

## A More Regular Process for Irregular Rendition

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He is a foot soldier in a clash between radical Islam and the United States that exploded on September 11, 2001.<sup>1</sup> With respect and admiration, his followers call him Abu Omar.<sup>2</sup> He is an Islamic cleric from Egypt who was granted political asylum in Italy in 1997.<sup>3</sup> There, in a Milan mosque for all to see and hear, he exhorted radicals to wage an outward jihad against the infidels.<sup>4</sup>

Governmental authorities in Europe and America are at a loss about what to do with people like Abu Omar—whether to treat him as a law enforcement problem, a military problem, an intelligence problem, or as no problem at all. Regardless of the kind of problem Abu Omar represents, the Italian security services and the intelligence services from allied countries had, at a minimum, taken notice of him. Some intelligence services even suspected Abu Omar of being a European affiliate for Ansar al-Islam, a terrorist group that has conducted anti-Western operations in Iraq.<sup>5</sup>

On February 17, 2003, some people took matters into their own hands.<sup>6</sup> Without notice to Abu Omar and without a judicial or ad-

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<sup>1</sup> See Craig Whitlock, *Europeans Investigate CIA Role in Abductions; Suspects Possibly Taken to Nations That Torture*, WASH. POST, Mar. 13, 2005, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Michael Isikoff & Mark Hosenball, *Terror Watch: More Questions on Missing Imam; If the CIA did Abduct Abu Omar in Italy, the Timing Suggests His Rendition was Connected to the Upcoming War in Iraq*. NEWSWEEK, June 29, 2005, 1, <http://www.msnbc.msn.com/id/8409341/site/newsweek/>.

<sup>6</sup> See Whitlock, *supra* note 1.

ministrative hearing, these people snatched him from the streets of Milan, dumped him into a van, and whisked him on a private plane back to his native Egypt for less-than-friendly discussions.<sup>7</sup> Although some observers alleged that the dark hand of the Central Intelligence Agency (“the CIA”) was behind Abu Omar’s “snatch,”<sup>8</sup> those allegations are unproven. Whether Italian authorities participated in or were aware of Abu Omar’s abduction and the extent of American involvement still remain a mystery.<sup>9</sup> One Italian prosecutor, however, was unimpeded by the mysterious circumstances of Abu Omar’s abduction. Armed with some evidence of American involvement, this prosecutor issued over twenty arrest warrants against United States operatives for taking Abu Omar outside of Italy.<sup>10</sup> After that, the prosecutor charged Italian intelligence officials for complicity in the abduction.<sup>11</sup>

Inevitably, the Italian prosecutor’s search for the truth will be thwarted because it is unlikely that Americans indicted in the case will ever face charges in Italy. The United States will not voluntarily surrender its officials through extradition, and it is unlikely that Italian authorities will transfer them through irregular means. Apparently, an abduction is acceptable for a radical cleric, but not for American officials.

The abduction of foreign nationals in foreign nations by United States agents is not something new. Such abductions occurred before September 11.<sup>12</sup> But before September 11, the purpose of a snatch was most often to bring an accused back to the United States for prosecution—not to transport him or her to another nation for interrogation without charges.<sup>13</sup> Before September 11, the suspect even-

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<sup>7</sup> *Id.*

<sup>8</sup> Stephen Grey & Don Van Natta, *13 With the C.I.A. Sought by Italy in a Kidnapping*, N.Y. TIMES, June 25, 2005, at A1.

<sup>9</sup> See Dana Priest, *Italy Knew About Plan to Grab Suspect; CIA Officials Cite Briefing in 2003*, WASH. POST, June 30, 2005, at A1; Craig Whitlock, *Italy Denies Complicity in Alleged CIA Action*, WASH. POST, July 1, 2005, at A14.

<sup>10</sup> See *Italy Seeks Arrests in Kidnapping Case*, N.Y. TIMES, Dec. 24, 2005, at A5.

<sup>11</sup> Stephen Grey & Elisabetta Povoledo, *Italy Arrests 2 in Kidnapping of Imam in '03*, N.Y. TIMES, July 6, 2006, at A1.

<sup>12</sup> For example, in 1987, Lebanese terrorist suspect Fawaz Younis was rendered into U.S. custody after being lured onto a private yacht where F.B.I. agents captured him as the vessel entered international waters. See Elaine Sciolino, *Friend Led Terror Suspect to F.B.I.*, *Lawyer Says*, N.Y. TIMES, Sept. 19, 1987, at 3.

<sup>13</sup> For instance, plans to snatch Osama Bin Laden in Sudan in 1996 were not carried out because there was no criminal indictment against him. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 110 n.7 (2004). A notable snatch was the case of Mir Amal Kasi. After he was snatched in Afghanistan, he was rendered back to the

tually appeared in a public courtroom to face criminal charges. Since then, snatches have changed and increased in frequency.<sup>14</sup> Now, the purpose to a snatch is most often to gather intelligence by taking the suspect to a secret location.<sup>15</sup>

For the interrogation of terrorism suspects, secret locations outside the United States have several advantages for American authorities. First, other terrorists are less able to liberate their captured colleagues from secret locations than from known sites on the current battlefields in Afghanistan and Iraq. Second, the locations may have more available interrogators who speak the suspect's native language. Third, the locations may be more convenient, in terms of restaurants and hotels, for the interrogation teams. Finally, according to the surprisingly candid statements of one CIA official, officials in other countries might use interrogation techniques that the United States does not, may not, and should not use.<sup>16</sup>

The number of snatches (or "renditions") is much smaller than the number of enemy prisoners of war ("POWs") Americans have taken in conventional wars.<sup>17</sup> This is not to say, however, that the

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United States to face murder charges in Virginia for killing two CIA employees as they were about to drive into headquarters in Langley, Virginia. See *The Threat to the United States Posed by Terrorism: Hearing Before the S. Comm. on Commerce, Justice, and State, the Judiciary, and Related Agencies*, 106th Cong. (1999) (statement of Louis J. Freeh, Dir. of the Federal Bureau of Investigation), available at [http://www.fas.org/irp/congress/1999\\_hr/990204-freehct2.htm](http://www.fas.org/irp/congress/1999_hr/990204-freehct2.htm). Kasi was convicted in 1997 and executed for his crime in November 2002. Arnaud de Borchgrave, *Pakistan: In flagrante delicto*, WASH. TIMES, Dec. 13, 2002, at A21.

<sup>14</sup> Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, at 106–07.

<sup>15</sup> See THE 9/11 COMMISSION REPORT, *supra* note 13.

<sup>16</sup> See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

<sup>17</sup> A senior intelligence official said there had been fewer than 100 detainees in the CIA program since its inception shortly after the September 11 attacks. Sheryl Gay Stolberg, *Threats and Responses: The Overview; The President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 6, 2006, at A1. During World War II the United States accepted hundreds of thousands of prisoners of war from the British. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1219–20 (2004) (citing GEORGE G. LEWIS & JOHN MEWHA, DEP'T OF THE ARMY, PAMPHLET NO. 20-213: HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776–1945 83 (1955)). In August of 1942, the United States accepted 150,000 prisoners of war from the British and in November of that year accepted another 25,000. *Id.* During World War II, 700,000 prisoners of war were transferred by the United States to the control of other countries, such as France, Belgium, and Luxembourg. *Id.* at 1218. See also Arnold P. Kramer, *German Prisoners of War* (2001), <http://www.tsha.utexas.edu/handbook/online/articles/GG/qug1.html> (at the end of World War II there were 425,000 enemy prisoners in 511 main and branch camps throughout the United States); John Ray Skates, MISS. HISTORICAL SOC'Y, *German Prisoners of War in Mississippi, 1943–1946* (2004), <http://mshistory.k12.ms.us/features/feature20/>

number of renditions is insignificant. Rather, this is to say that rendition is something different from traditional warfare. For instance, unlike prisoners of war who are monitored by the International Committee of the Red Cross and other organizations,<sup>18</sup> terrorism suspects who have been rendered remain in the shadows—outside traditional legal process. In effect, rendition is the hidden domain of intelligence services, not the open realm of courts, prosecutors, and defense lawyers.

Although rendition is designed to stay out of the news, the pesky media have reported that the United States has rendered over 100 people by irregular means to such places as Syria, Afghanistan, and Egypt since September 11.<sup>19</sup> Through persistence, the media have pried loose some details on rendition. Those details invite an analysis of the legality of irregular rendition under American law.

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germanprisonersofwar.html (in July, 1943, the United States and Great Britain took 275,000 German and Italian soldiers into captivity).

<sup>18</sup> “The ICRC monitors and assesses detainees’ conditions of detention and treatment by sending trained staff to visit places of detention, talk with the authorities concerned, hold private interviews with detainees/prisoners and prepare an overall analysis of their findings. ICRC findings, assessments and related recommendations are discussed with the authorities at the appropriate levels.” INTERNATIONAL COMMITTEE OF RED CROSS, ICRC ANNUAL REPORT 2005, Jan. 6, 2006, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList125/1C6C94A33EA24A59C125718100393DBA>. “In 2005, the ICRC visited more than 500,000 prisoners of war and detainees in more than 80 countries.” International Committee of the Red Cross, [http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/ICRC\\_Activities?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/ICRC_Activities?OpenDocument) (last visited Sept. 10, 2006).

“Visiting people deprived of their freedom in connection with conflict is a core protection task of the International Committee of the Red Cross (ICRC). . . . During the First and Second World Wars, countless numbers of prisoners—whether American, British, French, German or of other nationalities—benefited from these visits, and from the dispatch of parcels and messages from home. This work continues today, for example through the visits to prisoners of war taken in the conflict between Ethiopia and Eritrea, or in the Western Sahara.”

International Committee of the Red Cross, *ICRC Visits to Persons Deprived of their Freedom: An Internationally Mandated Task, Implemented Worldwide*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JRME?OpenDocument> (last visited Sept. 10, 2006).

<sup>19</sup> See Mayer, *supra* note 14, at 107. Citizens of various countries have allegedly been rendered to many different places. See, e.g., *id.* (Mahar Arar, a Canadian citizen, was allegedly rendered from New York’s JFK Airport to Syria); Whitlock, *supra* note 1 (German citizen Khaled El-Masri was allegedly rendered from the Balkans to Afghanistan, and returned four months later when captors realized he was not the correct al-Qaeda suspect); Dana Priest, *Help From France Key in Covert Operations*, WASH. POST, July 3, 2005, at A1 (German suspected of being European al-Qaeda leader held in France as he was about to switch planes); Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 11 (Mamdouh Habib, an Egyptian-born Australian, was rendered from Pakistan to Egypt, Afghanistan, and Guantanamo, and eventually was released).

The Bush Administration has not used rendition on American citizens accused of terrorism. For them, the criminal justice system remains a primary mode of detention. Although two American citizens, Yaser Hamdi and Jose Padilla, were held in military brigades as “enemy combatants” in a “global struggle on terror,” American renditions have so far only been conducted on non-U.S. citizens.

But whatever the scope of the rendition program or the nationality of the person rendered, each rendition is significant to the person transferred, and to his family, friends, and acquaintances. For this reason, rendition should be subject to scrutiny. Each rendition has the potential to be a case of mistaken identity or a false accusation. Each rendition takes us farther away from the checks and balances of the criminal justice system and into the shadows of black operations and secret sites. Perhaps for these reasons, another former CIA official, less in step with the prevailing sentiment at the CIA, has called the rendition program “an abomination.”<sup>20</sup>

This Article attempts to answer three aspects to one basic question about rendition. First, may the United States, while respecting and complying with the rule of law, engage in snatches or renditions? Second, may the United States take a person suspected of being involved in terrorism from another jurisdiction with (or without) that jurisdiction’s consent and transfer him to a third jurisdiction for interrogation? Finally, may the United States do what the media alleged it did to Abu Omar?

This Article does not, however, discuss in depth nor formulate an opinion on at least four other issues concerning rendition. First, other than by mentioning the debate, I do not spend much time assessing the policy arguments for and against rendition.<sup>21</sup> Second, I stay neutral as to whether the President, if necessary, may use commander-in-chief powers to overrule any domestic or international law that would otherwise stand in the way of irregular rendition as a part of the strategy against terrorism.<sup>22</sup> Third, I do not fully explore the differences in three levels of interrogation: (1) methods that are acceptably used on criminal defendants; (2) methods that constitute cruel, inhuman, and degrading (“CID”) treatment; and (3) methods

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<sup>20</sup> Mayer, *supra* note 14, at 106–07.

<sup>21</sup> Thus, I am not opposed to a policy that would preclude rendition because of the perceived damage it causes to our self-image and to our international reputation.

<sup>22</sup> Compare Yoo, *supra* note 17 (arguing that the President’s commander-in-chief powers can trump certain provisions of treaties such as the Convention Against Torture), with Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (arguing that the President does not have the power unilaterally to violate treaties).

that constitute torture. I accept prevailing views and common sense on what constitutes an affront to due process and on what constitutes CID and torture. Fourth, even though the Bush Administration has sometimes defined torture in the most restricted way, for present purposes, I take at face value their pronouncements that terrorism suspects are not tortured in United States custody and are not transferred to other jurisdictions to be tortured.<sup>23</sup> Even so, mindful of potential evidence that rebuts the Bush Administration's claims, I dare to enter a gray zone to determine whether irregular rendition can be made regular and legal through assurances from third countries—Egypt in Abu Omar's case—and through monitoring and oversight by American officials on the conditions and treatment of rendered suspects.

As much as possible, I try to leave rhetoric behind to delve into questions of law. The practice of rendition is something that goes beyond political parties. Readers who are extremely troubled by the policy of rendition may view my analysis as a retrospective on the Bush Administration's past practices. They may describe my project as history. Less troubled readers, on the other hand, may be willing to proceed by leaving policy to policymakers and legal analysis to lawyers.

Respecting academic conventions on form, I proceed with deliberate pace through several movements in this Article. Part I adds precision to the use of the term "irregular rendition," explaining my preference for this term over "snatches" and "extraordinary rendition."<sup>24</sup> Part II assesses domestic and international laws that affect irregular rendition.<sup>25</sup> Here, the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT")<sup>26</sup> is of particular importance. While the term irregular rendition usually refers to situations in which suspects are sent to countries with questionable human rights records, I will show that some irregular renditions are clearly legal. For example, not even Human Rights Watch should complain if the United States renders a Swiss citizen captured on the battlefield in Afghanistan back to Switzerland. Part III assesses various types of assurances that the

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<sup>23</sup> U.S. Department of State, *Rice Says United States Does Not Torture Terrorists* (Dec. 5, 2005), <http://usinfo.state.gov/mena/Archive/2005/Dec/05-762606.html>.

<sup>24</sup> See *infra* Part I.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> G.A. Res. 39/46, Annex, ¶ 39, U.N. GAOR, 39th Session, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984), available at <http://www.hrweb.org/legal/cat.html> [hereinafter *Convention Against Torture*].

United States could obtain from the receiving countries before conducting an irregular rendition.<sup>27</sup> The assurances could be either oral or written and could come from heads of state, through diplomatic channels of an ambassador or a foreign minister, or from intelligence officials. Part IV assesses the role that post-transfer monitoring and oversight could play in making close calls on irregular rendition.<sup>28</sup> Part V, working within what I believe is an intelligence paradigm, lays out several scenarios in which a suspect is rendered to another jurisdiction.<sup>29</sup> To correlate with the analysis from Part II, some countries mentioned as recipients of rendered suspects are divided into three groups. Most of the attention is thus focused on countries to which rendition would be permissible but potentially problematic.

My conclusion is that with care and caution irregular rendition can be carried out under the law. The way I reach this conclusion may disappoint leading voices in the broader debate about counter-terrorism. At one end, those who have a broad view of executive power might accuse me of micro-management. At the other end, those who trumpet individual liberty might accuse me of heartlessness far worse than micro-management. Such accusations from both sides of the debate should serve as a reassurance, however, that I have made some progress in finding a reasonable position in the middle on a thorny issue in counter-terrorism.

## I. DEFINITIONS

“Snatch” is a colloquial term used to describe the process of bringing people into the American rendition program. It has been defined as “to seize by a sudden or hasty grasp” or “to kidnap.”<sup>30</sup> This term is often used by law enforcement officers and intelligence officials. For instance, a former counter-terrorism czar, Richard Clarke, uses the term.<sup>31</sup> I try to avoid the term as a reminder of the seriousness of our subject: a government’s decision to put a human being in a cage and to transfer him to another cage for rough treatment. Similarly, I avoid the term “extraordinary rendition” because it has become popular in the media as a symbol for torture and other wrongdoing.<sup>32</sup>

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<sup>27</sup> See *infra* Part III.

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> See *infra* Part V.

<sup>30</sup> RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1807 (3d ed. 2001).

<sup>31</sup> See RICHARD A. CLARKE, AGAINST ALL ENEMIES 143 (2004).

<sup>32</sup> Other academic authors also prefer the term irregular over extraordinary. See, e.g., STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 851 (3d ed. 2002) (“Rendition is

“Regular” is an appropriate term for starting a neutral analysis of American practices. This term has been defined as “evenly or uniformly arranged” and “characterized by . . . uniform procedure.”<sup>33</sup> By starting with this term, I easily establish a duality between regular and irregular practices. Irregular rendition is separate from transfers pursuant to a treaty. Renditions based on a treaty are known as extraditions. They involve the courts and the foreign ministries in sending and receiving countries, and deserve the label of “regular rendition.”<sup>34</sup> In contrast, “irregular renditions” are not based on a treaty, and involve the secret transfer of a foreign terrorism suspect from United States custody to other countries for detention and interrogation. These transfers may or may not be done by a written agreement.

I focus on irregular renditions in which the United States is the country that sends terrorism suspects to another country. In theory and in practice, there are many other scenarios of irregular rendition: cases in which the United States is the receiving country or cases when rendition occurs between two other countries. The media attention on American practices—and the focus of this Article—should not lead to a skewed conclusion that the United States is the only country in the rendition business. Renditions by other countries have been scrutinized by the European Court of Human Rights and by human rights organizations such as Human Rights Watch.<sup>35</sup> Sweden, for example, has been criticized for denying asylum to two putative terrorists, Ahmed Agiza and Muhammed Zery, and for expelling them to Egypt.<sup>36</sup> However, no matter what countries are involved, what terms are used, or what safeguards are put in place, critics of irregular rendition should understand that we move forward with dark hoods over our heads. The hoods represent the possibility that, despite our best efforts, we may not have all the facts. What we are doing might be immoral or based on mistaken identity. The govern-

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irregular when [an] individual [] [is] taken from one country to another as a criminal suspect against [his] free will and without consent of the country from which [he is] taken.” (citing JORDAN PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 436 (2d ed. 2000)).

<sup>33</sup> WEBSTER'S UNABRIDGED DICTIONARY, *supra* note 30, at 1624.

