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Kidnapping Terrorists: Extraterritorial Forcible Abductions in the Global War on Terrorism

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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.
Acknowledgements

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I have long since possessed something of an unhealthy fascination with terrorism; with the strategic and tactical aspirations of disenchanted 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 an 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-

² Id.
indictment detention as combatants, under the material witness statute,\(^3\) or under general \textit{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 \textit{seeking state} acting within the territorial boundaries of the \textit{host state}, but without its consent.\(^5\) Like the actions which include \textit{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 \textit{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 \textit{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


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


\(^6\) Id.
United States may be concerned, this distinction is not altogether fruitful; a vigilante is a vigilante, in either case.\footnote{This may not be entirely true in the case of bounty hunters who act domestically (see: \textit{Taylor v. Taintor}, 83 U.S. 366 (1872)) but it does apply with regard to extraterritorial arrests (see: \textit{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 \textit{host state}, and may be extradited from the United States for that purpose (see: \textit{Kear v. Hilton}, 4th Cir., 699 F.2d 181 (1983)).}

A final method, much like the vigilante, is the abduction of a suspect by private citizens working at the behest of the \textit{seeking state}.\footnote{Id.} 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 \textit{seeking state}. Typical use occurs when the \textit{seeking state} wishes to act under the guise of \textit{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.

\textbf{B. Genesis of Forcible Abductions}

Forcible abductions are not new. In fact, it can be said, the United States has relied on forcible adductions 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.\footnote{\textit{Shuey v. United States}, 92 U.S. 73 (1875).} 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,
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. 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. 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. 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.” Abductions, under this jurisprudence, were not to be conducted without the consent of the *host state*. Experience with

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12 *Supra Ker v. Illinois*
13 *Supra Bassiouni*
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

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\(^{16}\) 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. 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.\textsuperscript{21} It was under this authority that forcible abductions of suspected narcotics dealers were executed in Mexico.\textsuperscript{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.\textsuperscript{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…”\textsuperscript{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.”\textsuperscript{25} Although the scope of what measures may be deemed sufficiently appropriate remains unclear, they may be interpreted to include economic and diplomatic sanctions.\textsuperscript{26} Conivance 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

\textsuperscript{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.


\textsuperscript{24} Id.

\textsuperscript{25} Id.

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 hose 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

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31 Supra Reeve, p. 103
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{35} use of the four aircraft as weapons of mass destruction,\textsuperscript{36} transnational terrorism,\textsuperscript{37} murder of government officials,\textsuperscript{38} destruction of government property,\textsuperscript{39} and conspiracy\textsuperscript{40} are all federal crimes, all three branches of government took those actions to qualify as acts of war.\textsuperscript{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

\textsuperscript{33} Id. p.7.
\textsuperscript{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.
\textsuperscript{35} 49 U.S.C. App. 1472
\textsuperscript{36} 18 U.S.C. §2332a
\textsuperscript{37} 18 U.S.C. §2339b
\textsuperscript{38} 18 U.S.C. §115
\textsuperscript{39} 18 U.S.C. §1361
\textsuperscript{40} 18 U.S.C. §371
\textsuperscript{41} Notably, Congress recognized this state of war by passing an Authorization for the Use of Military Force (AUMF) shortly after September 11\textsuperscript{th}. 
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

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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, following the protective principle, the nationality principle, the passive personality principle and that of universality.

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. Given the nature of threat posed by international terrorism, the protective principle has been deemed applicable. The nationality principle, otherwise known as the principle of active personality, 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. 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. 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.
46 Supra United States v. Yousef
47 Supra Bantekas p.151; See also United States v. Walezak, 783 F.2d 852 (1986).
countries,\textsuperscript{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.\textsuperscript{51} Assertion of passive personality jurisdiction has been upheld in court\textsuperscript{52} and reiterated by further statutes.\textsuperscript{53} The principle of universality, unlike the protective principle, requires no substantive nexus with the United States, its citizens, or its national interests.\textsuperscript{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.”\textsuperscript{55} There are those who contend that terrorism, like slavery,\textsuperscript{56} piracy,\textsuperscript{57} or crimes against humanity,\textsuperscript{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.\textsuperscript{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

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} United States v. Yunis, D.C. Cir., 924 F.2d 1086 (1988)
\textsuperscript{53} See, for instance, 49 U.S.C. §1472(n)
\textsuperscript{58} Prosecutor v. Nikolic, Case No. IT-94-2-R61, Judgment of the International Criminal Tribunal for the Former Yugoslavia.
Circuit Court of Appeals. Terrorism, the court found, can scarcely be defined, to say nothing of being universally condemned.

