⁵¹ Assertion of passive personality jurisdiction has been upheld in court⁵² and reiterated by further statutes.⁵³ The principle of universality, unlike the protective principle, requires no substantive nexus with the United States, its citizens, or its national interests.⁵⁴ Instead, under assertion of universal jurisdiction, as British Attorney General Lord Peter Goldsmith has asserted, “there are some crimes which are so heinous, such an affront to justice, that they can be tried in any country.”⁵⁵ There are those who contend that terrorism, like slavery,⁵⁶ piracy,⁵⁷ or crimes against humanity,⁵⁸ pose such considerable threat to the greater whole of mankind that any court at any time and in any place maintains jurisdiction to try the alleged offender.⁵⁹ But this interpretation is not widely accepted. In prosecuting rendered terrorist Ramzi Yousef, the government relied upon an assertion of universal jurisdiction for terrorism related offenses, a claim which was promptly reversed by the Second

⁵⁰ Id.

⁵¹ Id.

⁵² *United States v. Yunis*, D.C. Cir., 924 F.2d 1086 (1988)

⁵³ See, for instance, 49 U.S.C. §1472(n)

⁵⁴ See generally: Randall, Kenneth C., “Universal Jurisdiction Under International Law,” *University of Texas Law Review*, 66 *Tex. L. Rev.* 785 (1988) and Abramovsky, Abraham, “Extraterritorial Jurisdiction: The United States’ Unwarranted Attempt to Alter International Law in *United States v. Yunis*,” *Yale Journal of International Law*, 15 *Yale J. Int’l L.* 121 (1990).

⁵⁵ As quoted in: “UK Court Convicts Afghan Warlord of ‘heinous’ Crimes,” *The Guardian*, Monday, July 18, 2005.

⁵⁶ Bassiouni, M. Cherif, “International Crimes: Jus Cogens and Obligatio Erga Omnes,” 59 *Law & Contemp. Probs.* 63 (Autumn 1996).

⁵⁷ *Democratic Republic of Congo v. Belgium*, Arrest Warrant of 11 April 2000, 2002 I.C.J., separate opinion of Judge Guillaume (limiting universal jurisdiction to the crime of piracy).

⁵⁸ *Prosecutor v. Nikolic*, Case No. IT-94-2-R61, Judgment of the International Criminal Tribunal for the Former Yugoslavia.

⁵⁹ See Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice*, New Press, January 2003.

Circuit Court of Appeals.⁶⁰ Terrorism, the court found, can scarcely be defined, to say nothing of being universally condemned.⁶¹

Although most criminal statutes providing for extraterritorial application do so only generally, the wealth of Congressional actions and treaties providing such jurisdiction in terrorism-related cases can be read to underscore Congressional assent therein. The question is left to what species of extraterritorial jurisdiction may apply. With respect to terrorism prosecutions, the most probable forms of extraterritorial jurisdiction will likely entail the protective and passive personality principles.

Whether jurisdiction be recognized through the protective or passive personality principles, law enforcement bureaus are tasked with the express authority to investigate alleged criminal conduct, detain, and refer cases for prosecution.⁶² Obtaining the body, in this sense then, is an intrinsic necessity of performing the law enforcement function. No court holds within its competence the authority to issue an arrest warrant for a non-citizen extraterritorially.⁶³ Members of the law enforcement community, however, are not bound exclusively by a warrant to effectuate an arrest. Warrantless arrests, according to that rule, may take place “when an officer has probable cause to believe a suspect has committed a felony.”⁶⁴ Typically, such an action would follow both the issuance

⁶⁰ Supra *United States v. Yousef*

⁶¹ Id.

⁶² FBI’s arrest authority may be found at: 28 U.S.C §533(1) and 18 U.S.C. §3052. DEA’s authority may similarly be found at: 21 U.S.C. §878, but this authority relies upon a presumption against extraterritorial application (see: supra *Alvarez-Machain*).

⁶³ 18 U.S.C. §3041-3042 grants courts the authority to issue extraterritorial arrest warrants only to United States citizens and nations who are fugitives from justice and charged with or convicted of a federal crime; Supra *Abbell*.

⁶⁴ Federal Rules of Criminal Procedure, Rule 4(C).; *United States v. Watson*, 423 U.S. 411, 418, 421 n. 11, 96 S. Ct. 820, 47 L.Ed.2d 598 (1976); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct.280, 69 L.Ed. 543 (1925).

of an arrest warrant and perhaps an INTERPOL Red Notice.⁶⁵ Further, operating under the Department of Justice's 1989 memorandum regarding extraterritorial law enforcement activities,⁶⁶ law enforcement officers would be supported both by acts of Congress and internal Executive memoranda. In those instances where the Executive and Legislative departments are of one mind, Presidential Executive authority is at its zenith.⁶⁷

B. Commander-in-Chief Authority in GWOT Abductions

Although the actions of the Executive in conducting extraterritorial forcible abductions revolve principally around law enforcement, like in the cases of luring⁶⁸ and expulsion,⁶⁹ and do not appear to materially involve intelligence or military applications of force, Commander-in-Chief authority would appear limited on first blush. Invocation of Commander-in-Chief status, as conceived in modern times, is scarcely relevant to the application of force for reasons other than the protection of the United States or its vital interests. But, as we have seen in the years following the initiation of hostilities, threat neutralization relative to international terrorism comes on myriad dimensions. Law enforcement is one. As a consequence, the President would no doubt contend, courts are therefore

⁶⁵ An international Red Notice refers to a posting listed by INTERPOL headquarters and disseminated to the National Central Bureaus (NCBs) of all member states, requesting the arrest of a particular individual, generally for particularly heinous crimes. For more on the INTERPOL Notice System see: McNabb Associates, P.C., "Interpol" at: <http://www.internationalextradition.com/interpol.htm>; See also: Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases*, Transnational Publishers, Ardsley, NY, 2004.p. §1-8 -§1-11.

⁶⁶ Supra Office of Legal Counsel, Department of Justice, June 21, 1989.

⁶⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), (hereinafter: Steel Seizure Case), concurring opinion J. Jackson.

⁶⁸ Supra Bassiouni

⁶⁹ Id.; McNabb, Douglas C. and Matthew R. McNabb. "And the Gloves Came Off," *The European Lawyer*. October 2005. p.38-39.

bound to “indulge the widest latitude of interpretation to sustain [the President’s] exclusive function to command the instruments of national force, at least when turned against the outside world.”⁷⁰ Latitude, in so far as the Commander-in-Chief authority is concerned, is limited to the exertion of force for protecting its own, enveloped by the protective principle of extraterritorial criminal jurisdiction.

But exercise of this force does not come without Congressionally mandated parameters. After all, the Supreme Court has noted, “we submit ourselves to rulers only if under rules.”⁷¹ Congress, and not the President, is vested with the sovereign authority to declare war, establish the laws applicable in that war, grant letters of marque and reprisal to private citizens in conducting those actions, make rules concerning captures on land and sea, and to make all other laws necessary and proper to fulfill such functions.⁷² Although law enforcement may be considered a species of threat neutralization, the parameters of its exercise have been rightly circumscribed by Congress. Unless the post 11 September 2001 Authorization for the Use of Military Force (AUMF)⁷³ were to be read as an unprecedented expansion of Presidential authorities beyond traditional instruments of force, haphazardly bleeding the line between the exacting of military strength and law enforcement responsibilities, Commander-in-Chief authority independent of the Executive function cannot be found.

C. Customary Executive Practice

⁷⁰ Id.

⁷¹ Id.

⁷² Constitution of the United States of America, Article I Sec.8

⁷³ Authorization for the Use of Military Force (AUMF) 107th Congress, Public Law 107-40 [S. J. RES. 23], September 18, 2001.

Executive agencies have utilized extraterritorial forcible abductions as an instrument of criminal prosecution for well over a century.⁷⁴ At no time in this long history of its practice has Congress objected. According to the Supreme Court in the *Steel Seizures* case, in order for any given action to rise to the level of extraconstitutional gloss of Presidential power, it must consist in “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution.”⁷⁵ For most of its history, extraterritorial forcible abductions were aberrations to standard practice. But, with the progressive reversal in that posture outlined previously, into an overt policy with regard to counterterrorism, it would appear that such a custom is present. Executive custom, however, is not sufficient authority in and of itself. No President can claim to act solely on the basis of a past record laid by Presidents passed, were no Constitutional basis found.⁷⁶

D. Foreign Relations Authority

Presidential authority in the field of foreign affairs is derived, *inter alia*, from the President’s duty to appoint Ambassadors and other officials to negotiate treaties on behalf of the United States.⁷⁷ Federal authority appears traditionally to have been considered “in origin and essential character different from that over

⁷⁴ The record dates back no later than to *Supra Shuey*

⁷⁵ *Supra Steel Seizure Case*

⁷⁶ See generally: *Reid v. Covert*, 354 U.S. 1 (1957) (noting that customary gloss on Presidential power is limited by the powers expressly recognized within the Constitution) and *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (applying the same limitations to so-called “Inherent Emergency Powers” of the President).

⁷⁷ Art. II Sec. 2 Constitution of the United States of America

internal affairs.”⁷⁸ But while “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved,”⁷⁹ in the case of forcible abductions utilized with the end of criminal prosecution in mind, both law enforcement and foreign affairs are implicated. Indeed, though diplomatic relations are no doubt affected, the root and cause of such actions are derived within the sphere of domestic policy. As such, Presidential authority must be found elsewhere.

III. Statutory Challenges

Forcible abductions for prosecution face a number of statutory difficulties. First among these challenges is the federal kidnapping statute, which expressly provides for prosecution against any individual who “unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for ransom or reward,”⁸⁰ carrying up to life in prison⁸¹ without parole.⁸² The statute’s prohibition extends both domestically and extraterritorially.⁸³

Transposing this framework over the four variable fact-patterns discussed previously, it would appear that when the law enforcement community acts either with the connivance of the *host state* or on its own independent authority, the federal kidnapping statute would not apply. As noted previously, Rule 4(C) of the Federal Rules of Criminal Procedure implies legal permissibility of extraterritorial arrests in the cases at hand. Should a private individual act in a private capacity

⁷⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁷⁹ *Id.*

⁸⁰ 18 U.S.C. 1201(a)

⁸¹ *Id.*

⁸² Parole was abolished within the Federal System in 1987.

⁸³ *Supra* 18 U.S.C. 1201(a)

however, there can be little doubt that they remain eligible for prosecution under the statute; a vigilante is a vigilante. It is unclear though, as to whether a private individual, acting through contract with American law officials, perhaps having been deputized, could have criminal exposure for *his* actions. Within this intelligence arena such actors are known as “dirty assets,”⁸⁴ but use of private individuals who act at the behest of the law enforcement community is even more common, guided under Attorney General Guidelines relative to the use of confidential informants.⁸⁵ Under these guidelines, no member of the law enforcement community is permitted to authorize a confidential informant to “participate in an act of violence,”⁸⁶ or to “participate in an act designed to obtain information... that would be unlawful if conducted by a law enforcement agent.”⁸⁷ Forcible kidnapping is a crime of violence.⁸⁸ Thus, it would appear, no law enforcement official maintains the authority to use confidential informants for the purposes of extraterritorial forcible abductions or the interrogation therein.

IV. Constitutional Challenge of Due Process

Of the provisions in the Constitution which might be used to prohibit forcible abductions as a method for bringing a suspect into a given jurisdiction, the most troublesome is that of Due Process. The Fifth Amendment provides that

⁸⁴ See generally: Hitz, Frederick P. “Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA,” 25 Harv. J. Law and Pub. Pol. 765, 765-66 (2002); Thomas Baugher, “Swans Swimming in the Sewer: Legal Use of “Dirty Assets” by CIA,” Int’l J. of Intelligence and Counterintelligence Vol. 9 No. 4 435, 457 (1996).

⁸⁵ Attorney General’s Guidelines Regarding the Use of Confidential Informants, accessed online via: <http://www.usdoj.gov/olp/dojguidelines.pdf>

⁸⁶ Id. AG Guidelines III(C)(1)(b)(i) p.25.

⁸⁷ Id. AG Guidelines III(C)(1)(b)(i) p.25.

⁸⁸ See U.S. Sentencing Guidelines Manual §4B1.2; For more on federal sentencing issues relative to kidnapping see: Id. §2A4.1.

no person shall “be deprived of life, liberty, or property, without due process of law,” as does the Fourteenth Amendment place a similar restriction on the states. Collectively taken, the Due Process requirement constitutes a bedrock principle of equitability in the criminal process.⁸⁹

The first watershed case involving any model of forcible abduction reached the Supreme Court in 1886, in *Ker v. Illinois*.⁹⁰ Defendant Frederick Ker, while living in Peru, was indicted by an Illinois grand jury for larceny and embezzlement. After prodding by the Governor of Illinois at the time, President Andrew Johnson invoked the treaty of extradition between the United States and Peru by authorizing a Pinkerton Agent—a private security firm predating the Secret Service—to take custody of Ker from Peruvian authorities. Upon arrival however, the Pinkerton Agent quickly learned that, in the midst of war, the Peruvian capital city of Lima had been taken over by Chile. Instead of resorting to the long, troublesome process of extradition with either former Peruvian authorities or newly anointed Chilean officials, the agent forcibly abducted Ker, placed him onto a nearby boat, and took him back to the United States. Ker promptly sought for the court to divest itself of jurisdiction. The Supreme Court, on appeal, ruled that the principal issue of concern was not that of procedures taken to bring Ker to court, but instead revolved around whether or not the trial

⁸⁹ It is important to note here that a distinction has been drawn between extraterritorial application of the Fourth and Fifth Amendments. See especially: *United States v. bin Ladin*, S.D.N.Y., 132 F.Supp.2d 168 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁹⁰ *Supra Ker v. Illinois*

itself was sufficiently fair.⁹¹ Abduction was, as the district court held, a “mere irregularity” in procedure, insufficient to vitiate criminal jurisdiction.⁹²

Some sixty-six years after the Ker decision, the Supreme Court heard another case involving abductions, *Frisbie v. Collins*. A Michigan state prisoner, on petition for a writ of habeas corpus, alleged that he had been abducted in Chicago and brought back to Michigan to stand trial by Michigan police officers who had traveled there for that explicit purpose. The Supreme Court went on to uphold the Ker interpretation in holding that the sole factors in determining Due Process were “satisfied when one present in court is convicted of a crime after being fairly apprized of the charges against him and after a fair trial in accordance with Constitutional procedural safeguards.”⁹³ “There is nothing in the Constitution,” the Court reasoned, “that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”⁹⁴

Thus, under the newly accrued *Ker-Frisbie* doctrine, Due Process extended only to a fair trial, regardless of the method by which jurisdiction over the person was obtained. The judicial posture eventually came to be encapsulated in the maxim: *male captus bene detentus* –poorly captured, well detained, or the “Tough Luck Rule.”⁹⁵ Interestingly though, since *Frisbie*, the scope of the Due Process clause in other areas has expanded immensely, now covering not only the right to a fair trial, but even pre-indictment and pre-trial considerations which bar

⁹¹ Id.

⁹² Id.

⁹³ *Supra Frisbie v. Collins*

⁹⁴ Id.