<sup>34</sup> For a discussion of international extradition, see 31A AM. JUR. 2D *Extradition* § 12 (2005).

<sup>35</sup> See Human Rights Watch, *Human Rights News: Torture and Abuse*, <http://www.hrw.org/doc/?t=torture> (last visited August 24, 2006).

<sup>36</sup> Craig Whitlock, *New Swedish Documents Illuminate CIA Action; Probe Finds 'Rendition' of Terror Suspects Illegal*, WASH. POST, May 21, 2005, at A1.

ment does not want us to know everything, and perfection is for higher powers.

Whether the topic is irregular rendition or something else, national security is not the only area that deals with ambiguity in American law. Analogous to the difficulties that American officials face in deciding whether and how to render terrorism suspects are the difficulties that American executives face in deciding how to sell their products and services around the world. The Iranian trade sanctions, for example, prevent Halliburton from selling petroleum products to Iran.<sup>37</sup> Nothing prevents Halliburton, however, from selling such products to France. Yet, Halliburton may not sell to a French company if there is a strong likelihood that those products will, in turn, be sold to Iran.<sup>38</sup> This would be an illegal end-run around the Iranian sanctions. In the corporate sphere, Halliburton protects itself from liability by conducting “due diligence,” seeking oral and written assurances, and with monitoring and oversight.<sup>39</sup> In the intelligence sphere, even though officials at the CIA do not necessarily label their practices “due diligence,” they protect themselves from liability in the same manner.

## II. THE LEGAL FRAMEWORK

### A. *Commander-in-Chief Powers*

The media have revealed, in part, the Bush Administration’s practice of irregular rendition.<sup>40</sup> Only a small group of American of-

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<sup>37</sup> See 15 C.F.R. § 746.7 (2006); DEPARTMENT OF THE TREASURY, FOREIGN ASSETS CONTROL REGULATIONS FOR EXPORTERS AND IMPORTERS 20 (2006), *available at* <http://www.treas.gov/offices/enforcement/ofac/regulations/t11facei.pdf> (“[G]oods, technology . . . or services may not be exported, reexported, sold or supplied, directly or indirectly, from the United States . . . to Iran.”).

<sup>38</sup> See 31 C.F.R. § 560.204 (2006) (export not permitted if person has “knowledge or reason to know” that export would be “directly or indirectly supplied, transshipped, or reexported exclusively or predominately to Iran”); see 50 U.S.C.S. § 1705 (LexisNexis 2006) (placing civil penalties on individuals and companies who “knowingly participate[]” in a violation of the International Emergency Economic Powers Act (IEEPA)); *United States v. Reyes*, 270 F.3d 1158, 1170 (7th Cir. 2001) (finding that defendant willfully violated IEEPA by having knowledge that his Swiss customer might forward military aircraft parts to Iran).

<sup>39</sup> Federal export regulations of certain types of technology and software explicitly require a “written assurance . . . in the form of a letter or any other written communication.” 15 C.F.R. § 740.6(a) (3) (2006).

<sup>40</sup> See Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1; Dana Priest, *CIA, White House Defend Transfers of Terror Suspects*, WASH. POST, Mar. 18, 2005, at A7; Dana Priest, *CIA’s Assurances on Transferred Suspects*

ficials inside “compartments” of classified information, however, knows the full truth about irregular rendition.<sup>41</sup> The rhetoric from the President and his advisors makes clear that they do not believe “quaint” legal theories should impede getting tough with terrorists.<sup>42</sup> For example, about a year after September 11, a top CIA official, Cofer Black, thrust his chin out and proudly stated: “[t]here was ‘before’ 9/11 and ‘after’ 9/11. After 9/11, the gloves came off.”<sup>43</sup> That statement was as much fact as provocation. At less candid moments, apologists for the administration could argue that irregular rendition moves suspects to safer locations for interrogation and puts the suspects closer to interrogators who speak their language and understand their culture. Nonetheless, the popular perception, created by the candor of Cofer Black and others, is that suspects are rendered to locations where there are not so many checks on aggressive interrogation—to places where the gloves more easily come off.

To learn much of anything about the rendition program is a struggle. Those without clearances are left to speculate and infer. Although it is fair to speculate that the Bush Administration only embarked on its rendition policy or made specific rendition decisions after receiving legal guidance from lawyers with access to the classified facts, nothing has been revealed to the public. That is, unlike the infamous “torture” memo of August 2002 concerning interrogation practices, memoranda and letters from the Office of Legal Counsel on irregular rendition, if any exist, have not leaked to the public.<sup>44</sup>

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*Doubted*, WASH. POST, Mar. 17, 2005, at A1; Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation*, WASH. POST, May 11, 2004, at A1.

<sup>41</sup> Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1.

<sup>42</sup> See Memorandum from Alberto R. Gonzales, Counsel to the President, on the Geneva Conventions and Prisoners of War to George W. Bush, the President of the United States, 2–3 (Jan. 25, 2002), available at <http://msnbc.msn.com/id/4999148/site/newsweek> (arguing that the need for flexibility in the war on terror trumps traditional reasons for applying the Geneva Conventions to al-Qaeda and Taliban prisoners).

<sup>43</sup> *Investigation of September 11 Failures: Hearing Before a Joint Session of the Senate and House Intelligence Committees*, 107th Cong. (2002) (testimony of Cofer Black, Dir. of the CIA’s Counter-Terrorism Center), available at 2002 WL 31151504; see also John Barry, Michael Hirsh, and Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, 1, available at <http://www.msnbc.msn.com/id/4989436/site/newsweek/>.

<sup>44</sup> See Memorandum from Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A to George W. Bush, the President of the United States 1 (Aug 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter *Torture Memorandum*]; Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8,

In search of details about the rendition program, I write outside the *in camera* setting of the official analysis. I cannot assess all the official arguments because I am not privy to them. Similarly, lawyers in the Bush Administration cannot comment on my analysis because of their obligations to keep the confidences of their client. Therefore, the current officials and this former official are on parallel tracks. As citizens, we should hope that their analysis exceeds what I have done, that they too have been honest in dealing with the difficult questions.

For a glimpse into the official guidance, one can infer from the academic comments that former advisers have made. For instance, Professor John Yoo, since leaving the Bush Administration as a key adviser, has argued that no law, not even the CAT, stands in the way of irregular rendition.<sup>45</sup> Professor Yoo argues that nothing prevents the United States from taking control of a terrorism suspect in a country outside the United States and rendering the suspect to another country outside the United States.<sup>46</sup> His argument contains several strands. First, whatever gets in the way of the executive's use of irregular rendition in transferring terrorists constitutes an unconstitutional interference with the President's commander-in-chief powers during an armed conflict.<sup>47</sup> Second, the CAT is not self-executing.<sup>48</sup> Third, even if the CAT were self-executing, it only applies to renditions from United States territory to other countries.<sup>49</sup> To buttress this argument that the CAT does not have extra-territorial effect, Professor Yoo refers to *Sale v. Haitian Centers Council, Inc.*<sup>50</sup> in which the Supreme Court held that the Refugee Convention only applied to conduct within United States territory.<sup>51</sup> Fourth, Professor Yoo posits that even if there is customary international law against such transfers, executive decisions to render terrorism suspects trump that law.<sup>52</sup>

To demonstrate that transfers of people during a conflict have been the exclusive domain of the executive branch, Professor Yoo

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2004, at A1. Some members of Congress still believe that the Office of Legal Counsel did offer some guidance on rendition in a March 13, 2002 memorandum. See Letter from Sen. Patrick Leahy to Alberto R. Gonzalez, Counsel to the President (Jan. 4, 2005), available at <http://leahy.senate.gov/press/200501/010405.html>.

<sup>45</sup> Yoo, *supra* note 17, at 1229–30.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1230.

<sup>48</sup> *Id.* at 1228.

<sup>49</sup> *Id.* at 1229.

<sup>50</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

<sup>51</sup> *Id.* at 156.

<sup>52</sup> Yoo, *supra* note 17, at 1230 n.201.

spends several pages on how prisoners of war were handled in the Revolutionary War, the Quasi-War with France, the War of 1812, the Mexican War, the Civil War, the Spanish-American War, World War I, the Interwar Period, World War II, Vietnam, Panama, and the Gulf War.<sup>53</sup> For his own purposes, Professor Yoo picks and chooses when suspected terrorists should be treated as POWs. For the Geneva Conventions, Professor Yoo believes that suspected terrorists are not entitled to be treated as POWs.<sup>54</sup> But for irregular rendition, he believes they can be treated like prisoners from other armed conflicts.<sup>55</sup> Nowhere does he make explicit the premise that a war on terrorism is similar enough to prior wars for the past precedents to apply. That premise is implicit in his analysis. The most relevant comparison Professor Yoo makes is not his list of wars, but a list for the handling of prisoners who were *not* entitled to “formal” POW treatment.<sup>56</sup> However, rather than cover this point in the text, he relegates it to a footnote.<sup>57</sup>

It is apparent that Professor Yoo’s arguments continue to influence the Bush Administration. In 2006, John Bellinger, the State Department’s legal advisor, in response to questions from the committee that supervises the CAT, stated: “[n]either the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the CAT applies to persons outside the territory of the United States.”<sup>58</sup> This argument, in different clothes, is Professor Yoo’s argument about the Convention’s lack of extra-territorial effect. Although Mr. Bellinger refers to the *Sale* decision in his other comments, he does not explicitly credit Professor Yoo. Yoo’s influence is apparent nonetheless.

Despite the protests against Professor Yoo and despite his unpopularity with human rights organizations, it is clear that many more officials than Mr. Bellinger share his views.<sup>59</sup> Professor Yoo, in

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<sup>53</sup> *Id.* at 1206–22.

<sup>54</sup> See John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207, 215–16 (2003).

<sup>55</sup> See Yoo, *supra* note 17, at 1221–22.

<sup>56</sup> *Id.* at 1222.

<sup>57</sup> See *id.* at 1222 n.167 (stating that “[h]istorical practice firmly supports the power of the President to transfer and otherwise dispose of the liberty of all individuals captured incident to military operations, and not merely those individuals who may technically be classified as prisoners of war under relevant treaties”).

<sup>58</sup> U.S. Dep’t of State, *List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America*, at 32 (April 28, 2006), <http://www.state.gov/documents/organization/68662.pdf>.

<sup>59</sup> Responses of Alberto Gonzalez, Nominee to be Attorney General, to the Written Supplemental Questions of Senator Edward M. Kennedy, Response to

line with the Bush Administration, suggests that our counter-terrorism policies cannot operate within a criminal law paradigm.<sup>60</sup> That paradigm has shifted, according to the Bush Administration, from “prosecution” to “prevention.”<sup>61</sup> While I agree that full process cannot be given to all suspected terrorists, I do not believe that we exist in a binary world where the laws of war are the only alternative. Perhaps the criminal justice model can be blended with the military model; a blended form of tribunal to prosecute terrorism suspects is one possibility.

Concerning irregular rendition, let us imagine that White House officials and CIA policymakers insist on more flexibility for operations. Behind the scenes, they may not be willing to gamble on aggressive interpretations of American and international law. They may not completely follow Professor Yoo. Out of caution about getting too close to the line of illegality or for policy reasons, the executive branch may ask its lawyers to assume that at least one provision of law, the CAT, applies to rendition. Similarly, let us imagine a situation in which the executive detains a non-U.S. citizen on U.S. territory far away from the front lines in Afghanistan and Iraq. Outside the immigration laws and the extradition process, the executive may propose, quickly and secretly, to render the putative terrorist elsewhere. In such cases, Professor Yoo’s provocative views about the full scope of executive power may not solve all problems, and an analysis of the CAT will be necessary.<sup>62</sup>

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Question 11 (January 25, 2005), *available at* <http://balkin.blogspot.com/Gonzales.Kennedy.supp.pdf>.

<sup>60</sup> See, e.g., Yoo, *supra* note 17, at 1193, 1198 (“If September 11 was not an act of war, then the United States might be limited to the tools of the criminal justice system in its efforts to fight the Qaeda terrorist organization . . . terrorist organizations such as al Qaeda have now acquired the military power that once only rested in the hands of nation-states. That change must bring terrorist networks within the laws of war.”).

<sup>61</sup> Tim Golden, *Domestic Surveillance: The Advocate; A Junior Aide had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1 (describing Professor Yoo as a “critical player” in the Bush Administration’s legal response to the terrorist threat); Tim Golden, *Threats and Responses: Tough Justice; After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at 11 (summarizing comments and statements by various members of White House counsel, which reflect a change to more aggressive and “forward-leaning” counter-terrorism policies, in the face of devastating terrorist attacks).

<sup>62</sup> Since this Article chooses to explore the role of assurances and monitoring in depth, I do not discuss other international conventions that may apply, that is, the Geneva Conventions or the International Covenant on Civil and Political Rights. I assume that if irregular rendition is made legal under the CAT it is legal under these other conventions and under customary international law. Testing that assumption would take me far outside the scope of this Article. Further, accepting one of Profes-

B. *The Convention Against Torture*

i. Historical Framework

The practice of torture goes back to the beginning of human history.<sup>63</sup> The efforts to ban torture do not go back as far. Torture has been categorized not only as a blatant crime against human rights, but the “most effective weapon against democracy.”<sup>64</sup> Even without a specific treaty on torture, reasonable arguments have been made that torture violates the universal law of nations, making the ban on torture *jus cogens* under international law.<sup>65</sup> Therefore, international treaties play a double role: supporting *jus cogens* and creating prohibitions that have not yet reached a level of international consensus.

The United Nations adopted and opened the CAT for signature on December 10, 1984.<sup>66</sup> The CAT is part of the international community’s broader efforts to end barbarism in the world. The CAT builds on an international law foundation that was laid by the Hague Convention on the laws of war<sup>67</sup> and the Geneva Conventions on the

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sor Chesney’s conclusions about transfers from Guantanamo Bay, Cuba, I do not conduct a separate analysis of the detainees’ due process rights. See Robert Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 744 (2006) (“[T]here is no reason to believe that the requirements of substantive due process would be any more or less forgiving than those of CAT.”).

<sup>63</sup> See, e.g., Oswaldo Estrada, *Human Dignity and the Convention Against Torture: Has the Burden of Proof Become Heavier than Originally Intended?*, 3 REGENT J. INT’L L. 87, 90 (2005); Daniel Rothberg, “What we have seen has been terrible”; *Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 485 (2003).

<sup>64</sup> 144 CONG. REC. S3013-01 (April 1, 1998) (remarks given by Senator Paul Wellstone to the United States Senate on the United Nations International Day in Support of Victims of Torture).

<sup>65</sup> See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (stating that the international prohibition of official torture has attained the force of a *jus cogens* norm). See generally Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and its implications for National and Customary Law*, 15 EUR. J. OF INT’L L. 97, 98 (2004) (stating that the prohibition against torture is a peremptory norm, or *jus cogens* principle); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L AND COMP. L. REV. 411, 437–39 (1989) (“Torture is widely recognized as contravening *jus cogens*.”).

<sup>66</sup> See Office of the United Nations High Commissioner for Human Rights, *Convention Against Torture Ratifications and Reservations*, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited Feb. 17, 2006) [hereinafter *Convention Against Torture Ratifications and Reservations*]. As of 2005, seventy-four countries have signed the convention. *Id.*

<sup>67</sup> Hague Convention (IV), *Respecting the Laws and Customs of War on Land*, and Annex: *Regulations Respecting the Laws and Customs of War on Land*, art. I, IV, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

treatment of combatants and non-combatants during war.<sup>68</sup> As a relatively new effort at international rulemaking by the United Nations, the CAT expresses the will of the international community and the signatories to the convention to end both torture and the cruel, inhuman, or degrading treatment of people around the world.<sup>69</sup>

President Ronald Reagan signed the CAT on April 18, 1988.<sup>70</sup> The United States Senate ratified it on October 27, 1990.<sup>71</sup> The Senate, however, did so with a number of “understandings” and “declarations.” Thus, the United States Senate attempted to make clear that the provisions of Articles One through Sixteen were not self-executing for purposes of U.S. domestic law.<sup>72</sup> For my purposes, rather than digress into a discussion of whether the United States Senate had the right to ratify subject to these particular understandings and declarations, I assume they were valid. Therefore, they can serve as benchmarks in determining United States obligations under the CAT.<sup>73</sup>

Although it is common to abbreviate the Convention as “CAT,” one should not forget that the rest of the Convention’s title addresses

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<sup>68</sup> See e.g., Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>69</sup> Convention Against Torture, *supra* note 26, at preamble. Torture practices were first prohibited in 1948 by the Universal Declaration of Human Rights and in 1951 by the Convention on the Prevention and Punishment of the Crime of Genocide. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10 1948), available at <http://www.un.org/Overview/rights.html>. This concept was reaffirmed in 1966 by the International Covenant on Civil and Political Rights. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>.

<sup>70</sup> 134 CONG. REC. S6464-02 (May 23, 1988).

<sup>71</sup> 136 CONG. REC. S17486, S17491-2 (Oct. 27, 1990) [hereinafter *United States Convention Against Torture Ratification History*]. Because the United States did not deposit the instrument of ratification with the United Nations until October 21, 1994, the United States’ obligations under the Convention did not take effect until thirty days later. *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir. 2001).

<sup>72</sup> *United States Convention Against Torture Ratification History*, *supra* note 71. The Senate’s primary reservation was that any obligation to prevent torture goes only as far as the constitutional requirements existing under the Fifth, Eighth, and Fourteenth Amendments. *Id.*

<sup>73</sup> The Vienna Convention on the Law of Treaties, Section 2, Article 18 of 1969 allows a State ratifying a treaty to make “reservations” unilaterally modifying the legal effect of the treaty, so long as the reservation is neither prohibited by, nor inconsistent with, the purpose of the treaty. See Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

“other cruel, inhuman, or degrading treatment or punishment.” In short, the CAT addresses two levels of conduct: torture and CID. These two levels overlap with some provisions of American law. For instance, our Constitution forbids both torture and CID on criminal defendants, and the Uniform Code of Military Justice forbids torture and CID on detainees of the United States military.<sup>74</sup>

The CAT, in basic terms, outlaws torture and requires signatories to enact and to enforce criminal laws in their nations against torture.<sup>75</sup> According to one non-governmental organization that tracks the world’s progress in outlawing torture, the CAT is the “most protective of any of the treaties to which the United States is a party,” protecting even against harmful expulsion and extradition.<sup>76</sup> Therefore, hopes for better treatment of candidates for rendition largely rest on the specific provisions of the CAT.

