

Rendition Operations: Does U.S. Law Impose Any Restrictions?

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For centuries, the United States has seized individuals overseas and, outside any formal extradition process, brought such individuals to the United States to stand trial. A more recent wrinkle has been the transfer of such individuals to other countries for the purposes of prosecution or interrogation. Known as “rendition operations,” such transfers have often been criticized. Numerous commentators, asserting that many of these activities violate U.S. law, have called on the U.S. government to cease such operations and prosecute U.S. officials who engage in them. Nonetheless, President Barack Obama established a Special Task Force, which recently advocated the continued use of rendition operations, though it suggested some policy changes. In order to effectuate such changes and understand their impact, the Administration, as well as the critics and proponents of rendition operations, need to understand current U.S. law regarding renditions. Yet, despite all the focus, concern, and criticism over rendition operations, no scholarly work to date has evaluated the entirety of U.S. law regarding such activities. This article proposes to do just that. It concludes that, upon close inspection of U.S. law, there are virtually no legal restrictions on these types of operations. Indeed, U.S. law does not even preclude the United States from rendering individuals to a third country in instances where the third country may subject the rendered individual to torture. The only restrictions that do exist under U.S. law preclude U.S. officials from themselves torturing or inflicting cruel and unusual punishment on an individual during rendition operations, rendering that person to a country with the specific intent of having the person tortured, or rendering an individual from a place of actual armed conflict or occupation—all of which prove to be narrow

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limitations indeed. Finally, few actual means exist to prosecute or sue U.S. officials engaged in rendition operations, due to limitations in civil and criminal statutory authority, as well as the courts' continuous reluctance to consider such claims.

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I. INTRODUCTION

On January 25, 1993, Pakistani national Mir Aimal Kasi parked his car outside the headquarters of the Central Intelligence Agency (“CIA” or “Agency”) in Langley, Virginia.¹ Brandishing an AK-47 assault rifle, Kasi proceeded to open fire on the automobiles waiting to turn into the CIA’s entrance. Two Agency employees were killed; three others were wounded. At the end of his shooting spree, Kasi escaped, eventually making his way back to Pakistan. For the next four and a half years, the CIA and the Federal Bureau of Investigation (“FBI”) engaged in an extensive manhunt to find Kasi. Finally, in June 1997, FBI agents located Kasi in a hotel in Pakistan. The United States decided against seeking to formally extradite Kasi to the United States. Instead, the FBI snatched him from his hotel room, transported him by military aircraft back to the United States, and delivered him to the Commonwealth of Virginia, which had an outstanding warrant for his arrest.²

The abduction and transfer of Kasi to the United States represents an example of what is known as a “rendition” operation.³ At its base, a “rendition” is the forcible movement of an individual from one country to another, without use of a formal legal process, such as an extradition mechanism.⁴ Such operations are alternatively described as “abductions,” “kidnappings,” “seizures,” or “transfers,” depending on the sentiment of the commentator describing such activities.⁵

1. Kasi v. Angelone, 300 F.3d 487, 490 (4th Cir. 2002).

2. *Id.* at 490–91. A jury eventually convicted Kasi of capital murder, and he was executed in 2002. Maria Glod & Eric M. Weiss, *Kasi Executed for CIA Slayings; U.S. Cautions of Possible Attacks in Retaliation*, WASH. POST, Nov. 15, 2002, at A1.

3. ASHLEY S. DEEKS, COUNCIL ON FOREIGN RELATIONS, C.S.R. NO. 35, AVOIDING TRANSFERS TO TORTURE 17 n.24 (2008).

4. *See id.* at 16 (“A rendition is the transfer of an individual from one state to another, without the use of traditional processes such as extradition, deportation, or expulsion.”); John T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 MELB. J. INT’L L. 516, 528 (2005) (“At the most basic level, the term ‘rendition’ refers to the practice of seizing a person in one country and delivering her to another country, usually for the purpose of criminal prosecution.”). *But see* Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1406–07 (2008) (asserting, with little support, that a “rendition” requires a judicial process and does not apply to transfers for interrogation purposes).

5. Critics tend to refer to such operations as “abductions” or “kidnappings.” *See, e.g.*, Abraham Abramovsky, *Extraterritorial Abductions: America’s “Catch and Snatch” Policy Run Amok*, 31 VA. J. INT’L L. 151 (1991); Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 230–31 (1992) (using the terms “abduction,” “kidnapping,” and “seizure” in condemning rendition operations). Supporters of the practice, and more neutral observers, tend to use the term “transfers.” *See, e.g.*, DEEKS, *supra* note 3; Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L.

The United States has engaged in rendition operations since the late 1800s.⁶ Indeed, the United States has been conducting rendition operations longer than it has engaged in formal extraditions.⁷ Such operations can take various forms, from snatch-and-grabs in a foreign country, to luring culprits into international waters and seizing them there, to actual armed invasion of a foreign country for the purpose of apprehending the wanted individual.⁸ They are conducted by a slew of different U.S. government organizations—the FBI, CIA,⁹ Department of Defense (“DoD”), and Drug Enforcement Administration (“DEA”)—and are utilized by both Democrat and Republican administrations.¹⁰ Regardless of when conducted, and by whom, American Administrations have constantly considered rendition operations to be a “vital tool” of U.S. foreign policy.¹¹

However, questions are often raised as to the legality of such operations.¹² Some commentators assert that the United States is restricted or prohibited from rendering individuals to the United States for trial.¹³ Others argue that the United States is currently precluded

REV. 657 (2006); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004); Press Release, Dep’t of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html> [hereinafter Special Task Force Press Release] (using the term “transfer” to describe all individuals transported to other nations).

6. Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT’L L. & POL. 813, 857–58 (1993) (noting that the United States would use other means than were provided by the extradition treaties).

7. *Id.*

8. Examples of these various types of rendition operations are discussed *infra* Part II.

9. Directors of the CIA have publicly acknowledged for years that the CIA engages in rendition operations. See, e.g., ‘We Don’t Do Torture,’ *CIA Director Testifies*, ASSOCIATED PRESS, Mar. 17, 2005, available at <http://www.msnbc.msn.com/id/7220179/> (noting how Director Goss defended rendition operations in his testimony); Tracy Wilkinson & Bob Drogin, *Missing Imam’s Trail Said to Lead from Italy to CIA*, L.A. TIMES, Mar. 3, 2005, at A1 (“CIA Director Porter J. Goss strongly defended the agency’s role in delivering suspects to other countries when he appeared before the Senate Intelligence Committee on Feb. 16[, 2005].”); Michael Hayden, Dir., Cent. Intelligence Agency, Remarks at the Council on Foreign Relations (Sept. 7, 2007), available at <https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html> (“And I mentioned renditions [conducted by the CIA since 9/11], the number of renditions—that’s moving a terrorist from A to B—. . . the number of renditions is . . . mid-range two figures.”).

10. See rendition cases cited *infra* Part II.

11. See, e.g., Condoleeza Rice, Sec’y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005), available at http://turkey.usembassy.gov/statement_12052005.html (“Rendition is a vital tool in combating transnational terrorism. Its use is not unique to the United States, or to the current administration.”).

12. Yoo, *supra* note 5, at 1183–84 (citing numerous commentators who have argued that various rendition operations are illegal).

13. See, e.g., William J. Aceves, *The Legality of Transborder Abductions: A Study of United*

from rendering individuals from Iraq or Afghanistan, due to the U.S. invasion of, and continuing involvement in, those countries.¹⁴ Numerous scholars have recently asserted that U.S. law prohibits rendition of individuals to foreign countries known to have poor human rights records or where the rendered individual may face abuse.¹⁵ The most vehement criticism, however, focuses on so-called “extraordinary renditions,” in which the United States, according to commentators, purposefully renders individuals to third countries that will torture them.¹⁶ Many critics have called for terminating all or some types of rendition operations, as well as the criminal investigation and prosecution of U.S. government officials who have engaged in such operations—especially “extraordinary renditions.”¹⁷

States v. Alvarez-Machain, 3 SW. J. L. & TRADE AM. 101, 102–03 (1996) (noting the extensive questioning of the legality of renditions to the United States).

14. See, e.g., Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1394–1411 (2007); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295, 296–97 (2007).

15. See, e.g., Abramovsky, *supra* note 5, at 155; J. Troy Lavers, *Extraordinary Rendition and the Self Defense Justification: Time to Face the Music*, 16 MICH. ST. J. INT'L L. 385, 400 (2007); Elisa Massimino, *Leading by Example? U.S. Interrogation of Prisoners in the War on Terror*, 23 CRIM. JUST. ETHICS 2, 75 (2004); A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 20 (2006); Michael V. Sage, Note, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. W. INT'L L.J. 121, 142 (2006); see also Satterthwaite, *supra* note 14, at 1333 (questioning the legality of rendition operations).

16. See, e.g., Jules Lobel, *The Preventative Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1408 (2007) (describing extraordinary rendition as “a preventative technique whereby suspects are sent to third countries not to try them for crimes they allegedly committed, but to torture and preventatively detain them without charge in order to obtain information to prevent future crimes”); Satterthwaite, *supra* note 14, at 1333 (arguing that extraordinary rendition “perverts the rule of law”).

17. See, e.g., MAJORITY STAFF REP. OF H. COMM. ON THE JUDICIARY, 110TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 271–72 (Jan. 13, 2009), available at <http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf> (recommending the appointment of a Special Counsel “to determine whether there were criminal violations committed pursuant to Bush Administration policies that were undertaken under unreviewable war powers, including . . . extraordinary rendition”); Morton Kondracke, *Say No to “War Crimes” Probe*, WASH. TIMES (Dec. 26, 2008, 5:45 AM), <http://www.washingtontimes.com/news/2008/dec/26/say-no-to-war-crimes-probe/> (urging then President-elect Obama to “put a stop” to calls to investigate or prosecute various anti-terrorist activities such as rendition operations); Mark Kukis, *Closing Down the Dark Side*, TIME, Dec. 8, 2008, at 34–35 (discussing the pressure on President-elect Obama to halt rendition operations); Eli Lake, *Panetta Faces Rendition Queries*, WASH. TIMES, Jan. 15, 2009, at A1 (noting that President-elect Obama’s campaign documents call for the end of “outsourcing our torture to other countries”); Editorial, *Obama Must Right the Wrongs*, L.A. TIMES (Jan. 18, 2009), <http://articles.latimes.com/2009/jan/18/opinion/ed-leadership18> (calling on then President-elect Obama to follow through on his intent to end “extraordinary rendition”); *US/Italy: Italian Court Challenges CIA Rendition Program*, HUMAN RIGHTS WATCH (Apr. 15,

So heightened has been the concern about rendition operations and other transfers that, on just his second full day in office, President Obama issued an executive order creating a Special Interagency Task Force on Interrogation and Transfer Policies (“Task Force”).¹⁸ One of the Task Force’s two enumerated missions was as follows:

[T]o study and evaluate the practice of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.¹⁹

Though the final report issued in August 2009 by the Task Force has not been made publicly available, an official press release states that the Task Force report “made policy recommendations” related to the treatment of individuals transferred to other countries.²⁰ These policy recommendations proposed strengthening U.S. procedures to ensure such individuals receive proper treatment, including the creation of a monitoring mechanism.²¹ The Task Force, however, made no suggestions for legislative changes.²²

As such, it appears unlikely that there will be any attempt to change current U.S. law relating to rendition operations. Understanding the reach and limitations of such law, therefore, will be imperative for policymakers in deciding which, if any, policy changes to make with regard to rendition operations, and to comprehend the impact such changes may have. Any proposed policy change that does not consider the underlying law regarding this critical national security issue risks being deemed illegal, ineffective, irrelevant, or a combination of all three.

However, no scholarly work to date has evaluated the U.S. law governing rendition operations *writ large*. This article intends to fill that void by analyzing the U.S. law governing both renditions to the

2008), <http://www.hrw.org/en/news/2008/04/15/usitaly-italian-court-challenges-cia-rendition-program> (noting that the Human Rights Watch terrorism and counterterrorism director has stated that “[t]he CIA’s rendition program should be on trial in the United States” and that the “[U.S.] Department of Justice has utterly failed in its responsibility to investigate and prosecute these serious crimes”).

18. Exec. Order No. 13,491, § 5, 74 Fed. Reg. 4893 (Jan. 22, 2009).

19. *Id.* § 5(e)(ii).

20. Special Task Force Press Release, *supra* note 5.

21. *Id.*

22. *Id.*

United States as well as renditions of individuals from one foreign country to another (which I shall refer to as “foreign-to-foreign renditions”).²³ Through this analysis, an interesting pattern emerges. Despite the numerous complaints and criticisms of rendition operations, U.S. law provides surprisingly few actual legal restrictions, and in most situations no practical limitations, on the ability of the U.S. government to engage in rendition operations to the United States or elsewhere. Further, only modest means exist to prosecute or sue U.S. officials involved in such operations.

Part II of this article provides a background on rendition operations, including a summary of Supreme Court cases stretching back to the 1880s that have upheld such operations. Part III assesses the various possible limitations imposed by U.S. law on the engagement of the United States government in rendition operations. This Part analyzes potential restrictions imposed by the U.S. Constitution, laws related to torture and abuse, bilateral treaties, international law, the 1949 Geneva Conventions, and an obscure provision known as the Mansfield Amendment. Despite strenuous assertions by numerous commentators that many U.S. rendition operations skirt the law,²⁴ this Part concludes that virtually all U.S. rendition operations are permitted by U.S. law, even in instances where the transferred individual may be subjected to torture by the receiving nation. The only real restrictions are that the United States cannot itself torture the individual, specifically intend the person to be tortured by others, subject the person to cruel and unusual punishment, or transfer him or her from a place where the United States maintains occupation or is engaged in armed conflict.²⁵ In reality, however, even these purported restrictions impose few actual limitations

23. This article will not consider renditions *from* the United States, as there is no indication that such activities take place. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32890, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE 3–4 (2009). This article also will not address renditions to CIA secret detention facilities overseas. The legality of those rendition operations is intrinsically intertwined with the CIA’s detention program itself, a program that is so classified as to preclude valid legal analysis in an unclassified forum such as this, and in any case could comprise an entire law review article in its own right. Nonetheless, this article’s conclusion that rendition operations are generally legal under U.S. law means that, should the operation of the CIA’s secret detention facilities be deemed legal, so too would renditions to such facilities. In any case, President Obama has ordered all CIA secret detention facilities closed down and the program ended, thus eliminating such rendition operations for the foreseeable future. Exec. Order No. 13,491, § 4(a), 74 Fed. Reg. 4893 (Jan. 22, 2009). For a general analysis of the legality of activities conducted by the CIA towards detainees, to include activities undertaken as part of the CIA’s detention program, see Kenneth J. Levit, *The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror*, 1 J. NAT’L SECURITY L. & POL’Y 341, 348–50 (2005).

24. See *supra* notes 12–17.

25. See *infra* Part III.

on rendition operations. Parts IV and V then turn to the legal limitations on individual U.S. government officials, evaluating the possible criminal and civil repercussions, respectively, for U.S. government officials involved in renditions.²⁶ These Parts conclude that while both criminal and civil sanctions do exist under U.S. law, such options are fairly limited, and courts remain highly reluctant to consider such claims, especially in the civil context.

Before proceeding, I should note that the purpose of this article is *not* to promote rendition operations, to propose legislation, nor to suggest a course of action by Congress, the Obama Administration, or anyone else with regard to renditions. Indeed, my position as a CIA employee precludes me from taking any such stance or offering any such proposals. Further, the purpose of this article is not to countenance torture or similar abuse, actions which I personally find abhorrent regardless of what our legal system actual prohibits. Instead, this article seeks to clear the deck, as it were, with regard to the law governing rendition operations. By exposing what the current state of U.S. law on such operations actually is, as opposed to what most presume or wish it to be, I hope to lay to rest erroneous legal assumptions and misconceptions currently circulating with regard to rendition activities. This will hopefully allow for a meaningful debate, both for the Administration as well as for the nation, about what policies should be in place with regard to such operations and what laws, if any, should be enacted if the status quo is deemed unacceptable.

II. BACKGROUND

There are numerous reasons why the U.S. government might choose to forgo formal extradition proceedings and instead resort to rendition operations. In some cases, there may not be an extradition treaty in place.²⁷ Libya, for example, has no extradition treaty with the United States, a situation that caused considerable consternation for years when the Ghaddafi government refused to turn over individuals implicated in the bombing of Pan American Flight 103.²⁸ North Korea and Syria,

26. This article will focus solely on rendition operations by U.S. government officials, and will not consider rendition operations conducted by private parties, such as bounty hunters or contractors, due to the extensive and separate legal issues that would need to be evaluated for such analysis.

27. Nadelmann, *supra* note 6, at 814; *see, e.g.*, *United States v. Cotten*, 471 F.2d 744, 745 (9th Cir. 1973) (noting that the United States rendered defendants to the United States from Vietnam because there was no extradition treaty between the two countries).

28. S. Res. 731, 102d Cong. (1992) (requesting Libya turn suspects implicated in the Pan American Flight 103 bombing over to other countries for prosecution); Trevor Rowe, *U.N. Presses Libya on Bombing*, WASH. POST, Jan. 22, 1992, at A1 (describing the U.N. Security

countries antagonistic towards the United States, similarly lack extradition treaties with the United States.²⁹ In other cases, an extradition treaty may contain significant restrictions. For example, several extradition treaties explicitly preclude extraditing citizens of that foreign country,³⁰ while other treaties permit extradition only for certain crimes.³¹

Even an extradition treaty that appears strong on its face may prove useless if the foreign country's current regime is antagonistic towards the United States.³² The United States has recently encountered difficulty extraditing Iranian nationals from various countries that seem more sympathetic to the plight of Iran than that of the United States.³³ The foreign nation may also lack adequate law enforcement capable of implementing a formal transfer.³⁴ For example, former CIA director William Webster noted that Lebanon, consumed by a brutal civil war in the 1980s, had "no capacity to provide law enforcement or assistance" to extradition requests during that time period.³⁵ In other countries, bribes or threats by fugitives to local law enforcement or judicial officers have made formal extradition a non-viable option.³⁶ Extradition has proved similarly unworkable from countries in which a foreign country or leader cannot publicly be seen as assisting the United States. In such cases, rendition operations permit the transfer to take

Council Resolution as necessary given Libya's failure to turn the suspects over to the United States or the United Kingdom).