⁹⁵ Bassiouni, M. Cherif, *International Extradition: United States Law and Practice*, 4th 2002 Edition, Oceana Publications, Dobbs Ferry, New York, 1996. p.217-295 (Hereinafter: Bassiouni 4th Edition)

either prosecution or the use of particular discovery. This expansion of general Due Process—with the exception of one case—has yet to extend to the Ker-Frisbie doctrine, however.

This exception to the Ker-Frisbie doctrine did not come until 1974, when the Second Circuit Court of Appeals ruled in the scandalous case of a one Francisco Toscanino,⁹⁶ establishing the first “shock the conscience” exception.

Toscanino, along with four others, was charged in the Eastern District of New York with conspiracy to import drugs.⁹⁷ According to Toscanino, pursuant to the indictment, members of the Montevideo police, acting as paid agents of the United States, lured him from his home in Montevideo.⁹⁸ As agreed, they met at a deserted bowling alley whereupon Toscanino was abducted, knocked unconscious, blindfolded, gagged, and thrown into the back of a car, and subsequently driven to the Uruguay-Brazil border.⁹⁹ When they reached Brazil, the kidnapers (members of the Montevideo police) handed him over to a group of Brazilians who proceeded to interrogate and torture him for some fourteen days.¹⁰⁰ Torture included the injection of fluids in his eyes and nose, electric shock administered to his ears, toes, and genitals, prolonged denial of sleep, and severe physical beatings.¹⁰¹ During this period of torture, the US Attorney for the Eastern District of New York prosecuting the case surprisingly received progress reports on the effectiveness of the interrogation.¹⁰² Toscanino was held

⁹⁶ *United States v. Toscanino*, 2nd Cir., 500 F.2d 267 (1974).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Supra* Bassiouni

incommunicado and was repeatedly denied requests to speak with any member of his family, the Uruguayan embassy, or a lawyer.¹⁰³ Eventually, he was taken to Rio de Janeiro, where he was drugged and placed on a flight to New York in the custody of U.S. agents. According to the Second Circuit, the treatment of Toscanino could not be reconciled with the expanded notion of Due Process, claiming that a court must

*divest itself of jurisdiction over the person of a defendant where it had been acquired as the result of the government's deliberate, unnecessary, and unreasonable invasion of the accused's Constitutional rights.*¹⁰⁴

Under this precedent, in order to divest itself of jurisdiction on Due Process grounds, a court must certify that the conduct be “of the most outrageous and reprehensible kind.”¹⁰⁵

It would not even be one year later however, that the same court found the exception to be extremely narrow. In this case, defendant Lujan was charged with eight others in conspiracy to import and distribute large quantities of heroin in the United States.¹⁰⁶ U.S. agents flew to Argentina undercover and asked the defendant (a licensed pilot) to fly them to Bolivia for the ostensible purposes of conducting business.¹⁰⁷ Once in Bolivia, the Bolivian police –acting as paid agents of the U.S.- detained Lujan, where he was barred from contacting the

¹⁰³ Supra *United States v. Toscanino*

¹⁰⁴ Id.. The court appears to have derived its authority to vitiate jurisdiction more from its supervisory Article III power, rather than from a jurisprudential understanding of Due Process. See also: Supra *United States v. Noriega* (finding no source of supervisory authority under which the court could divest itself of jurisdiction because an act of war was necessary to effectuate defendant's arrest).

¹⁰⁵ Id.

¹⁰⁶ *Lujan v. Gengler*, 2nd Cir., 510 F.2d 62 (1975)

¹⁰⁷ Id.

Argentinean embassy, a lawyer, or his family.¹⁰⁸ During the time of his detention, he was neither formally charged by the Bolivian government nor did the United States formally request his extradition. He remained in something of a legal black hole. American agents and Bolivian police proceeded to place him on a plane, whereupon he was arrested by the United States upon arrival to the United States.¹⁰⁹ According to the court, though Toscanino ensured that the government would not have *carte blanche* in the area of rendition, because no action by the government rose to the level of being a “deliberate, unnecessary, and unreasonable invasion of the accused’s Constitutional rights”¹¹⁰ the action did not violate his Due Process protections. In the end, the court concluded, “not every irregularity in the circumstances of the defendant’s arrival in the jurisdiction would vitiate subsequent legal proceedings.”¹¹¹ Taken together, *Toscanino* and *Lujan* essentially find that *male captus bene detentus* stands, except in those very rare instances of “serious violations of the 4th, 5th, 6th, and 14th amendments.”¹¹²

That same year the very same court again chose not to apply the “shock the conscience” exception. Defendant Lira was charged out of the Southern District of New York for conspiracy to import narcotics. While visiting the home of his common law wife in Santiago Chile, Lira was arrested by Chilean police allegedly acting on behalf of the United States, blindfolded, beaten, and tortured over a period of four weeks.¹¹³ Eventually he was placed onto a plane headed to New York, whereupon arrival he was promptly arrested by American

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² *Supra* Paust

¹¹³ Id.

authorities.¹¹⁴ According to the court, this torture did not rise to the level of the Toscanino exception, most notably because the maltreatment took place largely without direct American involvement.¹¹⁵ This same refusal to apply the exception was held in both the First¹¹⁶ and Fifth¹¹⁷ Circuits in the following few years. Toscanino's "shock the conscience" exemption was quickly eroding.

But by 1990 the Seventh Circuit declared the Toscanino exception officially dead.¹¹⁸ Juan Ramon Matta-Bellesteros petitioned the Seventh Circuit for habeas corpus relief, alleging that when he arrived to his home in Honduras from work he was surprised to find Honduran Special Troops ("Cobras") waiting for him, accompanied by at least four U.S. Marshals.¹¹⁹ He was handcuffed, hooded, and thrown onto the floor of a car driven by a U.S. Marshal, who proceeded to take him to a U.S. Air Force base an hour and a half away.¹²⁰ During the one and a half hour long drive he was apparently beaten and burned by stun guns at the direction of the U.S. Marshals.¹²¹ Once at the Air Force base, he was placed onto a plane headed to the U.S., whereupon he was again allegedly beaten and shocked all over his body by U.S. Marshals.¹²² Upon arrival to the United States, he was taken to prison and had to visit a doctor within twenty-four hours to care for severe abrasions and burns consistent with stun guns.¹²³ The Seventh Circuit held that while it did not condone the activities of the U.S.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *United States v. Cordero*, 1st Cir., 42 F.3d 697 (1981)

¹¹⁷ *Supra United States v. Lopez*

¹¹⁸ *Matta-Ballesteros v. Henman*, 7th Cir., 896 F.2d 255 (1990)

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Marshals, “Toscanino, at least as far as it creates an exclusionary rule, no longer retains vitality.”¹²⁴

With the Toscanino exception gasping for breath on its jurisprudential deathbed, the Supreme Court, for all intents and purposes, finished it off in *United States v. Alvarez-Machain*. Dr. Humberto Alvarez-Machain, a Mexican citizen, was indicted for participating in the torture and subsequent murder of a DEA agent in Mexico. Specifically, he was accused of keeping the agent alive throughout prolonged periods of torture, in order to maximize the amount of information that could be elicited from the agent.¹²⁵ DEA offered a Mexican official \$50,000 plus expenses for delivering Alvarez-Machain to the United States.¹²⁶ On April 2, 1990, five to six armed men burst into Alvarez-Machain’s office.¹²⁷ One showed him a badge of the federal police, another placed a gun to his head and told him to cooperate or be killed.¹²⁸ He was subsequently taken to a house in Guadalajara where he was forced to lie on the floor face down for two to three hours, while being shocked on soles of his shoes and twice injected with an unknown disorienting substance.¹²⁹ He was then transported to Leon where he was met by an man who identified himself as a DEA agent and would take him to El Paso, Texas.¹³⁰ Throughout the ordeal, DEA was heavily involved and those who participated in Mexico were generously compensated (some even relocated

¹²⁴ Id. Other circuits have held similarly.

¹²⁵ Supra *United States v. Alvarez-Machain*

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

to the United States at taxpayer's expense).¹³¹ The Supreme Court again chose to assert *Ker-Frisbie*, saying that the conduct of the officers in abducting Alvarez-Machain was immaterial to jurisdiction.¹³²

Once Alvarez-Machain faced trial, he was acquitted and filed suit against those involved in the abduction for a violation of the Foreign Tort Claims Act, to which the Supreme Court found a foreign civil immunity exception in favor of extraterritorial government action.¹³³ By 1997, the Eleventh Circuit would go as far as to conclude that an act of war would not give rise to any authority allowing “a court to exercise its supervisory power to dismiss an indictment based on harm done by the government to third parties.”¹³⁴

As a consequence of these cases, the general rule is this: *Ker-Frisbee* stands, *Toscanino* does not. Despite public and international outcry against the practice, American courts have declared resoundingly that forcible abductions do not alone vitiate jurisdiction on Due Process grounds.

Courts abroad often recognize an entirely different standard for Due Process, or whatever the general equivalent may be. Take, for instance, the rendition case of the ex-Nazi war criminal Adolf Eichman,¹³⁵ where after having been abducted in Argentina by private Israeli citizens, and brought back for trial, the court concluded that had the action been conducted by agents of the Israeli

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004)

¹³⁴ *United States v. Noriega*, 117 F.3d 1206 (1990)

¹³⁵ *Attorney-General of Israel v. Eichman*, 36 I.L.R. 5 (1962)

government, and not private citizens working in a private capacity,¹³⁶ then the court would be required to vitiate jurisdiction.¹³⁷ Likewise, were Argentina to contest jurisdictional grounds, which it had seized to do once the trial began,¹³⁸ then Israel may have been required to hand Eichman back over to the Argentineans.¹³⁹ Unlike American judicial interpretation,¹⁴⁰ the practice of vitiating jurisdiction on procedural objections has also persisted in British courts, among others.¹⁴¹ As a matter of American Constitutional law however, the law is settled; forcible abductions do not vitiate a court's jurisdiction.

V. International Legal Challenges

American Constitutional and statutory provisions are not, of course, the sole sources of legal challenge to forcible abductions. As international law would have it, the issue of legality revolves around threshold questions involving the degree of state responsibility in two concrete forms: *sovereignty* and *human rights*. That is, the state is bound to respect not only the rights of other states, but the rights of persons as well.

¹³⁶ Although it is widely agreed that the action was in fact a government sponsored forcible abduction, namely with the assistance and at the behest of the Israeli international intelligence and covert operations bureau, Mossad.

¹³⁷ Jones Q.C., Alun and Doobay, Anand, Jones and Doobay On Extradition and Mutual Assistance, Sweet & Maxwell, London, England, 2005. p.3-007 – 3-008

¹³⁸ Initially, Argentina did protest the Israeli action (see: 15 U.N.S.C.O.R., UN Doc S/4349), it seized its protest upon the initiation of criminal prosecution within Israel.

¹³⁹ Id.; In some instances, the issue of sovereignty is of less relevance because the government lacks effective control over the security of the state (see: Supra *Ker v. Illinois*) or because such territory is considered hostile territory in the midst of a declared war (see: *Chandler v. United States*, 1st Cir., 171 F.2d 921, cert. denied, 336 U.S. 918 (1949), *reli'g denied*, 336 U.S.S 947 (1949)).

¹⁴⁰ Supra *Alvarez-Machain*

¹⁴¹ Id. p. 3-009; Interestingly, initial practice of *male captus bene detentus* was largely predicated upon an early British case (*Ex p. Scott* 9 B&C 446 (1829)), although this trend was first reversed in British jurisprudence in 1982 (*Ex p. Mackeson*, 75 Cr. App. R. 24 (1982)). See: Bantekas, Ilias and Susan Nash, International Criminal Law: 2nd Edition, Cavendish Publishing, London, United Kingdom, 2003. p. 218-219 (discussing the origins of *male captus bene detentus*) and p.222-225 (discussing the “doctrine of abuse of process” and collusion by law enforcement agencies).

A. Sovereignty

The most crucial, and no doubt most controversial, threshold question to be broached is that of sovereignty. As general practice, those instances in which a given individual is forcibly rendered with the connivance of the *host state* pose no threat to sovereign rule.¹⁴² Non-consensual abduction, on the other hand, is far different. Sources of state sovereignty, in the Westphalian world,¹⁴³ are considered inherent and, with few exceptions,¹⁴⁴ absolute. But the definition and ultimate protection of that sovereignty comes principally from law, namely the United Nations Charter. The Charter states that “all members shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purpose of the United Nations.”¹⁴⁵ Successive international legal opinions have fortified the concept. In 1927 the Permanent Court of International Justice (PCIJ), in the *Lotus* case, struck down Turkey’s extraterritorial application of its domestic laws, namely because one state lacks the authority to exercise its power in the territory of another.¹⁴⁶ Following World War II, the ICJ went on to hold that one state cannot use force as remedy to the obstruction of passage in international waters.¹⁴⁷

¹⁴² See, for example: *Ocalan v. Turkey*, 37 E. H. R. R. 19 (2003). The case of *R. v. Horseferry Road Magistrates’ Court, Ex Parte Bennett*, [1994] 1 App. Cas. 42, [1993] 3 All E.R. 138, 3 W.L.R. 90, 98 Crim. App. 114. House of Lords, June 24, 1993, may be an exception. (See also: Wedgwood, Ruth, “Section Note: *R. v. Horseferry Road Magistrates’ Court, Ex Parte Bennett*,” 89 A.J.I.L. 142, January, 1995).

¹⁴³ The October 24, 1648 Treaty of Westphalia established the end of the Thirty Years War in Europe and gave rise the modern conception of the sovereign and independent state. Since that date, and largely up until the late 20th Century, the state was the primary actor with legal character in international relations and its derivative law.

¹⁴⁴ Exceptions may, for example, include the right of self-defense or various assertions on the grounds of *Jus Cogens* violations.

¹⁴⁵ United Nations Charter, Article II, Section 4

¹⁴⁶ *France v. Turkey*, P.C.I.J. No. 10 (1927)

¹⁴⁷ *United Kingdom v. Albania (Corfu Case)*, I.C.J. 1 (1949)

Some have argued that forcible abductions are also likely to be considered uses of force.¹⁴⁸ Most notable of exceptions to state sovereignty –particularly as it applies to the GWOT–includes Article 51 of the U.N. Charter, which permits the use of force to repel¹⁴⁹ “an armed attack.”¹⁵⁰ In essence, this exception is consistent with self-defense theory, but is understood to require a showing of: (a) an identifiable threat, (b) an imminence in threat and (c) inability to solve the problem using less extreme measures.¹⁵¹

Identification of a precise threat can prove difficult when placed into the context of a geographically boundless conflict waged, to some extent, against an ideologically indeterminate enemy.¹⁵² Distinguishing between those which pose a direct threat to any one state however, is operationally difficult, perhaps impossible. As a result, enormous latitude seems to be granted to Executive discretion (not limited to the United States) in assessing the degree to which any given individual, group, or organization threatens its security.

¹⁴⁸ See: Weissman, Kristin Berdan “Extraterritorial Abduction: The Endangerment of Future Peace,” 27 U.C. Davis L.Rev. 460, The Regents of the University of California, 1994 (arguing that forcible abductions are a form of “private reprisal” and therein considered an act of force).