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. 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. 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.” Typically, such an action would follow both the issuance

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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.
of an arrest warrant and perhaps an INTERPOL Red Notice. Further, operating under the Department of Justice’s 1989 memorandum regarding extraterritorial law enforcement activities, 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.

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 luring and expulsion, 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

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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

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.”

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.” 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. 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) 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
Executive agencies have utilized extraterritorial forcible abductions as an instrument of criminal prosecution for well over a century.\textsuperscript{74} At no time in this long history of its practice has Congress objected. According to the Supreme Court in the \textit{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.”\textsuperscript{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.\textsuperscript{76}

D. Foreign Relations Authority

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

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\textsuperscript{74} The record dates back no later than to Supra \textit{Shuey}
\textsuperscript{75} Supra \textit{Steel Seizure Case}
\textsuperscript{76} See generally: \textit{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 \textit{Home Building & Loan Association v. Blaisdell}, 290 U.S. 398 (1934) (applying the same limitations to so-called “Inherent Emergency Powers” of the President).
\textsuperscript{77} Art. II Sec. 2 Constitution of the United States of America
internal affairs.” But while “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved,” 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,” carrying up to life in prison without parole. The statute’s prohibition extends both domestically and extraterritorially.

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

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 
be deputized, could have criminal exposure for *his* actions. Within this 
intelligence arena such actors are known as “dirty assets,” 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. Under these guidelines, no member of the law 
enforcement community is permitted to authorize a confidential informant to 
“participate in an act of violence,” or to “participate in an act designed to obtain 
information… that would be unlawful if conducted by a law enforcement 
agent.” Forcible kidnapping is a crime of violence. 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

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84 See generally: Hitz, Frederick P. “Unlocking the Rogue Elephant: September 11 and Letting the CIA be 
Sewer: Legal Use of “Dirty Assets” by CIA,” Int’l J. of Intelligence and Counterintelligence Vol. 9 No. 4 

85 Attorney General’s Guidelines Regarding the Use of Confidential Informants, accessed online via: 

86Id. 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 Federick 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

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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.\textsuperscript{91} Abduction was, as the district court held, a “mere irregularity” in procedure, insufficient to vitiate criminal jurisdiction.\textsuperscript{92}

Some sixty-six years after the Ker decision, the Supreme Court heard another case involving abductions, \textit{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.”\textsuperscript{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.”\textsuperscript{94}

Thus, under the newly accrued \textit{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: \textit{male captus bene detentus} –poorly captured, well detained, or the “Tough Luck Rule.”\textsuperscript{95} Interestingly though, since \textit{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

\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Supra \textit{Frisbie v. Collins}
\textsuperscript{94} Id.
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, 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. 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. 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. When they reached Brazil, the kidnappers (members of the Montevideo police) handed him over to a group of Brazilians who proceeded to interrogate and torture him for some fourteen days. 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. 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. Toscanino was held

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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. 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

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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}
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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

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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. 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. 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.
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. This same refusal to apply the exception was held in both the First and Fifth 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. Juan Ramon Matta-Ballesteros 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. 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. 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. 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. 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. The Seventh Circuit held that while it did not condone the activities of the U.S.
Marshals, “Toscanino, at least as far as it creates an exclusionary rule, no longer retains vitality.”

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. DEA offered a Mexican official $50,000 plus expenses for delivering Alvarez-Machain to the United States. On April 2, 1990, five to six armed men burst into Alvarez-Machain’s office. One showed him a badge of the federal police, another placed a gun to his head and told him to cooperate or be killed. 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 disoriented substance. 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. Throughout the ordeal, DEA was heavily involved and those who participated in Mexico were generously compensation (some even relocated

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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). The Supreme Court again chose to assert Ker-Frisbie, saying that the conduct of the officers in abducting Alvarez-Machain was immaterial to jurisdiction.

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. 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.”

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, 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

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131 Id.
132 Id.
135 Attorney-General of Israel v. Eichman, 36 I.L.R. 5 (1962)
government, and not private citizens working in a private capacity,\textsuperscript{136} then the court would be required to vitiate jurisdiction.\textsuperscript{137} Likewise, were Argentina to contest jurisdictional grounds, which it had seized to do once the trial began,\textsuperscript{138} then Israel may have been required to hand Eichman back over to the Argentineans.\textsuperscript{139} Unlike American judicial interpretation,\textsuperscript{140} the practice of vitiating jurisdiction on procedural objections has also persisted in British courts, among others.\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{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), rel’g denied, 336 U.S. 947 (1949)).