29. See generally I. I. KAVASS, *EXTRADITION LAWS AND TREATIES* (2007) (compiling all the extradition treaties that the United States has with foreign countries, and indicating no extradition treaty between the United States and either Libya, Syria, or North Korea).

30. Abramovsky, *supra* note 5, at 155; Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 77 (1999).

31. Richard Downing, *Recent Development: The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil*, 26 STAN. J. INT'L L. 573, 576 (1990); Nadelmann, *supra* note 6, at 814; Plachta, *supra* note 30, at 100.

32. Downing, *supra* note 31, at 576; Nadelmann, *supra* note 6, at 814; Plachta, *supra* note 30, at 100.

33. Mark Hosenball, *Administration Frustration*, NEWSWEEK (Oct. 8, 2008), <http://www.newsweek.com/2008/10/07/administration-frustration.html>.

34. Downing, *supra* note 31, at 576; Rice, *supra* note 11 (supporting rendition operations by stating "[w]e must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law").

35. David B. Ottaway & Don Oberdorfer, *Administration Alters Assassination Ban; In Interview, Webster Reveals Interpretation*, WASH. POST, Nov. 4, 1989, at A1.

36. Jimmy Gurule, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457, 459 & n.11 (1994); Nadelmann, *supra* note 6, at 861.

place, but allow the foreign country or leader to maintain plausible deniability.³⁷

The wars against narcotics and terrorism over the past few decades have only served to exacerbate the problems of formal extradition to the United States. The desire of the American government to prosecute more and more drug traffickers and terrorists in U.S. courts has often outstripped the ability and willingness of some foreign countries to extradite individuals to our shores.³⁸ Rendition proves an attractive alternative to allowing such actors to remain free overseas.³⁹ As one commentator has stated: “Current and former U.S. intelligence officials said the rendition program is poised to play an expanded role because it is the main remaining mechanism—aside from Predator missile strikes—for taking suspected terrorists off the street.”⁴⁰

With regard to foreign-to-foreign renditions, numerous reasons may motivate the United States to assist in having an individual rendered to a country other than the United States. A foreign nation may have an arrest warrant for a dangerous individual, while the United States may not. In other cases, the United States may believe that the individual will be better debriefed in his or her home country than by U.S. officials. The theory is that officials from the rendered individual’s own country better understand the culture and language of the rendered individual, and have better leverage on him or her. This in turn may lead the rendered individual to divulge more useful information.⁴¹ Renditions to foreign countries also have geopolitical implications as they induce American allies to take greater responsibility for the actions of their nationals, as well as take on a greater role in preventing crimes and terrorism.⁴²

37. Melanie M. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options*, 26 J. LEGIS. 315, 326 (2000) (“Due to unstable political conditions and the spread of Islamic fundamentalism, some countries in the Middle East do not want to be viewed as a U.S. partner in bringing terrorists to justice.”); *id.* at 327–28 (listing examples); Nadelmann, *supra* note 6, at 865 (noting that the Uruguayan interior minister approved a rendition on the condition that his permission would not be revealed if there were any problems with the rendition).

38. Nadelmann, *supra* note 6, at 820; Yoo, *supra* note 5, at 1185–88.

39. Nadelmann, *supra* note 6, at 820; Yoo, *supra* note 5, at 1185–88; Greg Miller, *Obama Lets CIA Keep Controversial Renditions Tool*, CHI. TRIB., Jan. 31, 2009, at 5 (noting that even human rights groups recognize that there is a legitimate place and need for rendition operations in order to combat terrorism).

40. Miller, *supra* note 39, at 5.

41. Yoo, *supra* note 5, at 1187.

42. *Id.* at 1187–88.

While formal extradition could be a means to effectuate these foreign-to-foreign transfers, it is not always a feasible option. The foreign countries at issue may not have an extradition treaty between them, or may not enjoy a good relationship.⁴³ Further, these countries may not want their cooperation with the other nation (or their involvement in the transfer) to be public knowledge.⁴⁴ Many commentators assert that the United States, and in particular the CIA, has sometimes engaged in these foreign-to-foreign rendition operations for another, less charitable, purpose. Specifically, these critics allege the CIA has undertaken numerous rendition operations to outsource torture to countries that will use techniques prohibited to U.S. officials.⁴⁵

Such criticism spotlights the main concerns with rendition operations. Because such activities take place outside the open process of an extradition proceeding, the possibility of error or abuse arises. There could be a case of mistaken identity of the rendered individual. There might not be a valid legal basis for transferring the individual. The individual may not receive appropriate legal process by the state to which they are rendered. Worst of all, the individual may be subject to abuse or even torture, with the United States turning a blind eye towards, or even being complicit in, such activities.⁴⁶

Despite such legitimate concerns, U.S. law has consistently upheld the legality of such operations. Indeed, as of the time of the writing of this article, there does not appear to be a single case in which a U.S. court has deemed a rendition operation illegal. And U.S. courts have been reviewing such cases for a long time, especially for individuals rendered to the United States to stand trial.

The Supreme Court first considered rendition operations more than 120 years ago in the 1886 case of *Ker v. Illinois*.⁴⁷ In that case, the defendant Ker, residing in Peru, stood accused of committing larceny in the United States. President Chester A. Arthur sent a representative to

43. For example, there is no extradition treaty between India and Pakistan. See *Never Gave Up Demand for Extradition of 26/11 Suspects*, OUTLOOKINDIA (Jan. 16, 2009, 16:17 IST), <http://news.outlookindia.com/item.aspx?651905>. The United Kingdom does not have formal extradition treaties with about eighty nations, including North Korea and Syria. See Julian Joyce, *World Shrinks for Men on the Run*, BBC NEWS (Mar. 26, 2008, 12:12 GMT), http://news.bbc.co.uk/2/hi/uk_news/7312853.stm.

44. See *supra* note 37.

45. See, e.g., Beth Henderson, *From Justice to Torture: The Dramatic Evolution of U.S.-Sponsored Renditions*, 20 TEMP. INT'L & COMP. L.J. 189, 190–91 (2006); Lavers, *supra* note 15, at 388; Lobel, *supra* note 16, at 1408; Massimino, *supra* note 15, at 75.

46. See, e.g., GARCIA, *supra* note 23, at 1–5; Massimino, *supra* note 15, at 75.

47. 119 U.S. 436 (1886).

Peru to seek extradition of Ker to the United States in compliance with a treaty between the United States and Peru. The representative, however, did not seek Ker's extradition, but instead, according to Ker, "forcibly and with violence" arrested him and brought him back to the United States to be prosecuted.⁴⁸

The Supreme Court found that prosecuting Ker under such circumstances violated neither the U.S. Constitution nor any U.S. statute.⁴⁹ As the Court stated: "[F]or mere irregularities in the manner in which [the defendant] may be brought into the custody of law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment."⁵⁰ The Court further found no relevance in the fact that an extradition treaty between the two countries existed and was not utilized, as Peru could have ordered Ker out of the country at any time, or could have surrendered him to U.S. officials outside the treaty's confines.⁵¹ Further, since Ker was not brought to the United States pursuant to the treaty, its terms did not provide him any defense.⁵²

The Supreme Court upheld this concept years later in the 1952 case of *Frisbie v. Collins*.⁵³ Though not a true rendition case—in that the transfer occurred entirely within the United States⁵⁴—the opinion's take on Ker is highly instructive. In *Frisbie*, defendant Collins claimed that, while he was living in Chicago, police officers from Michigan seized him and brought him to Michigan to stand trial on murder charges.⁵⁵ Collins alleged that this action amounted to a forced kidnapping in violation of the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act, and therefore his conviction should be overturned.⁵⁶ The Supreme Court disagreed.⁵⁷ With regard to the violation of the Federal Kidnapping Act, the Court found that sanctions

48. *Id.* at 438. One commentator theorizes that the representative did not seek extradition because, at the time, Chilean forces occupied Peru, and therefore, there was no actual Peruvian government to approach regarding the possibility of extradition. Abramovsky, *supra* note 5, at 157.

49. *Ker*, 119 U.S. at 444.

50. *Id.* at 440. This principle is sometimes referred to as "*male captus, bene detentus*," i.e., "bad capture, good detention." Henkin, *supra* note 5, at 231.

51. *Ker*, 119 U.S. at 442.

52. *Id.* at 442–43.

53. 342 U.S. 519, 522 (1952).

54. *Id.* at 520.

55. *Id.*

56. *Id.*

57. *Id.* at 522–23.

for violating that law did not include setting a convicted felon free.⁵⁸ As for the constitutional claim, the Court stated:

This Court has never departed from the rule announced in [*Ker*] that the power of a court to try a person for crime is not impaired by the fact that he had been forced within the court's jurisdiction by reason of a "forcible abduction." . . . There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.⁵⁹

For decades after the *Frisbie* decision, numerous critics questioned the legal validity—not to mention the moral and political implications—of the "*Ker-Frisbie* Doctrine," as it came to be known.⁶⁰ However, the Supreme Court put the issue to rest in 1992 when it emphatically upheld the doctrine in the case of *United States v. Alvarez-Machain*.⁶¹ Alvarez-Machain, a Mexican doctor, stood accused of assisting in the torture and killing of a DEA agent in Mexico.⁶² He claimed that the U.S. courts had no jurisdiction to prosecute him based on the manner in which he came to appear before the courts; namely that DEA agents, after Alvarez-Machain had been indicted, contracted with individuals in Mexico to forcibly kidnap him from his medical offices in Mexico and place him on a plane to the United States where he was arrested.⁶³ Alvarez-Machain alleged that he could not be tried in a U.S. court since the abduction violated the extradition treaty between the United States and Mexico, as well as customary international law.⁶⁴ The Mexican government strenuously agreed.⁶⁵

The Supreme Court, however, held otherwise.⁶⁶ First, the Court held that Alvarez-Machain's case did not differ in any material manner from the Supreme Court precedents in *Ker* and *Frisbie*.⁶⁷ Then, turning to the extradition treaty argument, the Court concluded that the United

58. *Id.* at 523. Sanctions for violating the Federal Kidnapping Act are discussed in more detail *infra* Part IV.A.

59. *Frisbie*, 342 U.S. at 522 (citation omitted).

60. *See, e.g.*, *United States v. Toscanino*, 500 F.2d 267, 272 (2d Cir. 1974) (citing several sources in concluding that "the *Ker-Frisbie* rule has been criticized and its continued validity repeatedly questioned"); Abramovsky, *supra* note 5, at 156 ("*Ker* was a judicial fluke and continued reliance upon it for our national policy is sheer folly.").

61. 504 U.S. 655, 670 (1992).

62. *Id.* at 657.

63. *Id.* at 657–58 & n.2.

64. *Id.* at 657–58.

65. *Id.* at 669 (noting the Mexican government's objection to the abduction, including the Mexican government's assertion that defendant's rendition violated Mexican territorial sovereignty).

66. *Id.* at 670.

67. *Id.* at 660–62.

States had not violated the terms of its treaty with Mexico because no express or implied provision of that treaty obligated either party to refrain from abductions in the territory of the other, nor did the treaty discuss any sanctions if any such abduction did occur.⁶⁸ As the Court stated: “[T]o infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice.”⁶⁹

As to the customary international law argument, the Court noted that Alvarez-Machain did not assert that customary international law provided an independent basis to dismiss his indictment, but rather that such international law “should inform the interpretation of the [extradition treaty] terms.”⁷⁰ Though noting that the defendant may be correct that abduction could be a violation of “general international law principles,” the Court found that Alvarez-Machain could not point to any such principles suggesting that the extradition treaty between the United States and Mexico should be read to preclude other mechanisms of bringing a defendant to trial, such as rendition operations.⁷¹ Thus, the Court refused to dismiss the indictment, holding that the mere fact of Alvarez-Machain’s forcible abduction from Mexico would not “prohibit his trial in a court in the United States for violations of the criminal laws of the United States.”⁷²

The *Alvarez-Machain* decision generated significant criticism both within the United States and abroad.⁷³ Not only did Mexico object strenuously to the rendition,⁷⁴ but so too did the governments of Argentina, Bolivia, Brazil, Chile, Paraguay, Uruguay, Colombia, and

68. *Id.* at 663.

69. *Id.* at 668–69.

70. *Id.* at 666.

71. *Id.* at 667–69.

72. *Id.* at 670. Interestingly, upon remand, the District Court dismissed the criminal case against Alvarez-Machain before it went to the jury, and the dismissal was upheld on appeal. *Alvarez-Machain v. United States*, 107 F.3d 696, 703–04 (9th Cir. 1996). The lead prosecutor in the case vehemently disagreed with the district court’s ruling, asserting that the judge “simply did not care for Americans kidnapping foreigners, and he resolved the case accordingly. To this day, I further believe that if the jury had been allowed to render a verdict, a guilty verdict would have resulted.” Paul Hoffman et al., *Kidnapping Foreign Criminal Suspects*, 15 WHITTIER L. REV. 419, 443 (1994) (comment of Manuel A. Medrano).

73. Aceves, *supra* note 13, at 117–26 (discussing in detail the vocal international outcry to the decision).

74. See *supra* note 65 and accompanying text (describing Mexico’s objection to Alvarez-Machain’s rendition); see also BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 723 (4th ed. 2003) (listing the various angry reactions of the Mexican government to the *Alvarez-Machain* opinion).

Canada, just to name a few.⁷⁵ Iran went so far as to pass a draft law authorizing the President of Iran to arrest Americans who acted against Iranians anywhere in the world and render them to Iran for trial.⁷⁶ Then-President George H.W. Bush announced that he did not intend on using the power in the future, and then-candidate for President Bill Clinton severely criticized the opinion.⁷⁷ U.S. journalists and academics denounced the opinion vociferously.⁷⁸ Members of the U.S. Congress similarly expressed displeasure with the decision, introducing two eventually unsuccessful legislative proposals to limit or prohibit rendition operations.⁷⁹

These critics asserted that the Court's decision to permit abductions renders extradition treaties meaningless,⁸⁰ undercuts U.S. relationships with other countries,⁸¹ puts U.S. citizens at risk of being rendered to other countries,⁸² encourages federal agents to make ad hoc decisions that could alter or undermine larger U.S. policy interests,⁸³ and generally undermines basic American values of due process.⁸⁴ Supporters countered that, even if such criticism is accurate, the

75. CARTER ET AL., *supra* note 74, at 721–22 (describing the outrage by numerous countries to the *Alvarez-Machain* decision); Gurule, *supra* note 36, at 458 n.6 (same).

76. CARTER ET AL., *supra* note 74, at 724; Downing, *supra* note 31, at 594.

77. CARTER ET AL., *supra* note 74, at 722–23; Hoffman et al., *supra* note 72, at 421.

78. Gurule, *supra* note 36, at 458.

79. *Id.*; Hoffman et al., *supra* note 72, at 422.

80. Hoffman et al., *supra* note 72, at 423. *But see* Nadelmann, *supra* note 6, at 882 (suggesting that rendition operations do not undermine extradition treaties as such treaties are “not viewed under the laws of the United States and most other nations as a prohibition on resort to measures outside the treaty”).

81. *See, e.g.*, Abramovsky, *supra* note 5, at 206 (noting the harm to U.S. relations with Mexico due to rendition operations there); Downing, *supra* note 31, at 591–94 (discussing the ramifications of the U.S. rendition policy on U.S. relations with other countries); Gurule, *supra* note 36, at 490 (noting that some consider U.S. rendition operations to undermine respect for the United States in the international community); Nadelmann, *supra* note 6, at 871–72 (discussing that, after learning about the rendition of a narco-trafficker from Honduras to the United States, Honduran nationals marched on the U.S. embassy in Tegucigalpa and set fire to part of it).

82. Abramovsky, *supra* note 5, at 201; Downing, *supra* note 31, at 594–96; Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT’L L. 746, 754 (1992); *see also* United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring) (“That respect for the sovereign integrity of other nations is, in addition to conforming to high moral principles, a self-serving pragmatic viewpoint for the United States to take; we can better demand in the international court of public opinion similar respect for our sovereign integrity if we extend such respect to others.”).

83. Abramovsky, *supra* note 5, at 203.

84. *See* Glennon, *supra* note 82, at 756 (“Does it make sense, though, to breach justice in the method of seizure so as to do justice in the manner of trial? Does it make sense to violate due process internationally so as to pursue due process domestically? I think not.”); Henkin, *supra* note 5, at 231 (“When United States officials bring the abducted person to the United States for trial, the due process of law is contaminated.”).

solution is not to return the rendered individual to the foreign country or set him or her free, but rather for the Executive Branch to work out a political solution or to punish the individuals involved in the rendition.⁸⁵ Further, these commentators asserted that an outright ban on renditions could potentially lead the U.S. government to take more drastic measures, such as an attempted targeted killing of the individual at issue, or even an invasion.⁸⁶

Regardless of one's opinion as to the moral or geopolitical propriety of the *Alvarez-Machain* decision specifically, or the *Ker-Frisbie* Doctrine in general, the law of the land is clear. Despite congressional, presidential, international, and public outrage, no U.S. law precludes or limits prosecution of an individual who has been rendered to the United States to stand trial. Unfettered, federal courts have upheld such rendition operations in virtually every factual scenario conceivable.