¹⁴⁹ Some commentators assert that repelling an armed attack may come only after an armed attack has already taken place (see: Supra Weissman). This interpretation of repulsion is entirely inconsistent with a growing acceptance toward preemptive action in the face of international terrorism and weapons of mass destruction. In any case, the attacks of 11 September 2001 would likely serve as sufficient showing of an “armed attack” in so far as activation of Article 51 within GWOT may be concerned.

¹⁵⁰ United Nations Charter Article 51

¹⁵¹ Criteria of this sort is a matter of considerable debate within the international legal community, though perhaps the most widely cited standard is derived from the *Caroline* incident, where famed American Secretary of State Daniel Webster found that in order for preemptive measures to be taken, there must be “a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.” See Moore, John Norton, “The Use of Force in International Relations: Norms Concerning the Initiation of Coercion,” Chapter 4, in Supra Moore and Turner, p.69-206. Perhaps the greatest impediment to developing a singular norm for the use of preemption is derived in the failure to first define the nature of aggression. Aggression is unlawful under Article 2(4) of the United Nations Charter, and were an preemption deemed unlawful it would be considered so as a class of aggression. But without an overarching definition for aggression, any precise definition of a class therein is necessarily incomplete.

¹⁵² Though the present conflict has been dubbed the “Global War On Terrorism” most scholars would concede that the enemy can be more narrowly tailored to al-Qa’eda and its affiliate groups and/or movements. Distinguishing between those which pose a direct threat to any one state however is operationally difficult, perhaps impossible. As a result, enormous latitude seems to be granted to Executive discretion (not limited to the United States) in assessing the degree to which any given individual, group, or organization threatens the sovereign security of its state.

Perhaps the most troublesome of the requirements in modern days is that of imminence. Preemption has long been conceived, American statesman Daniel Webster once famously penned, as requiring a “necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.”¹⁵³ It was under the banner of this authority for preemption which the State of Israel used in the initiation of the Six Day War and later in the bombing of an Iraqi nuclear facility.

Modern interpretation of preemption –at least in so far as American policy reflects a change –altered radically upon the issuance of the National Security Strategy of the United States in 2002.¹⁵⁴ In that report the President implied that the specter of threats which now exist both within a sub-state realm (namely from non-state actors like terrorists) and in a technological era of mass-casualty yields (namely from weapons of mass destruction), renders the Webster requirements obsolete. The new paradigm is one of *prevention* rather than merely *preemption*; prevent terrorists’ future ability to strike rather than merely waiting for them to gain capacities to do so. Such reinterpretation compels the question of whether the GWOT exists within a climate where overt Executive action is deemed universally permissible in pursuit of self-defense. Any answer to that question is, to date, necessarily incomplete, limited to the interpretation of the interested party. Until an “uninterested,” supranational body with recognized authority within the state system, like the United Nations Security Council or International

¹⁵³ Moore, John Norton and Turner, Robert F., National Security Law, 2nd Edition, Carolina Academic Press, Durham, North Carolina, 2005. p.521

¹⁵⁴ The doctrine of preemption has been subsequently upheld by the National Security Strategy of the United States in 2006.

Court of Justice, takes it upon itself to redefine the aegis of permissible self-defense (or reassert the old paradigm), the interpretation and application of the self-defense requirement will likely be specific to the nature of the action and involved actors, or will be again delegated to the province of bilateral, or selectively multilateral, agreement.

Ultimately however, this reinterpretation of permissible threat neutralization has little applicability to the narrow instances of forcible abductions for criminal prosecution. Though, there can be little doubt, that the arrest and prosecution of alleged terrorists is itself a form of threat neutralization, because such action can take place only pursuant to federal criminal indictment, and because criminal prosecutions are themselves reactive rather than proactive, some injury against the state must be believed to have taken place. Whereas the instrument of ‘targeted killing’¹⁵⁵ may in certain cases be directed against perceived threats who, up to the point of execution, might never have committed an offense against the United States, alleged criminals are, by definition, believed to have committed an affirmative act against the state. This is not to suggest, of course, that such criminal conduct itself rises to an act against the state sufficient to trigger the right of self-defense, some of those rendered may be sought for white collar fraud offenses, for instance. But in so far as a link may be drawn between these alleged acts and terrorist activity, the rendition would still qualify under the pre 11 September doctrine of self-defense.¹⁵⁶

¹⁵⁵ For more on the legality of “targeted killing” see: Banks, William C. and Peter Raven-Hansen, “Targeted Killing and Assassination: The U.S. Legal Framework,” *University of Richmond Law Review*, 37 U. Rich. L. R. 667 (2003).

¹⁵⁶ The rendering of individuals for activities other than those which might be linked to terrorism fall beyond the scope of this note, though the forcible abduction of a given individual for autonomous crimes which

Taken collectively then, whether the interpretation of sovereignty is restrictive or expansive forcible abduction executed by the *seeking state* without the knowledge of the *host state* is impermissible unless qualified by a robust interpretation of self-defense.¹⁵⁷

Further, the Tokyo (1969), Montreal (1971), Hague (1971), and Hostage Conventions (1979) oblige contracting states to extradite or to prosecute alleged criminals (*aut dedere aut judicare*, extradite or prosecute),¹⁵⁸ particularly within the sphere of terrorism.¹⁵⁹ The United Nations Security Council has even gone so far as to impose economic sanctions where a state failed to extradite or prosecute alleged terrorists.¹⁶⁰ In those instances where a state fails in its obligation to appropriately address terrorists, and where another state maintains under the banner of its protective principle the right to prosecute, exercising that right may require infringement upon the sovereignty of another state. Failure of the *host*

would not be understood to trigger the right of self-defense would likely be outside of the self-defense exception and prove wholly irreconcilable with the supreme right of the state to be sovereign.

¹⁵⁷ What recourse for a violation of this principle, particularly when the action is law enforcement and not military in nature, is unclear. If military in nature, it is conceivable that a state may make claims of aggression, but positive action for recourse is unlikely in so far as the United States holds a veto in the United Nations Security Council, the only supranational body which maintains lawful authority to bring such recourse.

¹⁵⁸ Laflin, Melanie M., "Kidnapping Terrorists: Bringing International Criminals to Justice through Irregular Rendition and Other Quasi-Legal Options," *Journal of Legislation*, 26 J. Legis. 315, p.2-3; Convention on Offences and Certain Other Acts Committed on Board Aircraft, December 4, 1969, 20 U.S.T. 2941 (1969); Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1646 art. 7 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 565, 575 art. 7; International Convention Against the Taking of Hostages, December 4, 1979, 18 I.L.M. 1456, 1460 art. 8. See also European Convention on Suppression of Terrorism, opened for signature January 27, 1977, 15 I.L.M. 1272-76 (1976) (providing members to the Council of Europe a similar requirement); United States Draft Convention For the Prevention and Punishment of Certain Acts of International Terrorism, October 16, 1972, 678 Dep't State Bull (1972) as published in John Norton Moore, et al, *National Security Law Documents*, Carolina Academic Press, Durham, North Carolina, 1995. p.319-322; *Supra Bantekas* p. 160-161 (citing as the first multilateral treaty encouraging prosecution of non-extradited alleged criminals as the 1929 Convention for the Suppression of Counterfeiting Currency, 112 LNTS 371); *Nulyarimma v. Thompson* (Australian Federal Court, 1999), FCA 1192 (finding that *aut dedere aut judicare* is found within customary international law).

¹⁵⁹ This dictum is granted greater significance in light of United Nations Security Council Resolution 1373, S/RES/1373(2001) (mandating all member States take immediate action to criminalize terrorism related activity).

¹⁶⁰ U.N. Doc. S/RES/748 (1992) (imposing economic sanction against Libya for failing to extradite two nationals accused of bombing Pan Am flight 103 in 1988).

state under its treaty obligations to address terrorism does not vitiate the imperative of the *seeking state* to see to it that justice be met. Indeed, it may be said, the failure of the *host state* to meet its obligations may go far in reducing its claim in providing sovereign immunity to terrorists.¹⁶¹

B. Human Rights

In addition to the issue of sovereignty, as noted before, another possible objection from the sphere of international law is one of human rights.¹⁶² Human rights law, with respect to its applicability to forcible abductions, has its birth principally in the United Nations Charter and the International Convention on Civil and Political Rights (ICCPR).

1. United Nations Charter

Article 55, section c of the Charter requires that states promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁶³ It goes on to state that “all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.”¹⁶⁴ When these two treaty-based requirements are coupled with an ICJ decision declaring that “a denial of fundamental human rights is a flagrant

¹⁶¹ Others may assert that a similar imperative may exist were terrorism understood within the scope of the universality principle rather than within the scope of the protective principle. Although distinguishing the two is not of concern here, particularly where the claim to universality appear weak, although it would seem a dangerous incursion to the system of autonomous, sovereign states were the principle of universality sufficient to waive sovereignty claims in the face of extraterritorial forcible abductions.

¹⁶² International Humanitarian Law (or the Laws of War) are not applicable within the context of law enforcement activities, even though such actions are conducted during wartime.

¹⁶³ Universal Declaration of Human Rights (UDHR) Article 3

¹⁶⁴ *Id.*

violation of the purposes and principles of the charter,”¹⁶⁵ a clear requirement may be gleaned: states must observe human rights. What those rights consist in, however, is not so clear. The primary document in international law enumerating the most fundamental of individual rights is the Universal Declaration of Human Rights. In the declaration, individuals are promised rights to life, liberty, and security of person¹⁶⁶ and the right against arbitrary arrest, detention, or exile.¹⁶⁷ These rights largely mirror those found within the American Due Process clause, and are likely to be interpreted as providing prohibitions on those forcible abductions of alleged terrorists where conducting similar actions within the United States would vitiate one’s Due Process rights.¹⁶⁸ The natural question becomes whether or not the Declaration is binding under international law.

Upon creation, the Declaration was not, in the words of the ICJ, “in the nature of a treaty binding on the states.”¹⁶⁹ Some argue, however, that over the past fifty-seven years of its existence, the provisions have become part of the “general principles of international law” and should be considered an official interpretation of Article 55 of the U.N. Charter. The sole question, for scholars in that vein at least, is to whether abductions constitute violations of the Declaration. No American court, has recognized, or even addressed the issue, but eminent Professor Jordan Paust has written that the practice:

¹⁶⁵ *Legal Consequences For States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Advisory Opinion of 21 June 1971.

¹⁶⁶ Universal Declaration of Human Rights (UDHR) Article 3

¹⁶⁷ UDHR Article 9

¹⁶⁸ Note that this prohibition is especially weak. Under *Ker v. Illinois*, the act of forcible abductions within the domestic sphere are understood not to vitiate jurisdiction on Due Process grounds, the only question is whether a court –American, international, or foreign –would apply this principle neatly to the international legal sphere as well. It is thus likely wholly dependent upon what court the case is brought before. After all, because such actions are for prosecutorial purposes, likely pursuant to indictment, there exists no human right against criminal prosecution and the extraterritorial arrest therewith.

¹⁶⁹

*may not be incompatible with principles of justice, 'unjust', 'unlawful', or otherwise 'arbitrary' to abduct or capture an international criminal in a context where action is reasonably necessary, to assure adequate sanction against egregious international criminal activity.*¹⁷⁰

This would likely only enhance when dealing in the realm of national security. Indeed, he later rightfully notes that an abduction may even prove to be a less violent method of threat neutralization, and perhaps more proportionate as the laws of war require.¹⁷¹ In this regard, abduction satisfies not only the requirements under the charter, but also the later discussed *prima facie* dictum that obliges all states to use the most restrictive means to effectuate desired ends.

2. International Covenant on Civil and Political Rights (ICCPR)

An individual's second source of internationally recognized human rights is found amidst a motley collection of multilateral conventions of which the United States is a party. The International Covenant on Civil and Political Rights (ICCPR), for example, expands upon the United Nations Charter and the Declaration by establishing not only the shared right against arbitrary arrest and detention,¹⁷² but also asserts an international right of Due Process,¹⁷³ freedom of movement,¹⁷⁴ and right against being expelled from one's country in any manner other than the procedures established by law (except in national security

¹⁷⁰ Paust, Bassiouni, Scharf, Gurule, Sadat, Zagaris, Williams, eds., International Criminal Law: Cases and Materials, 2nd Edition, Carolina Academic Press, Durham, North Carolina. 2000.

¹⁷¹ Id.

¹⁷² International Covenant on Civil and Political Rights, Art. 4, December 16, 1966, 999 U.N.T.S. 171, 61.L.M. 368 (1967).

¹⁷³ Id.

¹⁷⁴ Id. Art. 12

instances).¹⁷⁵ Perhaps most important relative to forcible abductions though, are three protection provided for within ICCPR's Article 9. Article (9)1 states that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law,"¹⁷⁶ and Article 9(5) goes on to say that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."¹⁷⁷ Again, the question is raised as to whether the activity of law enforcement is covered within the specter of general law enforcement authority or under the threat neutralization mechanism offered by the post-11 September AUMF. Because law enforcement is bound by its own provisions, provisions which under American legal interpretation are not vitiated upon the presence of the "mere irregularity" of forcible abduction, it is unlikely that any American court would find provisions within the ICCPR to prohibit such activity.

C. U.N. Security Council Resolutions

It is long-established practice¹⁷⁸ that, as a member of the United Nations, the United States is bound by the edicts of the Security Council.¹⁷⁹ With respect

¹⁷⁵ Id. Art.13

¹⁷⁶ Id. Art. 9(1)

¹⁷⁷ Id. Art. 9(5)

¹⁷⁸ Cornell, Michael L., "A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction," 16 Conn. J. Int'l L. 325, Connecticut Journal of International Law, Spring 2005.

¹⁷⁹ See also: *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 54 (June 21, 1971) stating in part: "Security Council resolutions are binding on member states that must carry out the resolution;" Michael P. Scharf, "The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons From the Yugoslavia Tribunal," 49 DePaul L. Rev. 925, DePaul Law Review, Summer 2000, stating in part: "Under international law, a State has a duty to comply with its international legal obligations, including binding Chapter VII Security Council Resolutions, which take precedence over all domestic legal obligations. A State may not legitimately assert that it is unable to fulfill its international legal obligations on the basis that it is prohibited from doing so by domestic legislation, or that it lacks the necessary domestic authority."

to the international legal sphere, if not applicable to domestic legal application, these edicts trump domestic law.¹⁸⁰ It follows then, that the application of a Security Council resolution prohibiting forcible abductions which take place without the consent of the host state would apply equally to the United States as it did to the party to which it was initially directed. Responding to Israel's forcible abduction of Adolf Eichman in Argentina, the Security Council in 1960 denounced the move as contrary to standards of international law and a material breach in Argentina's sovereign territory.¹⁸¹ It remains unclear, albeit unlikely however, that a past Security Council resolution condemning one forcible abduction could be read to bind the United States from taking similar future action with respect to the ongoing GWOT. But one Security Council action does come squarely into play. Following the initiation of hostilities by the al-Qa'eda network on 11 September 2001, the United Nations took prompt action in passing Security Council Resolution 1373.¹⁸² UNSCR 1373, mandates that all states must criminalize terrorist related activity, end material support or safe-haven to international terrorists, and take necessary measures to end the financing regimes therein, and constructed a UN Counter-Terrorism Committee to oversee implementation of such provisions.¹⁸³ In a ministerial annex to UNSCR 1456 (2003), the Security Council addressed the issue of human rights applicability to counterterrorism measures, saying, in part that

¹⁸⁰ Id.; See also: U.N. Charter art. 25; Vienna Convention on The Law of Treaties, May 23, 1969, 1115 U.N.T.S. 331, art. 27; Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, 92d Cong., 1st Sess. 1 (1974).