## ii. Specific Articles

Article One of the Convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” to punish, obtain information, coerce, or intimidate.<sup>77</sup> This definition specifically excludes any pain and suffering resulting from lawful sanctions and punishments.<sup>78</sup> To be torture, the conduct must be an intentional infliction of pain or suffering committed by officials; it is something “perpetrated or sanctioned

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<sup>74</sup> See U.S. CONST. amend. IV, V, VI; see also 10 U.S.C. § 855 (2000) (prohibiting punishments by court-martial involving “flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment”). The 2005 McCain Amendment tried to close the loophole that reportedly allowed the CIA to engage in CID on non-U.S. citizens outside the United States. The McCain Amendment “prohibits the ‘cruel, inhuman or degrading treatment or punishment’ of anyone in the custody of the U.S. Government. This provision, modeled after wording in the U.N. Convention Against Torture . . . is meant to overturn an administration position that the convention does not apply to foreigners outside the United States.” Josh White & R. Jeffrey Smith, *White House Aims to Block Legislation on Detainees*, WASH. POST, July 23, 2005, at A1. The newest source of American law on interrogations of suspected terrorists is the Military Commissions Act of 2006. Military Commissions Act of 2006, available at <http://thomas.loc.gov/cgi-bin/query/D?c109:2:./temp/~c109d7wXgE:..> Under McCain and the MCA, the definition of CID is still tied to Fifth, Eighth, and Fourteenth Amendment standards.

<sup>75</sup> See Convention Against Torture, *supra* note 26, at art. 4–7.

<sup>76</sup> Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* at 32 (2005), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf> [hereinafter *Torture By Proxy*].

<sup>77</sup> Convention Against Torture, *supra* note 26, at art. 1.

<sup>78</sup> *Id.*

by a nation's authorities."<sup>79</sup> While the definition of torture should not be artificially limited, it should not be so expansive that it merges into criminal justice standards on interrogation or into the CAT's separate definition of cruel, inhuman, and degrading treatment. A balance is necessary.

Article Two of the CAT makes clear that the ban on torture applies at all times and under all circumstances: "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>80</sup> In short, the ban on torture is absolute and not subject to any exceptions.

Article Three of the CAT is most relevant to irregular rendition. This article requires that no country "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>81</sup> It is significant that CID is not mentioned in this article and that a parallel provision related to CID does not exist under the Convention.<sup>82</sup> As such, the definition on which the legality of irregular rendition turns is only the likelihood of torture.

Since the Senate viewed many of the CAT's provisions as not being self-executing, the United States took actions after ratification to fulfill its commitments under the treaty. In 1994, Congress barred torture outside the United States by United States citizens and United States agencies.<sup>83</sup> In doing so, the new federal statute borrowed the definition of torture from the CAT.<sup>84</sup> In addition, the statute defines severe mental pain or suffering as "prolonged mental harm" caused by any of the following: intentional severe physical pain or suffering; use of or threat of mind-altering substances or anything else that can greatly alter sense or personality; threat of imminent death; or the

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<sup>79</sup> *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir. 2004).

<sup>80</sup> Convention Against Torture, *supra* note 26, at art. 2.

<sup>81</sup> *Id.* at art. 3.

<sup>82</sup> Days before the McCain Amendment passed, Secretary of State Condoleezza Rice declared that the United States, as a matter of policy, does not engage in CID. See Joel Brinkley, *Rice Appears to Reassure Some Europeans on Treatment of Terror Detainees*, N.Y. TIMES, Dec. 9, 2005, at A6. What is still not clear is whether the Bush Administration has made a corresponding change in policy to preclude renditions when there are substantial grounds for believing that the suspect is in danger of CID.

<sup>83</sup> 18 U.S.C.S. § 2340A (LexisNexis 2006). The statute not only operates against U.S. citizens for acts of torture committed outside the United States, but also extends its jurisdiction over alleged offenders present in the U.S. regardless of the offenders' or victims' citizenship. *Id.*

<sup>84</sup> 18 U.S.C.S. § 2340(1) (LexisNexis 2006).

threat of putting someone else in any of these situations.<sup>85</sup> The statute, however, does not define “severe physical pain” and does not give much guidance on determining what pain is severe enough for the statute to apply. For actions within the United States, a statute was not deemed necessary because torture was already disallowed under the United States Constitution and under various state and federal statutes.<sup>86</sup>

The CAT’s definition of torture is open to different interpretations. Severe pain or suffering is often interpreted only to prohibit acts so extreme that they are condemned world-wide.<sup>87</sup> The State Department, in one interpretation, states that protection from torture under the CAT is “usually reserved for extreme, deliberate, and unusually cruel practices.”<sup>88</sup> Another interpretation from the Justice Department stated that torture requires specific intent to inflict suffering “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>89</sup> The Justice Department, however, abandoned this controversial interpretation in time for Alberto Gonzalez and Michael Chertoff to be confirmed respectively as Attorney General and head of the Department of Homeland Security.<sup>90</sup> Even so, for at least a year after this interpretation had been abandoned, the Bush Administration continued to operate under stingy definitions such that water-boarding, namely giving the suspect the sensation of suffocation through dripping water and wet towels,<sup>91</sup> may have been interpreted as being short of torture. The McCain Amendment, which passed at the end of 2005 as the Detainee Treatment Act, attempted to put an end to such practices and stinginess. All United States

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<sup>85</sup> 18 U.S.C.S. § 2340(2)(A)–(D) (LexisNexis 2006).

<sup>86</sup> Torture has long been illegal under various state and federal laws that prohibit assault, battery, and murder. *See, e.g.*, 18 U.S.C.S. § 1111 (LexisNexis 2006) (defining and prohibiting murder); *see also* S. Rep. No. 103-107, at 59 (1993) (“The definition for ‘severe pain and mental suffering’ incorporates the understanding made by the Senate concerning this term.”).

<sup>87</sup> President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-200, *reprinted in* 13857 U.S. Cong. Serial Set at 3.

<sup>88</sup> *Id.* at 4.

<sup>89</sup> Torture Memorandum, *supra* note 44, at 1.

<sup>90</sup> *See* Memorandum for James B. Comey, Deputy Attorney General, on Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec 30, 2004), *available at* <http://www.usdoj.gov/olc/dagmemo.pdf>.

<sup>91</sup> Mayer, *supra* note 14, at 106.

agencies were prevented from engaging in torture or in cruel, inhuman, and degrading tactics.<sup>92</sup> Now it is much more difficult for the Bush Administration to argue with a straight face that water-boarding is short of *both* torture and CID. Bush's lawyers are left with a controversial argument that the President can trump Congress through commander-in-chief powers.

As with any legal standard, some applications of Article Three are clear-cut while other applications are ambiguous.<sup>93</sup> In some irregular renditions, the grounds for believing that the person about to be expelled, returned, or extradited will be tortured are close to zero. Such situations, to state the obvious, do not present "substantial grounds." In other renditions, the grounds for believing that someone will be tortured are close to 100%. Such situations, just as obviously, present substantial grounds. Cases between the two obvious poles require further analysis.

The CAT neither defines "substantial grounds" nor qualifies Article Three. The United States Senate, perhaps aware of Article Three's ambiguity, added a specific understanding of Article Three upon ratification.<sup>94</sup> The Senate's understanding was that "substantial grounds for believing" means "more likely than not."<sup>95</sup> What appeared to be a clarification, however, really traded one sort of ambiguity for another. As a result, the Senate's understanding may have actually watered down the CAT's requirement, making it easier to be in compliance on renditions.<sup>96</sup> This assumes that "more likely than not" is a more lenient standard for the executive branch than "substantial grounds." The higher the bar for the possibility of torture, the more leeway the executive has with irregular rendition. Rendition is prohibited only when the belief that the suspect will be tortured in the receiving country reaches that bar.

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<sup>92</sup> Detainee Treatment Act of 2005, 42 U.S.C.S. § 2000dd(a) (LexisNexis 2006) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

<sup>93</sup> See *infra* Part II.C.

<sup>94</sup> United States Convention Against Torture Ratification History, *supra* note 71

<sup>95</sup> *Id.*; see also 8 C.F.R. § 208.16(c)(2) (setting the standard as "more likely than not" for asylum-related removal cases); *Khup v. Ashcroft*, 376 F.3d 898, 906 (9th Cir. 2004);

*Abdulrahman v. Ashcroft*, 330 F.3d 587, 592 (3d Cir. 2003).

<sup>96</sup> Contrast the CAT standard with the standard for seeking asylum in the United States, which only requires a "well-founded fear" of harm proving that such fear is reasonable rather than probable. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987) (interpreting "well-founded fear of persecution" in 8 U.S.C. § 1101(a)(42) (2000)).

The second part of Article Three makes clear that a rendition's legality is tied to specific facts and to a totality of circumstances. It states that "[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."<sup>97</sup> Other than its short list of "gross, flagrant, or mass violations," Article Three does not provide much guidance on what those "relevant considerations" are.

As a part of the process of conforming American law to the CAT, the United States changed some of its provisions on extradition and immigration.<sup>98</sup> In 1998, Congress required the relevant federal agencies to put in place regulations "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."<sup>99</sup> This aspect of American law corresponds closely with the language of Article Three from the CAT. Regulations were passed that applied to the role of the Department of Homeland Security and the Justice Department in transfers.<sup>100</sup> Regulations were also passed that applied to the role of the State Department in transfers.<sup>101</sup> Added up, the regulations make clear that Article Three principles apply to removals and extraditions and, thus, those regulations serve as one benchmark under American law.

Yet, as noted above, my focus is on irregular renditions of people who are at all times outside United States territory. I do not fully analyze transfers of people from within the United States, transfers of people attempting to enter or to stay in the United States through the immigration process, or transfers from the special jurisdiction of Guantanamo Bay, Cuba. My focus is on secret activities that the CIA has allegedly carried out in the shadows—in foreign countries.<sup>102</sup> Those transfers may involve a different benchmark.

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<sup>97</sup> See Convention Against Torture, *supra* note 26, at art. 3.

<sup>98</sup> See, e.g., Foreign Affairs Reform and Restructuring Act ("FARRA") of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681–822 (1998).

<sup>99</sup> *Id.*

<sup>100</sup> See 8 C.F.R. §§ 208.16–18, 1208.16–18 (2006).

<sup>101</sup> See 22 C.F.R. § 95.2 (2006).

<sup>102</sup> A cottage industry has been created for identifying airplanes involved in CIA renditions. The identifications are sometimes as specific as the types of vessel and the tail numbers. See Scott Shane, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005, at A1.

Whether or not the CIA has adopted regulations to implement Article Three principles is classified.<sup>103</sup> Therefore, some official observers, in line with Professor Yoo, may continue to challenge whether Article Three even applies to irregular renditions. Their challenge might involve arguments that the CAT is not self-executing and that CAT's territorial reach is limited. Rather than debate self-execution and territoriality, I have assumed that at least Article Three applies to CIA activities. In that way, I leave more space to examine pre-transfer assurances and post-transfer monitoring.

### iii. Cases and Precedents

Some people have lived to tell what they endured through alleged CIA renditions. Notable examples are Khaled El-Masri, a German rendered from Macedonia to Afghanistan, and Mamdouh Habib, an Australian rendered from Pakistan to Egypt.<sup>104</sup> Both men have received substantial attention from the media.<sup>105</sup> Both men claim that, while innocent of any connection to terrorism, they were mistreated in their receiving countries.<sup>106</sup> As a result, Masri has filed a lawsuit against the United States.<sup>107</sup> In addition, a Canadian named Maher Arar alleges that he was detained during a lay-over at Kennedy Airport in New York City and, after transit through Jordan, rendered to Syria where he was tortured.<sup>108</sup> Arar's case, unlike Masri's and

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<sup>103</sup> I know this from the CIA's pre-publication review of this manuscript.

<sup>104</sup> See Whitlock, *supra* note 1; Jehl & Johnston, *supra* note 19.

<sup>105</sup> Ian Cobain, *CIA Rendition Flights: Case Studies: Seized, Held, Tortured: 6 Tell the Same Tale*, THE GUARDIAN, Dec. 6, 2005, at Home Pages\_4; Tony Patterson, *Germans Investigate CIA Kidnap of Innocent Citizen*, THE INDEPENDENT, February 22, 2006, at 18; Farah Stockman, *7 Detainees Report Transfer to Nations that Use Torture*, THE BOSTON GLOBE, Apr. 26, 2006, at A3; Nicholas Watt, *US Accused of Using Gangster Tactics over Terror Suspects: Washington 'outsourced torture', Says Senator: Critics Attack Lack of Evidence in Report*, THE GUARDIAN, January 25, 2006, at 14; Craig Whitlock, *Probe of Detainee Transfer Finds Many CIA Flights*, WASH. POST, Apr. 27, 2006, at A20.

<sup>106</sup> In Masri's case, the United States has apologized to the German Government for rounding up Masri by confusing him with a "known" terrorist with a similar name. See Glenn Kessler, *U.S. Said to Admit German's Abduction Was an Error*, WASH. POST, Dec. 7, 2005, at A18.

<sup>107</sup> *Khaled El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).

<sup>108</sup> *Arar v. Ashcroft*, 414 F. Supp.2d 250, 252-56 (E.D.N.Y. 2006); see Complaint at 4, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (S.N.D.Y. 2006) (No. CV 04 0249), available at [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/ArarComplaint.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf); Memorandum and Order for Dismissal at 2-9, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (S.N.D.Y. 2006) (No. CV 04 0249), available at [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Arar\\_Order\\_21606.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_Order_21606.pdf); see also Nina Bernstein, *U.S. Defends Detentions at Airports*, N.Y. TIMES, Aug. 10, 2005, at B1; Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. TIMES, May 29, 2005, at 10.

Habib's, began in the immigration context.<sup>109</sup> But so far none of these men has obtained a verdict against the United States. For such lawsuits to make it to a verdict, the plaintiffs have to surmount the steep obstacles of standing, of the political question doctrine, and of the government's assertion of the state secrets evidentiary privilege.<sup>110</sup>

Although this Article does not focus on renditions in the immigration context, they are useful in interpreting Article Three of the Convention because they provide what little law there is on how Article Three is applied in practice. With no Supreme Court case on point, lower courts in the federal system have interpreted the "more likely than not" standard under Article Three as requiring at least a fifty-one percent chance that the person will be tortured after rendition.<sup>111</sup> In effect, they have applied the "preponderance of the evidence" standard from civil cases. Martin Lederman, formerly at the Justice Department and an outspoken critic of the Bush Administration, has stated an obvious problem with this standard: "The Convention only applies when you know a suspect is more likely than not to be tortured, but what if you kind of know? That's not enough."<sup>112</sup> Mr. Lederman, however, does not go so far as to argue that the vagueness of the standard makes it unconstitutional. After all, the preponderance standard is the same one that applies to civil verdicts which often involve billions of dollars.

Other experts have concluded that "the prohibition against re-foulement to torture requires both an objective assessment of the conditions in the state to which an individual may be transferred, and a subjective assessment of the danger particular to the individual."<sup>113</sup> This danger must be more than a "mere suspicion."<sup>114</sup> One definition does not conclude the analysis, however. As often occurs in the interpretation of statutes, definitions move from one phrase to another without a clear ending. The catch phrases are a moving target. Substantial grounds become "more likely than not." "More likely than

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<sup>109</sup> See Bernstein, *supra* note 108.

<sup>110</sup> In fact, Arar's lawsuit was dismissed because Arar lacked standing, the Torture Victim Prevention Act did not create a private right of action, and there was no subject-matter jurisdiction for a *Bivens* action. The court's decision did not even fully reach the political question or state secrets issues. See Memorandum and Order for Dismissal, *supra* note 108, at 77 n.14, 85-86.

<sup>111</sup> See, e.g., *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (interpreting "more likely than not" in relation to torture, religious, and political persecutions of an alien to mean fifty-one percent).

<sup>112</sup> Mayer, *supra* note 14, at 108.

<sup>113</sup> *Torture By Proxy*, *supra* note 76, at 32.

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

not” then becomes “credible threats” or “fifty-one percent likely” or more than “mere suspicion.” Beyond repeating catch phrases, other methods are necessary for determining the legality of irregular rendition.

The United States, as noted, has enacted regulations, consistent with the CAT, for removing aliens.<sup>115</sup> Here, in the immigration context, assurances are laid out as one explicit factor in determining the legality of a rendition. To remove aliens, the Attorney General, in consultation with the Secretary of State, determines whether the assurances are “sufficiently reliable.”<sup>116</sup> What is sufficient and what is reliable is left to executive discretion.

Other factors emerge from the immigration cases. The possible torture in the receiving country must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>117</sup> If the rendered suspect is tortured by private parties, the United States would not be responsible under the CAT. For the CAT to apply, the receiving government must sanction or conduct the actual torture.<sup>118</sup> To show that the receiving government has acquiesced in the torture is not straightforward. As in other contexts, the line between private and public conduct is often blurred. In this context, courts have held that acquiescence “is not limited to ‘actual knowledge, or willful acceptance’; the ‘willful blindness’ of government officials suffices” for torture.<sup>119</sup> If torture by lower-level officials is routine, that may serve as evidence that higher-level officials, or the government itself, illegally turned its eye from torture.<sup>120</sup>

It is particularly difficult to find public action, under the CAT standard, when the receiving country lacks a central government that functions in the entire national territory.<sup>121</sup> So, in what might appear a paradox, the CAT makes it easier to render to lawless areas than to territories under firm governmental control. In one case, the Eleventh Circuit ruled that if there is no central government, the receiv-

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<sup>115</sup> 8 C.F.R. § 208.18(c)(2) (1999).

<sup>116</sup> *Id.*

<sup>117</sup> Convention Against Torture, *supra* note 26, at art. 1.

<sup>118</sup> *Id.*

<sup>119</sup> *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004); *see also* *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–95 (9th Cir. 2003) (acknowledging that both “actual knowledge” and “willful blindness” constitute acquiescence under the CAT).

<sup>120</sup> *See* *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004).

<sup>121</sup> The Convention does protect against torture occurring under a private party’s control, but only to the extent that an existing government gives consent or acquiescence to the conduct. *Reyes-Reyes*, 384 F.3d at 787.

ing country could not be involved in torture or could not acquiesce in torture; by application, the CAT did not prohibit the transfer of a person to Somalia.<sup>122</sup> The Somalia case, however, only applied to the removal from the United States of an alien who would not be interrogated in the receiving country.<sup>123</sup>

The context for terrorism suspects is different. Unlike the removal of most aliens, irregular rendition involves close cooperation between the sending and the receiving countries. American renditions of terrorism suspects have two basic purposes: first, taking the suspect from the “battlefield,” and second, obtaining information from him about terrorist plots and terrorist cells. In counter-terrorism practice, it seems pointless for the CIA to render suspects to lawless areas. That would run counter to the purposes of irregular rendition, especially the second purpose. The countries that have been reported as recipients of rendered suspects, Egypt and Syria to name but two, are not like Somalia. They have central governments and intelligence services that control—sometimes brutally—their entire country. They may be taking rendered suspects as a way of cooperating with the United States on counter-terrorism; secular regimes in the Middle East, including those of Egypt and Syria, may share the American assessment about the magnitude of the risk from al-Qaeda and other groups that are motivated by a radical view of Islam. Those regimes may be cooperating for their own survival.