Thus, federal courts have found the nationality of the rendered individual to be irrelevant. Courts have permitted prosecuting U.S. citizens rendered to the United States,⁸⁷ as well as citizens of close U.S. allies.⁸⁸ Further, courts have held that the method of the rendition is also irrelevant. Courts have upheld the doctrine where the rendered individual was prosecuted in the United States after being forcibly abducted overseas,⁸⁹ tricked by U.S. agents into coming into the United States,⁹⁰ or lured into international waters.⁹¹

85. *See* *United States v. Reed*, 639 F.2d 896, 903 (2d Cir. 1981) (noting that a fugitive from the law is hardly in a moral position to try to claim that rendering him to justice violates the law); *Hoffman et al.*, *supra* note 72, at 437 (querying, in discussing the *Alvarez-Machain* case, “[I]f what is truly at stake are the sovereign rights of Mexico rather than the rights of the individual defendant, why is repatriation a good remedy?”).

86. Glennon, *supra* note 82, at 755.

87. *See, e.g., Reed*, 639 F.2d at 902 (upholding the court's jurisdiction over a U.S. citizen rendered to the United States from the Bahamas); *United States v. Cotten*, 471 F.2d 744, 745, 747 (9th Cir. 1973) (same for two U.S. citizens rendered from Vietnam to the United States).

88. *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (permitting trial of a rendered Mexican citizen); *Kasi v. Angelone*, 300 F.3d 487, 490 (4th Cir. 2002) (same for rendered Pakistani citizen).

89. *See, e.g., Alvarez-Machain*, 504 U.S. at 657 (explaining that *Alvarez-Machain* was forcibly kidnapped from his medical office in Mexico).

90. *See, e.g., Reed*, 639 F.2d at 900–01, 908 (upholding conviction where defendant claimed he had been enticed by CIA agents onto a plane in the Bahamas, which he thought was going to Nassau, but instead flew to Florida, where he was arrested); *United States v. Wilson*, 565 F. Supp. 1416, 1421–23 (S.D.N.Y. 1983) (holding that the court retained jurisdiction over defendant who alleged the U.S. government fraudulently induced him to fly from Libya to the Dominican Republic, where he was arrested by U.S. marshals and flown to New York).

91. *See, e.g., United States v. Yuris*, 924 F.2d 1086, 1089 (D.C. Cir. 1991) (upholding the conviction of defendant even though undercover FBI agents arrested him after luring him from Lebanon onto a ship in international waters with promises of a drug deal); *United States v. Bridgewater*, 175 F. Supp. 2d 141, 144, 146 (D.P.R. 2001) (retaining jurisdiction over defendant

The reaction of the foreign country where the abduction took place proves similarly inconsequential. Courts have upheld renditions where the foreign country assisted in the rendition,⁹² where the foreign country was paid by U.S. officials to conduct the rendition,⁹³ where the foreign country failed to object after the rendition occurred,⁹⁴ or, as in *Alvarez-Machain*, where the foreign nation emphatically objected.⁹⁵

Courts retain jurisdiction over individuals even if their rendition stems from an invasion of a foreign country. The most famous example of this involved General Manuel Antonio Noriega in the late 1980s.⁹⁶ At the time, Noriega served as commander of the Defense Forces of the Republic of Panama.⁹⁷ He also served as one of the premier cocaine traffickers in Latin America.⁹⁸ When a grand jury in the Southern District of Florida indicted Noriega on drug charges, Noriega declared a state of war against the United States.⁹⁹ Within days of the announcement, President George H.W. Bush ordered U.S. troops to invade Panama for the purpose of, inter alia, “seizing Noriega to face federal drug charges in the United States.”¹⁰⁰ In the ensuing invasion, U.S. military troops took Noriega into custody and rendered him to Miami to face his pending federal charges.¹⁰¹ A U.S. court later upheld the use of rendition to bring Noriega to trial, and a jury convicted him of numerous racketeering and drug-related offenses.¹⁰²

who was tricked to board a vessel in St. Kitts, which moved to international waters where defendant was arrested by the U.S. Coast Guard).

92. See, e.g., *United States v. Valot*, 625 F.2d 308, 309–10 (9th Cir. 1980) (holding that the United States may try defendant where Thai officials “initiated, aided and acquiesced” to defendant’s rendition from Thailand to the United States to face trial for violating parole); *United States v. Sorren*, 605 F.2d 1211, 1212–14 (1st Cir. 1979) (permitting prosecution in the United States where Panamanian officials arrested defendant and turned him over to U.S. authorities outside of the extradition proceedings).

93. See, e.g., *United States v. Orsini*, 424 F. Supp. 229, 231 (E.D.N.Y. 1976) (“[P]ayments [made by U.S. officials], to secure the return of fugitives to the United States . . . would not serve as a ground for dismissal of the indictment . . .”), *aff’d*, 559 F.2d 1206 (2d Cir. 1977).

94. See Mary Alice Kovac, Comment, *Apprehension of War Crimes Indictees: Should the United Nations’ Courts Outsource Private Actors to Catch Them?*, 51 CATH. U. L. REV. 619, 641–42 (2002) (providing examples of silence as acquiescence to renditions).

95. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 669–70 (1992) (upholding jurisdiction over defendant in U.S. federal courts despite Mexico’s protest to his rendition).

96. *United States v. Noriega*, 117 F.3d 1206, 1209–10 (11th Cir. 1997).

97. *Id.* at 1209.

98. *Id.* at 1210.

99. *Id.* at 1209–10.

100. *Id.* at 1210.

101. *Id.*

102. *Id.* at 1209–10; see also Nadelmann, *supra* note 6, at 879–80 (describing the invasion of Panama, the “primary objective” of which was to remove Noriega from power and bring him to the United States for trial).

Furthermore, the fact that a rendition, and foreign officials' assistance with it, violates a foreign nation's laws has no impact on whether the rendered individual may be prosecuted in the United States.¹⁰³ Indeed, the Sixth Circuit has gone so far as to uphold the conviction of an individual where, after a Colombian court expressly prohibited extraditing him to the United States and ordered his release, Colombian officials first released him and then helped render him to the United States.¹⁰⁴

Throughout history, U.S. courts have been highly supportive of renditions to the United States for the purposes of prosecution, and have accordingly upheld the legality of renditions in this context. The next section will consider what limitations, if any, exist on rendition operations, expanding the analysis to include some of the legal twists that have arisen with the more recent foreign-to-foreign rendition operations, as well as renditions for interrogation as opposed to prosecution.

III. POTENTIAL LEGAL RESTRICTIONS ON RENDITION OPERATIONS

There is no "renditions statute" in U.S. law. The U.S. government's authority to engage in rendition operations stems from the President's powers under Article II of the U.S. Constitution,¹⁰⁵ as well as the statutory authority of various U.S. government agencies to, e.g., conduct arrests worldwide or engage in covert action operations.¹⁰⁶

As noted previously, however, various commentators have asserted that there are numerous legal restrictions to, if not outright prohibitions on, U.S. government involvement in rendition operations.¹⁰⁷ Specifically, questions have been raised as to whether rendition operations violate the U.S. Constitution, U.S. laws, international treaties

103. *See, e.g.*, *United States v. Bin Laden*, 156 F. Supp. 2d 359, 361, 366 (S.D.N.Y. 2001) (upholding prosecution of defendant who had been rendered to the United States with the assistance of South African officials, even after the Constitutional Court of South Africa found the rendition illegal under South African law because the South African officials had not secured an assurance from the United States that defendant would not be subject to the death penalty).

104. *See United States v. Pelaez*, 930 F.2d 520, 521–22, 526 (6th Cir. 1991) (upholding jurisdiction where Colombian authorities rearrested defendant and rendered him to the United States after a Colombian court had previously ruled that the extradition treaty between the United States and Colombia did not apply to defendant because the alleged crime occurred before the extradition treaty had been signed).

105. U.S. CONST. art. II.

106. *See, e.g.*, 18 U.S.C. §§ 3052, 3107 (2006) (authorizing the FBI to make arrests worldwide for violations of U.S. law); 50 U.S.C. § 413b (2006) (authorizing the President to direct U.S. government agencies to engage in covert action).

107. *See supra* notes 12–17 and accompanying text (discussing the views of commentators that have questioned the legality of U.S. rendition operations).

governing torture and other abuses, bilateral treaty law, international law, the 1949 Geneva Conventions, and the Mansfield Amendment.¹⁰⁸ As explored below, close examination of these areas of law reveal that few legal restrictions on rendition operations do in fact exist, and even those that do are very narrowly tailored.

A. U.S. Constitution

The Supreme Court in both *Ker* and *Frisbie* made it clear that renditions to the United States for the purpose of prosecution do not violate the U.S. Constitution, as the rendered person is accorded due process through the trial proceedings themselves.¹⁰⁹ As the Supreme Court in *Ker* framed it:

The “due process of law” here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.¹¹⁰

Ker acknowledged the possibility that there could theoretically be circumstances under which a rendition operation could trigger a constitutional claim.¹¹¹ However, as the numerous cases discussed in the prior section indicate, in the more than a century since the decision in *Ker*, the courts have been unable to find such a circumstance.¹¹²

U.S. courts, however, have not considered whether renditions to the United States for interrogation purposes are constitutional. Evaluation of such renditions would presumably hinge on the Due Process Clause of the Fifth or Fourteenth Amendment, as was the case in *Ker* and *Frisbie*.¹¹³ In those cases, the Court found the rendition constitutional because the defendant was afforded due process through trial.¹¹⁴ Assuming the U.S. government had a lawful basis for holding and

108. See *infra* Part III.A–F (addressing whether rendition operations violate each of these areas).

109. See *supra* notes 47–59 and accompanying text (discussing the *Ker* and *Frisbie* decisions).

110. *Ker v. Illinois*, 119 U.S. 436, 440 (1886); see also *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (noting that, in renditions to the United States for prosecution, “due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards”).

111. *Ker*, 119 U.S. at 440.

112. See *supra* text accompanying notes 87–104 (citing examples where the courts have upheld renditions).

113. *Frisbie*, 342 U.S. at 520; *Ker*, 119 U.S. at 439–40.

114. See *supra* notes 47–59 and accompanying text (providing further detail of the outcomes in both *Ker* and *Frisbie*).

interrogating the rendered individual in the United States, the same logic would apply to renditions for interrogation purposes. Put another way, as *Ker* and *Frisbie* clearly indicate, an individual's right to due process is not based upon, nor violated by, the means by which he or she appears in the United States (e.g., via a rendition operation). Rather, it is based solely on whether the individual receives adequate due process once on American soil. If the ability to hold and interrogate that individual passes constitutional muster, then so too would the rendition.¹¹⁵

U.S. involvement in the rendition of an individual from one foreign country to another foreign country, i.e., a foreign-to-foreign rendition, adds further wrinkles to the analysis; though again, U.S. courts have not specifically considered the constitutionality of such operations.¹¹⁶ For the U.S. Constitution to prohibit or limit foreign-to-foreign renditions, courts would first need to determine that the Constitution applied to those rendered individuals. Such a determination is highly unlikely. The Supreme Court has long held that the U.S. Constitution does not cover aliens outside the sovereign territory of the United States.¹¹⁷ This concept would therefore apply to foreign-to-foreign rendition operations, which have always involved the external transfer of non-resident aliens from one foreign country to another outside the sovereign territory of the United States, and thus preclude applicability of the Constitution to such activities.¹¹⁸

115. Though no court appears to have considered this issue directly, some insight into this area can be gleaned from the Supreme Court decision of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Hamdi, an American citizen, was seized by members of the Northern Alliance in Afghanistan, and then turned over to the U.S. military in Afghanistan, which detained and interrogated him before sending him to Guantanamo Bay. *Id.* at 510. When the United States discovered Hamdi was a U.S. citizen, it transferred him to the United States as an "enemy combatant" and held him there without any intention of bringing him to trial. *Id.* at 510–11. The Court determined that the United States did not have the authority to detain an American in the United States as an enemy combatant absent presentment before a neutral decisionmaker. *Id.* at 598. The Court did not, however, evaluate nor question the method by which Hamdi arrived in the United States, suggesting that, if Hamdi received adequate due process once in the United States, the manner in which he arrived would be irrelevant.

116. In *El-Masri v. United States*, a German citizen alleged that the CIA violated his constitutional rights when it rendered him to a CIA secret detention facility overseas. 479 F.3d 296, 299 (4th Cir. 2007). However, the court never evaluated this constitutional claim, as it dismissed the entire case under the State Secrets Privilege. *Id.* at 313. That privilege is discussed *infra* Part V.F.

117. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("[W]e . . . reject[] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." (citing *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950))).

118. Technically, foreign-to-foreign rendition operations could involve U.S. citizens, but I am unaware of a single incident involving the rendition of a U.S. citizen to a foreign country. Should that occur, however, the Constitution would apply as it protects American citizens wherever

Admittedly, the Supreme Court has recently expanded the reach of the Constitution beyond its traditional confines. Specifically, in the case of *Boumediene v. Bush*, the Court extended constitutional habeas rights to non-American detainees being held at the U.S. military base in Guantanamo Bay, Cuba.¹¹⁹ However, in so doing, the Court expressly noted that it previously had “*never* held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have *any* rights under our Constitution.”¹²⁰ The Court’s determination that habeas rights extended to the detainees at Guantanamo Bay turned on the special character of that military base which, “while technically not part of the United States, is under the complete and total control of our Government.”¹²¹ This situation, however, is a far cry from standard foreign-to-foreign rendition operations. Such activities, taking place by definition on a foreign nation’s sovereign territory,¹²² occur in areas in which the United States possesses little to no control, and certainly much less than the “complete and total control” outlined in *Boumediene*, regardless of whatever influence the United States might exert on that foreign nation. Thus, while it is possible that the Supreme Court may continue to extend constitutional rights beyond U.S. borders, it seems extremely unlikely that the Court would extend such rights to aliens involved in foreign-to-foreign renditions.¹²³

A shocking decision by the Court to do so, however, would not portend a prohibition to such activities, since the mere applicability of

located. *Id.* at 283 n.7 (Brennan, J., dissenting) (“[T]he rule, accepted by every Court of Appeals to have considered the question, [is] that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad.”); *Reid v. Covert*, 354 U.S. 1, 6 (1956) (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”); Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 353 (2006) (“[I]t is undisputed that . . . citizens within or outside the United States are entitled to due process.”).

119. 553 U.S. 723, 732 (2008).

120. *Id.* at 770 (emphasis added).

121. *Id.* at 771.

122. As noted previously, the United States has never rendered an individual from American soil. *See supra* note 118.

123. *But see* M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION* 294 (5th ed. 2007) (arguing that constitutional limitations should be extended to apply to non-citizens because they are “not only designed to protect U.S. citizens from such violations of the Constitution by U.S. agents, but are also intended to ensure that those acting in the name of the United States conform to constitutional standards, irrespective of where they may be”); Yin, *supra* note 118, at 414 (arguing that nonresident aliens “have a cognizable liberty interest in being free from confinement”).

the Constitution to rendered foreign individuals would be only the first step. Courts would then need to determine if the Constitution actually precludes such rendition operations, a conclusion which appears highly improbable. As *Frisbie* provides, “There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”¹²⁴ Though the *Frisbie* court was focused on trials in the United States, there is no basis to believe our Constitution would permit that same person to escape justice overseas. As with renditions to the United States, if the foreign country to which an individual is rendered provides sufficient due process upon his or her arrival, whether in the form of prosecution or interrogation, then the rendition itself would seem to pass U.S. constitutional muster (again, in the extremely unlikely situation of the U.S. Constitution even applying to such foreign rendition operations).

B. Torture and Other Abuses

Legal restrictions on torture and abuse under U.S. law pose some limitations on rendition operations. Nonetheless, such legal limitations are very constricted. Indeed, U.S. law does not even preclude rendering an individual to a foreign location where he or she could be abused or tortured.

1. Torture

Restrictions on torture in U.S. law find their genesis in the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”),¹²⁵ which President Reagan signed in 1988, and the Senate consented to in 1990.¹²⁶ Pursuant to this international treaty, the United States enacted legislation prohibiting its officials from engaging in, or conspiring to engage in, torture.¹²⁷ That legislation clearly precludes U.S. officials from torturing an individual during an actual rendition operation.¹²⁸ Therefore, such activity is absolutely prohibited under U.S. law.

124. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952).

125. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 98 S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85, 114 [hereinafter CAT]; see GARCIA, *supra* note 23, at 7 (noting that U.S. restrictions on torture stem from the CAT); Chesney, *supra* note 5, at 670 (same); Yoo, *supra* note 5, at 1223–24 (same).

126. Yoo, *supra* note 5, at 1228.

127. 18 U.S.C. § 2340A (2006). A detailed description of the legal requirements for “torture,” provided *infra* Part IV.B, discusses the extremely high threshold for proving conspiracy to torture.

128. It is worth noting that, prior to the enactment of the anti-torture statute, the Second

Critics of rendition operations allege that the provisions of the CAT go beyond merely prohibiting torture during such an operation, and actually forbid the United States from rendering an individual to a nation where the individual could be, or even likely would be, tortured.¹²⁹ Such an assertion, however, is erroneous.

Article 3 of the CAT, the key provision in this area, provides, “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹³⁰ However, the Supreme Court has held that acts of Congress, including consent to international treaties, “do not have extraterritorial application unless

Circuit sought to deprive courts of jurisdiction over individuals rendered to the United States “by the use of torture, brutality and similar outrageous conduct.” *Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir. 1975); *see also* *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974) (originating the concept). This so-called *Toscanino* exception to the *Ker-Frisbie* Doctrine ran afoul of Supreme Court authority holding that a defendant “is not himself a suppressible ‘fruit,’ and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.” *United States v. Crews*, 445 U.S. 463, 474 (1980) (citations omitted). This inherent flaw has rendered the *Toscanino* exception all but meaningless. BASSIOUNI, *supra* note 123, at 294 (“*Toscanino* was distinguished by the District of Columbia and the First, Second, Fourth, Sixth, Eighth, and Ninth Circuits, and was rejected by the Fifth, Seventh, and Eleventh Circuits.” (citations omitted)); Abramovsky, *supra* note 5, at 160 (“The reluctance to invoke the ‘*Toscanino* exception’ has effectively rendered that exception virtually meaningless.”); Downing, *supra* note 31, at 582 (“[*Toscanino*] has been read so narrowly that it presents no real constitutional challenge . . .”). Indeed, no court has ever used the exception to actually deprive itself of jurisdiction over a defendant. Abramovsky, *supra* note 5, at 159; Downing, *supra* note 31, at 583.