¹⁸¹ U.N.S.C.R.. 138, U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960)

¹⁸² Supra S/RES/1373(2001)

¹⁸³ Id.; The UN Counter-Terrorism Community was further bolstered by the addition of a Counter-Terrorism Executive Directorate (CTED), under S/RES/1535(2004).

*States must ensure that any measure[s] taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.*¹⁸⁴

The Security Council in 2005 proceeded to pass UNSCR 1624, stressing that counterterrorism measures by member states must “comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.”¹⁸⁵ Where the rights provided criminal defendants, among others, within the Declaration and ICCPR may not be binding upon the President as such, the dictates of the Security Council have been so viewed. Again, however, because such activities are of a law enforcement nature, conducted consistent with American interpretations of lawful law enforcement activity, as evidenced by the avalanche of those cases upholding the Ker-Frisbie doctrine generally, it is unlikely that any American court would read post-11 September 2001 UNSCR actions as prohibiting forcible abductions when aimed at criminal prosecution.

C. Customary International Law

For a given practice to fall under the scope of custom, it “must be a widely-recognized practice of nations that states follow out of a sense of legal obligation.”¹⁸⁶ The Supreme Court in *Alvarez-Machain*, expressed doubt that

¹⁸⁴ S/RES/1456(2003), Annex (6).

¹⁸⁵ S/RES/1624(2005)

¹⁸⁶ Trudy, Timothy, “Did We Treaty Away Ker-Frisbee?” *St. Mary’s Law Journal*, 26 *St. Mary’s L. J.* 791, 1995, p.3.

such custom exists.¹⁸⁷ Ultimately however, a state is not obliged to act consistent with a custom if that state consistently rejects the practice.¹⁸⁸ Because, as discussed previously, the American Executive branch has consistently practiced and the American judiciary in turn has consistently upheld, forcible abductions since 1896,¹⁸⁹ little doubt remains that an exception to any possible custom against the practice has been carved. However, additional customary practice must also be considered.

The first *prima facie* challenge posed by international law to forcible abductions comes in the form of the Latin axiom *nunquam decurritur ad extraordinarium sed utoi deficit ordinarium* –never resort to the extraordinary until the ordinary fails.¹⁹⁰ As a well established principle of international law, this *rule of the extraordinary*, as it might be called, would permit the *Ker-Frisbee Doctrine* only after all alternatives had been exhausted. The watershed case for this rule came in 1959 before the International Court of Justice (ICJ), which established that where rights claimed by one state have been breached by another in violation of international law,¹⁹¹ all local remedies must first be exhausted before resorting to the ICJ.¹⁹² This general exhaustive rule has been subsequently interpreted to mean that states should not take extreme measures when non-

¹⁸⁷ Supra *Alvarez-Machain*. See also: Re Argoud, 45 I.L.R. 90, 98 (Cass. Crim. 1964) (France) (denying prosecutorial immunity to defendant abducted from Germany); Attorney General of Israel v. Eichmann, 36 I.L.R. 5, 6567 (Dist. Ct. 1961) (Israel) (basing personal jurisdiction over abducted defendant in United States case law) aff'd, 36 I.L.R. 277, 342 (S. Ct. 1962); Martin Feinrider, "Extraterritorial Abductions: A Newly Developing International Standard," 14 Akron L. Rev. 27, 28 (1980) (asserting that foreign courts generally uphold detentions resulting from improper captures). All citations here have been adapted from: Supra Trudy p.18.

¹⁸⁸ *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 27778, November 2001,

¹⁸⁹ Supra *Ker v. Frisbee*

¹⁹⁰ Supra Bassiouni

¹⁹¹ Supra Paust

¹⁹² *Switzerland v. United States of America* (1959)

extreme measures are available.¹⁹³ Ramzi Yousef, if this principle were to hold, should not have been abducted by the United States, in light of the fact that other alternatives were available.¹⁹⁴

A second procedural *pram facie* challenge to abductions in international law is best expressed by another Latin axiom, *Ex Injuria Ius Non Oritur*.¹⁹⁵ As the Roman counterpart to the American exclusionary rule, “it requires that certain violations of law not ripen into lawful results.”¹⁹⁶ One who commits an *injuria* must redress it apart from its result, and no lawful benefits may be accrued by the violator for his acts.¹⁹⁷ Under the rubric of forcible abductions then, this international norm would suggest that because an abduction is itself unlawful, particularly when conducted without the consent of the *host state*, the court would be required to vitiate its jurisdiction. This principle however, like the one preceding it, is just that: a principle, not a law. As a norm of international conduct it too is not binding, and thus cannot flatly prohibit the action.

Even if such customs were persuasive however, they remain merely general principles of law. Customary international law, according to Supreme Court interpretation, encourages the Executive towards or against particular actions, particularly in the absence of Congressional direction. But, as many American legal scholars have noted, international custom is not strictly binding in

¹⁹³ Supra Paust

¹⁹⁴ Traditional procedures of extradition may have been pursued, in addition to prosecution predicated upon likely criminal exposure within the *host* state of Pakistan.

¹⁹⁵ Supra Bassiouni

¹⁹⁶ Id.

¹⁹⁷ Id.

the same sense as might a treaty bind the Executive.¹⁹⁸ Under this practical, albeit no less dismissive, interpretation then, forcible abductions may be impermissible within the purview of international law, though not directly binding upon the President.

VI. Dodging the Treaty

As a general rule of practice, most foreign courts recognize the extradition treaty as being the sole source of authorized rendition.¹⁹⁹ Consequently, if the treaty permits only extradition by way of a formal process, all forms of irregular rendition are necessarily excluded and thus impermissible. Much to the successive consternation of American allies in the providing of mutual legal assistance, American courts have routinely ruled contrary to this general international norm. According to American case law, the scope of a given extradition treaty is conceived as merely outlining *a* method for rendition, not *the* method, which leaves alternative, extraordinary, or irregular methods available, in so far as the extradition treaty fails to explicitly prohibit them.²⁰⁰

¹⁹⁸ This interpretation of Executive authority is widely disputed, particularly when the noted customs of international law find a nexus with Federal common law. (See generally: Dycus, Berney, Banks, Raven-Hansen, ed, National Security Law, 3rd Edition, Aspen Publishers, New York, New York, 2002. P. 236-241). The conflict most vividly arises from conflicting interpretation of two cases: *The Paquete Habana* (175 U.S. 677, S. Ct. 1900) and *Mir v. Meese*, 11th Cir., 788 F.2d 1446 (1986). In *Paquete*, the court held that, “International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.” *Mir* went on to distinguish this framework by deciding that a decision by the Attorney General to detain illegal aliens from Cuba for an extended period of time constituted a “controlling executive act” within the *Paquete* definition, and thus was not overruled by international legal norms which prohibited such action. In any event, the judicial trend seems to be towards a general deferral to Executive decision, rather than to the norms or of international law.

¹⁹⁹ *Supra* Jones and Doobay p.79-102

²⁰⁰ This interpretation is most saliently made by the Court’s opinion in *supra United States v. Alvarez-Machain*.

Among the first watershed cases in the modern avoidance of extradition treaties was decided in 1980 by the 9th Circuit, *United States v. Valot*.²⁰¹ Steven Valot violated parole in the District of Hawaii by traveling to Asia and then to Nevada.²⁰² A warrant was issued for his arrest. In 1977 he was arrested and incarcerated in Thailand for marijuana related charges.²⁰³ On May 4, 1979, Thai officials brought Valot to the Bangkok airport and forced him to remain there until American DEA agents arrived, who then forcibly took him board a flight back to Honolulu.²⁰⁴ Valot contended that that his removal was in violation of the extradition treaty and prosecution was therefore barred. The court held that where no formal extradition request exists and the defendant is deported by the authorities of another country, and no “extradition” formally occurs, failure to carry out the requirements of the extradition treaty does not bar prosecution.²⁰⁵

The Supreme Court went on to uphold this principle twelve years later, in the much-discussed *Alvarez-Machain* case.²⁰⁶ On April 18, 1990, the Mexican embassy officially requested information from the Department of State on the details of the case, threatening that bilateral relations would be endangered if the allegations were true. Then, on May 16, 1990, the Mexican embassy again wrote to the State Department, this time contending that the abduction and detention of Alvarez-Machain was in violation of the extradition treaty. Only July 19, 1990, the embassy presented a third communiqué to State, this time requesting the arrest and extradition of any informants and the DEA agent who masterminded the

²⁰¹ *United States v. Valot*, 9th Cir., 625 F.2d 308 (1980).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Supra United States v. Alvarez-Machain*; See discussion above.

Alvarez-Machain abduction. Alvarez-Machain himself moved to dismiss the indictment, calling the government conduct outrageous.²⁰⁷

Although the controversial legacy of the American evasion of treaty law still remains, it stands among considerable dissent both inside and outside the courtroom. Justices Stevens, Blackmun, and O'Connor dissented vehemently in the *Alvarez-Machain* case, contending “that the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court’s interpretation.”²⁰⁸ When these actions are taken “without consent of the foreign government,” the dissenters quote the American Law Institute’s Restatement of Foreign Relations, “abducting a person from a foreign country is a gross violation of international law and... is a blatant violation of the territorial integrity of another state” and “eviscerates the extradition system.”²⁰⁹

VII. Political Ramifications

Taking action which is not only inconsistent with the judicial interpretations of courts around the world, but also a flagrant –if necessary – incursion of sovereignty undermines a state’s political reliability in the view of other states, roundly jeopardizing the integrity of mutual legal assistance and extradition treaties collectively. After the abduction of Dr. Humberto Alvarez-Machain, for example, Canada and Mexico, among a number of other states,

²⁰⁷ Information for this paragraph comes in part from case material and in part from Paust, Bassiouni, Scharf, Gurule, Sadat, Zagaris, Williams, eds., International Criminal Law: Cases and Materials, 2nd Edition, Carolina Academic Press, Durham, North Carolina. 2000.

²⁰⁸ *Supra Alvarez-Machain*

²⁰⁹ *Supra Bassiouni*

protested the apparent circumvention of treaty-law.²¹⁰ Some even submitted *amicus curiae* briefs to that affect.²¹¹ Similar reactions occurred in response to the Israeli abduction of Eichman.²¹² American use of extraterritorial non-consensual arrest alienates even its closest friends and allies by actively drawing into question the validity of its agreements.²¹³

International law is a precarious beast in that it mostly lacks enforcement mechanisms. It is, instead, formalized agreements based upon good faith, a faith which a nation willingly undermines by permitting or conducting abductions. American use of forcible abductions, as with all forms of rendition which actively ignore the presence of a treaty, may be viewed by some states as something ultimately more cancerous than an aberration from good faith procedures of rendition. It is, many states might contend, endemic to the stylistic *modus operandi* of American exceptionalism; an exceptionalism which must not be permitted to remain untouched. Of course, the degree to which any activity involves the connivance of the *host state* respectively alters the severity of this view. In those cases which involve a private citizen of any variety working in an exclusively private capacity, the international norm would seem to lean towards the Israeli court's view in *Eichman* that jurisdiction exists only in so far as the *host state* refuses to contest. Should the state contest jurisdiction, the individual would perforce be returned with apology.

²¹⁰ *Supra Alvarez-Machain.*

²¹¹ *Id.*

²¹² U.N.S.C.R., 138, U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960)

²¹³ Platt, Ian J., "International Law- All Nations Beware: United States Extradition Treaty with Mexico Does Not Prohibit Forcible Abductions- *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992)," Suffolk University Law Review, 27 Suffolk U. L. Rev. 271, Spring 1993.

Members of the American law enforcement community can be reassured however, that for the present most states within the GWOT regime –if it could be so called –would likely tolerate this exceptionalism. If a member of the al-Qa’eda terrorist network were identified in Europe, it seems reasonable in this milieu to believe that European authorities would be disinclined to protest the alleged terrorist’s forcible abduction, particularly if he/she did not hold European citizenship or was considered a high-value target and a danger to the community.²¹⁴ Indeed, most states would likely be inclined towards offering material assistance in the effort, again provided the individual either is not a citizen of that state or is deemed a serious danger to the community.

As with most things in a time of war, the latitude granted to state conduct expands immensely, but when the latitude permits exceptionalism to a perceived law –as many in the international community perceive the exclusivity of the extradition treaty –those exceptions weave their way into the fabric of the whole. Jurisprudence of whatever color has a baseline in precedent. By permitting the United States to continue its practice of ignoring the international norm, states seem to be drawing a line of permissibility around American actions in times of the extreme, thereby giving a card for American law enforcement officials to draw from the deck in the future. It could become, one might presume, an important precedent for the permissibility of such action.

How can states stop America from conducting forcible abductions should it deem it necessary? The answer is manifold, but among the tools are two

²¹⁴ To further bolster this assertion, it would seem that some European states, as will be discussed in Monograph 5 of this note, have been willing not to protest covert operations for third party interrogative renditions, an altogether far more precarious act.

general postures. First is the legal response. Members of the international community could very well undercut the root of the American judicial interpretation that a treaty is *a* method of rendition, rather than *the* method, by renegotiating their treaties of extradition. When an extradition treaty includes a compass provision of exclusivity, that is where it states that all other forms of rendition not mentioned are expressly forbidden, the loophole through which American law enforcement officials have been jumping since *Frisbie* would at last be ended.

The second posture is largely political. Because renegotiation of extradition treaties with the United States may prove infeasible or politically remiss, a state could seek an executive agreement²¹⁵ in some form that no individual would be forcibly abducted from either state without express permission (connivance) of the *host state*. By making such an agreement a state would allow American exceptionalism in times of crisis, but would likewise hold a firm contractual agreement with which the unwitting *host state* would hold even stronger quasi-legal grounds for dissent, thereby maintaining additional leverage against the *seeking*, or in this case aggressor, state. Whether this executive agreement could also be used to undercut the *Ker-Frisbee* avoidance of the treaty is unclear, but it certainly would provide a significant rostrum in international relations.