Yet, reports that Syria has received terrorism suspects from the United States may suggest something more subtle about cooperation out of self-interest. Even when diplomatic relations between two countries are strained, as they are between the United States and Syria, sometimes intelligence services are able to work out mutually beneficial deals. That is, sometimes the relationship between spymasters is quite different from the relationship between diplomats. Not always do the scenes on stage correspond with what goes on off the stage.

#### iv. Country Reports

Although the second part of Article Three states that a “consistent pattern of gross, flagrant or mass violations of human rights” should be taken “into account,”<sup>124</sup> it does not explain what sources set

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<sup>122</sup> *D-Muhumed v. U.S. Atty. Gen.*, 388 F.3d 814, 819–20 (11th Cir. 2004).

<sup>123</sup> *Id.*

<sup>124</sup> *Convention Against Torture*, *supra* note 26, at art. 3.

this pattern. Further, it does not describe the exact pattern that shows substantial grounds that a rendered suspect will be tortured.

In the modern age, citizens have many sources of information to check on governmental activities. Even those activities which governments shroud as “classified information” sometimes pop out into the public discourse. Thanks to the work of our own government, other governments, international bodies, the media, and non-governmental organizations, citizens have many sources for assessing the human rights records of countries around the globe. The reports about these countries, however, are not usually focused on the CAT. They are more general than specific.

The United States Department of State issues annual country reports that assess human rights conditions, past and present, and incidents of human rights violations in various countries.<sup>125</sup> These reports are influential. For the CAT analysis, American courts consider them relevant, though not solely conclusive, to the likelihood that a person will be tortured in the receiving country.<sup>126</sup> A negative country report, however, does not always carry over from one government to another government in the same country. In theory, a new government, to borrow from a criminal procedure concept, should be able to purge the taint of prior practices. As one court noted, a change of a country’s constitution and the adoption of a better policy “regarding political activism, police brutality, and civil liberties,” might alleviate concerns about the receiving country’s human rights violations, including torture.<sup>127</sup> Thus, country reports are one factor in the totality of the circumstances for assessing the legality of renditions under the CAT.

Some courts have interpreted the “more likely than not” standard to require past acts of torture and “gross, flagrant, or mass violations of human rights,” which is indeed a high standard.<sup>128</sup> In addition, for the CAT to prevent rendition, the risk of torture must be

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<sup>125</sup> *See id.*

<sup>126</sup> *See Zarouite v. Gonzales*, 424 F.3d 60, 63 (1st Cir. 2005) (“The State Department’s regular country reports are generally persuasive of country conditions . . . but are open to contradiction.”); *Tissah v. Ashcroft*, 107 F. App’x 369 (4th Cir. 2004) (finding that State Department country reports detailing torture of detainees were relevant indicator of conditions in country).

<sup>127</sup> *Kourteva v. I.N.S.*, 151 F. Supp. 2d 1126, 1130 (N.D. Cal. 2001) (finding that policies changed in Bulgaria when the government shifted from communists to socialist-democrats).

<sup>128</sup> *Nuru v. Gonzales*, 404 F.3d 1207, 1218–19 (9th Cir. 2005); *see also* 8 C.F.R. § 208.16(c) (3) (iii–iv) (1999) (codification of this standard).

related to a specific person.<sup>129</sup> For these reasons, it is possible that a rendition could be legal in the face of abuses in the receiving country. The more tenuous the evidence of past human rights violations, the weaker the link between general conditions and the person being considered for rendition, the more likely the person can be rendered in compliance with the CAT.<sup>130</sup> In short, a “credible” threat of future torture of a specific person must exist for the CAT to apply.<sup>131</sup> Thus, the CAT standard looks forward.

v. Commentators

This Article is not the first to analyze provisions of the CAT that apply to renditions. Various non-governmental organizations, serving as sound secondary sources on the CAT, have already assessed the legality of America’s secret rendition program.<sup>132</sup> These assessments, however, whether by the Association of the Bar of the City of New York (the “City Bar”) or by Human Rights Watch, tend to substitute policy preferences for legal analysis.

The City Bar defines “extraordinary rendition” as a transfer from United States custody “to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.”<sup>133</sup> Although Article Three of the CAT only refers to the likelihood of torture, the City Bar uses “torture” and “cruel, inhuman, or degrading” as interchangeable concepts. By those means, the City Bar’s definition already stacks the deck against rendition. Because of its distaste for the policy of rendition, the City Bar tends to state baldly that neither assurances nor monitoring after rendition can tip the balance toward legality under the CAT.

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<sup>129</sup> Human Rights Watch, “Empty Promises:” *Diplomatic Assurances No Safeguard Against Torture*, at 4, available at <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf> [hereinafter *Empty Promises*].

<sup>130</sup> See, e.g., *Pena v. U. S. Atty. Gen.*, 134 F. App’x 384, 386 (11th Cir. 2005) (denying protection to alien based on anonymous death threats); *Zheng v. Ashcroft*, 93 F. App’x 370 (3d Cir. 2004) (denying protection to alien who did not introduce any evidence of past torture or potential future torture).

<sup>131</sup> *Nuru*, 404 F.3d at 1219–20.

<sup>132</sup> See, e.g., American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Abuse by the United States at Home and Abroad*, [http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf) (“Torture and cruel, inhuman or degrading treatment are prohibited at all times under human rights law, even in war or when fighting terrorism. . . . The prohibition of cruel, inhuman or degrading treatment at all times is applicable to state agents under Article 16(2) of the Convention Against Torture. . . .”).

<sup>133</sup> *Torture by Proxy*, *supra* note 76, at 4.

The City Bar's statements are divided into three parts. First, assuming that American diplomats will be involved in obtaining assurances from the receiving countries, the City Bar concludes that diplomats will not press hard enough to obtain proper assurances because of their "need to maintain diplomatic, trade, and commercial relations of significance to the United States."<sup>134</sup> This assumes, without evidence, that diplomatic relations are zero-sum and that renditions are a lower priority for our State Department. Second, the City Bar claims that the mechanisms to monitor rendition are inadequate.<sup>135</sup> Rather than focus on CIA practices, however, the City Bar draws on negative experiences with monitoring at the Department of Defense.<sup>136</sup> To the City Bar, secrecy and abuse always go hand in hand. Third, the City Bar is troubled by "unfettered discretion" in the executive branch.<sup>137</sup> Once again, the City Bar goes too far. The executive branch has always had broad discretion across the range of national security issues.<sup>138</sup> This is nothing new. Although the CAT does not require judicial oversight, the City Bar is particularly troubled that our courts are not involved in assessing assurances before suspects are transferred.<sup>139</sup> They call this a "procedural shortcoming."<sup>140</sup> The City Bar even claims, on thin authority, that the lack of judicial oversight "likely violates international law."<sup>141</sup>

The law on irregular rendition is grounded in facts and rules. The law does not float with the wishful thinking of human rights or-

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<sup>134</sup> *Id.* at 88–89.

<sup>135</sup> *Id.* at 89.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 89.

<sup>138</sup> The text of the Commander-in-Chief Clause of the Constitution provides some of the President's authority over national security matters. For example, on the Executive's power over national security information, see the Supreme Court's recognition in *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988), that "[t]he President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." (citations omitted) The Court also recognizes Executive authority over intelligence operations. *Totten v. United States*, 92 U.S. 105, 106 (1875) ("[The President] was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy."). For the President's power to respond to invasion and insurrection as commander-in-chief, see *The Amy Warwick*, 67 U.S. 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.").

<sup>139</sup> *Torture by Proxy*, *supra* note 76, at 89.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

ganizations. The fact is the CAT does not require that a person about to be rendered must have a hearing where he can provide independent evidence of the chances that he will be tortured in the receiving country. He is not entitled to attack the adequacy of the assurances and the monitoring that the sending country proposes to put in place. Even so, as a matter of policy, the United States may deem it worthwhile to provide such a hearing. That could increase the fairness and the reliability of the process related to rendition. That is an option for policymakers, not a requirement, under the CAT. Policy and law are not the same things.

If the United States were tempted to go down the hearing route, American intelligence officials would demand various protections. They would insist, at a minimum, that these hearings be before executive officials or before a court with secret proceedings like the one that handles applications for national security wiretaps under the Foreign Intelligence Surveillance Act.<sup>142</sup> For the intelligence community, transparency on irregular rendition soon loses out to secrecy. Whatever the variations on the hearing, intelligence officials would strongly oppose any process that is completely open to the public. The sources and methods of rendition, the diplomatic interactions with foreign governments, and the interactions with liaison services would easily take the rendition into the classified realm. There, the intelligence officials would not stand for open government.

Other groups have joined the chorus with the City Bar. Voices from Human Rights Watch strike similar notes.<sup>143</sup> The respect is mutual, and the City Bar relies to a large degree on its colleague's work.<sup>144</sup> Human Rights Watch concludes that assurances and monitoring are "empty promises."<sup>145</sup> In the introduction to one report, Human Rights Watch states:

[P]ost-return monitoring per definition implies a fundamental distrust of the formal diplomatic assurances and lack of confidence in domestic mechanisms to hold perpetrators of torture accountable in the countries offering such assurances. Sending governments would no doubt argue that post-return monitoring is merely a failsafe, and that they would not return anyone whom they genuinely believed to be at risk. But when governments and international organizations dispatch monitors to observe elections

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<sup>142</sup> Foreign Intelligence Surveillance Act, 50 U.S.C.S. § 1803 (LexisNexis 2006).

<sup>143</sup> See *Empty Promises*, *supra* note 129.

<sup>144</sup> See *Torture by Proxy*, *supra* note 76, at 86–88.

<sup>145</sup> Indeed, the title of the Human Rights Watch report, relied on heavily by the City Bar of New York, includes the "empty promise" phrase. See *Empty Promises*, *supra* note 129.

or assess human rights they do so because they fear election fraud and human rights violations. It follows that the use of post-return monitoring in cases of returns involving diplomatic assurances amounts to an acknowledgement that returnees are at risk of torture or ill-treatment.<sup>146</sup>

The world is not as tidy as Human Rights Watch would like to believe. Just because a person fears something does not mean that something exists. In a different context, for example, the fact that a doctor orders comprehensive blood tests for a patient does not prove that the patient has leukemia. The tests are a precaution. The tests are a means of lowering the level of uncertainty. Sometimes fears are unfounded or exaggerated. Sometimes the doctors are overly cautious. Sometimes the tests are unnecessary. Sometimes, to return to Human Rights Watch's context, election monitors are dispatched to increase confidence in something positive, in an election without fraud.

Human Rights Watch allows public policy concerns to inflate its evaluation of legal standards. It is correct that "mere accession to U.N. human rights instruments" does not guarantee a country's compliance with the "obligations enshrined therein."<sup>147</sup> But much of Human Rights Watch's report, indifferent to Article Three's clear statement that the CAT only applies to the risk of torture, proceeds as if Article Three applied to both torture and cruel, inhuman, or degrading treatment. Whether by carelessness or by design, Human Rights Watch blurs the Article Three standard into a higher standard: a certainty that the suspect will not be tortured. Referring to work from the United Nations Special Rapporteur, Human Rights Watch states that "[b]efore a person may be returned, assurances must be 'unequivocal,' that is, leaving absolutely no doubt that no torture or ill-treatment will occur."<sup>148</sup> That, however, is not how the United States interprets the law.

Human Rights Watch seeks a rule that allows irregular rendition only if the United States is certain the receiving country will not torture the suspect. Throughout, Human Rights Watch does not leave room for doubt. But Article Three prohibits rendition only if there are "substantial grounds for believing" torture may occur.<sup>149</sup> It does not insist on absolute knowledge. It leaves room for doubt. As noble as its work is, Human Rights Watch's insistence on knowledge with "absolutely no doubt" takes the legal standard past beyond a reason-

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<sup>146</sup> *Id.* at 4–5.

<sup>147</sup> *Id.* at 14.

<sup>148</sup> *Id.* at 7.

<sup>149</sup> Convention Against Torture, *supra* note 26, at art. 3.

able doubt, past the legal standard which applies to guilt in American criminal trials. Its insistence on absolute knowledge comes across as naïve, making it easier for hardened officials in any political administration to dismiss those expectations and recommendations.

It does make sense to hold the executive branch to high standards. But when standards are set too high, such expectations may have the paradoxical outcome of making it more difficult to bring about incremental improvements in the oversight on rendition. To the extent that observers from Human Rights Watch base their arguments on the law, they should factor in the law as it is in the United States rather than the law as they would like it to be here. Perhaps Human Rights Watch should come down from the mountain to help those who are attempting to make some progress, step by step, in the plains and valleys of American counter-terrorism. Substantial grounds for believing torture will occur, the CAT standard, is not the same as any possibility that torture will occur.

More sensibly, Human Rights Watch does acknowledge the two-part framework at the core of this Article: assurances of proper treatment from the receiving country and monitoring of the terrorism suspect after transfer.<sup>150</sup> But more by rhetoric than by analysis, it sweeps away the possible adequacy of assurances and monitoring. According to Human Rights Watch, “[t]he widespread or systematic use of torture in many of the countries to which people have been returned, indicates that diplomatic assurances and post-return monitoring are inadequate safeguards against torture and ill treatment.”<sup>151</sup> By this argument, Human Rights Watch is too pessimistic. The past does not always doom the future.

Although general conditions in a country are important to the CAT analysis, Article Three addresses a particular rendition of a person, not rendition in the abstract.<sup>152</sup> General conditions, while probative, do not determine the outcome on a particular rendition between intelligence services. The CIA can render a suspect to a place with a horrible human rights record and deplorable prisoner practices without that suspect being tortured. That much is a theoretical possibility. When the CIA is the sender, United States law focuses on whether the odds are more likely than not that the receiver will tor-

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<sup>150</sup> See *Empty Promises*, *supra* note 129, at 4.

<sup>151</sup> *Id.*

<sup>152</sup> See Convention Against Torture, *supra* note 26, at art. 3. It is important to recall that the refouler, return, expulsion, or extradition to which the CAT refers involves “a person” and the likelihood that “he” will be tortured rather than any broadly applied condemnation of a nation’s human rights record. *Id.*

ture the suspect.<sup>153</sup> This one standard from Article Three anchors the law on irregular rendition.

Before any further examination of Article Three, as a reminder, it is useful to turn the analysis around to United States practices. Separate from the abuses that have occurred in our state and federal prisons, separate from the mistreatment that has occurred in our military detention facilities such as Abu Ghraib and Guantanamo, it still seems likely that other countries can render persons to the United States consistent with their CAT obligations. Surely, the City Bar and Human Rights Watch are not so adamant to take the United States permanently off the receiving list for regular and irregular renditions. To America's credit, rather than tolerate abuses and mistreatment, we investigate them.<sup>154</sup> We attempt to prosecute the wrongdoers.<sup>155</sup> That is the way we stay within the rule of law. That is our redemption.

### C. Clear-Cut Cases

Without digging any deeper into statutes, legislative history, commentary, or court cases, one can tether the analysis of irregular rendition to two clear-cut examples: the first in which there are not substantial grounds for believing torture will occur, and the second in which there are substantial grounds, no matter the assurances and the monitoring. Rather than parse language from legal texts, one can provide an example of a rendition that is clearly legal and another example of a rendition that is clearly illegal. These examples, in turn, can be used as analogies to interpret actual practices of rendition.

#### i. Safe Haven

Imagine, for example, that during a raid in Afghanistan, American forces capture a blond, blue-eyed man of about thirty who had been fighting on the side of the Taliban. The captive speaks English well, but with a German accent. He does not have a passport or any other form of identification on him. He has a long beard and the pungent odor of someone who has not bathed in weeks. In response to questioning from United States military intelligence officials, who

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<sup>153</sup> See United States Convention Against Torture Ratification History Reservation 2, *supra* note 71, at S17492.

<sup>154</sup> See, e.g., Kate Zernike, *Reservist to Offer Guilty Plea in Jail Assault*, N.Y. TIMES, Jan. 28, 2005, at A6 (concerning prosecution of United States soldier involved in prisoner abuse).

<sup>155</sup> See, e.g., *id.*

quickly arrive on the scene, the captive claims to be a Swiss citizen from a small town near Zurich. He says his name is Karl Rohner, and that he is thirty-three years old.

The American authorities promptly inform the Swiss authorities. Because the Swiss do not have much of a diplomatic presence in Afghanistan, the Americans go through their State Department to direct inquiries to the Swiss Foreign Ministry in Berne. The State Department asks the Swiss whether they have any record of a Rohner that matches the captive's age and appearance. Rohner checks out. Meanwhile, during further questioning, Rohner tells his American captors that he came to Afghanistan on a humanitarian mission for a Swiss non-governmental organization. He claims the Taliban kidnapped him and forced him to fight on their side. Other captives from the American raid, in separate questioning, confirm much of Rohner's story. Soon, lucky for Rohner, the American authorities are ready to release him. For his safety, they will not release him in Afghanistan, however. The Swiss authorities say he must come home to apply for a new passport. Frugal to the extreme even in matters of state, they ask their American friends to handle Rohner's transport back to Switzerland. But the lawyers who represent the Department of Defense hesitate. They need to ensure that a quick transfer on a military aircraft does not violate the law. In particular, they are concerned about irregular renditions because of the CAT.

Surely, even if Switzerland has an extradition treaty with Afghanistan,<sup>156</sup> human rights organizations and other defenders of human rights do not expect the Americans to forego an irregular rendition on these facts. The courts in Afghanistan barely function.<sup>157</sup> To the extent that they do function, their process is slow and confused. Their participants are at risk of attacks from the Taliban and their supporters. Far away, Switzerland is a safe haven for Rohner. Switzerland is his home. Switzerland is a member of the CAT with a nearly impeccable human rights record.<sup>158</sup> This scenario is thus a clear example where irregular rendition makes good policy and good law. Rohner can be transferred consistent with Article Three of the CAT.

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<sup>156</sup> Afghanistan and Switzerland do not appear to have a bilateral extradition treaty or to be members of a common multinational extradition agreement. See United Nations Treaty Collection, <http://untreaty.un.org/English/treaty.asp> (last visited August 23, 2006).

<sup>157</sup> See Faiz Ahmed, *Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code*, 29 HASTINGS INT'L & COMP. L. REV. 93, 102 (2005) (noting Afghanistan's shortage of state-sponsored legal institutions and its difficulties in establishing judicial processes).

<sup>158</sup> See *infra* Part V.

## ii. The Lion's Den

For a clear boundary at the other end of the field, imagine a hypothetical from the past. Saddam Hussein, to the despair of the Iraqi people, is still in power. A leading Iraqi dissident, a Kurd—call him Mustapha Chalabi—escapes from Iraq by walking around checkpoints into Jordan. In Amman he purchases a false passport in a different name. Then he flies toward London on a British Airways flight. After the flight lands at Heathrow, while he is presenting himself at the immigration check, he whispers into the British official's ear that his passport is false. He says he is a top Iraqi dissident and needs to speak to the CIA officer who he is sure must be somewhere on duty near the airport.