129. *See, e.g.*, Abramovsky, *supra* note 5 (criticizing rendition operations); Downing, *supra* note 31 (same). It is worth noting that the CAT, as adopted by the United States, only prohibits transferring an individual where it is more likely than not that he or she will be tortured, and does not preclude transfer where lesser forms of aggressive activity may occur. *See* Parry, *supra* note 4, at 530 (distinguishing torture from lesser forms of degrading treatment); Radsan, *supra* note 15, at 17 (arguing that the definition of torture should not be so expansive as to merge with the CAT’s definitions for other forms of punishment). Article 16 of the CAT precludes “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture,” but only if they take place “in any territory under [a state party’s] jurisdiction.” CAT, *supra* note 125, art. 16 (emphasis added). This clearly would not apply to foreign-to-foreign renditions. *See* Satterthwaite, *supra* note 14, at 1367 (noting that Article 16 applies where a state exercises both effective and factual control). The Senate ensured this interpretation with its understanding that Article 16 prohibits the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. David P. Stewart, *The Torture Convention and the Reception of International Criminal Law within the United States*, 15 NOVA L. REV. 449, 460–61 (1991). As such, Article 16 protects only persons in the United States and Americans overseas, not foreigners rendered to other countries. The McCain Amendment, discussed *infra* Part III.B.2, seeks to resolve this geographic limitation.

130. CAT, *supra* note 125, art. 3. Article 2 of the CAT also provides, “No 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.” *Id.* art. 2.

such an intent is clearly manifested.”¹³¹ In this case, a review of the Senate’s consent to the CAT reveals that the United States did not “clearly manifest” an intention that the CAT have extraterritorial application.¹³² Thus, the United States interprets the CAT, including Article 3, as being non-extraterritorial.¹³³ As several commentators have noted, this means that, under U.S. law, Article 3 does not apply to foreign-to-foreign rendition operations because such activities naturally take place outside U.S. territory.¹³⁴

Furthermore, the express language of Article 3 precludes its application to foreign-to-foreign rendition operations. Article 3 does not permit a nation to “expel, return (‘refouler’) or extradite” a person to another nation where there is a danger the individual would be tortured.¹³⁵ When the Supreme Court evaluated similar language contained in the Refugee Convention, it defined the term “expel” to “refer[] to the deportation or expulsion of an alien who is already present in the host country,” and the terms “return” and “refouler” to relate to the “exclusion of aliens who are merely on the threshold of initial entry.”¹³⁶ The Court thus concluded that such terms pertained only to individuals transferred from the United States, and not to individuals moved from one foreign country to another.¹³⁷ Though the Court did not consider the last term in Article 3 of the CAT—“extradition”—that term is defined as the means of sending an

131. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993); *see also* Chesney, *supra* note 5, at 673–74 (describing how *Sale* precludes the CAT from having extra-territorial effect); Yoo, *supra* note 5, at 1230 (noting that the inapplicability of the CAT to rendition operations “receives further support from the canon of construction that statutes and treaties are not to be read to have extraterritorial effect unless Congress clearly states its intentions otherwise in the text”).

132. 136 CONG. REC. 36,192–98 (1990).

133. *See* Chesney, *supra* note 5, at 673 & n.64 (listing numerous U.S. official statements that the United States interprets treaties such as the CAT to apply solely within the territory of the United States); Satterthwaite, *supra* note 14, at 1353 (noting that U.S. reports to the United Nations consistently maintain that human rights treaties such as the CAT apply only to U.S. territory). *But see* Chesney, *supra* note 5, at 673 n.65 (identifying critics of this interpretation).

134. *See, e.g.*, Chesney, *supra* note 5, at 673–74 (noting that Article 3 does not affect foreign transfers due to its lack of extraterritorial application); Yoo, *supra* note 5, at 1229–30 (stating that the non-extraterritoriality of the CAT means Article 3 does not “affect[] the transfer of prisoners held outside the United States to another country”).

135. CAT, *supra* note 125, art. 3.

136. *Sale*, 509 U.S. at 180 (internal quotation marks omitted).

137. *Id.* at 183 & n.40 (noting that even the United Nations High Commissioner for Refugees had implicitly acknowledged this fact); *see also* Yoo, *supra* note 5, at 1229 (noting that the *Sale* Court found the terms “expel” and “return (‘refouler’)” did not impact movement of individuals from one foreign country to another).

individual from the United States to another country through the formal process of an extradition treaty.¹³⁸

Thus, by using the terms “expel, return, and extradite” (and not a more generic and broader term like “transfer”), Article 3 applies only to transfers of persons *from U.S. shores* to another country; its provisions are inapplicable to foreign-to-foreign rendition operations, in which an individual is transferred from one foreign country to another. Some critics have argued that this interpretation is too narrow in that it contradicts the overarching purpose of the CAT to preclude torture.¹³⁹ However, this narrow interpretation is nonetheless the interpretation accepted by the United States and its courts,¹⁴⁰ and appears to be the most accurate reading of the explicit language contained in Article 3.

Finally, even if Article 3 of the CAT were to apply extraterritorially and even if its terms were interpreted to include foreign-to-foreign rendition operations, *no* individual or entity has standing to enforce the provisions of Article 3 under U.S. law. This result stems from the manner in which the United States implemented the CAT provisions. When the Senate consented to the CAT in 1990, it placed several limitations on that consent.¹⁴¹ The most important limitation for our purposes here was the Senate’s declaration that the CAT would not be “self-executing.”¹⁴² This means that there is no private right of action,

138. BLACK’S LAW DICTIONARY 623 (8th ed. 1999) (defining “extradition” as “[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged”).

139. *See, e.g.*, GARCIA, *supra* note 23, at 17–18 (noting that critics could object to this narrow interpretation); Satterthwaite, *supra* note 14, at 1378 (criticizing the U.S. interpretation of the Article 3 language).

140. *Sale*, 509 U.S. at 180–83 (noting that the Refugee Convention, by using the terms “expel” and “return (refouler),” bears no applicability on activities taking place outside the United States); Parry, *supra* note 4, at 530; Satterthwaite, *supra* note 14, at 1378 (noting that the United States takes the position that words expel, return (refouler), and extradite “all implied the individual’s presence on the territory of the state”); Yoo, *supra* note 5, at 1229.

141. *See supra* note 129 (discussing several examples); *infra* note 257 (discussing how the Senate defined the term “torture” differently than the CAT).

142. 136 CONG. REC. 36,198 (1990). Though this is merely a Senate “understanding,” it and the other “understandings” the Senate placed on the CAT are considered law. *See* *Auguste v. Ridge*, 395 F.3d 123, 142 (3d Cir. 2005) (“We think it so plain a proposition that the United States [Senate] may attach an understanding interpreting the meaning of a treaty [CAT] provision as part of the ratification process that, where as here there is clear consensus among the President and Senate on that meaning, a court is obliged to give that understanding effect.”); *id.* (“[F]or purposes of domestic law, the understanding . . . adopted by the Senate in its resolution of ratification are [sic] the binding standard to be applied in domestic law.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 cmt. d (1987) (“A treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law . . . subject to that understanding.”).

i.e., an ability to sue, to enforce the CAT's provisions absent passage of specific legislation by Congress.¹⁴³

To implement the provisions of Article 3, Congress did pass legislation as part of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA" or "FARR Act").¹⁴⁴ Subsection (a) of the relevant part of the FARRA expressly provides, "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in physical danger of being subjected to torture, regardless of whether the person is physically present in the United States."¹⁴⁵ On its face, the last part of this provision would appear to indicate that the FARRA applies to overseas rendition operations.

However, as subsection (a) of the FARRA itself states, it is merely a policy statement, and has no legal effect.¹⁴⁶ Indeed, its apparent wide sweep is completely contradicted by the substantive provisions of the FARRA. While subsection (b) of the FARRA directs the heads of the relevant agencies to "prescribe regulations to implement the obligations of the United States under Article 3 [of the CAT],"¹⁴⁷ subsection (d) of the FARRA provides:

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in [the FARRA] shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention [Against Torture] or [the FARRA], or any other determination made with respect to the application of the policy set forth in subsection (a), *except as part of the review of a final order of removal* pursuant to section 242 of the Immigration and National Act (8 U.S.C. 1252).¹⁴⁸

143. *Pierre v. Att'y Gen. of U.S.*, 528 F.3d 180, 185 (3d Cir. 2008) ("Because the CAT did not self-execute, it needed to be 'implemented by legislation before [giving] rise to a private cause of action.'" (citations omitted)); *Pierre v. Gonzales*, 502 F.3d 109, 114 (2d Cir. 2007) ("The CAT is not self-executing; by its own force, it confers no judicially enforceable right on individuals."); Yoo, *supra* note 5, at 1228.

144. *Pierre*, 528 F.3d at 185–86; *Pierre*, 502 F.3d at 114; *Mironescu v. Costner*, 480 F.3d 664, 666 (4th Cir. 2007).

145. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–82 (codified as amended at 8 U.S.C. § 1231 note (1998)) [hereinafter FARRA].

146. *See* Yoo, *supra* note 5, at 1231–32 (stating that this policy statement "should not be construed as an actual interpretation of the treaty language or as a provision creating judicially enforceable rights").

147. 8 U.S.C. § 1231 note.

148. *Id.* (emphasis added).

Per its terms, then, the FARRA applies solely to, and creates restrictions only for, *removal* proceedings. As the Supreme Court recently stated in *Munaf v. Geren*, albeit in dicta, the language of subsection (d) indicates that “claims under the FARR Act may be limited to certain immigration proceedings.”¹⁴⁹ The circuit courts have been more direct. The Fourth Circuit, whose jurisdiction encompasses the CIA’s headquarters in Langley, Virginia, recently stated that the language in subsection (d) “plainly conveys that although courts may consider or review CAT or FARR Act claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims.”¹⁵⁰ The Ninth Circuit came to the same conclusion: “While [subsection (d)] plainly contemplates judicial review of final orders of removal for compliance with the Torture Convention and the FARR Act, it just as plainly does not contemplate judicial review for anything else.”¹⁵¹ In both cases, the courts determined that, under the terms of the FARRA, they had no jurisdiction to review extradition claims to determine if the individual might be tortured.¹⁵² While no published court opinion appears to have considered the matter in the context of a rendition operation, there is absolutely no reason to believe that a different result would ensue. Thus, by its terms, the FARRA does not apply to rendition operations.

Regulations adopted by U.S. government agencies in furtherance of the FARRA also do not impact rendition activities.¹⁵³ The Department of Homeland Security (“DHS”), the Department of Justice (“DoJ”), and the State Department have all issued regulations pursuant to the FARRA.¹⁵⁴ There is no indication that any other agency, including the

149. 533 U.S. 674, 703 n.6 (2008).

150. *Mironescu v. Costner*, 480 F.3d 664, 674 (4th Cir. 2007).

151. *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1086 (9th Cir.), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc). It is worth noting that a prior divided Ninth Circuit panel in *Cornejo-Barreto* came to the opposite conclusion. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1015–16 (9th Cir. 2000). Professor Robert Chesney believes this earlier divided panel has the better argument. Chesney, *supra* note 5, at 689–90. In view of the Fourth Circuit and Supreme Court decisions in this area, both of which were issued subsequent to both *Cornejo-Barreto* and the publication of Professor Chesney’s article, the tide clearly seems in favor of the conclusion reached by the later *Cornejo-Barreto* panel, quoted in the text.

152. *Mironescu*, 480 F.3d at 676 (“[W]e see no basis for refusing to give effect to Congress’s unambiguously expressed intention that courts reviewing extradition challenges may not consider CAT or FARR Act claims.”); *Cornejo-Barreto*, 379 F.3d at 1086. *Mironescu* also concluded that the limitations in the express language of the FARRA precluded a claim of torture under the Administrative Procedures Act. *Mironescu*, 480 F.3d at 677 n.15.

153. See Henderson, *supra* note 45, at 203 (noting that, based on the regulations enacted pursuant to the FARRA, “the FARRA does not possess [sic] any authority for restricting” rendition operations that commence outside the United States).

154. 8 C.F.R. § 208.16–18 (2008) (DHS); 8 C.F.R. § 1208.16–18 (2008) (DoJ); 22 C.F.R. §

CIA or DoD, has issued such regulations.¹⁵⁵ DHS' regulations expressly apply only to exclusion, deportation, or removal of an individual from the United States;¹⁵⁶ the same is true of the DoJ's regulations.¹⁵⁷ The State Department's regulations apply only to extradition requests.¹⁵⁸ Thus, none of these regulations involve or even refer to rendition transfers of individuals from one foreign country to another, much less place any restriction on such transfers or a mechanism for precluding them under any circumstance, including the provisions of Article 3 of the CAT.

As a result, the CAT and specifically Article 3, as well as the U.S. statutes and regulations implemented pursuant to it, do not limit the United States' ability to engage in foreign-to-foreign renditions, except to preclude U.S. officials from torturing, or conspiring to torture, the rendered individuals. It is worth noting, however, that as a matter of policy the United States nonetheless chooses to comply with Article 3 of the CAT and refuses to render individuals to nations where there is more reason than not to believe the rendered individual will be tortured.¹⁵⁹

95.2 (2008) (State Department).

155. Chesney, *supra* note 5, at 682–83 (noting that the DoD has not issued such regulations); Massimino, *supra* note 15, at 75 (noting that the CIA has not issued regulations pursuant to the FARRA). Professor Chesney suggests that transferred individuals may be able to force the DoD, and presumably other government agencies such as the CIA, to enact such regulations under the Administrative Procedures Act. Chesney, *supra* note 5, at 684–85.

156. 8 C.F.R. § 208.16–18 (discussing how an asylum official is to apply the CAT relating to the “exclusion, deportation, or removal of an alien” to a foreign country).

157. 8 C.F.R. § 1208.16–18 (discussing how an asylum official is to apply the CAT relating to the “exclusion, deportation, or removal of an alien” to a foreign country).

158. 22 C.F.R. § 95.2(b) (discussing obligations imposed by the CAT “with respect to extradition”).

159. President Obama issued an Executive Order on his second day in office, which, *inter alia*, created a Task Force to ensure that the “policies of the United States do not result in the transfer of individuals to other nations to face torture.” Exec. Order No. 13,491, § 5(e), 74 Fed. Reg. 4893 (Jan. 22, 2009); *see also* David Johnston, *Rendition to Continue, but with Better Oversight*, *U.S. Says*, N.Y. TIMES (Aug. 24, 2009), <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html> (noting that both President Obama and Administration officials have pledged not to send individuals to places where they may be tortured). The Bush Administration made similar statements. *See* President George W. Bush, Press Conference (Mar. 16, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050316-3.html> (stating that the United States renders individuals to other countries “with the promise that they won’t be tortured. That’s the promise that we receive. This country does not believe in torture”); Scott McClellan, White House Press Sec’y, Press Briefing (Mar. 17, 2005), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050317-4.html> (“When people are rendered to another country, we seek assurances that they won’t be tortured.”); Rice, *supra* note 11 (“The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture . . . [and] [t]he United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where

2. Cruel and Unusual Punishment

The McCain Amendment provides, “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.”¹⁶⁰ The latter terms are defined as the cruel, unusual, and inhumane treatment and punishment prohibited by the U.S. Constitution.¹⁶¹ The amendment makes clear that “[n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition.”¹⁶² It therefore clearly applies to rendition operations.

However, the amendment, by its terms, applies only to persons in the custody or under the physical control of the United States Government. Therefore, like the prohibition on torture described in the prior section, the McCain Amendment would likely apply only in instances in which U.S. officials themselves engage in such abuse during a rendition operation. It would not apply to any acts that a receiving country in a foreign-to-foreign rendition might take against a rendered individual once the United States turns the individual over to that foreign country’s officials. It would therefore appear to have limited impact on rendition operations.¹⁶³

3. Other Abuses

U.S. law does not prohibit abuses that fall below or outside those outlined in the above two sections.¹⁶⁴ This includes not only abuses

appropriate, the United States seeks assurances that transferred persons will not be tortured.”). Such assurances would appear to be all that is necessary to comply with the CAT. *See* Chesney, *supra* note 5, at 698 n.193 (providing a list of critics who concede the legality of relying on assurances); *see also* DEEKS, *supra* note 3, at 9, 18 (noting that Canada and European countries rely on such assurances in transfer cases). Some critics of the practice, however, disagree that assurances suffice. DEEKS, *supra* note 3, at 21–24 (outlining the considerable criticism about the use of assurances); Isaac A. Linnartz, *The Siren Song of International Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1500–01 (2008) (asserting that assurances are inadequate); Satterthwaite, *supra* note 14, at 1379–86 (questioning the propriety of relying on assurances in rendition operations); “*Empty Promises*”: *Diplomatic Assurances No Safeguard Against Torture*, HUMAN RIGHTS WATCH, Apr. 2004, at 4–5, available at <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf> (“[D]iplomatic assurances . . . are inadequate safeguards against torture and ill-treatment.”).

160. 42 U.S.C. § 2000dd(a) (2006).

161. *Id.* § 2000dd(d).

162. *Id.* § 2000dd(b).