\textsuperscript{140} Supra Alvarez-Machain

\textsuperscript{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.\textsuperscript{142} Non-consensual abduction, on the other hand, is far different. Sources of state sovereignty, in the Westphalian world,\textsuperscript{143} are considered inherent and, with few exceptions,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{147}


\textsuperscript{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.

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

\textsuperscript{145} United Nations Charter, Article II, Section 4

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

\textsuperscript{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.

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 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

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’\textsuperscript{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.\textsuperscript{156}


\textsuperscript{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.\(^\text{157}\)

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),\(^\text{158}\) particularly within the sphere of terrorism.\(^\text{159}\) 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.\(^\text{160}\) 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.

\(^\text{157}\) 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.


\(^\text{159}\) 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).

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 (ICCRP).

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,\textsuperscript{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 person\textsuperscript{166} and the right against arbitrary arrest, detention, or exile.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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:


\textsuperscript{166} Universal Declaration of Human Rights (UDHR) Article 3

\textsuperscript{167} UDHR Article 9

\textsuperscript{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.

\textsuperscript{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

171 Id.
173 Id.
174 Id. Art. 12
instances).\textsuperscript{175} Perhaps most important relative to forcible abductions though, are three protection provided for within ICCPR’s Article 9. Article (9)1 sates that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law,”\textsuperscript{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.”\textsuperscript{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.

\textbf{C. U.N. Security Council Resolutions}

It is long-established practice\textsuperscript{178} that, as a member of the United Nations, the United States is bound by the edicts of the Security Council.\textsuperscript{179} With respect

\begin{itemize}
  \item \textsuperscript{175} Id. Art.13
  \item \textsuperscript{176} Id. Art. 9(1)
  \item \textsuperscript{177} Id. Art. 9(5)
  \item \textsuperscript{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.”
\end{itemize}
to the international legal sphere, if not applicable to domestic legal application, these edicts trump domestic law. 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. 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. 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. 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

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-9/11 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

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185 S/RES/1624(2005)
such custom exists.\textsuperscript{187} Ultimately however, a state is not obliged to act consistent with a custom if that state consistently rejects the practice.\textsuperscript{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,\textsuperscript{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 \textit{prima facie} challenge posed by international law to forcible abductions comes in the form of the Latin axiom \textit{nunquam decurritur ad extraordinarium sed ut in deficit ordinarium} –never resort to the extraordinary until the ordinary fails.\textsuperscript{190} As a well established principle of international law, this \textit{rule of the extraordinary}, as it might be called, would permit the \textit{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,\textsuperscript{191} all local remedies must first be exhausted before resorting to the ICJ.\textsuperscript{192} This general exhaustive rule has been subsequently interpreted to mean that states should not take extreme measures when non-

\textsuperscript{187} Supra \textit{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.

\textsuperscript{188} Asylum (\textit{Colombia v. Peru}), 1950 I.C.J. 266, 27778, November 2001,

\textsuperscript{189} Supra \textit{Ker v. Frisbee}

\textsuperscript{190} Supra Bassiouni

\textsuperscript{191} Supra Paust

\textsuperscript{192} \textit{Switzerland v. United States of America} (1959)
extreme measures are available.\textsuperscript{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.\textsuperscript{194}

A second procedural \textit{pram facie} challenge to abductions in international law is best expressed by another Latin axiom, \textit{Ex Injuria Ius Non Oritur}.\textsuperscript{195} As the Roman counterpart to the American exclusionary rule, “it requires that certain violations of law not ripen into lawful results.”\textsuperscript{196} One who commits an \textit{injuria} must redress it apart from its result, and no lawful benefits may be accrued by the violator for his acts.\textsuperscript{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 \textit{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

\textsuperscript{193} Supra Paukt
\textsuperscript{194} Traditional procedures of extradition may have been pursued, in addition to prosecution predicated upon likely criminal exposure within the \textit{host state} of Pakistan.
\textsuperscript{195} Supra Bassiouni
\textsuperscript{196} Id.
\textsuperscript{197} Id.
the same sense as might a treaty bind the Executive.\textsuperscript{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.

\textbf{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.\textsuperscript{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.\textsuperscript{200}

\textsuperscript{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, \textit{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: \textit{The Paquete Habana} (175 U.S. 677, S. Ct. 1900) and Mir v. Meese, 11th Cir., 788 F.2d 1446 (1986). In \textit{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.” \textit{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 \textit{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.