Within a few days, while Chalabi is detained at the airport under joint British-American control, the American authorities confirm that he is indeed who he claims to be: a prominent dissident. Chalabi proposes to his interrogators a covert action to kill Saddam Hussein and to put Chalabi in power in Iraq. While Chalabi is in custody, a story, based on anonymous sources, leaks to the *Financial Times*. The Americans, the article says, are plotting with Chalabi against Saddam Hussein.

Various American agencies consult on what they should do. Lines of communication are opened up between Washington, D.C. and London. After consultation, the intelligence professionals state that they have no interest in working with Chalabi. Many of them had concluded, long ago, that he and his family are riddled with intelligence fabricators. In addition, they realize that the American President, a firm believer in honesty in international relations, does not have an appetite or a tolerance for covert action. The consensus, led by the CIA, is that it is not worth debriefing Chalabi anymore. He should be sent back to Iraq. The British do not want to keep him either.

For the next step, an inter-agency team of American lawyers is formed. The lawyer from the Immigration and Naturalization Service, an avid reader of law review articles and an expert on international law, suggests that sending Chalabi back to Iraq would violate the CAT. Iraq has an atrocious human rights record and, under Saddam Hussein, the country was not a member of the CAT.<sup>159</sup> The law-

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<sup>159</sup> Iraq's post-Saddam government has still not ratified the CAT. See Office of the United Nations High Commissioner for Human Rights, Convention Against Torture Ratifications and Reservations, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited Sept. 9, 2006) (in which Iraq is not listed as a participant).

yer from the CIA suggests they obtain written assurances from Saddam that Chalabi will not be harmed. If necessary, they can even ask Saddam to allow monitoring and inspection after Chalabi is transferred. In response, a lawyer from the State Department argues that a leader who cannot be trusted to fulfill his obligations to the United Nations on ceasefire arrangements and on inspections cannot be trusted on other matters. The State Department lawyer reminds the group that Saddam has a horrific record of dealing with dissidents. He executes them without legal process. His atrocities include the poison gassing of Iranians during the Iran-Iraq War and of Kurds in putting down an internal uprising. Saddam knows about Chalabi's plans. Any assurances from Saddam, even to the American President himself, would be worth far less than the paper they were written on.

Surely the Americans (and the British) would be reasonable in concluding that a substantial risk of torture, if not a risk of death, exists if Chalabi is returned home. The press has revealed Chalabi's plotting against Saddam. Saddam, who has a blatant disregard for international conventions, is ruthless with dissenters. Accordingly, this scenario serves as an example where irregular rendition, no matter the assurances, no matter the possibility of monitoring and oversight after the transfer, would be bad policy and bad law. This scenario is the functional equivalent of Saddam promising to kill Chalabi as soon as the defector returned home.

Between the two boundaries of the safe haven and the lion's den are an infinite number of examples where the analysis is much more difficult. That is the gray area this Article continues to explore.

#### *D. Legal Exposure*

Another way of exploring the legality of irregular rendition is to ask what, if anything, might happen to U.S. officials if they violate Article Three of the CAT.<sup>160</sup> Could they be exposed to criminal prosecution or civil suit in the United States?

As to criminal exposure, it is safe to assume that several officials at headquarters and in the field would be involved in any particular rendition. The capture of Abu Omar from Milan illustrates that point. The Italian magistrate, through his indictment, suggests that several American officials were involved in staking out Abu Omar and

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<sup>160</sup> The odds that the United States could assert jurisdiction over a foreign official are so low that any further analysis of the exposure of foreign officials does not seem necessary. Further, I do not analyze the extent to which detainees in CIA custody may delay or prevent an irregular rendition through a writ of habeas corpus or other means. The viewpoint of this section is thus after the fact of transfer.

capturing him.<sup>161</sup> Such group action exposes the officers to criminal liability under doctrines of attempt, aiding and abetting, and conspiracy.<sup>162</sup> Indeed, the media have noted that some discussions within the Bush Administration's secret circle have recognized the possibility of group liability for irregular renditions.<sup>163</sup> But for group liability to be possible, it must be connected to an underlying crime.<sup>164</sup> To be illegal, attempt, aiding and abetting, and conspiracy need to be attached to something specific.<sup>165</sup>

An aggressive prosecutor might build a case on the federal torture statute.<sup>166</sup> But this prosecutor would be charting new territory. So far, no one has been convicted under the torture statute for conspiracy to torture. Potential charges under the torture statute would also open up a range of possible defenses. The indicted defendants, still reading from the disavowed John Yoo playbook, might argue that they did not have the specific intent necessary to trigger the statute.<sup>167</sup> Or they might say their actions were excused or justified. Or the defendants may go straight for jury nullification, recognizing that people who have been rendered under the label of "terrorist" do not make appealing victims.

Such defenses compound the complications prosecutors would face from dealing with the classified facts involved in any irregular rendition. When the CIA operates under a blanket policy of neither confirming nor denying the rendition program, it is impossible for the parties in a criminal case to delve into the details of a particular rendition without treading on secrets during discovery or trial. Although the Classified Information Procedures Act ("CIPA")<sup>168</sup> is designed to handle some of the complications of having classified information in a criminal case, it does not necessarily resolve everything in the prosecutors' favor.<sup>169</sup> CIPA merely encourages the parties to

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<sup>161</sup> *Id.*

<sup>162</sup> See 18 U.S.C. § 2 (2000) (allowing for an individual who has aided, abetted, counseled, commanded, induced, or procured the commission of an offense against the United States to be punished as a principal); 18 U.S.C. § 371 (2000) ("If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned.").

<sup>163</sup> See Michael Isikoff, *Secret Memo—Send to Be Tortured*, NEWSWEEK, Aug. 8, 2005, at 7.

<sup>164</sup> 18 U.S.C. § 2 (2000).

<sup>165</sup> *Id.*

<sup>166</sup> 18 U.S.C.S. § 2340A (LexisNexis 2006).

<sup>167</sup> See Torture Memorandum, *supra* note 44, at 3.

<sup>168</sup> 18 U.S.C. app. § 3 (2000).

<sup>169</sup> *Id.*

work toward a resolution before trial.<sup>170</sup> The executive still has difficult choices under CIPA, and the threat of graymail still lurks behind the scenes.<sup>171</sup> For prosecutors, the CIPA precedents are not too encouraging.

In the case of Zacarias Moussaoui, alleged to be part of an al-Qaeda conspiracy, federal prosecutors worked for over four years, with rounds of appeals to the Fourth Circuit, before they reached the penalty stage for the trial.<sup>172</sup> In the case of Joseph Fernandez, the former head of CIA operations in Costa Rica, indicted by Independent Counsel Lawrence Walsh during the Iran-Contra investigation, the Court of Appeals affirmed the dismissal of the indictment because the intelligence agencies were not willing to turn over the classified information in the form that the trial court determined was necessary for a fair trial.<sup>173</sup>

The intelligence agencies, rather than admit that they do not want anyone second-guessing them, or that they are sweeping dirt under the carpet, might argue that revealing anything about an irregular rendition will pose an exceptional risk to national security. If challenged, they might stress the importance of “liaison” with other intelligence agencies and the need to protect “sources and methods.” Behind the scenes, they will push the Attorney General to dismiss a criminal prosecution.

Redress on irregular rendition will be difficult even if the action shifts from the criminal arena to the civil arena. Instead of federal prosecutors bringing a criminal case under the torture statute, the plaintiffs in a civil case claiming to have been tortured might bring an action under the CAT. These people, however, would be weighed down by several burdens. For instance, foreign officials involved in the torture would not likely be subject to American jurisdiction, and

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<sup>170</sup> See Saul M. Pilchen & Benjamin B. Klubes, *Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel*, 31 AM. CRIM. L. REV. 191, 193–94 (1994).

<sup>171</sup> Graymail is defined as the “[t]hreat by a defendant in a trial to expose intelligence activities or other classified information if prosecuted.” NORMAN POLMAR & THOMAS B. ALLEN, *SPY BOOK—THE ENCYCLOPEDIA OF ESPIONAGE* 274 (2d ed. 2004) (1997).

<sup>172</sup> *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005). Moussaoui was indicted in the Eastern District of Virginia in 2001. *Id.* After his case made two trips to the Fourth Circuit, Moussaoui pleaded guilty to all the charges against him in 2005. Neil A. Lewis, *Surprise Terror Plea Leaves Unresolved Issues*, N.Y. TIMES, Apr. 25, 2005, at 130. The penalty stage in his case did not begin until 2006. Neil A. Lewis, *One Verdict Decided, 9/11 Jury Faces Second*, N.Y. TIMES, Apr. 5, 2005, at A18.

<sup>173</sup> *United States v. Fernandez*, 913 F.2d 148, 164 (4th Cir. 1990).

American officials might benefit from substantive and procedural protections (e.g. qualified immunity) under the law.

Although CIPA does not burden civil plaintiffs, they are still no match for an executive branch whose goal is to keep them from prying into secrets. A civil action related to an irregular rendition might fail in the end for lack of justiciability.<sup>174</sup> One reason is that the negotiations between intelligence services on an irregular rendition may constitute the sort of “political question” which courts tend to avoid resolving.<sup>175</sup>

Moreover, a civil action related to an irregular rendition may be dismissed because of the state secrets privilege.<sup>176</sup> That privilege can prevent plaintiffs from learning more about irregular renditions, the sort of “black” operations which courts are loath to disclose.<sup>177</sup> In general, even if the United States is not a party to the civil suit, the executive may assert its evidentiary privilege by intervening in the case for that limited purpose. All the executive needs to do, either as a third party that has intervened or as a defendant, is to have the head of an executive agency—the Director of Central Intelligence, for instance—file something with the court that articulates a danger to national security if the case proceeds.<sup>178</sup> The court, in response to a reasonable assertion of the state secrets privilege, must carve out of the case whatever relates to classified information, limiting discovery

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<sup>174</sup> See *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (citing *Baker v. Carr*, 369 U.S. 186 (1962) (dismissing action to recover for losses arising out of the *USS Vincennes*' shooting down of an Iranian airliner)).

<sup>175</sup> Under the political question doctrine, courts will not decide matters “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . .’” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>176</sup> *United States v. Reynolds*, 345 U.S. 1 (1953). A state secret has been defined as “a governmental secret relating to the national defense or the international relations of the United States.” 228 FED. R. EVID. 509(a)(1) (Proposed draft 1972); see also Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 251 (1972).

<sup>177</sup> See *Reynolds*, 345 U.S. at 1; *Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 402 (S.D.N.Y. 1982) (“[T]he court must find that the claim was asserted properly and that there is a reasonable danger that disclosure might prejudice the national security.”); *Halkin v. Helms*, 690 F.2d 977, 993 (D.C. Cir. 1982) (“It is self-evident that the disclosures sought here pose a ‘reasonable danger’ to the diplomatic and military interests of the United States.”).

<sup>178</sup> See, e.g., *Reynolds*, 345 U.S. at 1 (holding that the Federal Government could invoke state secrets privilege to keep Air Force report classified); *Halkin*, 598 F.2d at 7 (permitting the government to not disclose whether intelligence information in dispute even existed, as the “state secrets privilege is absolute.”).

and further inquiry. If a carving out is not possible, the court must close the case down completely.<sup>179</sup>

The political question doctrine and the state secrets privilege are not the only obstacles plaintiffs must surmount because irregular rendition, as defined in this Article, has been practiced on non-U.S. citizens or “aliens.” Therefore, to assess the potential for civil suits, one should consider what access, if any, aliens have to courts.

It is possible for aliens to bring lawsuits against United States officials for treaty violations.<sup>180</sup> Under the CAT, however, the United States specifically precludes any civil action for acts of torture outside its territory.<sup>181</sup> Further, the federal torture statute contains an explicit preclusion of civil liability.<sup>182</sup> Finally, aliens will not fare much better in international tribunals. The United States does not consider itself subject to the jurisdiction of the International Court of Justice with respect to the CAT,<sup>183</sup> and the chances are slim that the United States would consent to jurisdiction on a specific case of irregular rendition.

The equitable doctrine of “unclean hands” may also deprive some aliens of access to American courts.<sup>184</sup> Lest we forget, the subjects of irregular rendition are said to be terrorists. One court has already denied relief to an alien under the CAT because he was found to be involved in terrorism.<sup>185</sup> Moreover, the Foreign Affairs Reform and Restructuring Act of 1998 reiterates the United States policy of

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<sup>179</sup> See *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364–65 (Fed. Cir. 2001).

<sup>180</sup> See Alien Tort Statute, 28 U.S.C. § 1350 (2000) (specifying that federal courts have jurisdiction over civil actions by aliens committed in violation of a treaty or international law); John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 29 (1999) (explaining that the United States has had the most extensive experience with civil suits filed against individuals based on the Alien Tort Statute and Torture Victim Protection Act).

<sup>181</sup> See United States Convention Against Torture Ratification History, *supra* note 71 (noting in Understanding Three that the United States does not view the Convention as requiring an extra-territorial private right of action for damages).

<sup>182</sup> 18 U.S.C. § 2340B (2000) (“Nothing in this chapter shall . . . be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.”).

<sup>183</sup> See United States Convention Against Torture Ratification History, *supra* note 71 (noting in Reservation Three that the United States does not consider itself bound by the Convention’s Article 30(1)).

<sup>184</sup> The unclean hands doctrine is “[t]he principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith.” BLACK’S LAW DICTIONARY 268 (8th ed. 2004).

<sup>185</sup> 8 U.S.C.S. § 1182(a)(3)(B)(iv) (LexisNexis 2006); 8 C.F.R. § 208.16(d)(3) (2000); *Cheema v. Ashcroft*, 383 F.3d 848, 857 (9th Cir. 2004).

precluding those aliens who pose a danger to the United States from the protections of the CAT.<sup>186</sup>

Undeterred by such obstacles, an alien who has been subject to irregular rendition might still be tempted to file a complaint in federal court. Proof that people have acted on this temptation comes from two different lawsuits, one filed by Khaled El-Masri, the other by Maher Arar.<sup>187</sup> At least three causes of action might seem promising to such plaintiffs. First, they might rely on the Alien Tort Statute.<sup>188</sup> Second, they might use the Torture Victim Protection Act.<sup>189</sup> Third, they might file a *Bivens* action.<sup>190</sup> No matter how they frame their complaints, however, their lawsuits are likely to be dismissed.

The Alien Tort Statute (“ATS”) was passed to anchor our new nation in the international community.<sup>191</sup> This statute gives American courts jurisdiction over some violations of the law of nations and some treaty obligations.<sup>192</sup> The second prong to jurisdiction, namely treaty obligations, does not seem as relevant to irregular renditions since the United States, as noted, has precluded civil actions that stem from violations of the torture statute and from violations of the CAT that occur outside the United States.<sup>193</sup> Thus, further analysis of

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<sup>186</sup> Foreign Affairs Reform and Restructuring Act (FARRA) of 1998, Pub. L. No. 105-277, at § 2243(c), 112 Stat. 2681, 2681–822 (1998).

<sup>187</sup> Khaled El-Masri v. Tenet, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006); Arar v. Ashcroft, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006).

<sup>188</sup> See, e.g., Complaint at 4, Arar v. Ashcroft, *supra* note 108, (alleging that action is brought directly under “treaty law”); Complaint at 4, El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D. Va. 2006) (No. 1:05 CV 01417), *available at* [http://www.acluva.org/docket/pleadings/elmasri\\_complaint.pdf](http://www.acluva.org/docket/pleadings/elmasri_complaint.pdf) (alleging jurisdiction and claim under Alien Tort Statute. See Alien Tort Statute, 28 U.S.C.S. § 1350 (LexisNexis 2006).

<sup>189</sup> See, e.g., Complaint at 4, Arar v. Ashcroft, *supra* note 108 (also alleging that action is brought “pursuant to the Torture Victim Prevention Act”); see Torture Victim Protection Act, 28 U.S.C. § 1350 (2000).

<sup>190</sup> See, e.g., Complaint at 4, Arar v. Ashcroft, *supra* note 108 (also alleging that action is brought directly under the Fifth Amendment); Complaint at 4, El-Masri v. Tenet, *supra* note 188 (similar Fifth Amendment claim); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971) (holding that a violation of constitutional rights can give rise to a damages action against the offending federal officials even in the absence of a statute authorizing such relief, unless “special factors counseling hesitation” or an explicit congressional declaration of another exclusive remedy exists).

<sup>191</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 722 n.15 (2004).

<sup>192</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>193</sup> The plaintiff could attempt to limit the civil action preclusion under the CAT in at least two ways. First, he could distinguish the preclusion on torture claims from decisions related to rendition. Second, he could argue that the violation of Article

irregular rendition focuses mainly on the first prong: violations of the law of nations.

The “law of nations” referred to in the ATS encompasses at least a “modest number” of violations that were accepted at common law in 1789 as violations of international norms.<sup>194</sup> In short, the ATS is set within an eighteenth-century paradigm. According to the Supreme Court’s interpretation, Congress created causes of action against piracy, against interfering with ambassadors, and against violating norms of “safe conduct.”<sup>195</sup> Beyond that, there has been a great debate about whether common law torts have evolved since the ATS was adopted.<sup>196</sup> In any event, torture may have been included in the modest number of violations already accepted at common law or may now qualify within the evolved purposes of the ATS.

The ATS did not receive much attention until 1980, when the Second Circuit decided *Filartiga v. Pena-Irala*.<sup>197</sup> The *Filartiga* court stated that, for purposes of the ATS, the law of nations had evolved beyond the common law in 1789.<sup>198</sup> Accordingly, the court allowed a Paraguayan citizen to sue another Paraguayan citizen in the United States for acts of alleged torture that occurred in Paraguay.<sup>199</sup> In essence, the United States provided a forum to address atrocities that violated *jus cogens*, even though the United States had no other interest in the case.<sup>200</sup> But *Filartiga*, limited to its facts, did not rule whether a similar action could be brought against United States citizens and officials, whether American torturers are the modern equivalent of pirates and slave traders.

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Three occurred inside the United States, say, at CIA headquarters for its role in the rendition.

<sup>194</sup> See, e.g., Debra A. Harvey, *The Alien Tort Statute: International Human Rights Watchdog, or Simply ‘Historical Trivia’?*, 21 J. MARSHALL L. REV. 341, 344–45 (1988) (“Generally, the courts have defined the Law of Nations as practices which, over a long period of time, have evolved into consensual and universal behavioral expectations among civilized societies.”).

<sup>195</sup> *Sosa*, 542 U.S. at 724.

<sup>196</sup> See generally Gene Trnnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 247–50 (2005).

<sup>197</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>198</sup> *Id.* at 881.

<sup>199</sup> *Id.* at 889.