163. As discussed *infra* section IV.C, the McCain Amendment also lacks any penalty or enforcement provision.

164. Parry, *supra* note 4, at 530 (noting that the CAT precludes only torture and not lesser forms of abuse); Radsan, *supra* note 15, at 17 (same). Both the Parry and Radsan articles were published before the enactment of the McCain Amendment provided that amendment’s additional

below cruel, unusual, and inhumane treatment, but also *any* abuses conducted by foreign countries prior to a rendition operation, so long as they are not at the direction of the United States. Thus, the fact that a defendant may have been subjected to poor conditions by a foreign country before being rendered is irrelevant. As one U.S. court noted: “Were American courts to seek to improve conditions in foreign jails by refusing to try those who are temporarily held there, the result would not be better jails, but the creation of safe havens in foreign lands for those fleeing the reach of American justice.”¹⁶⁵ Even allegations that the defendant had been beaten, abused, or tortured by the foreign country before being rendered does not have an impact.¹⁶⁶ As the Second Circuit has noted in evaluating such an allegation:

[W]here the United States Government plays no direct or substantial role in the misconduct and the foreign police have acted not as United States agents but merely on behalf of their own government, the imposition of a penalty would only deter United States representatives from making a lawful request for the defendant and would not deter any illegal conduct [by the foreign country].¹⁶⁷

Though these cases involved renditions to the United States, there is no reason to believe that the logic behind them would differ for foreign-to-foreign rendition operations.

C. Extradition Treaties and Other Bilateral Accords

The Supreme Court in *Alvarez-Machain* acknowledged that, under U.S. law, a rendition could be illegal if an extradition treaty either specifically precluded such operations or stated that the terms of the extradition treaty were the sole mechanism for the transfer of individuals.¹⁶⁸ While such a restriction on rendition operations may exist in theory, as a matter of practice it is a nullity.

restriction.

165. *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981).

166. *See United States v. Fielding*, 645 F.2d 719, 723–24 (9th Cir. 1981) (finding that alleged mistreatment by Peruvian officials was irrelevant); *United States v. Salameh*, 54 F. Supp. 2d 236, 264–65 (S.D.N.Y. 1999) (holding that alleged torture by Egyptian officials before defendant rendered to the United States does not deprive U.S. courts from trying defendant); *Di Lorenzo v. United States*, 496 F. Supp. 79, 81 (S.D.N.Y. 1980) (“The constitution does not protect the plaintiff from the ‘law enforcement activities of foreign authorities acting in their own country.’” (citations omitted)).

167. *United States v. Lira*, 515 F.2d 68, 71 (2d Cir. 1975). Situations where U.S. officials are alleged to have been involved in, or supported, the abuses are discussed *infra* Parts IV and V.

168. *United States v. Alvarez-Machain*, 504 U.S. 655, 664–66 (1992); *see also United States v. Best*, 304 F.3d 308, 314 (3d Cir. 2002) (noting that “a defendant cannot rely upon a mere violation of international law as a defense to the court’s jurisdiction,” but an exception to *Ker-Frisbie* does exist for “the violation of a treaty” (citations and internal quotation marks omitted));

This is because *no* U.S. extradition treaty actually precludes rendition operations to the United States or elsewhere, as a review of all of the U.S. extradition treaties currently in effect confirms.¹⁶⁹ Despite the announced intention of several foreign nations, in response to the *Alvarez-Machain* decision, to revise their extradition treaties with the United States to expressly exclude rendition operations,¹⁷⁰ at present, more than fifteen years later, not a single U.S. extradition treaty explicitly or even implicitly prohibits abductions of individuals from the territory of a signatory nation.¹⁷¹ Further, not a single U.S. extradition treaty indicates that it is the sole mechanism by which an individual may be transferred or removed from one signatory country to the other (or elsewhere).¹⁷² Even the U.S. extradition treaty with Mexico does not prohibit renditions,¹⁷³ despite Mexico's vociferous objection to the rendition of Alvarez-Machain from its territory.¹⁷⁴ Indeed, Mexico continues to operate under the same 1980 extradition treaty with the

United States v. Noriega, 117 F.3d 1206, 1213 (11th Cir. 1997) (“Under *Alvarez-Machain*, to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner.”); United States v. Matta-Ballesteros, 71 F.3d 754, 762 (9th Cir. 1995) (“*Alvarez-Machain* primarily holds that where the terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national.” (citation omitted)).

169. A compilation of all U.S. extradition treaties through 2004 can be found at KAVASS, *supra* note 29. For treaties and protocols entered into after 2004, see www.cas.org/juridico/mla/en/usa/index/html (Canada and Peru); Protocol Amending Extradition Convention with Israel, Treaty Doc. 109-3, 109th Cong. (1st Sess. 2005) (Israel); *Universal Instruments Against Terrorism: Lithuania*, UNITED NATIONS OFF. ON DRUGS & CRIME, www.unodc.org/tldb/browse_country.html?country=LIT (Lithuania); *Extradition Treaty* (Mar. 31, 2003), www.statewatch.org/news/2003/jul/uk_usa_extradition.pdf (United Kingdom). For a listing of all extradition treaties and protocols entered into by the United States, see 18 U.S.C. § 3181 note (Supp. 2009).

170. Hoffman, *supra* note 72, at 421 (comment of Ralph Steinhardt).

171. For a discussion of the history of extradition treaties, see generally KAVASS, *supra* note 29, and the sources cited *supra* note 169. See Letter of Submittal from Strobe Talbot, Dep’t of State, to the President of the United States (Feb. 2, 1999), *reprinted in* KAVASS, *supra* note 29, at 487.7 (noting that the extradition treaty between the United States and Korea, being submitted to the President for transmission to the Senate for advice and consent for ratification, “follows generally the form and content of extradition treaties recently concluded by the United States”). That formula does not include any discussion, much less prohibition, of rendition operations. See, e.g., *id.* at 487.13–26 (examining extradition treaty between the United States and Korea).

172. See *supra* notes 169 and 171. The standard formula for extradition treaties, discussed *supra* note 171, does not include any such provision.

173. KAVASS, *supra* note 29, at 590.1.

174. See *supra* note 65 and accompanying text (noting the Mexican government’s objection to the abduction of Alvarez-Machain).

United States that the *Alvarez-Machain* Court found did not prohibit rendition operations.¹⁷⁵

Court decisions validate this research. Both circuit courts and district courts have routinely and continuously found that specific extradition treaties pose no bar to rendition operations.¹⁷⁶ This proves true even in cases where the United States had pending extradition proceedings in the country.¹⁷⁷ I have found no cases to the contrary.

Of course, the United States could choose to enter into treaties that would specifically preclude or limit rendition operations. In response to the *Alvarez-Machain* decision, the United States and Mexico negotiated to do just that in the 1994 Treaty to Prohibit Transborder Abductions with the United States.¹⁷⁸ Yet, though both parties signed the treaty, it was never submitted to the United States Senate for its advice and consent.¹⁷⁹ As an unratified treaty, it lacks the force of law in the United States.¹⁸⁰ No similar treaty with any other country appears to be in effect.

As a final point, at least some commentators have argued that the Constitution provides the President the unilateral authority to violate treaties that interfere with his constitutional authorities.¹⁸¹ Though a

175. See 18 U.S.C. § 3181 note (Supp. 2009) (noting that the 1980 extradition treaty between the United States and Mexico remains in force). A protocol to the U.S.–Mexico extradition treaty entered into force in 2001. *Id.* However, the protocol made only minimal changes to the treaty; it does not mention, much less preclude, rendition operations, and does not provide that the treaty is the sole mechanism for transfer of individuals between the two countries. See Protocol to Extradition Treaty with Mexico, Treaty Doc. 105-46, 105th Cong. (2d Sess. 1998).

176. *United States v. Anderson*, 472 F.3d 662, 666–67 (9th Cir. 2006) (finding the extradition treaty between the United States and Costa Rica does not preclude the United States from prosecuting an individual rendered to the United States); *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006) (Ecuador); *United States v. Best*, 304 F.3d 308, 315 (3d Cir. 2002) (Brazil); *Kasi v. Angelone*, 300 F.3d 487, 500 (4th Cir. 2002) (Pakistan); *United States v. Torres Gonzalez*, 240 F.3d 14, 16 (1st Cir. 2001) (Venezuela).

177. *Anderson*, 472 F.3d at 666–67 (finding the extradition treaty between the United States and Costa Rica does not preclude the United States from rendering the individual to the United States, even if an extradition application is pending); *Kasi*, 300 F.3d at 500 (finding the U.S.–Pakistan extradition treaty does not preclude renditions to the United States, even if formal extradition proceedings had been initiated).

178. CARTER ET AL., *supra* note 74, at 723–24; Aceves, *supra* note 13, at 136.

179. CARTER ET AL., *supra* note 74, at 723–24; Aceves, *supra* note 13, at 136.

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312 cmt. j (1987) (“A treaty can be brought into force for the United States only after the Senate has given consent to it, and only subject to the conditions imposed by the Senate.”).

181. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 70 (1995) (“Acting for the United States, the President can denounce or terminate a treaty, even if to do so violates international law, and if he does, presumably it ceases to be a treaty of the United States and is no longer law of the United States.”); Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT’L L. 736, 741–42 (1992) (describing how the

detailed discussion of this premise is beyond the scope of this article, should the argument prove valid, it would suggest that even if the United States eventually were to enter into a treaty that prohibited or restricted renditions, the President would still have the ability to authorize a rendition operation that violated that treaty's terms, at least under certain circumstances.

D. *International Law*

Commentators have suggested that rendition operations, especially those conducted without the consent of the foreign government, run afoul of international law as they constitute: (1) a "gross violation of international human rights standards"; and/or (2) a "blatant violation of the territorial integrity of another state."¹⁸² These commentators point to the International Covenant on Civil and Political Rights ("ICCPR") and the Universal Declaration of Human Rights for support for the first assertion, and to the United Nations Charter and general customary international law principles to argue the second position.¹⁸³

With regard to international human rights standards, however, as the Ninth Circuit has observed, no prohibition on rendition operations actually appears "in the text of any international agreement . . . [or] international human rights instruments."¹⁸⁴ The ICCPR precludes arbitrary arrest or detention, and entitles detainees to a trial "within a reasonable time."¹⁸⁵ But, even critics of the U.S. rendition policy have

President can violate a treaty). *But see* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*, 90 CORNELL L. REV. 97, 106 (2004) ("[T]he President never possesses the unilateral authority to violate a treaty; he must always obtain congressional approval.").

182. Henkin, *supra* note 5, at 231; *see also* Fisher, *supra* note 4, at 1416 (asserting that foreign-to-foreign renditions for the purpose of interrogation violate international law, though not providing any coherent basis for this determination); Glennon, *supra* note 82, at 746 ("Numerous authorities have viewed it as flatly impermissible under longstanding customary norms for one state to send its agents to seize an individual located in the territory of another state without the consent of the government of that state."); Lavers, *supra* note 15, at 400 ("The extrapolation of forcible abductions as acceptable by the U.S. courts to the governments' practice of extraordinary rendition is a compounded reality of the rejection of international law.").

183. Henkin, *supra* note 5, at 231; Lavers, *supra* note 15, at 397; Parry, *supra* note 4, at 531; Lelia Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1223 (2006–2007). It should also be noted that Alvarez-Machain raised the argument of customary international law and the United Nations Charter in his respondent's brief, but the Supreme Court refused to address it directly, asserting that "[r]espondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the [terms of the extradition treaty between the United States and Mexico]." *United States v. Alvarez-Machain*, 504 U.S. 655, 666 (1992).

184. *Sosa v. Alvarez-Machain*, 333 F.3d 604, 619 (9th Cir. 2003) (en banc), *rev'd on other grounds*, 542 U.S. 692 (2004).

185. International Covenant on Civil & Political Rights, G.A. Res. 2200A(XXI), art. 9, U.N.

acknowledged that “the text of the ICCPR does not specifically prohibit forced disappearances,” such as renditions.¹⁸⁶ In addition, the United States has consistently taken the position that the ICCPR does not apply outside the sovereign territory of the United States,¹⁸⁷ and therefore would not apply to foreign-to-foreign rendition operations at least.

The Universal Declaration of Human Rights similarly prohibits “arbitrary arrest, detention or exile” and provides for fair and public hearings.¹⁸⁸ Nevertheless, as the Supreme Court has noted, “the Declaration does not of its own force impose obligations as a matter of international law” and thus has no binding legal impact on the United States.¹⁸⁹ In sum, then, as the Third Restatement of Foreign Relations notes, “None of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law.”¹⁹⁰

The U.N. Charter and customary international law likewise appear to provide no real limitation on rendition operations, at least from a U.S. perspective. Article 2, paragraph 4 of the U.N. Charter provides, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”¹⁹¹ Commentators claim that this principle is now subsumed in customary international law to prohibit rendition operations.¹⁹²

However, it is clear that no violation of a foreign nation’s territorial sovereignty occurs when the nation implicitly accepts, much less overtly assists in, a rendition operation, as is often the case.¹⁹³ More

Doc. A/6316 (Mar. 23, 1976), available at <http://www2.ohchr.org/english/law/ccpr.htm>. It also precludes subjecting individuals to “torture or to cruel, inhuman or degrading treatment or punishment,” *id.* art. 7, which the United States has effectively implemented through the FARRA and the McCain Amendment, discussed *supra* sections III.B.1 and III.B.2.

186. Sadat, *supra* note 183, at 1223.

187. Parry, *supra* note 4, at 531.

188. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 9–10, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

189. *Sosa*, 542 U.S. at 734–35 (quoting Eleanor Roosevelt’s assertion that the Declaration is “a statement of principles . . . setting up a common standard of achievement for all peoples and all nations” and “not a treaty or international agreement . . . impos[ing] legal obligations”).

190. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 reporters’ notes (1987); see also *Sosa*, 542 U.S. at 735 (noting that the Declaration and ICCPR do not establish any binding international law restriction on rendition operations).

191. U.N. Charter art. 2, para. 4.

192. See *supra* note 183 (citing commentators who point to customary international law for this assertion).

193. See *supra* notes 92–94 (describing several cases where U.S. courts held that the United States had a right to prosecute when the foreign nation assisted in the rendition operation).

importantly, regardless of the foreign nation's view of the operation, the international community has accepted the general legality of rendition operations. As the United States Supreme Court has noted, rendition operations "violate[] no [well-defined] norm of customary international law."¹⁹⁴ Indeed, most countries countenance rendition operations, and their judges continuously prosecute individuals who appear before their courts via such operations. As F.A. Mann concludes, after analysis of opinions from numerous countries:

With rare unanimity and undeniable justification the courts of the world have held that the manner in which an accused has been brought before the court does not and, indeed, cannot deprive it of its jurisdiction or of its right to hear the case against the person standing before it.¹⁹⁵

Examples abound of foreign courts accepting jurisdiction over rendered individuals. Probably the most famous is Israel's 1960 abduction of high-ranking Nazi officer Adolf Eichmann from Buenos Aires, Argentina, where he had been living for more than a decade.¹⁹⁶ The Israeli Supreme Court upheld Eichmann's conviction despite the rendition: "From the point of view of customary international law, it has already been made clear that the abduction of the appellant is no ground for denying to the Court the competence to try him once he is within the area of its jurisdiction."¹⁹⁷ French, British, Canadian, German, Palestinian, Hungarian, and South African courts, as well as the International Tribunal for Yugoslavia, have reached similar

194. *Sosa*, 542 U.S. at 738. Courts have also noted that, even were a rendition to violate international law, the judiciary would still have the authority to try the defendant. See *United States v. Alvarez-Machain*, 504 U.S. 655, 668 n.15 (1992) (noting that any violation of international law that may occur through a rendition does not impact "the authority of a court to later try an individual who has been so abducted"); *United States v. Best*, 304 F.3d 308, 314 (3d Cir. 2002) (noting that a rendition will not deprive a court of jurisdiction because "a defendant 'cannot rely upon a mere violation of international law as a defense to the court's jurisdiction'" (quoting *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979)); *Al-Zarhani v. Rumsfeld*, 684 F. Supp. 2d 103, 115 n.8 (D.D.C. Feb. 16, 2010) (noting that the D.C. Circuit "has rejected the argument that international law is precedential or binding on the courts").

195. F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 407, 414 (Yoram Dinstein ed., 1989); see also *United States v. Cordero*, 668 F.2d 32, 36 (1st Cir. 1981) (noting that the concepts of the *Ker-Frisbie* Doctrine are "widely applied throughout the world"); HENKIN, *supra* note 181, at 258 ("[I]nternational law is wedded to the principle *male captus bene detentus*: a person arrested in violation of international law . . . may nonetheless be brought to trial . . ."); Halberstam, *supra* note 181, at 737-38 (summarizing commentary regarding the effects of illegal seizure on jurisdiction).

196. *Israel v. Eichmann*, 36 I.L.R. 277 (1962).

197. *Id.* at 308; see also Abramovsky, *supra* note 5, at 202 (describing several more recent Israeli cases upholding rendition operations).

conclusions.¹⁹⁸ While some foreign courts and commentators disagree that renditions are uniformly accepted in the international sphere,¹⁹⁹ even critics of the practice have been forced to acknowledge that, at the very least, “[t]here appears to be no uniform state practice on forcible abductions.”²⁰⁰

Absent international consensus prohibiting rendition operations, and indeed strong support for such activities by a large contingency of nations, “international law” appears to provide no restraint on renditions. As the Supreme Court in *Alvarez-Machain* held that international law posed no impediment to rendering individuals to the United States,²⁰¹ it seems unlikely that the Supreme Court or any other U.S. court would find international law to impede the rendition of individuals to other countries, especially given the general worldwide acceptance of the practice.

It should be noted, however, that U.S. case law in this area has focused on renditions for the purpose of trial. No U.S. court (and, to the best of my knowledge, no foreign court) has evaluated whether international law precludes renditions for interrogation.²⁰² There is no reason to believe, however, that U.S. courts would find international law to prohibit such renditions. The U.N. Charter and customary international law focus on protecting territorial sovereignty, which is

198. See *Cordero*, 668 F.2d at 36 n.5 (providing examples of British, Belgian, and Israeli courts upholding renditions); Re Argoud, 45 I.L.R. 90, 98 (1964) (holding by a French court that rendition operations do not “entail of themselves the nullity of the prosecution”); Glennon, *supra* note 82, at 750 n.23 (British, Palestinian, and Hungarian courts); Halberstam, *supra* note 181, at 738 (Canadian, French, German, British, and Israeli courts); Kovac, *supra* note 94, at 632–33, 638–40 (French and South African courts, and International Criminal Tribunal for Yugoslavia).