American exceptionalism is not to be a concern addressed by foreign states alone. Because all political relations exist within some version of game

²¹⁵ The does have the authority to enter into executive agreements without the express consent of Congress, see: *United States v. Pink*, 315 U.S. 203 (1942).

theory, in which a given political actor must take into account assessments of probability in what other actors may do, coupled with the intrinsic *quid-pro-quo* of normal political relations, the United States, however strong, must always be concerned with how it is perceived. Indeed, given the fragile nature of international law and its derivative political relations, it would be folly to believe that the inherent degradation to treaty law which comes as byproduct of forcible abductions does nothing against the credibility of American word. How can a nation so dependent upon its neighbors, particularly as the world becomes smaller and the state-system becomes weaker, face them in earnest when it overtly dodges agreements? The Executive branch must recognize that proud assertion of American right, even when it concerns a nation's most treasured necessity of security, may lead to an undesirable corrosion of its credibility. The neutralization of combatants is a priority of supreme importance during the GWOT, as in any wartime footing, but there is a right way and a wrong way for one to execute that war. Minimizing damage to the political, ethical, and legal institutions in the process of conducting operations is a vital interest to maintaining vitality in the infrastructure of that which is called America. This is not to suggest that forcible abductions are a modern innovation in the law or in law enforcement instruments, but their prolonged supply in time compounded by their more recent demand in frequency brings new light to their use as a method of American policing.

VIII. Conclusion

It appears that few courts, if any, would today be willing to recognize abductions as a violation of Due Process, or any other Constitutional right, or even any non-Constitutional right gleaned from or proscribed by treaty. Even the nature of the treatment by agents seems unlikely to affect the jurisdiction of the court –as the Toscanino exception slowly slips into legal irrelevance. The permissibility of abductions, whether by way of overt seizure or 3rd party connivance, becomes all the more strengthened when the subject matter, identity of the defendant, or nature of the crime reaches a nexus with national security interests, leaving any suspected terrorist virtually stripped of anything that might seem on first impression to be a right of free movement, or the ability to find refuge beneath the inveterate international edifice of state sovereignty. In the final analysis then, abductions for the purpose of obtaining possession over the body of a suspected criminal is decidedly lawful- particularly when used as a last resort –if ethically hazardous and politically unsound.

Third-Party Interrogative Renditions

The following is the second and last monograph of a two part series on the use of extraterritorial forcible abductions in the Global War On Terrorism (GWOT). This monograph discusses the use of these as the product of covert intelligence or military operations for the purposes of detention or third-party interrogative renditions.²¹⁶

I. Introduction

Despite successive waves of public expressions to the contrary, the entirety of the national security legal field did not completely revolutionize when nineteen al-Qa'eda affiliated hijackers turned four American airliners into weapons in the Fall of 2001. But this reality has done little to assuage some critics over the use of certain tactics to execute the newly realized war on any and all associated with those terrorists and their organization, the Global War on Terrorism (GWOT) as it has come to be known. Forcible abductions may themselves be one matter of contention, but when those abductions take place as a matter of American covert operation policy executed by the particularly clandestine Central Intelligence Agency (CIA), and then used not for prosecution but instead to bring about isolated detentions in undisclosed locations for potentially indefinite periods of time, the validity of such activities is drawn seriously into question. It is a point of pivot from the use of extraterritorial forcible abductions for prosecutorial purposes into the venue of clandestine intelligence sources and methods emblematic of the larger paradigm shift away from criminal prosecution found within the field of modern American

²¹⁶ Third-Party Interrogative Renditions have also been called “extraordinary renditions” or at times just “renditions,” but to maintain consistency, fluidity, and accuracy for this note, only this one term has been used to describe the same phenomenon.

antiterrorism. The ends, rather than the means, have changed. And from this change in ends, the practice of third-party interrogative renditions emerged; extraterritorial forcible abductions by one state within the territory of a second state with the aim of interrogation in a third altogether. Radical as the shift may be, what makes it of particular concern is the apparent frequency in its use. Initially meant to be used in extraordinary cases, hence the public terminology “extraordinary rendition,” public revelations over apparent instances alone indicate that it may be considered closer to ordinary. Like most instruments of counterterrorism, this one is not new to the post-September 11th milieu,²¹⁷ though heightened awareness and the influx of such activities thrusts it into the limelight of public discontent. Initiated by President Clinton, President Bush has reportedly maintained the covert action program and expanded its use by magnificent proportions. According to one report, “well over 100 people have disappeared”²¹⁸ since the commencement of the covert operation program. Another report has the number at upwards of some 150 individuals since September 11th alone.²¹⁹ Former Director of Central Intelligence George Tenet testified before the 9/11 Commission that the United States was involved in over 80 renditions prior to 9/11.²²⁰ CBS News’ 60 Minutes was able to track down some 600 flights to 40 different countries, a veritable “who’s who” of the State Department’s listed

²¹⁷ As discussed in section 3 of this monograph, authorization for third-party interrogative renditions came well before 11 September 2001.

²¹⁸ 60 Minutes, “CIA Flying Suspects to Torture?” CBS News, March 6, 2005.

²¹⁹ Mayer, Jane, “Outsourcing Torture,” The New Yorker, February 14, 2005.

²²⁰ Tenet, George, “Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States,” March 24, 2004.

human rights abusers, onboard a fleet²²¹ some writers have referred to collectively as Torture Air.²²² While the program was initially intended as an extreme last resort for high-value targets, the post- 9/11 environment has engendered an air of permissibility around the process, particularly in light of the newly recognize combatant –rather than criminal –status for terrorists. With such status, members of the intelligence and military communities are left with a choice: either send the suspect to Guantanamo Bay, Cuba, or another military or CIA-run camp,²²³ or ship him off to another country altogether. Indeed, as one commentator has noted, “in criminal justice, you either prosecute the suspects or let them go. But if you’ve treated them in ways that won’t *allow* you to prosecute them you’re in this no man’s land. What do you do with these people?”²²⁴

Why not interrogate the suspects ourselves? Explanations have been sparse, though in most instances it would seem that any lawful action that might be taken by a foreign intelligence service might as well be conducted by the American government, unless of course those foreign intelligence services are presumed to use tactics that are unlawful under American law.²²⁵ But that something should not be done does not by extension make it unlawful. And so it

²²¹This fleet appears to be principally owned and operated by private companies who contract their planes out to the CIA’s Special Collection Service, see: St. Clair, Jeffrey, “Torture Air, Incorporated: The Road to Rendition,” Counterpunch Online, Weekend Edition April 9/10, 2005, Oregon City, Oregon.

²²² Id.

²²³ There are reportedly CIA prisons running in Thailand, Qatar, Afghanistan, and elsewhere. (See: Supra Grey).

²²⁴ Supra Mayer

²²⁵ One important exception to this may include the benefit gained by having a fellow national interrogate the detainee, as it relates to the building of a rapport. But in the known instances of rendition, in addition to recorded human rights records of those countries to which detainees are rendered, tactics utilized by these foreign intelligence services appear to focus more on the forcing of a confession through coercive measures, rather than through the process of interview aimed at gleaning full and truthful information. Under these conditions, it would seem, nationality may be of little consequence.

is in the vein of profound remorse that such notes must be written to give due consideration to the legitimacy of the Executive's legal claim.

One fundamental difficulty in assessing what constitutes a third-party interrogative rendition comes about within the province of delineating fine line distinctions between whether a given suspect was rendered for the purposes of interrogation or, in light of the fact that many of these individuals are sought for various crimes in those countries to which we are rendering them, whether such renditions are instead for the purposes of prosecution. For those countries to which many of the suspects have allegedly been sent, there may be no distinction. Tough interrogation is, it would seem, an inherent instrument of typical Islamist prosecutions and/or detentions in many of those states.²²⁶ Thus, a nexus is reached between American interests to obtain information, and the interrogating state's interest to detain. Covert interrogative renditions then, are seen by many in the field as a move to bridge the gap, a *Pareto Improvement*²²⁷ to performance in the GWOT.

II. Constitutional Framework

Presidential authority relative to the execution of these renditions crosses the spectrum of his Constitutionally bequeathed powers. As the Chief Executive, he is bound to faithfully execute the laws passed by Congress, as Commander-in-

²²⁶ Amnesty International, "Torture and Secret Detention: Testimony of the 'Disappeared' in the 'War on Terror,'" AMR 51/108/2005, August 4, 2005; Human Rights Watch, "In the Name of Counter-Terrorism: Human Rights Abuses Worldwide," A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003.

²²⁷ A "*Pareto Improvement*" refers to the economic phenomenon whereby any given action makes at least one party better off without making another party worse off. In some instances, the given action may make both parties better off. Lieberman, Marc and Robert Hall, Introduction to Economics, 2nd Edition, Thomson SouthWestern Press, 2005.

Chief he is obliged to provide for the executive functions relating to the national security, and as chief foreign relations negotiator he is authorized to conduct and execute the details of American foreign policy. Within each distinct authority, in addition to a customary extraconstitutional gloss of Presidential practice, Presidential claims relative to the third-party interrogative renditions may be made.

A. Chief Executive Authority and Third-Party Interrogative Renditions

1. The Framework of Covert Action

From that which has been reported to date, third-party interrogative renditions have taken place as covert operations, rather than as extensions of law enforcement or military authority.²²⁸ Covert action generally “involves activities designed to influence foreign governments, events, organizations, or persons in support of U.S. foreign policy in such a way that the involvement of the U.S. is not apparent.”²²⁹ This may include anything from the development and dispersal of propaganda²³⁰ to espionage. Covert operations, on the other hand, are that form of covert action which typically involve a paramilitary operation.²³¹ Authority for these clandestine activities is broadly gleaned from the Director of Central Intelligence’s mandate codified in the National Security Act of 1947,

²²⁸ Although the military and/or law enforcement officials, it appears, may have been involved in some of the operations, provided actionable intelligence, or otherwise accepted the suspects for detention following the rendition, the primary actors seem to be officers with the CIA. Consequently, the laws of covert action are those most applicable restrictions.

²²⁹ Richelson, Jeffrey T., The U.S. Intelligence Community, Fourth Edition, Westview Press, Boulder, Colorado, 1999. p.349

²³⁰ See generally The Word War: Shulsky, Abram N. and Schmitt, Gary J., Silent Warfare: Understanding the World of Intelligence, Third Edition, Brassey’s Inc., Dulles, Virginia, 2002. p.84-86

²³¹ *Supra* Richelson

essentially granting him authority to direct five functions: (a) collect foreign intelligence, (b) provide effective overall direction for the intelligence community, (c) correlate and synthesize intelligence, (d) perform other function he determines would enhance efficiency, and (e) “perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.”²³² This fifth-function has been, despite original intent to the contrary,²³³ interpreted to offer statutory authority for the execution of covert action of all stripes.²³⁴ Though the Agency is understood to hold the power to conduct covert operations under this authority, other laws have narrowed the scope of what can be done and provide formal processes by which the programs may be approved.

Congressional restrictions regarding oversight have become pervasive since the 1974 enactment of the Hughes-Ryan Amendment.²³⁵ According to this amendment, in order for the CIA to exercise this “fifth function” for the purposes of covert action, it must satisfy two requirements. First, the President must find that the action is in the U.S. national security interests. At the time, these “Presidential Findings” –as they have come to be known –came either in writing or by verbal command.²³⁶ Additionally under Hughes-Ryan was the requirement that the President notify the appropriate Congressional Committees (8 in number)

²³² National Security Act of 1947, 50 U.S.C. §403 (d) (5); First exercise of this authority was conducted pursuant to NSC-4/A.

²³³ Supra Richelson, p.17.; See also: Supra Dycus, et al p.433 (noting that the issue of covert action was never raised within the legislative record).

²³⁴ See genesis of “Fifth Function” authority in Supra Dycus, et al, p.429-237; Rudgers, David F., “The Origins of Covert Action.” Journal of Contemporary History, Vol. 35, No.2 (April 2000), p.249-262; Damrosch, Lori Fisler, “Covert Operations.” The American Journal of International Law, Vol. 83, No.4, The United States Constitution in its Third Century: Foreign Affairs (October 1989) p.795-805; See also: Executive Order 12, 333 46 Fed. Reg. 59,941, Sec. 1.8(e) (1981).

²³⁵ Hughes-Ryan Amendment to the Foreign Assistance Act, Pub. L. No.93-559 §32, 88 Stat. 1804.

²³⁶ Id.

in a “timely fashion.”²³⁷ Ambiguities in what constituted a “timely fashion” were, as one might expect, exploited by the Executive.²³⁸ Thus, under this Amendment, Congressional Oversight was minimal.

Under the 1980 Intelligence Oversight Act, the system of Presidential Finding requirements was maintained, but the requirement for Congressional notification was scaled back to four, rather than eight, committees.²³⁹ Additionally, according to the act, Congressional notification was to take place prior to the act, not retroactively.²⁴⁰ If pre-approval was determined impossible, the President was then required to issue a secondary finding deeming non-notification to be the product of “extraordinary circumstances affecting vital interests” and would be required to nonetheless notify the Majority and Minority leaders of both houses of Congress and the Majority and Minority leaders of the intelligence committees in both houses.²⁴¹ Should the President still fail to provide notification, he would be required to “fully inform” the intelligence committees in a “timely fashion” and explain the failure to notify.²⁴²

Taking up on the deficiencies with the previous two Congressional Oversight acts, the 1991 Intelligence Oversight Act²⁴³ tightened the requirements of the Presidential Finding. Accordingly, the President is required to develop his Finding in writing,²⁴⁴ thereby providing a clear tie from the President to the policy. Additionally, the Finding is required to identify all U.S. agencies

²³⁷ Id.

²³⁸ Id.

²³⁹ Intelligence Oversight Act of 1980, Pub. L. No. 96-450, §407(b), 94 Stat. 1981 (1980).

²⁴⁰ Id.

²⁴¹ Id.

²⁴² Id.

²⁴³ Title VI Oversight of Intelligence Activities, Intelligence Oversight Act of 1991, 50 U.S.C. §501 et seq.

²⁴⁴ Id.

involved, any third party involved, and may not authorize any program which violates federal law or the Constitution or which is used to influence U.S. political processes, media, policies, or public opinion.²⁴⁵ Notification was bumped to a 48-hour pre-event notification.²⁴⁶

From the limited knowledge publicly available regarding the third-party rendition program, members of the CIA, at the direction of the National Security Council, were asked to devise a plan as to where rendered suspects could be taken for interrogation.²⁴⁷ The plan, once formulated, was subsequently then forwarded to President Clinton for signature in May of 1998, formally codified in still classified Presidential Decision Directive 62 (PDD-62).²⁴⁸ Presumably, because this operation falls under the covert action authority of the CIA, select members of Congress, under the oversight requirements, should have been informed of the program. As of yet, there appears to have been no such notification.

2. Congressionally Mandated Torture Prohibitions

All treaties fall into one of two categories: (a) self-executing and (b) non-self-executing.²⁴⁹ A self-executing treaty means that the treaty itself suffices as law of the land once ratified. Non-self-executing treaties, on the other hand, require further codification by, for example, criminal statutes which mirror provisions in the treaty. The Convention Against Torture (CAT) is non-self-executing. Consequently, following its ratification in 1994, Congress passed a

²⁴⁵ Id.

²⁴⁶ Id.

²⁴⁷ Supra 60 Minutes

²⁴⁸ Presidential Decision Directive 62 (PDD-62)

²⁴⁹ Supra Dycus et al, p.222-226.

criminal statute (*18 U.S.C. § 2340A*). Thus, in order to find the binding law regarding torture, one must look at the statute, not the convention.