<sup>200</sup> *Id.* at 890 (“[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”).

There may be a difference in the treatment of an official who himself tortures versus an official who renders a person to another country where he is tortured. Concerning the latter category of officials, there may also be a difference in the shock to international norms from a deliberate violation of Article Three of the CAT and an irregular rendition where torture occurs even though the senders put in place careful assurances and substantial post-transfer oversight. The knowing violation, in any case, is more egregious than the careless one.

The Supreme Court in 2004 provided more guidance on the ATS in *Sosa v. Alvarez-Machain*.<sup>201</sup> In that case, the Ninth Circuit had stated that the ATS “creates a cause of action for an alleged violation of the law of nations,”<sup>202</sup> ruling that “arbitrary arrest and detention” can be characterized as such a violation.<sup>203</sup> Although the Supreme Court struck down the Ninth Circuit’s broad interpretation of the ATS, it recognized “that the door is still ajar subject to vigilant door-keeping, and thus open to a narrow class of international norms today.”<sup>204</sup> The Supreme Court was cautious. Absent a clear legislative mandate, it recommended against defining new causes of action under an evolving law of nations.<sup>205</sup> Since *Sosa*, the ATS is not as likely to apply to arrests and detentions. The door is not open to such actions. Even so, because *Sosa* is tied to the specific facts of the case, the door has not been necessarily shut on all scenarios related to irregular rendition.

In 1991 the Torture Victim Protection Act (“TVPA”) was added to the ATS as part of the codification of the CAT into United States law.<sup>206</sup> The TVPA’s clear purpose is to establish a civil action for someone who has been subject to torture.<sup>207</sup> Indeed, the Court in *Sosa* spoke of TVPA as a “clear mandate” for making torture actionable under the law of nations.<sup>208</sup> The definitions of torture in the TVPA correspond with the definitions in the CAT; if anything, the TVPA’s definitions are more specific and illustrative.<sup>209</sup> Therefore, a

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<sup>201</sup> 542 U.S. 692 (2004).

<sup>202</sup> *Id.* at 699 (citing *Alvarez-Machain v. United States*, 331 F.3d 604, 641 (9th Cir. 2003)).

<sup>203</sup> *Id.* (citing *Alvarez-Machain*, 331 F.3d at 620).

<sup>204</sup> *Id.* at 729.

<sup>205</sup> *Id.* at 727.

<sup>206</sup> See H.R. REP. NO. 102-367, at 1 (1991).

<sup>207</sup> See Torture Victim Prevention Act, 28 U.S.C.S. § 1350, n. § 2 (LexisNexis 2005).

<sup>208</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

<sup>209</sup> Torture Memorandum, *supra* note 44, at 22–23.

suspect who has been rendered inconsistent with the CAT might find hope in the TVPA. While redress is possible through the TVPA, the United States is presumed to have sovereign immunity unless a statute provides an express waiver.<sup>210</sup> The TVPA mentions actions under the “color of law, of any foreign nation” but does not refer to actions under American law or to actions against United States officials.<sup>211</sup> There is scant indication, if any, of a waiver of sovereign immunity.

*Schneider v. Kissinger*<sup>212</sup> is an important case concerning immunity under the TVPA. In that case, relatives of an assassinated Chilean general sued Henry Kissinger, former National Security Adviser and former Secretary of State, for his alleged involvement in the assassination.<sup>213</sup> Before dismissing the case as a political question, the court noted that “[t]he TVPA imposes civil liability only on an individual acting ‘under actual or apparent authority, or color of law, of any foreign nation.’ In carrying out the direct orders of the President of the United States, Dr. Kissinger was most assuredly acting pursuant to U.S. law.”<sup>214</sup> By the *Schneider* logic, American officials who act under orders on irregular renditions seem to be protected from suit under the TVPA. Therefore, unless a plaintiff demonstrates that a United States official (for example, an official in the intelligence community’s National Clandestine Service) acted outside the scope of his authority and “under the color of foreign law,” it will be difficult for the plaintiff to succeed under the TVPA. That is, simply because an official made a mistake in assessing the likelihood of torture in a receiving country does not necessarily entitle the rendered suspect to damages.

Finally, a *Bivens* action is possible when a federal official, operating under color of law or legal authority, deprives a person of a constitutional right.<sup>215</sup> There are some situations where this sort of action might apply to irregular rendition. For instance, a United States citizen or a resident alien might be seized on American soil and rendered without any process. That seizure might be construed as unreasonable under the Fourth Amendment or as a violation of due process under the Fifth Amendment.<sup>216</sup> Or the torture of a citizen or

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<sup>210</sup> See Federal Tort Claims Act, 28 U.S.C. § 1346 (2000).

<sup>211</sup> Torture Victim Protection Act, 28 U.S.C. § 1350, n. §2.

<sup>212</sup> 310 F. Supp. 2d 251 (D.D.C. 2004), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005).

<sup>213</sup> *Id.* at 253

<sup>214</sup> *Id.* at 267 (citation omitted).

<sup>215</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409–10 (1971).

<sup>216</sup> U.S. CONST. amends. IV, V.

a resident alien might be construed as cruel and unusual punishment in violation of the Eighth Amendment.<sup>217</sup> These scenarios, however, are outside the scope of this Article. Within scope are scenarios in which a foreign citizen is snatched from a foreign jurisdiction and taken to another foreign jurisdiction. In such scenarios, foreign citizens are much less likely than American citizens to have due process and other constitutional rights. Even if torture is alleged, at least one circuit has stated that the Fifth Amendment does not apply to the treatment of non-U.S. citizens by officials who are not from the United States.<sup>218</sup> This statement stands true even where the alleged mistreatment (torture of a Guatemalan rebel by Guatemalan forces) was at the behest of the CIA.<sup>219</sup>

### III. ASSURANCES AS REMEDY

The United States should comply with the rule of law for its own sake. Such compliance is separate from any redress that improperly rendered persons may have in American courts. As far as compliance with Article Three of the CAT, assurances from receiving countries serve as one of two broad avenues in the direction of legality.

The United States does not need to be too concerned about irregular renditions to countries such as Switzerland.<sup>220</sup> Assurances about the proper treatment of rendered suspects are not necessary from these countries. If we asked the Swiss for assurances, for instance, they might lecture us about our abuses at Abu Ghraib and Guantanamo because a request for such assurances would suggest that we maintain higher human rights standards than they do. With countries at the other end of the spectrum from Switzerland, no matter what assurances we receive, no matter what monitoring we believe we are putting in place, the United States should remain concerned about torture and, hence, reluctant to render. Returning an Iraqi dissident to Saddam Hussein's Iraq, as described in the Iraqi lion's den scenario, is an obvious example. No combination of assurances and monitoring would make that rendition legal. There would still be substantial grounds for believing that the suspect would be tortured upon transfer.

Even after the extremes are lopped off, many situations are left in the middle. Until a presidential administration adopts a blanket

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<sup>217</sup> U.S. CONST. amend. VIII.

<sup>218</sup> *Harbury v. Deutch*, 233 F.3d 596, 602–03 (D.C. Cir. 2000), *rev'd on other grounds sub nom.*, *Christopher v. Harbury*, 536 U.S. 403 (2002).

<sup>219</sup> *Id.*

<sup>220</sup> *See infra*, Part V.

policy against all irregular renditions, the situations in the middle must be considered. Accordingly, assurances from the receiving countries could play a significant role in determining the legality of irregular rendition.

On several occasions, the Bush Administration has noted that assurances affect its decisions on transfers of prisoners. The United States, although careful not to mention any details about CIA activities, stated in its Second Periodic Report to the Committee Against Torture that assurances sometimes play into the balance of whether to transfer a person to another government.<sup>221</sup> Before that, embroiled in the allegations about secret CIA prisons in Europe, Secretary of State Condoleezza Rice stated in 2005 that “[w]here appropriate, the United States seeks assurances that transferred persons will not be tortured.”<sup>222</sup> Similarly, in 2003, the Department of Defense’s General Counsel said that “United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country.”<sup>223</sup>

The assurances, of course, must be reliable and must be made in good faith to have any value in the calculations under the CAT.<sup>224</sup> In some cases, as a counter-weight to the possibility of torture in a receiving country, assurances may tip the balance toward legality. The more reliable the assurances and the more detailed they are, the more the balance tips toward legal rendition.

The President could make a policy decision not to render terrorism suspects to questionable countries. All close calls could be handled by a default decision not to render. Not rendering on close calls could become part of a retrenchment of CIA practices, which may have begun with the Detainee Treatment Act that precludes coercive interrogations by all United States personnel.<sup>225</sup> Precluding some ir-

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<sup>221</sup> Second Periodic Report of the United States of America to the Committee Against Torture, Annex 1, Part One, Section II, D, <http://www.state.gov/g/drl/rls/45738.htm#annexes> (last visited Oct. 1, 2006).

<sup>222</sup> Glenn Kessler, *Rice Defends Tactics Used Against Suspects*, WASH. POST, Dec. 6, 2005, at A01.

<sup>223</sup> Letter from William J. Haynes, II, General Counsel, Department of Defense, to Senator Patrick J. Leahy, June 25, 2003, in 150 CONG. REC. S781-03, S783 (Feb. 10, 2004).

<sup>224</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 (1987) (requiring international agreements to be made in good faith, although the importance of this requirement is not necessarily clear).

<sup>225</sup> Jonathan Weisman, *Senators Agree on Detainee Rights*, WASH. POST, Nov. 15, 2005, at A1. (Sen. Lindsey O. Graham said, “McCain’s amendment needs to be part of the overall package, because it deals with standardizing interrogation techniques and will reestablish moral high ground for the United States.”).

regular renditions may indeed be a reasonable policy; but that does not seem to be the current policy. That is not the easy way out from the middle.

A. *The Person Behind the Assurance*

The highest assurances come from heads of state in foreign jurisdictions about to take control of suspects. Diplomatic protocol would call for the President of the United States to ask for such assurances. President Bush, however, may not be interested in such details or he may choose not to use political capital in asking for assurances from other leaders.<sup>226</sup> Accordingly, assurances from heads of state may not always be realistic.

Even if heads of state are willing to give assurances, regardless of who asks for them, such assurances could be less valuable than assurances from lower-level officials. The head of state, after all, does not handle day-to-day details in the prison or detention facility. In addition, the security services of the receiving country (that is, the people in the room with the rendered suspect) may keep secrets from their leader. In short, gaps may exist between authority and control.

The process of asking for and obtaining assurances involves international relations between the sending country and the receiving country. Just so, American diplomats might seek assurances from their diplomatic counterparts, probably in the receiving country's ministry of foreign affairs.<sup>227</sup> The highest assurances, in diplomatic rank, would come from the foreign minister. Further, assurances from an ambassador to the United States may have the same (or similar) value as assurances given by a foreign minister. The ambassador's posting to Washington is often a plum assignment, a step or so away from becoming foreign minister. Most foreign countries also have diplomats of an intermediate rank, such as the deputy foreign minister, who may provide reliable assurances.

The diplomatic track, though, has drawbacks. The United States Department of State probably does not hold the terrorism suspects who are being considered for irregular rendition; the State Depart-

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<sup>226</sup> These are more than theoretical possibilities since the Bush Administration has not stated that it has ended the practice of irregular rendition.

<sup>227</sup> Samuel M. Witten, Deputy Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser of the U.S. Department of State, Written Declaration on U.S. Practices on Diplomatic Assurances at 6, *Cornejo-Barreto v. Seifert*, Case No. 01-cv-662-AHS, (C. D. Cal. October 2001), *available at* <http://www.state.gov/documents/organization/16513.pdf>. (asserting, *inter alia*, that "the Secretary might condition the extradition on the requesting State's provision of assurances related to torture").

ment is not a bureau of prisons. Control of the suspects lies elsewhere—probably with employees and contractors of the Central Intelligence Agency, the Department of Defense, or the Department of Justice. For this reason, negotiations that the State Department leads may not affect actual control of the suspects. As an alternative, the process of obtaining assurances from foreign countries that they will not engage in torture should be consolidated with actual control of the suspect. For example, if the CIA is about to transfer a suspect to a Bulgarian intelligence service, the negotiation should be between the liaison services instead of between diplomats. The fears of torture, in the end, relate less to the conduct of Bulgarian diplomats than to the conduct of Bulgarian police and security officers.

In most parts of the world, diplomats and spymasters usually operate in separate tracks. But sometimes the lines between diplomacy and espionage do blur.<sup>228</sup> In general, the diplomats deal in open policies while spymasters gather secrets and conduct covert actions. Our State Department, unlike the CIA, holds a daily press briefing.<sup>229</sup> Further, intelligence officers, unlike diplomats, are accustomed to joint operations and to trading information with officers from other intelligence services. Rendition deals, that is, the trading and transferring of suspects, can be built on a mutual respect among professionals.

The techniques to espionage, what spymasters call “tradecraft,” are similar around the world. Everybody does surveillance. Everybody does counter-surveillance. Everybody tries to gather intelligence from human assets, including officers in opposing services. Everybody performs counter-intelligence against penetrations into the home service. Spymasters, the world around, understand each other. So, on irregular renditions of terrorism suspects, the negotiations might be conducted between the intelligence services—the handlers of human assets. This is an example of simple symmetry between two groups. If the suspect is in joint control between United

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<sup>228</sup> Diplomatic immunity under the Vienna Convention may protect them. *See* Vienna Convention on Diplomatic Relations, art. 9, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 241. If they are revealed as spies, they can be declared *persona non grata* and returned to their home country, but not prosecuted by the country that revealed them. *Id.*; *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 80 (1965).

<sup>229</sup> United States Department of State, *Daily Press Briefings*, available at <http://www.state.gov/r/pa/prs/dpb/> (last visited March 23, 2006) (“The State Department Spokesman, or the alternate, generally briefs the State Department press corps on the record, on camera each workday afternoon in the Carl T. Rowan Press Briefing Room, room 2209 in the Harry S. Truman building of the U.S. Department of State.”).

States agencies (say, between the CIA and DOD), and is destined for joint control in a foreign jurisdiction (say, between the intelligence and law enforcement arms), all parties to the trade should be at the table. Thus, the symmetry becomes more complicated. No matter the level of complexity, if the assurances on irregular renditions are to be effective, they should be integrated into relevant chains of command in the sending and receiving countries. Moreover, the CIA might gather intelligence through secret means to test the sincerity of those foreign officials who give the assurances. So much is possible.

*B. The Form of the Assurance*

In some foreign jurisdictions, officials may not hesitate to put their assurances about the proper treatment of a prisoner in writing. The record for their assurances could come under one of many labels: a letter, a demarche, or a memorandum of understanding. Whatever the label, both sides to the rendition, the sending and receiving jurisdictions, would thereby have a copy of the deal. The written record would remind the parties of the solemnity of the understanding: entrusting the care of a human being from one jurisdiction to another.

But some foreign jurisdictions may not be willing to put anything in writing. The reason may be cultural or political.<sup>230</sup> Or, officials may fear leaks from their side. Or, officials may prefer not to have an official record in case a scandal later arises. In any event, when the preferences are against a written record, the assurances might come orally in a meeting between an American official and an official from the other jurisdiction. Their “meeting” could be in person, over the telephone, or by e-mail. The variations are endless.

Differences in details may or may not affect the value of the assurances. The differences between fountain pens and computers, so to speak, may be more style than substance. Yet, even when assurances from the other jurisdiction are strictly oral, the American official will almost surely, after the meeting, make an internal record of those assurances within the United States Government.<sup>231</sup> The notion

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<sup>230</sup> For example, on March 22, 1999 the Egyptian Minister of the Interior rejected a British request for written assurances arguing that they would “constitute an interference in the scope [of] the Egyptian judicial system and an infringement on Egyptian national sovereignty.” See Statewatch.org, *U.K.: Egyptian National ‘Unlawfully Detained’ After Intervention of Prime Minister*, <http://www.statewatch.org/news/2004/nov/03blair.htm> (last visited Aug. 26, 2006).

<sup>231</sup> This assumes the United States officials would not be secretly recording the meeting.

of a gentleman's agreement between intelligence services, where nothing is ever written down by either side, fits the fantasy of spy novels but not the international practice of espionage. The spymasters, like the diplomats and the lawyers, create piles of paper. The internal record on a rendition deal could be filed under many labels: a cable, a memorandum for the record, or a letter of understanding.

Whatever the label for the written record and whether or not the writer is an American diplomat, a defense official, or an intelligence official, the internal record will probably be distributed among United States agencies on a "distribution list" in the government.<sup>232</sup> A copy of the record will probably go to staffers at the National Security Council ("NSC"), including the NSC's legal adviser. Rendition, so practiced, falls within the NSC's statutory task of integrating domestic, foreign, and military policies.<sup>233</sup> Depending on the NSC's relationship with the White House, particularly the relationship between the National Security Adviser and the President, a copy of the written record may also go to the White House counsel and to the President himself. That said, the White House may prefer not to receive any copies. Along the lines of the Iran-Contra operations, the White House may use the NSC as a buffer for legal and political protection so policymakers stay untarnished by the rough and tumble of what goes on in the field. Policymakers might be "informed" by word of mouth in the corridors of power rather than by paper, thus building into the process of irregular rendition some plausible deniability as to details.<sup>234</sup>

Nothing in a statute, case law, or an international convention specifically addresses the legality of the range of assurances for an irregular rendition. Plus, the scholarship, until now, has not reached the differences in weight between written assurances and oral assurances. Assurances under Article Three of the CAT are not controlled by incorporation clauses, the parol evidence rule, or other familiar concepts of domestic contract law. Accordingly, assurances on ir-

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<sup>232</sup> But it is possible that a United States agency involved in renditions may insist on "compartmenting" the information from all other agencies. In any event, the Department of Education probably does not need to be on the distribution.

<sup>233</sup> The National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C. ch. 15 (2000)); 50 U.S.C. 403-3(c)(6); 50 U.S.C. 403-3(d)(1)-(5).

<sup>234</sup> It is reported that President Bush instructed the Director of Central Intelligence, George Tenet, not to tell him the locations of secret detainees so that it would not affect his interactions with representatives from those countries. See James Risen et al., *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1 (noting that the CIA searched for remote sites in friendly countries, and was allowed to use them without any outside scrutiny).

regular renditions fall within a body of law at the fringes of or beyond contract law.

American contract law, while not controlling, provides a framework for analyzing assurances on possible renditions. The Statute of Frauds requires some contracts, such as those which cannot be performed within one year, to be in writing.<sup>235</sup> The primary purpose of the Statute of Frauds is to prevent fraudulent claims from being enforced, but it also has the secondary effect of ensuring that the parties enumerate their terms fully and act cautiously in making their deals.<sup>236</sup> Similar purposes lead toward a preference for written assurances on irregular renditions under Article Three of the CAT. Some detentions may last for more than a year after irregular rendition, and officials on the sending and receiving ends of irregular rendition should enumerate their terms and act cautiously.