199. See Aceves, *supra* note 13, at 146–48 (explaining how decisions of national courts are relevant and often prohibit transborder abductions); Glennon, *supra* note 82, at 750 n.22 (citing cases where states declined to try abducted defendants); Henkin, *supra* note 5, at 231–32 (providing the Republic of South Africa as an example dismissing the prosecution of a person kidnapped from a neighboring country); Lavers, *supra* note 15, at 401–02 (discussing a lack of uniformity among states regarding forcible abductions).

200. Lavers, *supra* note 15, at 401; see also Glennon, *supra* note 82, at 750 (asserting that some nations have tried rendered individuals, while others have not).

201. See *supra* notes 70–72 and accompanying text (discussing Alvarez-Machain’s customary international law argument).

202. The only U.S. court to have had an international law claim before it based on an alleged foreign-to-foreign rendition for interrogation dismissed the case under the State Secrets Privilege. See *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007) (finding that the matter fell within a narrow class). The State Secrets Privilege is discussed *infra* section V.F. Louis Fisher asserts that the United States has precluded such foreign-to-foreign renditions stretching back to the 1800s, based upon the lack of a treaty or statute permitting such actions. See Fisher, *supra* note 4, at 1407–12 (discussing the requirement of a statute or treaty). However, all of his examples involve requests to transfer individuals from the United States, not from one foreign country to another, and therefore are not relevant to our discussion.

not affected by the issue of whether an individual is being abducted from a country for interrogation or trial. Further, as noted above, no article in the ICCPR, the Declaration of Human Rights, or any other international human rights convention actually prohibits rendition operations, regardless of the purpose.²⁰³ Indeed, a nation could comply with all of the provisions contained in those conventions—presentment of an individual before a court within a reasonable time period, avoidance of torture, and right to a fair trial—even in a situation where an individual is rendered for interrogation. Based on this, so long as the interrogation complies with the domestic laws of the relevant nation, it is difficult to envision an international law or other legal basis for how or why a U.S. court would prohibit renditions of individuals to that country for interrogation purposes.

E. 1949 Geneva Conventions

The 1949 Geneva Conventions, four in all, provide protection to individuals in places of armed conflict. Portions of two of those Conventions—the Third and Fourth Conventions—bear relevance to rendition operations.²⁰⁴ However, the actual impact of these Conventions on rendition operations proves to be limited, even in current conflict areas such as Afghanistan and Iraq.

The Third Geneva Convention (known as the “GPW”) provides that “Prisoners of War” (“POWs”) “may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”²⁰⁵ POWs, however, are defined as individuals that are part of an entity that has a command hierarchy, wears fixed insignia, carries arms openly, and complies with the laws of war.²⁰⁶ Neither the Taliban nor al-Qa’ida, the principle fighters in Afghanistan, meet this definition, as they do not wear fixed insignia, carry their arms openly, or comply with the laws of war.²⁰⁷

203. See *supra* notes 184–90 and accompanying text.

204. Chesney, *supra* note 5, at 705–06; Weissbrodt & Bergquist, *supra* note 14, at 301–02; Yoo, *supra* note 5, at 1223–27.

205. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 12, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “GPW”].

206. *Id.* art. 4(a); see also Chesney, *supra* note 5, at 714–32 (describing the POW status).

207. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 39 (2007) (asserting that the Geneva Conventions did not protect “al Qaeda terrorists or . . . members of the Taliban who did not wear uniforms or comply with the laws of war”); Chesney, *supra* note 5, at 713–32; Yin, *supra* note 118, at 352 (noting that al Qa’ida members “lack prisoner of war status”); Yoo, *supra* note 5, at 1226–27. It is worth noting that

Further, as noted above, the GPW does not preclude the transfer of POWs.²⁰⁸ Rather, it permits such transfers if the receiving country is a party to the Geneva Conventions, and if the transferring country “has satisfied itself of the willingness and ability” of the receiving country to follow the Geneva Conventions.²⁰⁹ These criteria should not be difficult for the United States to fulfill. Every nation in the world, except for Nauru, is a party to the Geneva Conventions, so the first criterion poses no problem.²¹⁰ Simple assurances from the receiving country that they will comply with the Geneva Conventions would appear to fulfill the second requirement.²¹¹ Thus, the Geneva Conventions would not appear to greatly limit transfers of POWs, to include renditions, to either the United States or another nation.

The Fourth Geneva Convention (known as the “GC”), which protects civilians in places of armed conflict, precludes transfer of a “protected person . . . to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”²¹² The GC further prohibits transfers of “protected persons” from an “occupied territory” to any other territory “regardless of their motive.”²¹³ Violations are considered grave breaches of the Geneva Conventions.²¹⁴

The GC defines “protected persons” as “those who . . . find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”²¹⁵ The GC explicitly excludes from this definition “nationals of a neutral State who find themselves in the territory of a belligerent State” and “nationals of a co-belligerent State” so long as their country maintains diplomatic relations with the country that holds them.²¹⁶ Ironically, due to the particularities of the

the U.S. Supreme Court has stated that Article 3 of the Third (and Fourth) Geneva Conventions applied to al-Qa’ida and Taliban members. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–33 (2006). However, that article, known as Common Article 3 because it appears in each of the Geneva Conventions, does not place limits on transfers. GPW, *supra* note 205, art. 3.

208. *See supra* note 205 and accompanying text.

209. *See* GPW, *supra* note 205, art. 12 (listing the standards established by the GPW for transfers of prisoners of war).

210. *See* Chesney, *supra* note 5, at 705 (“The first prong of Article 12 has no practical impact . . .”).

211. *See* Yoo, *supra* note 5, at 1225–26 (noting that such assurances should suffice for compliance with Article 12 of the Third Convention).

212. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 45, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter “GC”].

213. *Id.* art. 49.

214. *Id.* art. 147 (stating that the “unlawful deportation or transfer or unlawful confinement of a protected person” constitutes a grave breach of the GC).

215. *Id.* art. 4.

216. *Id.* It has long been acknowledged that this terminology is not extremely illuminating.

conflict in Afghanistan and, to a more limited degree, Iraq, many individuals captured by U.S. forces and its allies in those countries are nationals of neutral countries (such as Libyans) or co-belligerent countries that maintain diplomatic relationships with the United States and its allies (such as Brits or Aussies).²¹⁷ Indeed, with the advent of normalized relations between the United States and both the current Afghan and Iraqi governments, even civilians of both those nations might not be considered “protected persons” under the GC.²¹⁸ Due to these peculiarities, Professor Robert Chesney, in a highly-detailed analysis, argues that nationals of virtually every country who are captured in Afghanistan, for example, likely would be excluded from the definition of “protected persons” and thus not currently precluded from transfer under the GC.²¹⁹

Finally, it is critical to note that both the GPW and the GC apply only in certain circumstances. GPW restrictions on POW transfers apply only in “cases of declared war or any other armed conflict.”²²⁰ The GC is even more limited, applying only to transfers by “occupying forces,” i.e., where the entity “exercises the functions of government in such territory.”²²¹ At the current time, only Iraq and Afghanistan could possibly fall within these definitions. Commentators, however, remain uncertain whether the United States remains an occupying force in either Iraq or Afghanistan.²²² At least one district court has even gone

See INT’L COMM. OF THE RED CROSS, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 45 (Jean S. Pictet ed., 1958) (statement by the premier commentator on the Geneva Conventions, Jean Pictet, that the definition of “protected person” does “not stand out very clearly”).

217. *See* Chesney, *supra* note 5, at 733–34 (describing the difficulties in classifying captured individuals under the GC).

218. *Id.* at 735 (stating that “ordinary diplomatic relations now hav[e] resumed between the United States and both Iraq and Afghanistan,” potentially preventing citizens of Iraq or Afghanistan from being classified as “protected persons” under the GC).

219. *Id.* at 737 (“[I]t appears that the particular circumstances of the [individuals captured in Iraq or Afghanistan] do not trigger any of the provisions of the Geneva Conventions concerning detainee transfers.”); *see also* Yoo, *supra* note 5, at 1226–27 (arguing that neither captured Taliban nor al-Qa’ida members are “protected persons”). *But see* Weissbrodt & Bergquist, *supra* note 14, at 298–303 (arguing that the Fourth Geneva Convention applies to the Taliban, though not al-Qa’ida).

220. GPW, *supra* note 205, art. 2.

221. The prohibition applies for one year after the end of the occupation. *See* GC, *supra* note 212, art. 6 (“In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory [by certain provisions of the Convention to include those governing transfers].”).

222. *See* Sadat, *supra* note 183, at 1216 n.74 (noting that though the Iraqi government clearly exerts sovereignty as well as the functions of government, “[t]he question remains, of course,

so far as to hold that the “armed conflicts” in Iraq and Afghanistan ended several years ago,²²³ though that proposition seems fairly dubious.

It is beyond the scope of this article to argue the exact status of the situations in Afghanistan and Iraq, especially as the landscape there is ever-changing. Nonetheless, as the above analysis indicates, while the provisions of the Geneva Convention do provide restrictions on rendition operations, such restrictions will apply in only very narrow circumstances.

F. Mansfield Amendment

The Mansfield Amendment, an admittedly obscure provision, provides in relevant part, “No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law.”²²⁴ At least one commentator has suggested that this amendment may limit renditions operations involving narcotics matters.²²⁵

While the Mansfield Amendment on its face suggests a limitation to rendition operations, in actuality it provides no restriction whatsoever to such activities. To begin with, the amendment itself contains three statutory exceptions. Specifically, the amendment does not apply if exigent and threatening circumstances arise,²²⁶ if the activity is part of a maritime law enforcement operation,²²⁷ or if the activity is undertaken as part of a Status of Forces arrangement.²²⁸

whether Iraq is still ‘occupied’ for purposes of Geneva’s application”); Weissbrodt & Bergquist, *supra* note 14, at 306–07 (“[B]ecause Afghanistan arguably has yet to see the general close of military operations, the United States may still be bound by the Conventions as an occupying power.”).

223. *See* United States v. Proserpi, 573 F. Supp. 2d 436, 455 (D. Mass. 2008) (stating that “the cessation of a state of war with Afghanistan” ended on December 22, 2001 when the United States formally recognized the Karzai government, while the Iraqi armed conflict terminated on May 1, 2003, when President Bush proclaimed that “[m]ajor combat operations in Iraq have ended”). It is not clear that other courts will concur with this bold determination.

224. 22 U.S.C. § 2291(c)(1) (2006).

225. *See* Abramovsky, *supra* note 5, at 195–99 (discussing the potential implications of the Mansfield Amendment on rendition operations).

226. 22 U.S.C. § 2291(c)(3) (“[22 U.S.C. § 2291(c)(1)] does not prohibit an officer or employee from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public.”).

227. *Id.* § 2291(c)(4) (“With the agreement of a foreign country, [22 U.S.C. § 2291(c)(1)] does not apply with respect to maritime law enforcement operations in the territorial sea or archipelagic waters of that country.”).

228. *Id.* § 2291(c)(6) (“This subsection does not apply to the activities of the United States

Courts interpreting the Mansfield Amendment have carved out additional limitations to its coverage. They have emphasized that the amendment applies only if U.S. government officials “directly effect” the arrests,²²⁹ and have tended to read that term narrowly. For example, a district court in D.C. recently refused to find that U.S. DEA agents “directly effected” the arrest of the defendants despite the fact that those DEA agents notified El Salvadoran law enforcement officials of defendants’ impending plans to be in El Salvador and the existence of a U.S. arrest warrant for the defendants; were present at the eventual arrest conducted by El Salvadoran officials; and took custody of defendants at an El Salvadoran airport.²³⁰ Courts have also held that the Mansfield Amendment does not apply to arrests made on a ship flying the flag of a foreign country.²³¹

Due to these extremely narrow interpretations, no court has ever found the United States government to have violated the terms of the Mansfield Amendment. Further, the amendment itself contains no sanction if such a violation were to be found.²³² Thus, as one court has described it, “The Mansfield Amendment is silent as to remedies for its breach, and no court has ever implied a remedy for a defendant alleging its violation.”²³³ Even the commentator who suggested that the Mansfield Amendment could limit rendition operations acknowledges that the amendment is at best “underinclusive,” and that “[a]t worst, in its application, it is an abject failure.”²³⁴ Thus, it would appear to provide no actual limitation on rendition operations.

Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements.”).

229. *See id.* § 2291(c)(1).

230. *See* *United States v. Bourdet*, 477 F. Supp. 2d 164, 169–70, 173 (D.D.C. 2007) (holding the post-arrest transfers of defendants did not constitute “directly effected arrests” under the terms of the Mansfield Amendment); *see also* *United States v. Mejia*, 448 F.3d 436, 443 (D.C. Cir. 2006) (finding the Mansfield Amendment inapplicable where DEA agents took custody of defendants at an airport in Panama after Panamanian officials arrested defendants based upon U.S. warrants provided to those officials by the United States).

231. *See, e.g.,* *United States v. Streifel*, 507 F. Supp. 480, 489 (S.D.N.Y.), *aff’d*, 665 F.2d 414 (2d Cir. 1981) (refusing to find that the Amendment applies to a Coast Guard arrest on a vessel flying a Panamanian flag).

232. *See* *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988) (“Congress has not provided sanctions or penalties by way of relief for persons arrested in contravention of [the Mansfield Amendment.]”); *United States v. Bridgewater*, 175 F. Supp. 2d 141, 146 (D.P.R. 2001) (“The Mansfield Amendment regulates government action prescriptively; it does not provide repercussions for violations of the Amendment.”).

233. *Bourdet*, 477 F. Supp. 2d at 175.

234. *Abramovsky*, *supra* note 5, at 197.

G. Summary

As the above discussion illustrates, a careful examination reveals that U.S. law does not generally prohibit the United States from engaging in rendition operations, even in situations where the rendered individual may be subjected to torture in the receiving country. Indeed, the only real legal limitations that U.S. law places on rendition operations preclude U.S. officials from torturing or conspiring to torture the individual, inflicting cruel and unusual treatment on the individual, or transferring the individual in violation of the Geneva Conventions. As shown above, however, even these prohibitions have very limited impact on actual rendition operations.

IV. POTENTIAL CRIMINAL CLAIMS AGAINST U.S. GOVERNMENT EMPLOYEES INVOLVED IN RENDITION OPERATIONS.

The potential prosecution of government employees for their involvement in renditions raises an initial question of whether the United States government would consider taking such an action. A rendition is presumably undertaken at the behest of the government itself and thus arguably for the benefit of the United States. Any prosecution under such circumstances would therefore likely be against the government's interest, or at least embarrassing. It would also raise the question of whether the government employee is a mere scapegoat for overarching U.S. government activity. Further, any prosecution for activities connected with a rendition operation would likely require revelation of classified information related to the operation, thus putting national security issues at risk of exposure.²³⁵

Should the government nonetheless decide to pursue prosecution, only a few criminal statutes appear applicable: kidnapping statutes, the Anti-Torture Statute, the McCain Amendment, and the War Crimes statute. As shown below, even potential sanctions under these statutes are fairly restricted.²³⁶ Further, at the time of this writing, no

235. See *Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (en banc) (discussing how extensive amounts of classified information would be revealed in a renditions case), *cert. denied*, 130 S. Ct. 3409 (2010). It should be noted that the Classified Information Procedures Act, 18 U.S.C. app. §§ 1–9 (2006), provides a mechanism for prosecuting matters involving classified information. However, under its terms, when a defendant is precluded from presenting classified information relevant to his or her case, the court “shall dismiss the indictment or information” if no reasonable substitute for the classified information is available. *Id.* § 6(e)(2).

236. Some commentators have suggested that international forums, such as the International Court of Justice or a foreign national court, may be more viable arenas to try such cases. See Glennon, *supra* note 82, at 754–55 (listing reasons for trying cases relating to rendition operation in international forums, including possible retaliatory abductions or armed resistance in foreign countries where rendition operations conducted by U.S. officials take place); Weissbrodt &

government employee has ever been indicted, much less convicted, for violating any of these criminal statutes in connection with a rendition operation.

A. Kidnapping Statutes

The Federal Kidnapping Act provides in relevant part that a crime is committed when a person “unlawfully . . . kidnaps, abducts or carries away and holds for ransom or reward or otherwise any person . . . when . . . the person is willfully transported in interstate or foreign commerce . . . or the offender travels in interstate or foreign commerce . . . in furtherance of the commission of the offense.”²³⁷ Conspiracy to engage in such activity is also a crime.²³⁸ The term “unlawfully” is not defined in the Federal Kidnapping Act or its case law, and therefore it is unclear whether renditions undertaken pursuant to authorization statutes and at U.S. government direction would be considered “unlawful.”

Assuming such activities were “unlawful,” this statute on its face would appear to apply to all rendition operations, which are effectively transportations of seized individuals in “interstate or foreign commerce.”²³⁹ The Fifth Circuit, the only court to have considered the issue, has raised questions as to whether that assessment is correct. In *United States v. McRary*, the defendant and his wife hired a fishing boat for a trip from Key West, Florida. Once in international waters, the defendant and his wife brandished guns and forced the boat captain and crewman to transport them to Cuba. The defendant was eventually arrested in Cuba and served a sentence there. He subsequently returned to the United States, where he was arrested and eventually convicted for violating the Federal Kidnapping Act.²⁴⁰

The Fifth Circuit overturned the conviction. The court noted that the Federal Kidnapping Act stemmed from the Lindbergh baby kidnapping;

Bergquist, *supra* note 14, at 347–55 (discussing the practicability of requiring U.S. officials engaged in extraordinary rendition operations to be prosecuted in countries outside of the United States). The feasibility of such judicial forums to litigate or prosecute rendition operations is beyond the purview of this article’s focus on U.S. law and courts. However, it is worth noting that such international courts may prove ineffective mechanisms to handle such matters. U.S. officials may reside outside the court’s physical reach, the international tribunals may not have jurisdiction to hear such cases, or the cases may prove too politically sensitive to try.