\textsuperscript{199} Supra Jones and Doobay p.79-102

\textsuperscript{200} This interpretation is most saliently made by the Court’s opinion in supra \textit{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.* Steven Valot violated parole in the District of Hawaii by traveling to Asia and then to Nevada. A warrant was issued for his arrest. In 1977 he was arrested and incarcerated in Thailand for marijuana related charges. 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. 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.

The Supreme Court went on to uphold this principle twelve years later, in the much-discussed *Alvarez-Machain* case. 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

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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.\textsuperscript{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 \textit{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.”\textsuperscript{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.”\textsuperscript{209}

\section*{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,

\begin{footnotesize}
\textsuperscript{208} Supra \textit{Alvarez-Machain}
\textsuperscript{209} Supra Bassiouni
\end{footnotesize}
protested the apparent circumvention of treaty-law.\textsuperscript{210} Some even submitted \textit{amicus curiae} briefs to that affect.\textsuperscript{211} Similar reactions occurred in response to the Israeli abduction of Eichman.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{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 \textit{Eichman} that jurisdiction exists only in so far as the \textit{host state} refuses to contest. Should the state contest jurisdiction, the individual would perforce be returned with apology.

\textsuperscript{210} Supra \textit{Alvarez-Machain}.
\textsuperscript{211} Id.
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. 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 agreement 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

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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, 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” since the commencement of the covert operation program. Another report has the number at upwards of some 150 individuals since September 11th alone.

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. 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

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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.
human rights abusers, onboard a fleet\textsuperscript{221} some writers have referred to collectively as Torture Air.\textsuperscript{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,\textsuperscript{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?”\textsuperscript{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.\textsuperscript{225} But that something should not be done does not by extension make it unlawful. And so it

\textsuperscript{221}This 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.

\textsuperscript{222}Id.

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

\textsuperscript{224}Supra Mayer

\textsuperscript{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 gleaming 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.\textsuperscript{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 \textit{Pareto Improvement}\textsuperscript{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-


\textsuperscript{227} A “\textit{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, \textit{Introduction to Economics}, 2\textsuperscript{nd} 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.\textsuperscript{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.”\textsuperscript{229} This may include anything from the development and dispersal 
of propaganda\textsuperscript{230} to espionage. Covert operations, on the other hand, are that 
form of covert action which typically involve a paramilitary operation.\textsuperscript{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,

\textsuperscript{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.
\textsuperscript{229} Richelson, Jeffrey T., The U.S. Intelligence Community, Fourth Edition, Westview Press, Boulder, 
Colorado, 1999, p.349
\textsuperscript{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
\textsuperscript{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.”\footnote{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.} This fifth-function has been, despite original intent to the contrary,\footnote{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).} interpreted to offer statutory authority for the execution of covert action of all stripes.\footnote{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).} 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.\footnote{235 Hughes-Ryan Amendment to the Foreign Assistance Act, Pub. L. No.93-559 §32, 88 Stat. 1804.} 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 be known –came either in writing or by verbal command.\footnote{236 Id.} Additionally under Hughes-Ryan was the requirement that the President notify the appropriate Congressional Committees (8 in number)
in a “timely fashion.” Ambiguities in what constituted a “timely fashion” were, as one might expect, exploited by the Executive. 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. Additionally, according to the act, Congressional notification was to take place prior to the act, not retroactively. 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. 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.

Taking up on the deficiencies with the previous two Congressional Oversight acts, the 1991 Intelligence Oversight Act tightened the requirements of the Presidential Finding. Accordingly, the President is required to develop his Finding in writing, 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.
240 Id.
241 Id.
242 Id.
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. Notification was bumped to a 48-
hour pre-event notification.

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. The plan, once formulated, was subsequently then forwarded
to President Clinton for signature in May of 1998, formally codified in still
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. 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.” 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.” 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.” 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

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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 at the Convention Against Torture).


252 Supra Convention Against Torture
torture. 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.*

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. But because Congress alone holds the Constitutional authority to create the laws of war, 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

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253 18 U.S.C. §371
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 counsel 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

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 agreements\textsuperscript{259} of some kind from these states to the effect that they will not be tortured.\textsuperscript{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 Raines 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.”\textsuperscript{261}

Others have questioned the validity of such agreements.\textsuperscript{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

\textsuperscript{259}Supra 60 Minutes
\textsuperscript{260} Id. It is unclear as to whether these agreements were ever signed, according to Michael Scheurer, a former high level CIA official.
\textsuperscript{261} Supra 60 Minutes
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.”