Contract law is not alone in preferring the written record. When an executive agency conducts covert action, American law requires Presidential authorization to be stated in a written “finding.”<sup>237</sup> A covert action, usually conducted by the CIA, is an activity that is intended to influence political, economic, or military conditions abroad while hiding the government’s role.<sup>238</sup> The requirement of a written finding on covert action is extra evidence of a preference for the written over the oral record on intelligence activities. For irregular rendition, as a sort of covert action, the assurances should also be in writing.

In American business, it is standard practice in negotiating and drafting contracts to include a merger clause. That clause consolidates all prior understandings, written and oral, into the written contract that the parties are signing.<sup>239</sup> A standard merger clause might read: “It is expressly agreed by the parties to this contract that the contract constitutes the entire and only contract between the parties and that any previous agreement . . . is of no effect and shall not be considered in the interpretation of the terms of this contract.”<sup>240</sup> To the extent that lawyers involved in irregular rendition have had commercial experience before joining the government—a likely possibility—their rendition deals may reflect commercial practices. They

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<sup>235</sup> RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(e) (1981).

<sup>236</sup> 9 WILLISTON ON CONTRACTS § 21:1 (2005).

<sup>237</sup> 50 U.S.C.S. § 413b(a) (1) (LexisNexis 2006).

<sup>238</sup> I have assumed that irregular rendition per se does not fit within the definition of covert action.

<sup>239</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 210.

<sup>240</sup> 1 WILLISTON ON CONTRACTS 4th Forms § 33F:1.

may use merger clauses and other provisions that are standard in American contracts.

The commercial analogy may also explain the attitude of American principals to rendition deals. Some clients in the government may react to all the law and legal analysis like clients in the corporate world. Just as principals to commercial deals accuse their lawyers of creating far too much paper, intelligence officers on irregular rendition deals may accuse their government lawyers of making everything far too complicated.<sup>241</sup>

*C. Publicizing the Receiving Countries*

Except for isolated comments by a few officials, the Bush Administration has not said much about irregular rendition.<sup>242</sup> Our government still does not discuss whether specific persons have been rendered or whether specific jurisdictions have received renditions from the United States. As a change, the government should reveal to the public those countries that are possible recipients of rendered suspects. This would make the government more accountable, while not involving the courts through regular rendition or extradition. To relieve some of the public's legitimate concern about the dirtiness of irregular rendition, the government should also reveal those countries, for foreign policy reasons or for reasons under the CAT, that have been ruled out as rendition sites. This would make the government more accountable and would educate the public and American allies about an important tactic in American counter-terrorism.

Government officials, of course, may argue that revelations will complicate our foreign relations, breaching promises of secrecy they have made to other governments that cooperate with us in counter-terrorism. Their arguments would not be completely unreasonable. For example, if Jordan has taken renditions from us and if we shine a spotlight on them, it is almost certain that Jordan would cease or lessen its cooperation because of the potential backlash by anti-American portions in the Jordanian public. The stakes on irregular rendition are high. As a State Department official declared about transfers from Guantanamo: "Later review in a public forum of the

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<sup>241</sup> See DUANE R. CLARRIDGE, *A SPY FOR ALL SEASONS* 184 (1997) ("In the last few years, the Agency had been infested with lawyers and second-guessed and pilloried in hindsight by doughfaces ignorant of what espionage and covert action are all about.").

<sup>242</sup> While answering questions about the mistaken abduction of El-Masri, Condoleezza Rice answered, "when and if mistakes are made, we work very hard and as quickly a possible to rectify them." Kessler, *supra* note 106, at A18.

Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns."<sup>243</sup>

There is a way, however, to balance our commitments to cooperating governments while generating useful debate on which countries should be potential recipients of rendered suspects. In a welcome spurt of modesty, the Bush Administration should open up the debate and recognize that its officials and lawyers do not have all the answers. As with the handling of most legal issues, the administration's analysis would benefit from more interaction with scholars and the public. The administration should move from secrecy toward transparency.

If Jordan cooperates with the United States behind the scenes, our government could mention Jordan in a list of jurisdictions, some of which the administration knows are cooperating, some of which are not. Because Jordan would be mixed into a group of other countries, it would not have complete anonymity. Since the United States Government would not be acknowledging that Jordan is cooperating for sure, the damage to Jordan would not be significantly greater than the damage that may have already occurred through leaks and rumors. The process would be controlled. The improvement in the quality of our rendition decisions and in America's standing in the world would more than outweigh the nuisance to Jordan. The debate is something Jordanian officials should realize is in their own interest. The value of the debate is something American officials can stress to them.

On a middle road, this Article is part of a process of pressuring our government to be more forthcoming about important issues of national security. Since September 11, there has been one occasion when lobbying created a better balance between the efficacy of intelligence operations and the public's right to be informed. Until the 9/11 Commission was about to publish its report, the Bush Administration had neither confirmed nor denied that a few "high-value detainees" were being held in secret locations. Lobbied by the Commis-

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<sup>243</sup> Declaration of Pierre-Richard Prosper at 7, *Abdah v. Bush*, No. CIVA041254(HHK)(RMC) (D.C. Cir. 2005), available at [http://www.justicescholars.org/pegc/archive/Paracha\\_v\\_Bush/govt\\_opp\\_20050422\\_ex\\_D.pdf#search=%22declaration%20Prosper%20Mahmoad%20Abdah%20v.%20Bush%22](http://www.justicescholars.org/pegc/archive/Paracha_v_Bush/govt_opp_20050422_ex_D.pdf#search=%22declaration%20Prosper%20Mahmoad%20Abdah%20v.%20Bush%22).

sion and by the public, the Bush Administration finally relented.<sup>244</sup> The government confirmed the names of ten detainees, including Khalid Sheikh Mohammed (“KSM”), the alleged mastermind of the September 11 attacks.<sup>245</sup> Since then, no damage to national security has occurred from admitting ten names in a footnote to a public document. Indeed, on September 6, 2006, President Bush announced the transfer of KSM and thirteen other secret detainees to Guantanamo.<sup>246</sup>

Even without pressure, the Bush Administration sometimes changes its mind about what must be classified and what can be released to the public. Our country has a process for declassifying information.<sup>247</sup> When it suited the Bush Administration, the White House sent Secretary of State Colin Powell to the United Nations to make the case for war against Iraq. At the United Nations, Powell had been entrusted with intercepts and other sensitive bits of information, true or not, declassified days before the presentation to the Security Council.<sup>248</sup> Since our government does not always clench its fists on the secrets, some hope exists for a better balance on irregular rendition.

#### D. *The Specificity of Assurances*

Assurances stretch over a range of specificity. In a general assurance, the receiving country states that it understands its obligations under the CAT and agrees to comply with them. That assurance could be written in one sentence. In a specific assurance, a list of prohibited tactics could be attached. That assurance might take several pages, including attachments. For example, even if the sending and receiving countries cannot agree on whether water-boarding constitutes torture under the CAT, the sending country could ask the receiving country not to engage in that practice. All other things being equal, the more specific the assurances, the more worthwhile they are under Article Three of the CAT.

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<sup>244</sup> See THE 9/11 COMMISSION REPORT, *supra* note 13, at 146.

<sup>245</sup> See *id.*

<sup>246</sup> Sheryl Gay Stolberg, *Threats and Responses: The Overview; President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 7, 2006, at A1.

<sup>247</sup> The most recent Executive Order on classification procedures, Executive Order No. 13292, directs the declassification of information that is not exempt from search and review under sections 105c, 105d, or 701 of the National Security Act of 1947. Exec. Order No. 13292, 68 Fed. Reg. 15,315 (Mar. 25, 2003).

<sup>248</sup> See Dana Priest, *Telling Secrets: Not Just What, But How; Speech Is Revealing on Gathering Intelligence*, WASH. POST, Feb. 6, 2003, at A23.

*E. Repeat Renditions*

Prior renditions are a key factor in assessing additional renditions to a country. If the United States concludes that a problem country complied with its assurances—not torturing the suspect—it is more likely, if nothing else has changed, that the next rendition to the country will be legal with assurances.<sup>249</sup> On the other hand, if the United States has indications that the problem country did not comply with the assurances, it will be difficult, if not impossible, for repeat renditions to comply with the law. The greater the deviation between what was called for in the assurances and what occurred in practice, the more significant the problem under Article Three of the CAT. One credible case of torture, contrary to assurances, might be enough to turn gray into black. Additional renditions, even with multiple assurances, might present substantial grounds for believing that torture would occur.

In theory, the taint from prior renditions does not last forever.<sup>250</sup> In practice, the country could take actions to return toward the white. Yet, for the near term in which American counter-terrorism policies take place, any country painted black should be out of bounds for irregular rendition.

Another factor in the totality of the circumstances analysis might be the experience that countries other than the United States—perhaps Canada and the United Kingdom—have had with a particular receiving country on irregular renditions. The official communications, whether between diplomats or spymasters, on comparative experiences can be kept secret. Accordingly, Canadian and British officials may be more frank with American officials than with Human Rights Watch on whether a receiving country has honored its assurances on past renditions. There are things, good and bad, that the public does not always know.

Up until now, the literature on irregular rendition devotes little attention to the situation where the United States reasonably believes that the rendition is legal, but, after transfer, reasonably concludes that the receiving country has strayed into torture. To comply with treaty obligations in such a situation, the United States must insist

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<sup>249</sup> Indeed, if a country complies with assurances on several cases a point might be reached when assurances are no longer necessary.

<sup>250</sup> Just as immigration law has reclassified countries which require protection under the CAT, it is likely that any classification for irregular rendition may change depending on country conditions. *See Kourteva v. I.N.S.*, 151 F. Supp. 2d 1126, 1130 (N.D. Cal. 2001) (government shift in Bulgaria from communists to socialist-democrats prevented CAT from prohibiting transfer of alien).

that the torture cease or must do everything possible for the suspect to be returned to the United States or to another country where the suspect will not be tortured. Preferably, the suspect will be returned to a country like Switzerland. Such situations are another one of those gray areas, which must exist in practice, but are ignored by the black and white of many comments on irregular rendition.

#### IV. MONITORING AND OVERSIGHT

Besides assurances of proper treatment of prisoners by receiving countries, other measures help tilt toward legality on close calls of irregular rendition. One important measure is the willingness of a receiving country to allow post-transfer monitoring and oversight by United States officials or third-parties.<sup>251</sup> The relevant standard under the CAT, so often repeated, is whether it is more likely than not that a rendered suspect will be tortured in the receiving country.<sup>252</sup> As a part of a rendition deal, the United States could insist that monitoring and oversight take place after the transfer. If the receiving country agrees to monitoring and oversight, that lowers the perceived odds of torture.<sup>253</sup> After transfer of the suspect, the receiving country's abiding by the agreement on monitoring and oversight continues as a back-end factor of legality and loops back as a front-end factor for additional renditions. After transfer, the CIA might even use secret means to ensure that the receiving country is keeping its end of the rendition deal. The secret means could complement the open means of monitoring and oversight.

Monitoring and oversight could take two basic forms. First, the receiving country might accept visits from human observers. These observers could be American citizens or citizens from other countries. Candidates should include the Red Cross and other reputable non-governmental organizations. Second, the receiving country might accept technical oversight. Going beyond the obligations of the CAT, this oversight could involve detailed logs, giving the times and locations of the interrogations, and could include video and audio recordings of the interrogations themselves.

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<sup>251</sup> Contrary to the Human Rights Watch position on monitoring and assurances, *see* text accompanying notes 145–46 *supra*, an acquiescence in post-transfer monitoring by a receiving country lends weight to, rather than demonstrates the inadequacy of, an assurance.

<sup>252</sup> *See supra*. Part II.B

<sup>253</sup> The monitoring and oversight I have in mind is significant enough to make a difference under Article Three of the CAT, but not so extensive that the suspect effectively remains in American custody and control, subject to constitutional and statutory protections that may go beyond Article Three.

Like assurances, monitoring and oversight operate on a sliding scale. Monitoring and oversight are not necessary for renditions to Switzerland. At the other end of the scale, monitoring and oversight will not legalize renditions of notorious Iraqi defectors to Saddam Hussein's Iraq. In the gray zone, however, monitoring and oversight do make a difference. The closer the call, the more that monitoring and oversight become necessary.

A full analysis of each form of monitoring and oversight provides enough content for a separate law review article. In this respect, the analysis is like opening boxes within boxes. But without opening too many boxes, without raising too many questions, I can make some general comments. As to monitoring, the sending country should be relatively more assured if the receiving country agrees that a third-party inspection team may have unfettered and unaccompanied access to the suspect held in the receiving country's facility. Independent parties have more value than inspectors who are accompanied at all times by the authorities from the receiving country. In addition, the less notice the receiving country requires for the inspection, the more the sending country should be reassured. On the other hand, a rule need not be adopted that accompanied access or a long period of advanced notice per se makes the assurances and the monitoring unacceptable under the CAT. Again, the analysis is specific to the facts on a totality of the circumstances.

Most would agree that third-party monitoring and oversight from organizations such as the Red Cross have more value, in reaching legality, than oversight from United States officials. Oversight from the Red Cross is worth more because its representatives are neutral and because it has no stake in the "intelligence take" from the suspect. To assuage any concerns the Bush Administration has about protecting classified information related to renditions, it may insist that the Red Cross officials sign confidentiality agreements or obtain security clearances, or both. That would not be unreasonable.

As to technical oversight, the more intrusive the methods, the more value they have in reaching legality. Videos show more angles than still photographs. Video recordings with sound give a more complete record than a sole audio recording. Five cameras in the interrogation room show more details than one camera.

But too much faith should not be placed in technology. Even with cameras all over the interrogation booth, the suspect could be tortured elsewhere. In horrible situations, the torturers might instruct the suspect outside the booth that if he mentions anything about the torture when they are on camera, the treatment off camera

will become even worse. Such threats can also undercut the effectiveness of third-party oversight. When the suspect is so broken—when the suspect becomes a slave to his masters—the interrogations can be conducted without any signs of torture.<sup>254</sup> That is a nightmare.

The nightmare is that the rule of law, including assurances and monitoring, only goes so far in preventing and ferreting out evil. That the rule of law has limits does not mean that practitioners and policymakers on irregular rendition have descended into an abyss. What it means is that they must continue to struggle, inch by inch, measure by measure, to stay out of the underworld. As much as possible, professional observers, aided by first-hand observations and by technology, must look beyond the obvious for more subtle signs of torture. They must look closer at the receiving country's specific practices.

#### V CATEGORIES OF COUNTRIES

Irregular renditions can go to many places other than Swiss safe havens and Iraqi lion's dens. On renditions for intelligence purposes, at least three variables exist. First, the suspect may be rendered back to his country of origin (defined by citizenship or by residency). Or the suspect may be rendered to a third country. This variable is binary. Second, the receiving country may be a signatory of the CAT. Or the country may not be. This variable is also binary. Third, one's assessment of the receiving country's human rights records may vary. For the sake of reasonable simplicity, the analysis could develop three scenarios within this plane: the receiving country could have an excellent record, an in-between record, or a very poor record. This third variable, by definition, has three nodes.

The product of multiplying the three variables is twelve. Thus, a thorough analysis of irregular rendition might address at least twelve patterns. To illustrate, one pattern involves a rendition to a suspect's country of origin; the country is a member of the CAT; and the country has an excellent human rights record. That is the best pattern. But rather than cover all patterns, one could delve into country prac-

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<sup>254</sup> See John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 248–49 (2003) (discussing the effect of “escalation” on a victim of torture and its ability to shift responsibility for pain endured from the torturer to the victim); see also John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743 (2002) (discussing interrogation techniques and whether the use of torture may be, in some cases, more successful than traditional means of interrogation).

tices. The third variable, after all, seems most relevant to Article Three of the CAT.

Relying on Amnesty International and on the State Department, one can divide the countries into at least three groups concerning their treatment of detainees and their reputation for respecting human rights.<sup>255</sup> From top to bottom, three groups emerge. The human rights record for the first group is generally good, without any reports of torture. In the words of the State Department, these governments “generally respected the human rights of [their] citizens.”<sup>256</sup> Irregular renditions to this group should not pose any serious problems. Countries in the second group have isolated instances of mistreatment and torture, but nothing systematic. Irregular renditions to this group, while problematic, are possible with sufficient assurances and adequate monitoring and oversight. Countries in the third group have records of abuse, including mysterious disappearances. Mistreatment and torture are routine, with confessions often obtained through beatings.<sup>257</sup> Irregular renditions to this group, if not impossible under the law, pose the greatest problems for United States compliance with the CAT.

#### A. *Clean Countries*

In the first group, Finland is as close as a country can get to an unblemished human rights record. Finland ratified the CAT on August 30, 1989.<sup>258</sup> According to our State Department, there are no indications of a Finnish official employing torture.<sup>259</sup> The prisons in Finland are well run and safe for prisoners.<sup>260</sup> Finland’s judicial system provides prisoners with ample means to present allegations of abuse and to obtain redress.<sup>261</sup>

But no country is perfect. Amnesty International has criticized Finland for not having regulations on the use of force and other restraints when deporting foreign nationals.<sup>262</sup> Since there have not

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<sup>255</sup> These groupings are illustrative, not comprehensive.

<sup>256</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices—Finland, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41680.htm>.

<sup>257</sup> See U.S. Department of State, 2004 Country Report on Human Rights Practices—Uzbekistan, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41717.htm>.

<sup>258</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>259</sup> 2004 Country Report on Human Rights Practices—Finland, *supra* note 256.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Amnesty International, Finland Human Rights Report 2005, <http://web.amnesty.org/report2005/fin-summary-eng> (last visited Feb. 17, 2006).

been any reports of abuse, the lack of regulations is a minor defect in Finland's otherwise outstanding record.

Switzerland shares Finland's record for not mistreating prisoners and for protecting human rights.<sup>263</sup> Switzerland ratified the CAT on December 2, 1986.<sup>264</sup> Swiss prisons are adequate. There are some reports, however, that the police have used excessive force, especially against foreigners.<sup>265</sup> Beyond reports of police mistreatment,<sup>266</sup> Amnesty International is concerned about the Swiss police's use of taser dart-firing stun guns.<sup>267</sup> The worst reports from Switzerland concern physical attacks against foreign nationals who refuse to leave Switzerland to go to their countries of origin.<sup>268</sup> Yet, overall, Switzerland is a safe place for prisoners. The odds are slim prisoners will be mistreated while in custody there.

Another country with a good record for treating prisoners is Poland. This is significant because Poland has been mentioned as a place where the United States has rendered terrorism suspects.<sup>269</sup> Poland ratified the CAT on July 26, 1989.<sup>270</sup> The Polish authorities generally respect human rights.<sup>271</sup> Because Poland is not as rich as other countries in Europe, Polish prisons are poor by international standards, not matching the prisons of other countries in the first group. Although there are concerns about the safety of prisoners from attack, no incidents of torture have been reported.<sup>272</sup> Amnesty International does report, however, an excessive use of force that resulted in the deaths of three prisoners.<sup>273</sup>

In sum, these are easy cases. Unless there are some negative circumstances connected to a particular rendition, irregular renditions may be made to Finland, Switzerland, and Poland in compliance with

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<sup>263</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices—Switzerland, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41711.htm>.