237. 18 U.S.C. § 1201(a)(1) (2006).

238. *Id.* § 1201(c).

239. The Supreme Court in *Frisbie*, discussed *supra* notes 53–59, considered the Federal Kidnapping Act in the context of a rendition operation, but never determined whether it actually applied. *Frisbie v. Collins*, 342 U.S. 519, 522–23 (1952). Rather, the Court held that, even if the Act applied, its sanctions did not include “barring a state from prosecuting persons wrongfully brought to it by its officers.” *Id.* at 523.

240. *United States v. McRary*, 665 F.2d 674, 675 (5th Cir. 1982).

indeed the Act at one point was even referred to as the Lindbergh Law.²⁴¹ The purpose of the Federal Kidnapping Act was not to prevent all kidnappings wherever they occurred, but rather “to prevent kidnappers from evading capture by moving from one jurisdiction to another.”²⁴² Based on this background, the Fifth Circuit assessed that the phrase “transported . . . in foreign commerce” in the Act intended to preclude kidnappers from evading conviction by taking their victims to territories outside the United States. The Fifth Circuit concluded that the “foreign commerce jurisdictional basis [of the Act] mandates that the kidnapping take place in the United States and that the victim be subsequently transported to a foreign State.”²⁴³ Since the boat captain and crew in *McRary* were kidnapped in international waters, the court assessed that no violation of the Federal Kidnapping Act had occurred.²⁴⁴

The Circuit questioned that conclusion almost a decade later, in *United States v. De La Rosa*.²⁴⁵ In that case, the defendant had kidnapped a child in Mexico and brought him to the United States. The Fifth Circuit first distinguished *McRary* by noting that, since that case involved a seizure on the high seas, the kidnapping “had no connection with the United States, unlike the instant case.”²⁴⁶ The court then assessed that the original kidnapping statute defined the term “foreign commerce” to “include transportation from . . . a foreign country to any State, Territory, or the District of Columbia” but that the definition was later changed to “commerce with a foreign country” because it was believed that such a term was broader than the word “transportation.”²⁴⁷

241. *Id.* at 677 (discussing the original enactment of the Federal Kidnapping Act in 1932).

242. *Id.* This is bolstered by a prior Fifth Circuit case, cited to in *McRary*, which noted that “[c]riminal statutes are to be strictly construed. Penal statutes must not be stretched to enable the government to prosecute a defendant merely because what he has done is vile, or, as the government here suggests, a violation of state law that is likely to go unpunished by state authorities.” *United States v. McInnis*, 601 F.2d 1319, 1327 (5th Cir. 1979) (finding that no violation of the Act occurred when defendant conspired to induce a victim to cross into Mexico where the victim was to be kidnapped and killed, because the Act required unlawful control of an individual followed by interstate transportation).

243. *McRary*, 665 F.2d at 678. The Fifth Circuit also made an unconvincing, and quite frankly confusing, argument that expanding the relevant provisions of the Act to kidnappings that occurred in international waters would violate other portions of the Act, as well as international law. *Id.*

244. *Id.* (concluding that the Federal Kidnapping Act was not violated since “it is uncontroverted that the kidnapping here occurred outside the United States”).

245. 911 F.2d 985 (5th Cir. 1990).

246. *Id.* at 989 (stating that *McRary* involved a kidnapping in international waters and subsequent transportation of the victim to Cuba, thus lacking a connection to the United States as required by the Federal Kidnapping Act).

247. *Id.* at 989–90 (describing the expanded interpretation of the Act stemming from the 1952

Based on that, the court concluded that the term “foreign commerce,” as used in the Act “means to or from the United States.”²⁴⁸ This analysis would therefore permit criminal sanction under the Federal Kidnapping Act for rendition operations to the United States, but would preclude such sanction for foreign-to-foreign rendition operations as they do not involve transportation to or from the United States.

A separate conspiracy statute may nonetheless ensnare individuals engaged in either type of rendition operation. Specifically, 18 U.S.C. § 956 provides:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in . . . the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished . . .²⁴⁹

This statute has been used in cases ranging from conspiracy to murder,²⁵⁰ but does not appear to have been used to convict anyone for overseas kidnappings.²⁵¹ It is therefore difficult to know if a conspiracy charge under § 956 would be enforced in situations, such as rendition operations, where the Federal Kidnapping Statute itself would not be violated. Still, it is important to note that § 956 applies, by its own terms, only to “an act that would constitute the offense of . . . kidnapping” if committed in the United States.²⁵² As noted above, at most, the Federal Kidnapping Statute could apply only to renditions to the United States, which would also seem to limit the possible application of § 956 only to such operations. A court may be loathe to allow a prosecutor to use a conspiracy statute such as § 956 to circumvent limitations that Congress likely intended to impose via the Federal Kidnapping Statute.²⁵³

revision of the Act, which “substitute[d] the broad word ‘commerce’ for the narrower word ‘transportation’”).

248. *Id.* at 990 (requiring that a kidnapping occur in the United States or that a victim of a kidnapping abroad be transported to the United States in order for the Act to apply).

249. 18 U.S.C. § 956 (2006).

250. *See, e.g.,* United States v. Wharton, 320 F.3d 526, 537–38 (5th Cir. 2003) (upholding defendant’s conviction under 18 U.S.C. § 956 to conspire in the United States to kill an individual in Haiti).

251. In *U.S. v. Sattar*, defendants were indicted on violations of § 956 for overseas kidnappings and murders, but the jury found defendants guilty only of the conspiracy to murder charge. 395 F. Supp. 2d 79, 82 (S.D.N.Y. 2005), *aff’d*, U.S. v. Stewart, 590 F.3d 93 (2d Cir. 2009).

252. 18 U.S.C. § 956(a)(1).

253. Nonetheless, as indicated *supra* Part IV.A, courts have used § 956 to convict individuals

B. *Anti-Torture Statute*

The U.S. Anti-Torture Statute, enacted pursuant to the CAT,²⁵⁴ creates a criminal sanction for “[w]hoever outside the United States commits or attempts to commit torture,” or conspires to do so, as long as the alleged torturer is a U.S. national or is present in the United States.²⁵⁵ The term “torture” is defined as an act “specifically intended to inflict severe physical or mental pain or suffering.”²⁵⁶

No published case has examined the Anti-Torture Statute, and it would appear that no person has ever been indicted for violating its terms. Therefore, it is difficult to know what activities would constitute “torture” under its provisions. Nonetheless, some guidance can be acquired by looking at cases based on other statutes, such as the FARRA, which employ the same definition of “torture” as the Anti-Torture Statute.²⁵⁷

If those cases are any indication, prosecutors face a high hurdle in seeking to secure a conviction under the Anti-Torture Statute. To begin with, the term “torture” as defined by the Anti-Torture Statute requires the infliction of *severe* physical or mental pain or suffering.²⁵⁸ As courts have stated, this high-threshold requirement is “crucial to ensuring that the conduct . . . is sufficiently extreme and outrageous to warrant the universal condemnation that the term ‘torture’ both connotes and invokes.”²⁵⁹ Consequently, it is “usually reserved for extreme, deliberate and unusually cruel practices, for example,

for conspiring to commit overseas murders despite the fact that the federal murder statute does not have extra-territorial applicability. See 18 U.S.C. §§ 7, 1111 (2006) (establishing that the federal murder statute is limited to murders committed “[w]ithin the special maritime and territorial jurisdiction of the United States,” which is defined in § 7 to preclude extra-territorial murders); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 204 (S.D.N.Y. 2000) (noting that Congress limited “the reach of Section 1111 to murders committed ‘[w]ithin the special maritime and territorial jurisdiction of the United States’” (alteration in original)).

254. See *supra* Part III.B.1 and accompanying text.

255. 18 U.S.C. § 2340A (2006).

256. *Id.* § 2340 (2006).

257. When consenting to the CAT in 1988, the Senate stated, “[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering” 136 CONG. REC. 36,198 (1990); *Auguste v. Ridge*, 395 F.3d 123, 131 (3d Cir. 2005). The main statutes that stemmed from the CAT, such as the Anti-Torture Statute, the FARRA, and the Torture Victim Protection Act (“TVPA”), adopted this definition. Compare 18 U.S.C. § 2340 (defining “torture” for the Anti-Torture Statute pursuant to the definition established by the Senate in consenting to the CAT), with 8 U.S.C. § 1231 note (2006) (using the Senate definition of “torture” for the FARRA), and 28 U.S.C. § 1350 note (2006) (same for the TVPA).

258. 18 U.S.C. § 2340.

259. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) (describing the term “torture” in the context of a TVPA case); *id.* (“[O]nly acts of a certain gravity shall be considered to constitute torture.” (internal quotations and citation omitted)).

sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.”²⁶⁰

Furthermore, the government official must have *specifically intended* that such severe pain or suffering would occur when he or she engaged in the activity.²⁶¹ Thus, “[I]n the context of the [CAT], for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe pain and suffering.”²⁶² The government actor must have personally committed an act specifically intending to cause severe pain and suffering, or must have sent the person to another country with the intention that such pain and suffering would occur.²⁶³ Anything less does not suffice. Thus, it is insufficient to show that the foreign prison to which the individual will be transferred may be in terrible squalor and/or unable to handle the individual’s particular disease or ailment,²⁶⁴ that the country may engage in indefinite detention in violation of international law,²⁶⁵ or that there are reports that the country engages in physical beatings of prisoners.²⁶⁶ Willful blindness or deliberate indifference on the part of government officials also does not meet the standard of specific intent in this instance.²⁶⁷ Even “proof of knowledge on the part of government officials that severe pain or suffering will be the practically

260. S. EXEC. REP. NO. 101–30, at 14 (1990); *see also* *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (quoting the Senate Executive Report approvingly in a FARRA case); *Price*, 294 F.3d at 92–93 (same for a TVPA case). For a list of examples of court cases that did and did not find various allegations to meet the threshold of torture, see *Doe v. Qi*, 349 F. Supp. 2d 1258, 1315–17 (N.D. Cal. 2004) (discussing numerous cases which did not meet the “severe” pain and suffering threshold).

261. *Villegas v. Mukasey*, 523 F.3d 984, 988 (9th Cir. 2008) (“Every other circuit to consider the question has concluded that ‘torture’ under the CAT requires specific intent to inflict harm.”).

262. *Auguste v. Ridge*, 395 F.3d 123, 145–46 (3d Cir. 2005); *see also Villegas*, 523 F.3d at 989 (“[W]e hold that to establish a likelihood of torture for purposes of the CAT, a petitioner must show that severe pain or suffering was specifically intended—that is, that the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences.”).

263. *Villegas*, 523 F.3d at 989; *Auguste*, 395 F.3d at 145–46.

264. *Villegas*, 523 F.3d at 989 (“While [defendant] is correct that a variety of evidence showed that Mexican mental patients are housed in terrible squalor, nothing indicates that Mexican officials (or private actors to whom officials have acquiesced) created these conditions for the specific purpose of inflicting suffering upon the patients.”).

265. *Auguste*, 395 F.3d at 152–53.

266. *Id.* at 154.

267. *Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007) (refusing to allow “willful blindness” or “deliberate indifference” to be a factor in determining a CAT claim).

certain result” does not meet the test.²⁶⁸ Rather, there must be a showing that “[a] prospective torturer will have the goal or purpose of inflicting severe pain or suffering.”²⁶⁹ Thus, courts have refused to preclude removals of individuals to Mexico, Haiti, and even Syria where the individual could not show that it was more likely than not that he or she would be specifically tortured by officials of those countries upon arrival.²⁷⁰ Indeed, acquiring reasonable assurances from a country that it will not torture the transferred individual appears sufficient to negate the specific intent requirement for torture, and thus precludes prosecution under the Anti-Torture Statute.²⁷¹ Overall, then, it appears that the Anti-Torture Statute establishes an extremely high threshold that will be difficult for prosecutors to meet.²⁷² This may be why no criminal case appears to have ever been brought under the statute.

C. McCain Amendment

The McCain Amendment, discussed previously,²⁷³ provides, “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.”²⁷⁴ The amendment contains no explicit sanction for violation, nor any particular means of enforcement. The amendment does, however, require the President to “take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.”²⁷⁵ President George W. Bush delegated that responsibility to the Director of National Intelligence (“DNI”),²⁷⁶

268. *Pierre v. Att’y Gen. of U.S.*, 528 F.3d 180, 189 (3d Cir. 2008); *see also Pierre*, 502 F.3d at 121 (“The failure to maintain standards of diet, hygiene, and living space in prison does not constitute torture under the CAT unless the deficits are sufficiently extreme and are inflicted intentionally rather than as a result of poverty, neglect, or incompetence.”).

269. *Pierre*, 528 F.3d at 190.

270. *Villegas v. Mukasey*, 523 F.3d 984, 987 (9th Cir. 2008) (Mexico); *Pierre*, 502 F.3d at 121 (Haiti); *Hamid v. Gonzales*, 417 F.3d 642, 644 (7th Cir. 2005) (Syria).

271. *GARCIA*, *supra* note 23, at 17–18.

272. Any conviction may be further complicated by the suggestion of some commentators that torture may be warranted when the stakes are high enough. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS 200 (2006) (noting that John McCain acknowledged that laws limiting interrogation techniques should not preclude the President “from doing what he would have to do” in a ticking-bomb situation); Richard Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 30 (suggesting that anyone who questions whether torture is permitted during periods of a ticking bomb should not be in power). *But see* Massimino, *supra* note 15, at 75 (questioning the legal bases for torture under any circumstances).

273. *See supra* Part III.B.2.

274. 42 U.S.C. § 2000dd(a) (2008).

275. *Id.* § 2000dd-0(3) (Supp. 2008).

276. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007), *reprinted in* 18 U.S.C. §

though it is unclear what action, if any, the DNI has taken in response.²⁷⁷

D. War Crimes

U.S. law authorizes criminal sanctions, including lifetime imprisonment, for violation of a “war crime.”²⁷⁸ One such war crime is a grave breach of the Geneva Conventions.²⁷⁹ Nonetheless, as noted above, the Geneva Conventions’ restrictions on transfers apply only in very narrow circumstances, and may have limited or no applicability today even in places such as Afghanistan or Iraq.²⁸⁰ Thus, there may be little possibility for prosecution for this type of war crime.

The only other relevant portions of the war crimes statute preclude the commission of torture, as well as cruel and inhuman treatment.²⁸¹ However, such acts must have been committed in the context of an “armed conflict.”²⁸² As noted above, whether the United States continues to be in an armed conflict anywhere in the world, to include Afghanistan and Iraq, remains an open question.²⁸³ This uncertainty, coupled with the high threshold of proving at least “torture,”²⁸⁴ may greatly limit the applicability of these provisions of the war crimes statute to rendition operations. In any case, there is no indication that anyone involved in such operations has ever been indicted, much less convicted, for a war crime.

V. POTENTIAL CIVIL CLAIMS AGAINST U.S. GOVERNMENT EMPLOYEES INVOLVED IN RENDITION OPERATIONS

U.S. law does offer the possibility of civil sanctions against individuals involved in rendition operations, but only in fairly limited

2441 note and 42 U.S.C. § 2000dd-0 note (July 20, 2007), *revoked by* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

277. The Office of the DNI has stated that the intelligence community is “fully compliant” with the McCain Amendment. Benjamin Powell, ODNI General Counsel, Remarks to the Standing Committee on Law and National Security (June 22, 2006), *available at* <http://www.dni.gov/speeches/20060622.htm>.

278. 18 U.S.C. § 2441(a) (2008).

279. *Id.* § 2441(c)(1).

280. *See supra* Part III.E.

281. 18 U.S.C. § 2441(d)(1)(A)–(B). The term “cruel and inhuman treatment” is defined in relevant part as “an act intended to inflict severe or serious physical or mental pain or suffering.” *Id.* § 2441(d)(1)(B).

282. *Id.* § 2441(c).

283. *See supra* notes 220–23 and accompanying text (discussing the status of U.S. involvement in Iraq and Afghanistan).

284. *See supra* notes 259–72 and accompanying text (discussing the circumstances under which a harmful activity may be considered torture).

contexts. Further, courts have shown considerable reluctance to even consider such cases, often jettisoning claims related to rendition operations before they are even heard, pursuant to either the State Secrets Privilege or the Political Question Doctrine.

A. Tort Claims

The Federal Tort Claims Act (“FTCA”) provides the exclusive remedy for money damages “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”²⁸⁵ However, the FTCA contains numerous statutory exceptions. The most critical for rendition cases is the “foreign country exception,” which precludes “[a]ny claim arising in a foreign country.”²⁸⁶

For years, an argument ensued among various courts as to whether that exception applied to decisions made in the United States regarding activities undertaken overseas. The so-called “headquarters doctrine” asserted that the foreign country exception did not apply to actions taken by U.S. government officials at their headquarters in the United States in furtherance of activities conducted overseas, and therefore, such officials should be susceptible to an FTCA claim. The Supreme Court, however, laid to rest the “headquarters doctrine” in the civil claim that arose out of the *Alvarez-Machain* case.

After the Supreme Court upheld the *Ker-Frisbie* Doctrine in *Alvarez-Machain*, defendant Alvarez-Machain’s case went to trial, where he was acquitted.²⁸⁷ Alvarez-Machain subsequently filed suit against individuals allegedly involved in his rendition from Mexico, including several U.S. government employees.²⁸⁸ One of his main claims was made pursuant to the FTCA,²⁸⁹ under which he asserted that the foreign country exception did not bar this claim due to the headquarters doctrine. The Supreme Court disagreed, finding that acceptance of the

285. 28 U.S.C. § 1346(b) (2006); *see also id.* § 2679(b)(1) (“The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive or any other civil action or proceeding for money damages”). As indicated *supra* note 26, this article will not consider the impact of the FTCA or any other claims on private parties or government contractors who may be involved in rendition operations.