With regard to rendition, Art. 3 sec. 1 of the CAT explicitly forbids the expulsion, return, or extradition of any person to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁵⁰ According to a Senate “understanding” attached to its ratification of the CAT which defines the substantial grounds requirements as to mean “if it is more likely than not that he would be tortured.”²⁵¹ In order to determine this, the convention goes on to say, “competent authorities shall take into account... the existence in the state concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.”²⁵² With regard to all of the named countries to which the United States has been rendering terrorist suspects for interrogation, a *prima facie* inspection of the CAT would seem to suggest that it flatly prohibits such renditions.

Because the binding source of law is derived from the statute and not the treaty, however, these provisions cannot be considered to be a binding prohibition. The statute, interestingly, does not prohibit those renditions. Instead, it merely prohibits the act of torture itself. One exception to that may be, of course, if the particular scheme could be considered conspiracy to commit

²⁵⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. (hereinafter referred to as the Convention Against Torture).

²⁵¹ Senate Understanding to ratification of the Torture Convention in 1994, II(1)(e)(2). Found in: Wise, Edward M., Podgor, Ellen S., and Clark, Roger S., International Criminal Law Cases and Materials, 2nd Edition, Matthew Bender & Company, Inc., LexisNexis, 2004. p. 282.

²⁵² *Supra* Convention Against Torture

torture.²⁵³ Nonetheless, unless the elements of conspiracy can be met, which is unlikely, no grounds for statutory prosecution would appear to exist.

It is interesting to note, however, that section 1242 the Foreign Affairs Reform and Restructuring Act of 1998, expresses the sense of Congress that:

*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.*²⁵⁴

Although this does not criminalize rendition for torture, it does mirror the provision in the CAT which forbids renditions for that purpose. Consequently, the President, by this expression, is urged against conducting those renditions in times of peace. The first question becomes, can the Executive overlook these provisions in times of war? Many of the President's lawyers, most notably former Deputy Attorney General John Yoo, have argued that the Commander-in-Chief authority grants the President precisely that authority.²⁵⁵ But because Congress alone holds the Constitutional authority to create the laws of war,²⁵⁶ if Congress intended it to apply in wartime, then there is little doubt that the President would be bound. Thus, the essential question becomes, did Congress intend for this prohibition to include times of war?

If interpretation were to go back to the CAT, the answer is relatively clear: Article 2 explicitly provides no exception for torture in wartime. Presumably, the

²⁵³ 18 U.S.C. §371

²⁵⁴ Foreign Affairs Reform and Restructuring Act of 1998, Section 1242 (1998).

²⁵⁵ Hentoff, Nat, "Sweet Land of Liberty," The Washington Times, February 28, 2005, Op/Ed; Supra St. Clair; Supra Mayer

²⁵⁶ U.S. Const. art. I, §10

following prohibition on renditions for torture would be included in that article. It is conceivable, one might presume, that an interpretation would not return to CAT, instead looking solely at the statutes and acts of Congress. No statute or act discusses war as an exception, thereby leaving one with one of either two interpretations: (a) it is to apply only in times of peace because Congress would have explicitly mentioned the wartime element as a recognition of their duty to make the laws of armed conflict, or (b) the Congressional will is presumed to apply in times of war as well because no equivocation was provided to the contrary. Which of those presumptions is employed will likely determine the outcome of the interpretation.

In an effort to ensure that all states complied with the basic premises of human rights amidst the GWOT, the United Nations security council passed a resolutions which commands states to “ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”²⁵⁷

The second question which arises is that of whether the “substantial grounds” test has been passed. It was, as a former lawyer with the Department of Justice’s Office of Legal Counsel has put it, “the Convention only applies when you know a suspect is more likely than not to be torture, but what if you kind of know? That’s not enough. So there are ways to get around it.”²⁵⁸ Because the CIA has apparently rendered most of its suspects to countries which are listed

²⁵⁷ United Nations Security Council Resolution 1456, S/RES/1456 (2003)

²⁵⁸ Supra Mayer

human rights abusers and are well-documented in their use of torture, and the CAT indicates the method of identifying “substantial grounds” for torture by looking at the given state’s record, it would seem at first impression reasonable to presume that they might be tortured. This is particularly true in light of the value of whatever information may be obtained through the use of unscrupulous means. To dodge the issue, the CIA has reportedly obtained executive agreements²⁵⁹ of some kind from these states to the effect that they will not be tortured.²⁶⁰ Such an agreement, the Administration would claim, waives any CAT objection. Because the United States has obtained a signed commitment from the foreign interrogators, it is no longer “more likely than not,” that the suspects will be tortured, per the Senate understanding. No interested party is under the illusion that the suspects will be treated well, the sole question is whether the expected ill-treatment is tantamount to torture. “The idea that we’re gonna suddenly throw our hands up like Claude Rains in ‘Casablanca’,” one former CIA official has said, “and say, ‘I’m shocked that justice in Egypt isn’t like it is in Milwaukee,’ there’s a certain disingenuousness to that.”²⁶¹

Others have questioned the validity of such agreements.²⁶² Torture is method of punishment or information acquisition endemic in the law enforcement or intelligence services of certain states, particularly within those to which the United States seems to be rendering suspected terrorists. The concern, for many

²⁵⁹Supra 60 Minutes

²⁶⁰ Id. It is unclear as to whether these agreements were ever signed, according to Michael Scheurer, a former high level CIA official.

²⁶¹ Supra 60 Minutes

²⁶² Human Rights Watch, “Diplomatic Promises: Diplomatic Assurances No Safeguard Against Torture,” Human Rights Watch Report, Vol.16, No.4(D), April 2004; Human Rights Watch, “Still At Risk: Diplomatic Assurances No Safeguard Against Torture,” Human Rights Watch Report, Vol. 17, No.4 (D). April 2005.

of the critics, is that “where governments routinely deny that torture is practiced, despite the fact that it is systematic or widespread, official assurances cannot be considered reliable.”²⁶³

Agreements between an Executive department of one state and the Executive department of another are not rare. Indeed, many elements of mutual legal assistance and intelligence cooperation are found within such agreements, and typically bring with them weight of law.²⁶⁴ But for an international agreement of the sort to have force and effect within the domestic arena, it must first go through the Department of State.²⁶⁵ In order to ensure that such agreements are carried out in accordance with American foreign policy objectives, statutory law, and the Constitution, the State Department maintains procedures²⁶⁶ requiring basic Congressional consultation and approval by the Secretary of State or his designee.²⁶⁷ National security related agreements provide no exception.²⁶⁸ Under revised editions of the Case-Zablocki Act, the Department of State was bequeathed the burden to approve all Executive agreements.²⁶⁹ Title 22, section 181.7(c) of the Code of Federal Regulations goes further, requiring the production of a summary, citation of legal authority, background, and rationale addendum to accompany every international

²⁶³ Human Rights Watch “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” Human Rights Watch Vol. 16 No. 4 (D) p.4

²⁶⁴ See: *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding a claims agreement sufficiently binding on the basis of Congressional acquiescence and established Executive custom).

²⁶⁵ Robert Dalton, “Treaties and Other International Agreements,” Chapter 18 of *Supra Moore, et al*, p.889-892.

²⁶⁶ 11 F.A.M. 720, U.S. Dept’t St., revised February 25, 1985, (known as Circular 175 Procedure).

²⁶⁷ *Id.*; *Supra Dalton*

²⁶⁸ *Id.*

²⁶⁹ Case-Zablocki Act, 1 USC 112b; Distinguishing authority for executive agreements from treaties is often difficult. As one commentator has noted, “[o]ne is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, but [no one]... has told us which are which.” (Henkin, Louis, “Litigating the President’s Power to Terminate Treaties,” *American Journal of International Law*, 73 *Am. J. Intl. L.* 647, 1979.)

agreement.²⁷⁰ According to the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), the Secretary of State is to annually submit a report containing an index of all such agreements, including those not publicly listed by the Department, to the Congress.²⁷¹ They may even be submitted in classified form.²⁷² Although it remains difficult to assess, in light of classification, no evidence points to these procedures being applied with respect to those agreements that might ostensibly waive CAT objections. In the absence of this procedure being followed, one is left to conclude that such arrangements lack the weight of law. From a jurisprudential standpoint, it would seem that a weightless Executive agreement would be insufficient to qualify as vitiating the otherwise present “substantial grounds” for believing that one may be tortured. Had policymakers intended such actions to be genuine, binding Executive agreement would certainly provide a crucial baseline for their case.

3. Federal Kidnapping Statute

When forcible abductions are used as a method of rendering one to court, the abduction is generally executed in accordance with the Federal Rules of Criminal Procedure and statutory authority guiding the power of arrest.²⁷³ Thus, the abduction is, in effect, an arrest. Under this framework then, the act is not kidnapping in the same sense as might be understood as a crime. If, as in the case

²⁷⁰ 22 C.F.R. pt. 1811; See generally *Supra* Dalton

²⁷¹ Intelligence Reform and Terrorism Prevention Act of 2004, PL 108-408 §§ 7211-7214, 118 Stat. 3638, 3825-3832 (2004).

²⁷² *Id.*

²⁷³ See monograph I.

of *Frisbie v. Collins*,²⁷⁴ the abductors act outside of their jurisdiction or under the color of official capacity, the abduction is a crime.²⁷⁵ Intelligence officers, unlike those belonging to the law enforcement community carrying out forcible abductions for criminal prosecution, lack express Congressionally recognized authority to arrest or detain.²⁷⁶ Kidnapping, when utilized for purposes other than criminal prosecution, does not fall within the scope of official right, and thus should be viewed as a violation of federal criminal law. Although courts have not yet fully ruled on the matter, overt acts of torture, for example, are no likely less judicable because they were carried out under the ostensible color of Executive authority.²⁷⁷ After all, instructions by the President “cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”²⁷⁸

18 USC§1201(a) provides that whoever “unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for ransom or reward,” any person may face life in prison.²⁷⁹ Importantly, Congress chose to extend jurisdiction within the statute to include special aircraft jurisdiction.²⁸⁰ Special aircraft jurisdiction includes civilian aircraft of the United States, aircraft of the American armed forces, and “any other aircraft leased without crew to a

²⁷⁴ *Supra Frisbie v. Collins*

²⁷⁵ See monograph I.

²⁷⁶ The Administration would contend that authority for detention and the rendering thereof may be found within the CIA’s “Fifth Function” general covert action authority.

²⁷⁷ The issue has never been squarely addressed. In *Harbury v. Deutch*, 233 F.3d 596 (2000), the D.C. Court of Appeals found that 5th Amendment rights of a non-citizen living abroad were particularly limited, but the issue of criminal sanction for kidnapping may be distinguished from this case because it is under the application of an extraterritorial criminal statute and not a Constitutional right that action may be taken. A criminal statute which expressly permits extraterritorial application is not the same as a Constitutional right which has been found not to extend as far.

²⁷⁸ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)

²⁷⁹ 18 U.S.C. §1201(a)

²⁸⁰ *Id.*

lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.”²⁸¹ In so far as media reporting may be relied upon for fact patterns, most planes used by the CIA appear to be rented or leased from American companies.²⁸² One Gulfstream V jet suspected of being used in these operations, for instance, originally operated with the tail number N379P,²⁸³ subsequently changed to N8068V.²⁸⁴ The markings are designated, under provisions provided in accordance with the Chicago Convention,²⁸⁵ as originating from the United States. Other stories illustrate similar evidence.²⁸⁶ They are, in other words, American jets. And with American jets, the statute provides, comes American criminal jurisdiction for kidnapping.

No doubt, no federal agent is likely to investigate, nor any United States Attorney’s office prosecute, although the presence of not only a law but one which provides criminal sanction for extraterritorial kidnapping by those who use American aircraft in their scheme, Congressional will is surely clear. Kidnapping, absent law enforcement arrest authority,²⁸⁷ is unacceptable.

4. Authorization for the Use of Military Force

Across the spectrum of challenged action undertaken by the President within the GWOT context, an ever expanding claim has been proffered that the

²⁸¹ 49 U.S.C §46501

²⁸² Supra Mayer; Supra 60 Minutes

²⁸³ Id.

²⁸⁴ Supra Grey

²⁸⁵ Supra Chicago Convention

²⁸⁶ Supra 60 Minutes

²⁸⁷ See monograph I for more on the law enforcement exception.

AUMF grants Congressional assent for the President to conduct whatever actions he deems critical to fighting the so-called war.²⁸⁸ Whatever the legal status of third-party interrogative renditions may have been prior to its passage, when Congress affirmatively assented to the President's authority to "use all necessary and appropriate force"²⁸⁹ against those allegedly affiliated with al-Qa'eda, new questions arose within the spectrum of Chief Executive authority. One would assume such authority applies to both the province of intelligence as well as the military. The question, in as far as invocation of Chief Executive status may be concerned, becomes whether Congress can reasonably be said to have intended inclusion of such authority in its AUMF. According to the Supreme Court in *Hamdi v. Rumsfeld*, when considering the scope of the AUMF for detention of those identified as combatants, "detention of individuals falling into the limited category we are considering... is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorize the President to use."²⁹⁰ Although renditions for the purposes of detention are not themselves detentions –after all, simple detentions may take place without the assistance of any third party –the intricate methods utilized by the President to effectuate detention are bound not by Congress, but solely by the laws of war. Without a doubt, the power to wage war is the "power to wage the

²⁸⁸ A similar such claim has been made in the case of direct use of "tough interrogation" techniques on unlawful enemy combatants (see generally: Greenberg, Karen J. and Joshua L. Dratel, *Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, 2005) and the National Security Agency's warrantless intercepts (see generally: McNabb, Douglas C. and Matthew R. McNabb, "Of Bugs, the President, and the NSA," *The Champion*, March 2006, accessed online via: <http://www.nacdl.org/public.nsf/0/b50aa789eaec935a852571170070c49a?OpenDocument>).

²⁸⁹ *Supra* AUMF

²⁹⁰ *Hamdi et al v. Rumsfeld et al*, 542 US 507 (2004).

war successfully,²⁹¹ but –as discussed further in the next section –the scope of that authority necessarily falls within the confines of *jus belli*.

5. Congressional Acquiescence

Regardless of whether the AUMF is to be read as authorizing third party interrogative renditions, general public knowledge of these programs is abound. International human rights organizations, like Human Rights Watch²⁹² and the Council of Europe,²⁹³ have issued successive reports detailing alleged renditions of the sort; government inquiries in Italy,²⁹⁴ Germany,²⁹⁵ Sweden,²⁹⁶ Canada,²⁹⁷ the United Kingdom,²⁹⁸ and Spain,²⁹⁹ among others, have investigated –and in some cases found –apparent instances where renditions had in some part occurred on their territory; and media reports have proliferated in nearly every language. Members of Congress are no doubt presently aware, and for several years have been aware, of the program’s existence. Acquiescent failure on the part of Congress to contradict apparent Presidential authorization, some may contend, is

²⁹¹ *Lichter v. United States*, 334 U.S. 742 (1948)

²⁹² Human Rights Watch “Black Hole: The Fate of Islamists Rendered to Egypt,” March 2005, Vol. 17, No. 5 (E), (hereinafter referred to as HRW “Black Hole”).

²⁹³ Marty, Dick. “Alleged Secret Detentions in Council of Europe Member States.” Information Memorandum II, Committee on Legal Affairs and Human Rights, Council of Europe, ajdoc03 2006rev, 22 January 2006.