<sup>264</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>265</sup> 2004 Country Report on Human Rights Practices—Switzerland, *supra* note 263.

<sup>266</sup> *Id.*

<sup>267</sup> Amnesty International, Switzerland Human Rights Report 2005, <http://web.amnesty.org/report2005/che-summary-eng> (last visited Feb. 17, 2006).

<sup>268</sup> *Id.*

<sup>269</sup> Craig Whitlock, *Investigator Sees Signs of CIA Role in Abductions; Poland and Romania Queried on Prison Issue*, WASH. POST, Dec. 14, 2005, at A21.

<sup>270</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>271</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices—Poland, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41701.htm>.

<sup>272</sup> *Id.*

<sup>273</sup> Amnesty International, Poland Human Rights Report 2005, <http://web.amnesty.org/report2005/2eu-index-eng> and <http://web.amnesty.org/report2005/pol-summary-eng> (last visited Aug. 24, 2006).

the CAT. Neither assurances nor post-transfer monitoring is necessary to reach a conclusion that the terrorism suspect will not be tortured.

*B. Repeat Offenders*

So many countries are in the third group—at the bottom—that this Article can limit itself to those countries mentioned as United States allies on counter-terrorism. Uzbekistan, for one, has an atrocious human rights record.<sup>274</sup> Terrorism suspects, often held for long sentences after unfair trials, suffer worse than common criminals in Uzbekistan.<sup>275</sup> Torture is common in the form of beatings, suffocation, electric shock, rape, and other sexual abuses.<sup>276</sup> Information obtained through torture in pretrial facilities is often used against defendants at trial.<sup>277</sup> Death sentences are common, as are secret executions.<sup>278</sup> The United Nations reports that torture is systematic in Uzbekistan.<sup>279</sup> Official Uzbek investigations into allegations of torture are neither prompt nor impartial.<sup>280</sup>

Despite its poor human rights report, Uzbekistan has shown signs of improvement. Torture is not suspected in any prison deaths, although negligence by prison officials continues to result in deaths.<sup>281</sup> To ameliorate Uzbekistan's reputation, the Uzbek Cabinet of Ministers has taken steps to implement the CAT.<sup>282</sup> All in all, Uzbekistan's human rights record is black with some patches of white.

Egypt also has a poor human rights record. Even though the Egyptian Constitution prohibits inflicting "physical or moral harm" upon detainees, the use of torture and abuse by security services is common.<sup>283</sup> When Egypt ratified the CAT, it did so with a reservation to Article Twenty, preventing outside observers from investigating al-

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<sup>274</sup> Peter Finn, *Kyrgyzstan Signals Uzbek Extraditions*, WASH. POST, June 24, 2005, at A26.

<sup>275</sup> Amnesty International, *Uzbekistan Human Rights Report 2005*, <http://web.amnesty.org/report2005/uzb-summary-eng> (last visited Feb. 17, 2006).

<sup>276</sup> U.S. Department of State, *2004 Country Report on Human Rights Practices—Uzbekistan*, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41717.htm>.

<sup>277</sup> *Id.*

<sup>278</sup> Amnesty International Report, *Uzbekistan Human Rights Report 2005*, *supra* note 275.

<sup>279</sup> *2004 Country Report on Human Rights Practices—Uzbekistan*, *supra* note 276.

<sup>280</sup> Amnesty International Report, *Uzbekistan Human Rights Report 2005*, *supra* note 275.

<sup>281</sup> *2004 Country Report on Human Rights Practices—Uzbekistan*, *supra* note 276.

<sup>282</sup> *Id.*

<sup>283</sup> U.S. Department of State, *2004 Country Report on Human Rights Practices—Egypt*, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>.

legations of torture there.<sup>284</sup> But the United Nations Committee Against Torture has still found a systematic pattern of abuse in Egypt.<sup>285</sup> Torture and mistreatment are often used to extract information during interrogations.<sup>286</sup> Prisoners are detained incommunicado for long periods and the authorities do not keep the reports that the CAT requires.<sup>287</sup> The methods of abuse include: “blindfolding victims; suspending victims from a ceiling or doorframe with feet just touching the floor; beating victims with fists, whips, metal rods, or other objects; using electrical shocks; and dousing victims with cold water.”<sup>288</sup> Prisoners, whether men, women, or children, are threatened with and subjected to sexual assault, and the threats include the possibility that family members will be raped.<sup>289</sup>

While Egypt has made many arrests connected to terrorism, the government has not provided a realistic number of how many people are actually held.<sup>290</sup> The official number is 800, but Amnesty International puts the number far closer to 3000, many of whom have been tortured.<sup>291</sup> Terrorism suspects are tried in military courts where they are denied fair trials.<sup>292</sup> While there are indications of several deaths from torture in Egypt, very few of the perpetrators have been brought to justice, in part, because of insufficient investigations into the incidents.<sup>293</sup>

Prisoners who have been returned to Egypt from other countries suffer the risk of mistreatment and torture.<sup>294</sup> For example, since Yemen returned fifteen Egyptian nationals to Egypt, nothing is known about their locations and their fates.<sup>295</sup> They have disap-

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<sup>284</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>285</sup> 2004 Country Report on Human Rights Practices—Egypt, *supra* note 283.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Amnesty International, Egypt Human Rights Report 2005, <http://web.amnesty.org/report2005/egy-summary-eng> (last visited Feb. 17, 2006).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *See Id.* (noting that “[i]n February, the Yemeni authorities handed over 15 Egyptian nationals including Dr. Sayyid ‘Abd al-Aziz Imam al-Sharif, Muhammed’ Abd al-Aziz al-Gamal and Uthman al-Samman. The last two had been sentenced to death in absentia in 1999 and 1994 respectively. The fate and whereabouts of those returned were not known to AI or, reportedly, to their families and friends.”); *see also* <http://web.amnesty.org/report2005/yem-summary-eng>.

peared from public view into darkness. Based on its human rights record, Egypt's reputation is black.

Syria, although a signatory to the CAT,<sup>296</sup> joins Egypt near the bottom of the list for the treatment of prisoners. As a leading state sponsor of terrorism, Syria contravenes many United States policies in the Middle East.<sup>297</sup> Nonetheless, in the global struggle against the al-Qaeda brand of terrorism, Syria has been identified as the recipient of at least one terrorism suspect from United States control: Maher Arar, taken from the immigration context. The Syrian Ambassador to the United States, Imad Moustapha, has acknowledged that the United States transferred Arar to Syrian custody.<sup>298</sup> Denying that Arar was mistreated there, the Syrian Ambassador says Arar was released because the Syrians could not link him to any acts of terrorism.<sup>299</sup>

Arar may not be the only case of irregular rendition from American to Syrian control. Reports indicate that forces from the United States arrested and interrogated a terrorism suspect in Morocco and then secretly transferred him to Syria where he is being held in a tiny underground cell.<sup>300</sup>

Syria's human rights record is marred by arbitrary arrests, by unfair trials, and by torture which has resulted in at least nine deaths.<sup>301</sup> Even though the Syrian Constitution prohibits any physical or mental torture, our State Department reveals credible evidence of frequent torture in Syria.<sup>302</sup> The methods of abusing prisoners include: "fingers crushed; receiving beatings to their face and legs; having cold water thrown on them; being forced to stand for long periods of time during the night; hearing loud screams and beatings of other detainees; being stripped naked in front of others; and being prevented

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<sup>296</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>297</sup> See Douglas Jehl, *The Mideast Turmoil: Diplomacy; U.S. Avoids Criticism of Raid; Urges Israel to Use Caution*, N.Y. TIMES, Oct. 6, 2003, at A1 ("... the United States has long called Syria [] a state sponsor of terrorism."); Christopher Marquis, *Syria Said to Send Arms Again to Lebanon Guerillas*, N.Y. TIMES, Feb. 6, 2004, at A6 (noting that Washington lists Syria as a state sponsor of terrorism).

<sup>298</sup> CBS News, 60 Minutes II, *His Year In Hell*, July 15, 2005, available at <http://www.cbsnews.com/stories/2005/07/11/60II/main708164.shtml>.

<sup>299</sup> *Id.*

<sup>300</sup> Amnesty International, Syria Human Rights Report 2005, <http://web.amnesty.org/report2005/syr-summary-eng> (last visited Feb. 17, 2006). This allegedly occurred to Syrian-born German national Muhammad Haydar Zamar. *Id.*

<sup>301</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices—Syria, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41732.htm>.

<sup>302</sup> *Id.*

from praying and growing a beard.”<sup>303</sup> Other methods include: “administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim was suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a backward-bending chair to asphyxiate the victim or fracture the victim’s spine.”<sup>304</sup> Even children are not spared. Reports indicate that four school children were beaten with electric cables, had their heads banged together, and were ordered to strip on the threat of further beating.<sup>305</sup> Such methods are used to extract information and confessions, and Syrian officials up to the level of brigadier general have applied them.<sup>306</sup> In general, Syria’s human rights record is black.

In sum, even without any negative circumstances connected to a particular rendition, irregular renditions to Uzbekistan, Egypt, and Syria generally pose problems of compliance with the CAT. The problems there are so severe that they may not be resolved through assurances, post-transfer monitoring, or a combination of the two. The records for these countries are dark enough that disbelief cannot be suspended. For the time being, these countries should be removed from the list as recipients of irregular renditions from the United States and other countries. As a final verdict on specific cases, unless the United States demonstrates some special factors in its favor, such as extensive assurances and extensive monitoring, the renditions of Abu Omar and Mamdouh Habib to Egypt and of Maher Arar to Syria may not have strictly complied with Article Three of the CAT. In hindsight, that much seems clear.

### C. *Gray Areas*

Assurances and monitoring are most relevant on renditions to the second group. Bulgaria is one country in the middle. Bulgaria is a signatory to the CAT.<sup>307</sup> Some prisoners have reportedly been mistreated in Bulgaria, and some of the mistreatment by law enforcement officials may have crossed into torture.<sup>308</sup> The police have

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Amnesty International, Syria Human Rights Report 2005, <http://web.amnesty.org/report2005/syr-summary-eng> (last visited Feb. 17, 2006).

<sup>306</sup> 2004 Country Report on Human Rights Practices—Syria, *supra* note 301.

<sup>307</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>308</sup> Amnesty International Report, Syria Human Rights Report 2005, *supra* note 305.

beaten criminal suspects during initial interrogations.<sup>309</sup> Two specific incidents have been reported. Police officers released dogs on Roma Assen Zarev in an attempt to learn the whereabouts of some other men, and threatened to shoot him.<sup>310</sup> In another interrogation, police beat Boris Daskalov on the soles of his feet with rubber truncheons, having stuffed a cloth in his mouth to silence him.<sup>311</sup> Daskalov, it is reported, was handcuffed on his arms and legs and suspended between two chairs with a wooden stick between his arms and his knees.<sup>312</sup> The United Nations Committee Against Torture is concerned about such cases of prisoner mistreatment, particularly the case of Zarev, which may have reached the threshold of torture.<sup>313</sup> The Zarev and Daskalov incidents, while deplorable, do not suggest that such treatment is routine or would be the likely fate of someone rendered to Bulgaria. Based on its human rights record, Bulgaria's reputation is neither white nor black.

Problems similar to those in Bulgaria exist in Romania, another country mentioned as a possible site for secret CIA interrogations.<sup>314</sup> Romania ratified the CAT on December 18, 1990.<sup>315</sup> There are several reports of Romanian law enforcement officials mistreating prisoners with some cases crossing into torture.<sup>316</sup> The Romanian prisons in which the mistreatment has occurred have been described as "inhuman and degrading."<sup>317</sup> As in Poland, such degrading conditions are probably a result of Romania's limited budget rather than a deliberate effort to degrade prisoners. Inappropriate means of restraints, notably chains and shackles, are a common problem in Romania.<sup>318</sup> Several female prisoners allege that law enforcement officials raped them while they were in custody.<sup>319</sup> Another problem in Romania is widespread corruption, which affects the judiciary and undermines the media and other organizations.<sup>320</sup> Even so, torture is

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<sup>309</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices—Bulgaria, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41674.htm>.

<sup>310</sup> Amnesty International, Bulgaria Human Rights Report 2005, <http://web.amnesty.org/report2005/bgr-summary-eng> (last visited Feb. 17, 2006).

<sup>311</sup> *Id.*

<sup>312</sup> Amnesty International, Bulgaria Human Rights Report 2005, *supra* note 310.

<sup>313</sup> *Id.*

<sup>314</sup> Whitlock, *supra* note 269.

<sup>315</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>316</sup> Amnesty International, Romania Human Rights Report 2005, <http://web.amnesty.org/report2005/rom-summary-eng> (last visited Feb. 17, 2006).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

not routine or prevalent. On balance, Romania's human rights record is also gray.

Jordan approaches the bottom of the second category, and a reasonable argument can be made for putting Jordan in the third group. Although Jordan has ratified the CAT,<sup>321</sup> the human rights violations in Jordan seem worse than in Bulgaria and Romania. Significant to the policy debate, Jordan has been mentioned as a recipient of rendered suspects from the United States and as a behind-the-scenes ally of the United States in counter-terrorism.<sup>322</sup>

There are substantial allegations of abuse and torture during detention and interrogation in Jordan. Verification of these allegations, however, has been difficult because prisoners are not provided timely access to counsel.<sup>323</sup> Common methods of interrogation in Jordan are "beating, sleep deprivation, extended solitary confinement, and physical suspension."<sup>324</sup> Many detainees who have allegedly been mistreated and tortured were arrested for terrorism; one suspected terrorist allegedly died in custody from abuse by prison staff.<sup>325</sup> Worse, Amnesty International questions the impartiality of official investigations into these allegations.<sup>326</sup> Moreover, terrorism suspects may not receive due process when they appear before the State Security Court, a panel of military judges that handles terrorism cases.<sup>327</sup> As a result of such factors, Jordan's human rights record is a dark shade of gray.

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<sup>321</sup> Convention Against Torture Ratifications and Reservations, *supra* note 66.

<sup>322</sup> See John Crewdsen, *Suspected CIA Tactics Spread Outrage in EU; Human-Rights Concerns Arise over 'Rendition' of Terrorist Suspects*, CHI. TRIB., Jan. 1, 2006, at C4. ("Published estimates attributed to unnamed sources put the total number of renditions since Sept. 11 at 100 and 120, with some suspects known to have been deposited in Syria, Jordan, and Mexico."); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up after 9/11*, WASH. POST, Nov. 2, 2005, at A1 ("These prisoners, some of whom were originally taken to black sites, are delivered to intelligence services in Egypt, Jordan, Morocco, Afghanistan and other countries, a process sometimes known as 'rendition.'"); Ken Silverstein, *Jordan Has Complex Bond with the U.S. Close Up*, SEATTLE TIMES, Nov. 12, 2005, at A3 ("Jordan's General Intelligence Directorate, or GID, has surpassed Israel's Mossad as America's most effective allied counter-terrorism agency in the Middle East.").

<sup>323</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices—Jordan, Feb. 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41724.htm>.

<sup>324</sup> *Id.*

<sup>325</sup> Amnesty International, *Jordan Human Rights Report 2005*, <http://web.amnesty.org/report2005/jor-summary-eng>. (last visited Aug. 24, 2006).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

In sum, even without any negative circumstances connected to a particular rendition, irregular renditions to Bulgaria, Romania, and Jordan pose general problems of compliance with the CAT. Of the three, Jordan has the worst record. In specific cases, these problems may be resolved through assurances, post-transfer monitoring, or a combination of the two. These are difficult cases. These are cases where assurances and monitoring can make a difference.

## VI. CONCLUSION

Irregular renditions, contrary to the opinions of the City Bar, Human Rights Watch, and others, are possible under American law. Assurances and monitoring and oversight, if genuine, can make a difference in decreasing the perceived likelihood that a suspect will be tortured after he is transferred from United States control.

Law and policy do not always coincide. Something can be legal, even if it is bad policy. Our executive branch, of course, could attempt to be pure by not taking any chances with irregular rendition. As a matter of policy, the executive branch might render people through irregular means only to the cleanest of countries. But such a policy still requires a standard. Even the criminal law standard, proof beyond a reasonable doubt, is not 100% certainty of guilt. Be that as it may, the United States might render people only when convinced beyond a reasonable doubt that the rendered person will neither be tortured nor treated by cruel, inhuman, or degrading tactics. Such a policy might make sense for the domestic consensus behind counterterrorism and for convincing the rest of the world to support the United States. Such a policy helps retake some sort of high ground. But such a policy, as this Article has demonstrated, takes the United States beyond its legal obligations under the CAT.

Even a blanket policy against rendition blurs into gray. If officials have doubts about a receiving country and if there is no better country to take the suspect, the result will be more people detained in the United States and more people granted political asylum in the United States. No matter which direction is chosen, there are costs to a quest for purity; and inertia has its own costs. The experience in American prisons and in other American detention facilities around the world has shown that our prisoners are not perfectly safe from mistreatment.<sup>328</sup> We are not the cleanest of the clean. Whether the

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<sup>328</sup> See Josh White, *Abu Ghraib Dog Tactics Came from Guantanamo*, WASH. POST, July 27, 2005, at A14; Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. TIMES, May 1, 2005, at 35; Eric Schmitt, *Abuses at Prison Tied to Officers in Intelligence*, N.Y. TIMES, Aug. 25, 2004, at A1.

United States renders suspects or keeps them itself, the potential for abuse always exists. That is the harsh reality to holding people against their will.

Stepping into the gray, I have shown some ways in which irregular rendition can comply with American law for policymakers who dare to consider irregular rendition as a tactic in counter-terrorism and for an executive branch which does not veer toward the sanctimonious. My thesis has not been winks and nods for people who want to take the gloves off. Instead, my thesis reflects the importance of abiding by the rule of law while engaged in secret practices. Out in the open, a more regular process for irregular rendition is possible.

A more regular form of irregular rendition, to be sure, is not the same as regular rendition or extradition. But a more open process is far better for a democracy than a program of irregular rendition that operates completely in the shadows. Irregular rendition is taken into lighter shades of gray when the United States obtains reasonable assurances from the receiving country and carries out reasonable monitoring and oversight after transfer. That is a sensible direction.

Once the political posturing on irregular rendition has stopped, the legal analysis is not especially difficult. As with many other topics, it involves the interpretation of conventions, statutes, and cases. It involves the reasonable application of facts to standards. The most difficult task is to preserve American democracy as we fight barbarism around the globe. That is a task for everyone, and part of a regular process that should never be extinguished.