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. 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. 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 procedures requiring basic Congressional consultation and approval by the Secretary of State or his designee. National security related agreements provide no exception. Under revised editions of the Case-Zablocki Act, the Department of State was bequeathed the burden to approve all Executive agreements. 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 agreement.

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263 Human Rights Watch “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” Human Rights Watch Vol. 16 No. 4 (D) p.4
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.\textsuperscript{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.\textsuperscript{271} They may even be submitted in classified form.\textsuperscript{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.\textsuperscript{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

\textsuperscript{270} 22 C.F.R. pt. 181l; See generally Supra Dalton
\textsuperscript{272} Id.
\textsuperscript{273} See monograph I.
of Frisbie v. Collins, the abductors act outside of their jurisdiction or under the color of official capacity, the abduction is a crime. 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. 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. 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.”

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. Importantly, Congress chose to extend jurisdiction within the statute to include special aircraft jurisdiction. 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. 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” 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.” 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

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289 Supra AUMF

war successfully,” 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 Watch and the Council of Europe, have issued successive reports detailing alleged renditions of the sort; government inquiries in Italy, Germany, Sweden, Canada, the United Kingdom, and Spain, 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

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291 *Lichter v. United States*, 334 U.S. 742 (1948)
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](http://service.spiegel.de/cache/international/0,1518,384885,00.html)
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/](http://www.ararcommission.ca/)
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)

As a nation at war, the President is ensured significant Constitutional authority to provide security for the nation and its interests. 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.” Gravity is generally calculated by comprehending the situation as one of two divergent forms of warfare: general or imperfect. Were the war deemed imperfect, or partial, “its extent and operation depend on our municipal laws.” 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.” No President is granted carte blanche, even under a blanket AUMF.

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. In those instances of sudden and severe attacks against the United States, Presidential authority as Commander-in-Chief is undoubtedly significant, and

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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. 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. 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.” 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*


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. 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. 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. As one D.C. federal district court judge ruling in the *Hamdan* case noted, “the President is not a tribunal.” 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

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313 Supra Third Geneva Convention
314 Id.
315 Id.
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 known 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,

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\text{the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of,}
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317 See monograph 1
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.  

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.  

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.  

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.  

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.

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

\(^{324}\) 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. 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. With the exception of the United Kingdom and a number of the former Commonwealth countries, 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. 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.”

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,

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328 Id. p.887.
329 Supra Jones and Doobay
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 hesitation 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. According to that convention, aircrafts –civil and state run– are not permitted to conduct any flight which violates the laws and regulations of the state whose facilities it uses. States in turn, as a trend, typically prohibit the use of these

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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.\textsuperscript{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,”\textsuperscript{337} including
those acts performed under the color of official duty,\textsuperscript{338} even in times of war.\textsuperscript{339}
Primary criminal jurisdiction is granted to the host state for crimes committed
within its territory.\textsuperscript{340} Similar provisions are provided for under other SOFAs,
including addenda to this agreement.\textsuperscript{341} Kidnapping, no doubt, is a crime in
virtually any jurisdiction. As a result, it would appear, forcible abductions carried

\textsuperscript{336} Supra Dalton
\textsuperscript{337} Agreement Between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces, April 4,
1949 (hereinafter NATO-SOFA), Article II.
\textsuperscript{338} Id. Article VII(3)(a)(ii).
\textsuperscript{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)).
\textsuperscript{340} Id. Article VII(3)(b)
\textsuperscript{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
349 Supra Grey
of solitary confinement are racked with American targets, amidst whispers of a newly built detention center in the Upper Nile.\footnote{Id.}

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.\footnote{Supra HRW “Black Hole,” p.24 - 26} 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.\footnote{Id.} 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.\footnote{Id.} 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.\footnote{Id.} Sometime in March or April of 1999 Egyptian authorities, with apparent American assistance,\footnote{Id.} forcibly abducted Muhammad.\footnote{Supra HRW “Black Hole”}

\textsuperscript{350} Id.  
\textsuperscript{351} Supra HRW “Black Hole,” p.24 - 26  
\textsuperscript{352} Id.  
\textsuperscript{353} Id.  
\textsuperscript{354} Id.  
\textsuperscript{355} Supra HRW “Black Hole”  
\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{357} Id.  
\textsuperscript{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 be 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.” He still sits to await an unknown fate.

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.” According to reports, Egypt has failed to live up to that agreement.

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.\(^3\) 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,”\(^3\) Congress may revert back to
the assertion that the laws of war prohibit such renditions and therefore limit his


\(^3\) *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

European\textsuperscript{368} 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.\textsuperscript{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”\textsuperscript{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.

\textbf{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.

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