²⁹⁴ Lewis, Aiden. “Judge Issues Warrants for CIA Operatives.” *The Guardian*, Friday, December 23, 2005; Crewdson, John. “Italy Prosecutor, Boss Clash Over CIA Case.” *Chicago Tribune*, Nov. 23, 2005.

²⁹⁵ “Germany and Italy Want to See the CIA in Court.” Spiegel Online, Nov. 14, 2005, accessed at: <http://service.spiegel.de/cache/international/0,1518,384885,00.html>

²⁹⁶ Whitlock, Craig, “New Swedish Documents Illuminate CIA Action.” *Washington Post*, Saturday, May 21, 2005, A1; Swedish TV4 Kalla Fakta Program, “The Broken Promise,” Monday, May 17, 2004, as translated and provided by Human Rights Watch at: <http://hrw.org/english/2004/05/17/sweden8620.htm>

²⁹⁷ In response to claims made by one Canadian citizen (Maher Arar) having allegedly been rendered to Syria, the Canadian government established a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. For more see: <http://www.ararcommission.ca/>.

²⁹⁸ Beeston, Richard, “CIA Made ‘185 Rendition Flights Through Britain.’” *Times of London*, April 5, 2006; CNN, “UK Memo Fuels CIA Flights Row.” CNN Online, Thursday, January 19, 2006. Accessed online at: <http://edition.cnn.com/2006/WORLD/europe/01/19/uk.rendition/index.html>.

²⁹⁹ Grey, Stephen and Renwick McLean, “Spain Examines CIA ‘Rendition’ Flights.” *New York Times*, Monday, November 14, 2005; Prades, Maria Jesus “CIA Accused of Using Airport on Mallorca.” *The Guardian*, Nov. 14, 2005.

tantamount to its consent. This interpretation is underscored upon inquiry into the legislative record. In December of 2005, the wily Congressman Edward Markey (D) of Massachusetts authored H. Res. 593, directing cabinet officials to provide information regarding the program,³⁰⁰ a move roundly supported by the American Bar Association, New York University, Human Rights First, and the World Organization for Human Rights First USA. Congressman Markey further introduced H.R. 952, the Torture Outsourcing Prevention Act of 2005, seeking to expressly prohibit renditions to any country identified by the International Relations Committee or otherwise known for its use of torture. Two additional resolutions, H.Res. 624 and H.Res. 642, addressed issues relating to the application of the Geneva Conventions and Convention Against Torture as it applies to detentions in amidst the GWOT.³⁰¹ All such measures failed. . Indeed, whether Congressional officials knew of the rendition program before this date or not is immaterial to the capacity to end –or to some degree tailor –the program in its current stage. In the face of successive attempts by Congressmen to alter the *status quo* passing ignored, as the media, international human rights organizations, and foreign governments publicly discussing the program, Congress stood still with respect to the narrow issue of third party interrogative renditions specifically and, in so doing, affirmed the President’s authority.

B. Renditions and Power as Commander-in-Chief

³⁰⁰ United States House of Representatives, H.Res. 593 (2005)

³⁰¹ United States House of Representatives H.Res. 624 (2005); United States House of Representatives H.Res 642 (2005).

As a nation at war, the President is ensured significant Constitutional authority to provide security for the nation and its interests.³⁰² But though such general authority exists independent of Congressional will, its scope may be narrowed through law, to varying degrees dependent upon the “gravity of the situation confronting the nation.”³⁰³ Gravity is generally calculated by comprehending the situation as one of two divergent forms of warfare: general or imperfect.³⁰⁴ Were the war deemed imperfect, or partial, “its extent and operation depend on our municipal laws.”³⁰⁵ In an instance of general warfare however, “its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations.”³⁰⁶ No President is granted *carte blanche*, even under a blanket AUMF.³⁰⁷

Should one conclude that the GWOT is of an imperfect or partial nature, one is reverted largely back to the discussion relative to the AUMF. But characterization of the GWOT in those terms may not be so appropriate. Instigation by al-Qa’eda affiliated terrorists in 2001 has been deemed an act of war.³⁰⁸ In those instances of sudden and severe attacks against the United States, Presidential authority as Commander-in-Chief is undoubtedly significant,³⁰⁹ and

³⁰² Such protective authority applies not only in times of war. See: *Supra In Re Neagle* (stating in part, “Who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail, and of the persons and lives of its carriers.”).

³⁰³ *Supra Steel Seizure Case*

³⁰⁴ *Bas v. Tingy*, 4 US 37 (1800); Associate Justice Washington also made a similar bifurcation between what he called *Solemn War* and *Imperfect War*.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Hamdi et al v. Rumsfeld et al*, 542 U.S. 507, 552 (2004), Justice Sandra Day O’Connor writing for the majority states in part, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

³⁰⁸ This interpretation is predicated upon an estimation of scale, breadth, and impact, not unlike the action of a state. Its scope is underscored by the Congressional assent to the AUMF.

³⁰⁹ Original drafts of the Constitution provided that Congress shall have the power to “make war,” but upon the suggestion of Constitutional Convention delegates Madison and Gerry, the clause was altered to read

the acts likely of a general nature. Indeed, in nearly every ruling relative to the status of those dubbed combatants within the GWOT, courts have systematically presumed the absence of “municipal laws” binding the President.³¹⁰ Such rulings instead turn on the application of laws of war, most notably the Geneva Conventions. Application of the Conventions may come in one of two capacities, entirely dependant upon how the federal government chooses to define them, combatants or noncombatants.

1. Combatants

If the government were to treat those who are rendered as combatants, several provisions of the Third Geneva Convention should be applied. All combatants are *de facto* to be considered Prisoners of War (POWs), and are to be afforded those rights which follow, unless a “competent tribunal” is convened as determines otherwise.³¹¹ Article 12 of the convention permits prisoner transfers (or renditions) only to states that are parties to the convention and that will fully protect the rights of such POWs. As stated by one author, “where it appears that POW privileges will be denied, the original Detaining Power is under an obligation to take custody back and to transfer the POWs to a place of internment where their rights will be respected.”³¹² Consequently, it would seem, once considered a POW, the government would be obliged not to render any person for the purposes of interrogation. The Executive would likely get around this issue

“declare war,” a shift which as been interpreted as intending to allow the President to respond to sudden attacks. See: Supra Dycus et al, p.22-23.

³¹⁰ Supra *Hamdi et al v. Rumsfeld et al*

³¹¹ Art. 5, Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) (October 21, 1950).

³¹² Supra Fitzpatrick

by noting its assurance provided by the interrogating state that no torture would take place, once again calling into question the validity of those assurances.

More likely however, the President will continue to view suspected terrorists as unlawful or unprivileged combatants.³¹³ As unprivileged combatants, these persons are protected only by the general Common Article 3 which prohibits the infringement of only the most basic human rights.³¹⁴ It is unlikely that these renditions would be interpreted to be in violation of those common codes. The problem with the Executive's assertion that those being rendered are unprivileged combatants however, is that, as stated above, no combatant may be stripped of his POW rights until a competent tribunal has made such a ruling.³¹⁵ As one D.C. federal district court judge ruling in the *Hamdan* case noted, "the President is not a tribunal."³¹⁶ Consequently, barring such a tribunal stripping one of POW status, no such rendition is likely lawful under the convention.

2. Noncombatants

A second route that might be taken by the government is to assert that these individuals are not combatants at all, but are merely individuals who have knowledge of other combatants, thereby casting them outside of the laws of war altogether. The problem with this interpretation lies within the Fourth Geneva Convention, which protects the rights of civilians in time of war. Under this convention, rules for transfer are very strict, largely providing only for transfer to

³¹³ Supra Third Geneva Convention

³¹⁴ Id.

³¹⁵ Id.

³¹⁶ *Hamdan v. Rumsfeld*, D.D.C., Civil Action No.04-1519 (JR), accessed online via: <http://files.findlaw.com/news.findlaw.com/hdocs/docs/tribunals/hamdanrums110804opn.pdf>

provide safety for civilians from armed conflict, and thus would likely prohibit these renditions. Further, proceedings are to be held on a regular basis to determine status, always determining whether or not continued internment is necessary. These proceedings have not been provided –at least by all accounts – and it will likely be impracticable for them to be provided under the conditions of rendition know to date. As such, it would appear, renditions would not be permitted under this interpretation either, leaving the Commander-in-Chief bound from pursuing third party interrogative renditions not merely by acts of Congress, but by the laws of war.

3. Customary International Humanitarian Law

The laws of war are seldom understood to apply only to those circumscribed by treaty. Indeed, the presence of customary international humanitarian law is often the very basis for the assertion of criminal and civil jurisdiction, and serves as a guide to interpreting procedural and substantive areas of law within the codified treaties. In addition to customary international legal objections raised within the context of extraterritorial forcible abductions for prosecutorial purposes,³¹⁷ other norms may apply within the extraordinary rendition context. Perhaps most important among them is one potential norm prohibiting “enforced disappearance,”³¹⁸ that is,

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of,

³¹⁷ See monograph 1

³¹⁸ Henckaerts, Jean-Marie and Louise Doswald-Beck, Customary International Humanitarian Law Volume I: Rules, International Committee of the Red Cross, Cambridge University Press, Cambridge, United Kingdom, 2005. p.340-343.

*a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*³¹⁹

Although the corpus of international humanitarian law typically does not grant appearance to the term, some argue that it may be gleaned from a host of other practices, namely the norms relating to registration procedures and transparency of process, and those prohibiting arbitrary detention and torture, providing for the norm nonetheless.³²⁰ The Rome Statute for the International Criminal Court, though not assented to by Congress and therefore not a part of the directly applicable laws of war, has taken it one step further, defining the systematic practice of enforced disappearance as a species of crime against humanity.³²¹ With over 100 nations around the world assenting to this definition, some might argue, a clear norm has been carved. The Inter-American Court of Human Rights has even applied a *due diligence* obligation upon States, mandating that all efforts be made to prevent enforced disappearances.³²² Ultimately, as an international legal custom and not a codified treaty, the extent to which “enforced disappearance” may be viewed as binding the President’s Commander-in-Chief authority, in so far as the domestic legal sphere may be concerned, is limited, perhaps triggering general international relations concerns instead.³²³

³¹⁹ Rome Statute of the International Criminal Court, Article 7(1)(i)

³²⁰ Supra Henckaerts p.340, 428-456.

³²¹ Supra Rome Statute. Presumably, were the United States a party to the Rome Statute, members of the intelligence community could be tried for their activities in the “extraordinary rendition” program.

³²² *Velasques-Rodriguez v. Honduras*, Inter-American Court of Human Rights, Series C, July 29, 1988, no. 4.

³²³ See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (1988). The rule of viewing customary international law as largely inapplicable in the domestic sphere is underscored in the presence, as here, of a “controlling executive act.” (see generally: Supra Dycus et al, p.237-239). One important exception occurs where a “preemptory norm” or *jus cogen* is found. Although torture has been widely

C. Third-Party Interrogative Renditions and Foreign Affairs

Authority of the President in foreign affairs is firm and autonomous, not requiring “as a basis for its exercise an act of Congress.”³²⁴ No doubt, as the Supreme Court has found, “into the field of negotiation the Senate cannot intercede; and Congress itself is powerless to invade it.”³²⁵ But negotiation is distinct from exercise. And the authority of the President is limited to the extent to which affirmative actions taken by the President are approved in accordance with the general will of the Senate, as expressed through assent to treaties.³²⁶ Consequently, to ascertain the scope of latitude granted the President in exercising his foreign affairs authority, one must look to the applicable treaties.

1. CAT Ascension as Senatorial Expression

As discussed above, the anti-torture and rendition provisions provided for within the CAT, and subsequently interpreted by the Senate upon ascension, plays an important role in defining the legal status of those agreements obtained by foreign intelligence services not to torture those rendered. Whereas the dictates of the Case-Ziblocki executive agreement scheme may themselves proves sufficient to vitiate their validity, international legal conceptions of such agreements may do the same. The form of agreement within the international legal sphere which

accepted as species of preemptory norm, and exercised recently within the United Kingdom on universal jurisdiction grounds, whether renditions for this purpose may be included remains unclear, although would seem unlikely where executive agreements intended to wave CAT objections are in place.

³²⁴ *Supra Curtiss-Wright*

³²⁵ *Id.*

³²⁶ *Goldwater v. Carter*, 617 F.2d 697, *vacated and remanded*, 444 U.S. 996 (1979), Judge MacKinnon dissenting in part and concurring in part. (stating in part: “...when in the conduct of foreign affairs, a legislative function is implicated, the President’s power must be accommodated to a congressional exercise of power.”)

appears to most resemble those used to waive CAT objections is a Memorandum of Understanding (MOU). It is the general practice within the United States to accept MOUs as legally binding.³²⁷ Indeed, in many cases senior policymakers are compelled to submit their communiqués, minutes, or joint statements before their lawyers so as to ensure that their actions are not considered binding declarations.³²⁸ With the exception of the United Kingdom and a number of the former Commonwealth countries,³²⁹ this appears to be the general practice among all states. The International Court of Justice, for instance, found that minutes signed by the Foreign Ministers of Bahrain and Qatar constituted binding law, despite the Foreign Minister of Bahrain's belief to the contrary.³³⁰ As one commentator has noted, "the degree to which a MOU is binding is a matter for the intention of those who made it... A MOU made between two Government departments or agencies may be a binding treaty for the States parties to it."³³¹ The question it would seem then, is one largely of intent. Do the states intend for the agreement to be binding?

In the instant case, it remains unclear. On the one hand, were the United States not intending for the interrogating state to bleed its practices beyond the scope of the CAT, it would seem equally effective for the United States to conduct the interrogations itself. In other words, why send alleged terrorists to Uzbekistan or Egypt for interrogation when members of the American military,

³²⁷ Dalton, Robert, "Treaties and Other International Agreements," Chapter 18 of *Supra Moore, et al*, p.889-892.

³²⁸ *Id.* p.887.

³²⁹ *Supra Jones and Doobay*

³³⁰ *Qatar v. Bahrain* (Jurisdiction and Admissibility), 1994 I.C.J. 112, *passim*.

³³¹ Shabtai, Rosanne, "The Perplexities of Modern International Law," 291 *Collected Courses of The Hague Academy of International Law* 363 (2001), as quoted in *supra Dalton*, p.887.

law enforcement, or intelligence communities can conduct the interrogations themselves, unless of course it wished for those states to breach the MOU. On the other hand however, American officials are duly aware, particularly in light of revelations regarding prisoner abuse in American facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba, that torture is both anomalous with *soft-power* attributes of an ideological warfare and often yield operationally unsubstantiated flows of information. Thus, in a sense, though practice appears to signify apparent inclination toward a breach in the MOU, its evident counterproductivity would seem indicative of a hesitance to do so. At the time of this writing however, insufficient open-source information would appear to fairly reconcile this apparent contradiction regarding intent. As a result, any legal analysis regarding the international viability of the MOUs would necessarily require one to withhold judgment until such facts are made available.

2. Chicago Convention for Aviation Regulations

Virtually all aircraft in the world fly in accordance with certain regulations. As with most laws within the international context, these regulations are provided basis in treaty, namely the Chicago Convention on Civil Aviation.³³² According to that convention, aircrafts –civil³³³ and state run³³⁴ –are not permitted to conduct any flight which violates the laws and regulations of the state whose facilities it uses.³³⁵ States in turn, as a trend, typically prohibit the use of these

³³² Convention on International Civil Aviation, Signed at Chicago on 7 December 1944 (hereinafter: Chicago Convention).

³³³ Id. Article 4

³³⁴ Id. Article 3

³³⁵ Id. Article 12

facilities in the commission of a crime. Use of these facilities in a kidnapping, no doubt a crime in nearly any conceivable jurisdiction, may then be prohibited under the convention. Similar concurrent restrictions are in place for military flights based overseas.

3. Status of Forces Agreements (SOFAs)

Application of foreign laws to American military forces abroad is guided principally under the auspices of those treaties negotiated between the United States and the host country, known as Status of Forces Agreements (SOFAs). Agreements of this sort exist with every place in which the American military maintains a presence.³³⁶ At present however, allegations surrounding forcible abductions for third party interrogative purposes have principally taken place within the territory of NATO member states. NATO's SOFA has been in effect since 1949. Under this agreement, all military officers and their civilian components, are obliged "to respect the law of the receiving state,"³³⁷ including those acts performed under the color of official duty,³³⁸ even in times of war.³³⁹ Primary criminal jurisdiction is granted to the host state for crimes committed within its territory.³⁴⁰ Similar provisions are provided for under other SOFAs, including addenda to this agreement.³⁴¹ Kidnapping, no doubt, is a crime in virtually any jurisdiction. As a result, it would appear, forcible abductions carried

³³⁶ *Supra* Dalton

³³⁷ Agreement Between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces, April 4, 1949 (hereinafter NATO-SOFA), Article II.

³³⁸ *Id.* Article VII(3)(a)(ii).

³³⁹ *Id.* Article XV(1); A contracting party may suspend the application of any provision provided for within the NATO-SOFA by first giving 60 days' notice to the other contracting party (see: *Id.* Article XV(2)).

³⁴⁰ *Id.* Article VII(3)(b)

³⁴¹ See for example: Status of Forces Agreement with Italy.

out by American military officers or their civilian components are in violation of the SOFA. The only question which remains is whether members of the CIA may be considered “civilian components.” According to the NATO-SOFA, a “civilian component” refers to “civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons...”³⁴² Although members of the CIA are not, in so far as American legal standards are so concerned, “in the employ of an armed service.” They are, instead civilian government employees, though not sufficiently representative of American policy so as to qualify for diplomatic immunity and therefore would fall more squarely under the scope of the Chicago Convention. But, according to allegations surrounding several known instances of third party interrogative rendition, though the act abduction and transportation may itself involve CIA officers, and not military officials, military air bases, like Aviano Air Force Base in Italy,³⁴³ have allegedly been used as points of exit. Were military officials, or their civilian components, aware of the operation, apparent complicity may, in certain instances, fall within the scope of criminal conspiracy, and thus be prohibited by the SOFA.

V. Case Examples: Flights to Egypt

*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.*³⁴⁴

³⁴² Id. Article I(1)(b)

³⁴³ Supra Lewis

³⁴⁴ Supra HRW “Black Hole”

Egypt's record on torture is clear, all the more so when involving the interrogation of Islamist militants. According to a recent report by the Human Rights Watch, methods of torture typically include "beatings with fists, feet, leather straps, sticks, and electric cables; suspension in contorted and painful positions accompanied by beatings; the application of electric shocks; and sexual intimidation and violence."³⁴⁵ In April of 2005 an Egyptian government sponsored National Council for Human Rights admitted that torture is a part of "normal investigative practice" there.³⁴⁶ The United Nations Committee Against Torture and the United Nations Human Rights Committee have routinely condemned Egypt for its use of these techniques. In response, Egypt has, to date, refused to permit the U.N. Special Rapporteur on Torture to visit.³⁴⁷ The U.S. State Department has, as late its most recent report on Human Rights for activities in 2004, detailed numerous occasions in which torture was administered among other forms of detainee abuse.³⁴⁸

It comes as a great surprise then, that the CIA, as a part of its interrogative rendition program, has apparently sent a number of suspected terrorists to Egypt for questioning. El-Aqrab, the 320-cell inner sanctum of the Torah prison, has held some of the world's most infamous Islamists from Ayman al-Zawahiri to the intellectual extremist and radical author Sayyid Qutb.³⁴⁹ Now, it is believed, cells

³⁴⁵ Id. p.5.

³⁴⁶ Id.

³⁴⁷ Id.p.6

³⁴⁸ Id.; "Egypt: Country Reports on Human Rights Practices 2004," Department of State, Bureau of Democracy, Human Rights, and Labor, February 2005, accessed online via:

<http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>

³⁴⁹ Supra Grey

of solitary confinement are racked with American targets, amidst whispers of a newly built detention center in the Upper Nile.³⁵⁰

Muhammad al-Zawahiri, a graduate of engineering from Cairo University, businessman, and brother of Ayman al-Zawahiri, was indicted in 1981 and subsequently acquitted for an alleged role in the assassination of President Anwar Sadat, but was long suspected by the Egyptian government for ties with radical Islamist militants.³⁵¹ In fear of being retried for his supposed involvement in the Sadat assassination, Muhammad joined the Saudi government-endorsed World Islamic Relief Organization, providing architectural assistance to efforts to build schools and hospitals throughout Indonesia, Bosnia, Malawi, and elsewhere throughout the Muslim World.³⁵² After an Egyptian imam had been arrested in Jeddah at the request of the Egyptian government, Muhammad began to feel increasingly less secure in Saudi Arabia, he fled with his family to Yemen, and then to Sudan where he was reunited with his brother Ayman until being forced out in 1995.³⁵³ Once thrown out of Sudan, Muhammad took his wife and six children back to Yemen where he traveled frequently for work with engineering contractors in the United Arab Emirates.³⁵⁴ Sometime in March or April of 1999 Egyptian authorities, with apparent American assistance,³⁵⁵ forcibly abducted Muhammad.³⁵⁶

³⁵⁰ Id.

³⁵¹ Supra HRW “Black Hole,” p.24 - 26

³⁵² Id.

³⁵³ Id.

³⁵⁴ Id.

³⁵⁵ Supra HRW “Black Hole”

³⁵⁶ Id.

Meanwhile, Muhammad's other brother, Hussain, was driving to work in Malaysia where he was abducted, allegedly with CIA assistance, detained for thirty-six hours, blindfolded, handcuffed, and flown to Cairo.³⁵⁷ Six months later, finally recognizing that he posed no threat nor had any valuable information for Egyptian authorities, Hussain was released into his family's hands. Following his release, Hussain has been expressly forbidden from discussing his experience with anyone, although it is widely believed that he had been subjected to torture and other forms of maltreatment. Muhammad, on the other, would not be heard from for years to come.

Following the October 2001 American invasion of Afghanistan, "rumors circulated... that Muhammad had been executed, and that the Americans asked the Egyptian government for a sample of his DNA from the dead body to match it with that of a skull found in Tora Bora, which they suspected was Ayman al-Zawahiri."³⁵⁸ Three years later, when most had long presumed Muhammad dead, a London-based news service announced that he was still alive and in Egyptian custody in the Torah prison complex. The following week, the Egyptian Minister of Interior confirmed the report, and announced that the Egyptian government had decided to retry Muhammad in a military tribunal. Fourteen days later, Muhammad's family were permitted to meet with him, where they learned he had been severely beaten and likely hung from the ceiling by his wrists for prolonged periods of time. He had apparently spent some four and a half years in an Egyptian intelligence service detention center where he was denied sunlight and

³⁵⁷ Id.

³⁵⁸ Id.

fresh air, so as not to disrupt the interrogation, among other things. Apparently, at some point in the process, Muhammad had already been tried by a military tribunal, where he was sentenced to death. To date Muhammad has not been executed and, as his lawyer has said, “he has been sentenced to death by a military tribunal, but they have put all of the legal procedures aside.”³⁵⁹ He still sits to await an unknown fate.³⁶⁰

Muhammad was not alone. Walking back from class in downtown Stockholm on December 18, 2001, a one Ahmad Hussain Mustafa Agiza –an Egyptian living in Sweden –was forcibly abducted by unnamed Swedish security officials, and placed onto an American Gulfstream jet headed for Cairo, along with another Egyptian abductee, Muhammad Ibrahim Sulaiman al-Zari. Assurances were granted to Swedish officials by Egyptian authorities, that the two “would not be subject to the death penalty, torture or ill-treatment, and would receive fair trials.”³⁶¹ According to reports, Egypt has failed to live up to that agreement.³⁶²

VI. Political Fallout

Extraterritorial forcible abductions for the purposes of prosecution alone pose a considerable risk to the political legitimacy of the state, but when those abductions are aimed at clandestine interrogations by known human rights abusers, the ideological and intellectual American image is markedly tattered. In

³⁵⁹ Id.

³⁶⁰ Id.

³⁶¹ Id. p. 31

³⁶² Id.

this post-Cold War state of affairs, whereby the globalizing forces of economy and commerce push upward the universal significance of non-state actors, we must learn to engage and win in the struggle of the mind. Terrorists, for example, threaten our security, but what's worse is that they threaten the very ideological premises underpinning that security, namely the American troika of democracy, capitalism, and liberal values expressed in what some so broadly dub "the American way of life." And on that battlefield, this nation has largely failed to show up. Where in the period of bipolar Cold War politics the ideological competition was matched between Soviet and American interpretations of ethical governance, that marketplace is now open not only to other state-centric interpretations, but non-state interpretations as well. A double-edged externality of globalization has thus arisen: he with a message has a voice. When viewed from the marketplace of ideas, America's is a commodity of tremendous appeal. America offers the promise that one and one's progeny will be secure from the rancor of an overbearing state while guaranteeing autonomy to pursue individual interests in politics, in business, and in society. And so, American policymakers should recognize, America must firmly assert its hand, lest the desire for antiterrorism order outweigh the prospect of those attractive values it offers.

In this vein, every revelation of another rendered suspected terrorist to countries like Egypt, Uzbekistan, and Syria, is another win for those who seek to illustrate the ideological hypocrisy of the American cause, and in turn an important win for terrorists in the marketplace of ideas. Only by conceiving this world on a two dimensional battlefield, the *hard power* ends relative to force and

the *soft power* ends relative to will, can any demonstrable victory within the GWOT be found. Whatever their legal status, third-party interrogative renditions are an anathema to the triumph of personal dignity and of the due process measures instilled to provide it. From the political metric of their application then, the program must be suspended.

VII. How to End the Program

Although President Clinton took the first step in authorizing the third party interrogative rendition program and President Bush the second in reasserting its use in the post 11 September world, others are not powerless to act. For one, the power of the purse is considerable.³⁶³ Congress controls the money of government, in all of its many manifestations, and may refuse funding to any program it deems unnecessary, unconstitutional, or otherwise undesirable. Although some Congressman sought to withhold funding for these renditions, all such efforts as yet have failed. Were these members successful in raising significant public discontent against this rendition program, perhaps a sufficient majority may include a provision in a classified appropriations bill prohibiting the expenditure of funds for the program. And although the President would undoubtedly contend that his Commander-in-Chief authority outweighs such appropriations because “the power of the purse may [not] be Constitutionally exercised to produce an unconstitutional result,”³⁶⁴ Congress may revert back to the assertion that the laws of war prohibit such renditions and therefore limit his

³⁶³ See generally: Banks, William C. and Peter Raven-Hansen, National Security Law and the Power of the Purse, Oxford University Press, 1994.

³⁶⁴ *Lovett v. United States*, Ct. of Claims 66 F. Supp. 142, *aff'd on other grounds*, 328 U.S. 303 (1946)

Commander-in-Chief powers. With limited exceptions, it is the “plain and explicit duty of the executive branch... to comply” with such appropriations.³⁶⁵

Few courts have struck down appropriation limitations on such grounds.³⁶⁶

But Congress’s authority is not solely confined to appropriations. Indeed, the CIA itself bases its power in statutory law. Vagueness in the scope of its “fifth function” authority has granted tremendous latitude to its exercise. The 1947 National Security Act, constituting the agency’s bedrock authority, could be amended so as to expressly prohibit third party interrogative renditions, and any other undesirable actions of the sort. Though this may cause a greater push toward the use of military assets for the same purpose, it would a step toward ending the overall program. Where further Congressional actions, like revisions of the torture statute, the recent McCain Amendment regarding torture,³⁶⁷ or other such additions, might be overlooked by a President in wartime, base authority for the institution itself likely could not be so ignored.

A third remedy may lie in the hands of foreign authorities. By conducting these operations, the officers of the CIA are overtly violating the sovereign law of the host state; kidnapping is kidnapping. As a result, these states maintain criminal jurisdiction over them. Were states to begin seeking criminal prosecution against these officers, the agency may be more hesitant to continue the program. Likewise, political fallout could prove overwhelming. One court in Italy, for example, has pursued precisely this course by issuing Italian and

³⁶⁵ *Spaulding v. Douglas Aircraft Co.*, S.D. Cal. 60 F.Supp. 985, 988, 154 F.2d 419 (1945) *aff’d*, 154 F.2d 419 (9th Cir. 1946).

³⁶⁶ *Supra* Dycus et al p.139

³⁶⁷ *McNabb Associates, P.C.*, “McCain and the Not So Effectual Ban On Torture.” National Security Crimes Blog, Thursday, January 5, 2006. Accessed via: http://www.nationalsecuritycrimesblog.com/2006_01_01_archive.html.

European³⁶⁸ arrest warrants for 25 officers of the CIA allegedly involved in the forcible abduction and subsequent rendering of an Egyptian imam from the streets of northern Milano.³⁶⁹ Outrage in Italy, and indeed across Europe, has been immense, threatening the delicate post-Iraq transatlantic alliance and furthering the perception of American “imperial hubris”³⁷⁰ across Western Europe. Though political and not legal in nature, this repercussions emanating from this legal action could suffice to draw down the frequency of the program use, to a point where they could be more fairly described as “extraordinary” methods of rendition.

IX. Conclusion

The CIA’s third party interrogative rendition program has been the cause of considerable degradation to American credibility abroad; a credibility it must have to win the truly worldwide and multi-dimensional war against al-Qa’eda. Legal claims by the Executive in turn have mirrored the broader case for Presidential wartime autonomy historically wrought amongst the greatest of abuses now shunned by history. For now these renditions continue, and likely will continue, until Congress take an affirmative stance against their use or foreign actors obstruct the American intelligence community sufficient to render them at once impracticable.

³⁶⁸ Council Framework Decision 2002/584/JHA, 13 June 2002, accessed via: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf.

³⁶⁹ Whitlock, Craig, “European Investigate CIA Role in Abductions.” *Washington Post*, Sunday, March 13, 2005, A01.

³⁷⁰ See generally: Scheuer, Michael, *Imperial Hubris: Why the West Is Losing The War on Terror*, Potomac Books, Inc., March 2005.

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