286. 28 U.S.C. § 2680(k) (2006).

287. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

288. *Id.*

289. The other main claim, raised pursuant to the Alien Tort Statute, will be discussed *infra* Part V.B.

headquarters doctrine would “swallow the foreign country exception whole.”²⁹⁰ The Court thus dismissed Alvarez-Machain’s entire FTCA claim, holding, “[T]he FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”²⁹¹ The same result should occur with regard to any other rendition operation, whether to the United States or to a third country, as all such rendition operations undertaken by U.S. government officials take place overseas.²⁹²

B. Alien Tort Statute

The other main issue considered in Alvarez-Machain’s civil suit concerned the Alien Tort Statute (“ATS”). The ATS provides, in its entirety, “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.”²⁹³ Enacted in 1789, the statute stood in hibernation for 170 years, providing jurisdiction for only one case during that period.²⁹⁴

The Supreme Court did not wake the beast for Alvarez-Machain’s case. Evaluating the legislative history and purpose of the statute when enacted, the Court held that the ATS created “no new causes of action” but rather “is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability *at the time*.”²⁹⁵ Given that “the time” of the ATS’ enactment was 1789, when few international law violations were considered to exist, the Court stated, “[W]e have found no basis to suspect Congress had any examples in mind beyond . . . violation of safe conducts, infringement of the rights of ambassadors, and piracy.”²⁹⁶ While the Court left the door open to the possibility that other types of international law violations with the potential for personal liability could have existed in 1789, such examples did not include Alvarez-Machain’s rendition claim.²⁹⁷ As the Court concluded, Alvarez-Machain’s allegation of “a

290. *Sosa*, 542 U.S. at 703.

291. *Id.* at 712; *see also* Al-Zahrani v. Rumsfeld, No. 09-0028, 2010 WL 535136, at *10–13 (D.D.C. Feb. 16, 2010) (holding the “foreign country” exception precludes even FTCA claims of alleged torts at the U.S. military base at Guantanamo Bay, Cuba).

292. As noted *supra* note 23, the United States does not render individuals from U.S. soil.

293. 28 U.S.C. § 1350 (2006).

294. *Sosa*, 542 U.S. at 712–13.

295. *Id.* at 724 (emphasis added).

296. *Id.*

297. *Id.* at 725.

single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and prompt arraignment . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy [under the ATS].”²⁹⁸

It seems unlikely that the Court, with this backdrop, would find other rendition operations, even those lasting more than one day, to fall within the confines of the ATS. The Court made it clear that only universally-recognized principles of international law (and particularly those universally recognized in 1789) could be covered by the ATS.²⁹⁹ As noted above, rendition operations are not universally condemned but rather, to the contrary, are authorized and upheld by a large number of nations,³⁰⁰ suggesting a clear lack of universal recognition that such activities are illegal.³⁰¹ Further, the Court expressed a decided reluctance to create a private right of action under the ATS in the area of foreign relations, noting that such matters are best left to the other branches of government.³⁰² This would therefore appear to preclude claims based on rendition operations, though it is possible that torture would fall within the law of nations in existence in 1789 and that rendition operations whose purpose is to torture might therefore fall within the ATS parameters.³⁰³ This is particularly true given the passage of the Torture Victim Protection Act, which I will turn to next, since it evinces congressional and presidential condemnation of torture.³⁰⁴

C. Torture Victim Protection Act

The Torture Victim Protection Act (“TVPA”), which is appended as a statutory note to the ATS, creates a cause of action against any

298. *Id.* at 738.

299. *Id.* at 736 (“Alvarez cites little authority that a rule so broad has the status of binding customary norm today.”); *see also* Arndt v. UBS AG, 342 F. Supp. 2d 132, 139 (E.D.N.Y. 2004) (noting that, in the wake of the *Sosa* opinion, ATS claims need to be “universally recognized”).

300. *See supra* notes 195–200 (explaining that numerous foreign nations engage in rendition operations and that such operations are upheld by the courts of those nations).

301. *But see* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 25 (D.D.C. 2005) (suggesting in dicta that prolonged arbitrary detention could violate the law of nations and fall under the ATS, though the court found that plaintiffs did not adequately plead such a violation).

302. *Sosa*, 542 U.S. at 727–28.

303. *See* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005) (asserting that ATS includes torture claims as “there is a customary international law norm against torture”); *Exxon Mobil Corp.*, 393 F. Supp. 2d at 25 (suggesting that torture could violate the law of nations and fall under the ATS, though plaintiffs did not adequately plead such a violation).

304. *Mujica*, 381 F. Supp. 2d at 1179 (“[T]he existence of the TVPA is strong evidence that the prohibition against torture is binding customary international law norm.”).

“individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture.”³⁰⁵ The key language in the statute, however, restricts a claim only to those actions taken under the authority or color of law of a “foreign nation.”³⁰⁶ The courts have consistently interpreted this to mean that, unless the alleged torture was committed by a U.S. government employee acting under the authority of a foreign nation, the TVPA will not apply.³⁰⁷

The Second Circuit, for example, recently examined a TVPA claim by a Canadian citizen that he had been removed from the United States to Syria with the understanding and intention that Syrian officials would torture him.³⁰⁸ The Second Circuit, sitting en banc, dismissed the plaintiff’s TVPA claim. It noted that to state a claim under the TVPA, the plaintiff “must adequately allege that the defendants possessed power under Syrian law and that the offending actions (i.e. [the plaintiff’s] removal to Syria and subsequent torture) derived from an exercise of that power The complaint contains no such allegation.”³⁰⁹ Instead, the U.S. officials said to have been involved in the matter “are alleged to have acted under color of federal, not Syrian, law, and to have acted in accordance with alleged federal policies and in pursuit of the aims of the federal government in the international context.”³¹⁰ As the court noted, even if the U.S. government officials “encouraged or solicited certain conduct by foreign officials,” such conduct does not indicate that they were “clothed with the authority of Syrian law or that their conduct may otherwise be fairly attributable to Syria.”³¹¹

Thus, unless a U.S. official engages in a rendition operation on behalf of a foreign government (and not on behalf of the U.S. government),

305. 28 U.S.C. § 1350 note (2006).

306. *Id.* (emphasis added).

307. *See* *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (dismissing a TVPA claim against former Secretary of State Henry Kissinger for the death of a Chilean general because “[i]n carrying out the direct orders of the President of the United States, . . . Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law”), *aff’d*, 412 F.3d 190, 200 (D.C. Cir. 2005); *see also* Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 778 (2006) (“[C]ongress has enacted legislation authorizing private suits by the victims of official torture, but only when the torture is inflicted under color of a foreign country’s law, and not when it is inflicted under color of U.S. law.”).

308. *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

309. *Id.* at 568.

310. *Id.*

311. *Id.*

which seems highly unlikely, the TVPA does not provide a legitimate basis for a civil claim based upon a rendition operation.

D. Constitutional Claims

Acquiring damages for alleged constitutional violations will prove an uphill battle for rendered individuals. As noted above, the Supreme Court has already held that the Constitution does not prohibit renditions to the United States, while Supreme Court precedent strongly suggests the Constitution does not even apply to aliens in foreign-to-foreign rendition operations.³¹²

If rendered individuals are able to overcome these considerable hurdles, they will still face another. A plaintiff's ability to sue government officials for alleged constitutional deprivations stems from the landmark Supreme Court case of *Bivens v. Six Unknown Named Federal Narcotics Agents*.³¹³ The Court has authorized such *Bivens* claims only for purported violations of the Fourth Amendment, the Equal Protection portion of the Fifth Amendment, and the Eighth Amendment.³¹⁴ It has expressly refused to extend *Bivens* claims to numerous other areas.³¹⁵ This proves problematic for rendered individuals, who would most likely seek a *Bivens* claim under the rubric of the Due Process portion of the Fifth Amendment, namely the protection "of life, liberty, or property, without due process of law,"³¹⁶ which the Court has not yet found to be covered by *Bivens*.

The likelihood that the Court would extend *Bivens* into the area of due process appears remote. The Court has itself noted that it has "responded cautiously to suggestions that *Bivens* remedies be extended into new concerns."³¹⁷ Indeed, for the past twenty-five years it has steadfastly refused to extend *Bivens* claims beyond the narrow constitutional areas outlined above.³¹⁸ Thus, *Bivens* claims based upon

312. See *supra* Parts II & III.A (discussing how foreign-to-foreign rendition operations have always involved the external transfer of non-resident aliens from one foreign country to another outside the sovereign territory of the United States, and thus preclude applicability of the Constitution to such activities).

313. 403 U.S. 388 (1971).

314. *Wilkie v. Robbins*, 551 U.S. 537, 549–50 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001); *Arar*, 585 F.3d at 571.

315. *Arar*, 585 F.3d at 571–72 (listing various contexts under which the Supreme Court has rejected expansion of *Bivens*).

316. U.S. CONST. amend. V.

317. *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); see also *Malesko*, 534 U.S. at 70 (noting that the Court has "consistently rejected invitations to extend *Bivens*"); *Arar*, 585 F.3d at 571 (noting that the Supreme Court has resisted expanding *Bivens* in any direction since 1980).

318. *Malesko*, 534 U.S. at 68 ("Since *Carlson v. Green*, 446 U.S. 14 (1980)] we have

other constitutional provisions, such as the due process portion of the Fifth Amendment, could be met with resistance.

Such resistance is particularly likely in the context of rendition operations, given the national security facet of such activities. As the Supreme Court has stated, courts considering a *Bivens* claim “must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.”³¹⁹ The “special factors” include whether an alternative branch of government is better suited than the courts to create a remedy.³²⁰ When “congressional inaction has not been inadvertent,” the Court will defer to congressional decision and not create a judicial remedy under *Bivens*.³²¹ National security, foreign policy, and military concerns are also “special factors” that counsel hesitation in expanding *Bivens* claims.³²²

Based upon such “special factors,” the Second Circuit, sitting en banc, recently declined to extend a *Bivens* remedy to a situation very similar to a rendition operation when it considered the removal of the Canadian plaintiff described in the section above on the TVPA.³²³ In a highly-detailed analysis, the Second Circuit found a slew of bases for holding that “special factors” precluded expanding *Bivens* to an allegation that an individual was removed from the United States to Syria where he underwent torture. The court noted that any such action “would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation.”³²⁴ Any such case would require analysis of U.S. security issues, classified information, as well as the actions of

consistently refused to extend *Bivens* liability to any new context or new category of defendants.”).

319. *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

320. *Bush*, 462 U.S. at 380, 389.

321. *Schwieker*, 487 U.S. at 423; *see also Bush*, 462 U.S. at 389 (refusing to create a *Bivens* remedy to protect federal employees’ First Amendment rights when “Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service”).

322. *Arar*, 585 F.3d at 574–81 (listing various “special factors” established by the Supreme Court over the decades, to include military, foreign policy, and national security concerns); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111–14 (D.D.C. 2010) (noting that the possible danger of obstructing U.S. national security constitutes a “special factor” in refusing to extend *Bivens* to Guantanamo detainees).

323. *Arar*, 585 F.3d at 574–81. As noted previously, foreign aliens, such as the Canadian *Arar*, are not generally afforded any constitutional rights. *See supra* text accompanying notes 116–20. In this case, the plaintiff’s constitutional rights stemmed from the fact that he was in the United States when removed.

324. *Arar*, 585 F.3d at 574.

foreign nations, and would raise concerns with denying the defendant access to certain information as well as subject the United States to the potential for greymail.³²⁵ In the end, the court noted its limited competence in this area, and stated that the appropriate area of competence was in Congress, which had the ability to create a remedy for alleged illegal transfers of individuals such as the plaintiff if it so chose.³²⁶ Since Congress “has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence,” the Second Circuit found that it was not for the judiciary to do so.³²⁷

The same analysis would likely apply to rendition operations, especially foreign-to-foreign renditions where national security and foreign policy matters are at a zenith. This in turn would likely preclude any constitutional claim against a government official involved in such activities.

E. Civil Claims Based on Criminal Acts or Violations of International Law

There is no basis for turning the potential criminal claims described previously in Part IV into civil claims, given that those criminal statutes confer no private right of action on individual plaintiffs.³²⁸ Courts have found that the Federal Kidnapping Act, for example, provides no basis for a civil claim as the Act “was never intended to confer rights on the victim of a kidnapping, and does not do so by its language.”³²⁹ The Anti-Torture Statute explicitly states that it does not “create any substantive or procedural right enforceable by law by any party in any civil proceeding.”³³⁰ As noted above, the McCain Amendment does not provide for any sanction, whether criminal or civil.³³¹ The FARRA and

325. *Id.* at 574–81.

326. *Id.* at 580–81.

327. *Id.* at 565, 580–81.

328. As a general matter, civil claims cannot be brought based on criminal statutes, absent an explicit indication of congressional intent to create a private right of action. *Shaw v. Neece*, 727 F.2d 947, 949 (10th Cir. 1984) (“[A] plaintiff cannot recover civil damages for an alleged violation of a criminal statute.”); *Rzayeva v. United States*, 492 F. Supp. 2d 60, 84 (D. Conn. 2007) (“[P]rivate citizens do not have a private cause of action for criminal violations.”); *Prunte v. Universal Music Grp.*, 484 F. Supp. 2d 32, 42–43 (D.D.C. 2007) (noting that an explicit private right of action is necessary to allow private redress pursuant to a criminal statute, and determining that “[t]his Court therefore will not imply a private right of action into any of the criminal statutes alleged by [plaintiff] that do not provide an express private right of action”).

329. *Giano v. Martino*, 673 F. Supp. 92, 95 (E.D.N.Y. 1987).

330. 18 U.S.C. § 2340B (2006).

331. *See supra* Part IV.C.

its enacting regulations explicitly provide that they do not create a private right of action,³³² as does the War Crimes statute.³³³

Plaintiffs will have similar difficulty seeking damages under international law provisions. International treaties are not, in and of themselves, enforceable in a U.S. court of law unless they are self-executing.³³⁴ As noted above, courts have explicitly determined that the CAT is not self-executing and therefore permits no private right of action.³³⁵ The same is true for the Geneva Conventions,³³⁶ the United Nations Charter,³³⁷ and the ICCPR.³³⁸ The Universal Declaration of Human Rights similarly has no private right of action since, as discussed above, it has no binding impact on the United States.³³⁹ Finally, courts have held that customary international law does not afford a civil claim for rendition operations.³⁴⁰

332. See Federal Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. § 2242(d) (stating regulations promulgated pursuant to the FARRA do not create a private right of action); 8 C.F.R. § 208.18(e) (2008) (same); 8 C.F.R. § 1208.18(e) (2008) (same); 22 C.F.R. § 95.4 (2008) (stating that no court shall have jurisdiction over regulations pursuant to FARRA section 2242).

333. See 18 U.S.C. § 2441 (2008) (discussing the consequences of committing a war crime).

334. *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1367 (S.D. Fla. 1998) (“Individuals may possess standing under an international law treaty if there is a treaty and it is self-executing.”); Aceves, *supra* note 13, at 162–63.

335. See *supra* note 142 (discussing the Senate understandings of the CAT).

336. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808–09 (D.C. Cir. 1984) (Bork, J., concurring) (noting that the Geneva Conventions are not self-executing and do not provide a private right of action); Jinks & Sloss, *supra* note 181, at 126–29 (noting that U.S. courts have uniformly held that the Geneva Conventions do not provide a private right of action).

337. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (noting that there are numerous cases stating that the U.N. Charter is not self-executing, and none to the contrary); *Tel-Oren*, 726 F.2d at 809–10 (Bork, J., concurring) (noting that the U.N. Charter is not self-executing); *United States v. Caro-Quintero*, 745 F. Supp. 599, 614 (C.D. Cal. 1990) (same), *rev'd on other grounds by United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992).

338. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (“[T]he United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”); *United States v. Duarte-Acero*, 296 F.3d 1277, 1282–83 (11th Cir. 2002) (“[T]he ICCPR does not create judicially-enforceable individual rights.”); *United States v. Bridgewater*, 175 F. Supp. 2d 141, 147 (D.P.R. 2001) (“Since the ICCPR is not self-executing, it does not give rise to privately enforceable rights under United States law.”); Aceves, *supra* note 13, at 170–74 (noting that courts have found no private right of action to enforce treaties such as the ICCPR).

339. See *supra* notes 189–90 and accompanying text.

340. *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003) (en banc) (noting that there is no basis for a civil claim based on customary international law as there is no uniform prohibition on the activity), *rev'd on other grounds by Sosa*, 542 U.S. at 728.

F. Reluctance of Courts to Permit Civil Claims to Go Forward

Even if a civil claim based on a rendition operation were to fulfill the legal requirements of one of the causes of action described in the above sections, it would nonetheless stand a good chance of being dismissed by the courts under either the State Secrets Privilege or the Political Question Doctrine.

The State Secrets Privilege permits the United States to preclude the disclosure in a court of law of information which would harm the national security.³⁴¹ Its basis stems from the supremacy of the executive branch in matters concerning military and foreign affairs, and the courts' reluctance to interfere in those areas.³⁴² The privilege is quite absolute, as it concerns areas in which "the courts have traditionally shown the utmost deference to presidential responsibilities."³⁴³ The United States can intervene and assert the privilege even if it is not a party to the litigation.³⁴⁴ Judicial scrutiny of a properly asserted state secrets claim is extremely limited.³⁴⁵ When properly invoked, no party may use the protected information at trial.³⁴⁶ The court must dismiss any claims based upon the protected information and, further, if the protected information goes to the very subject matter of the case, then dismiss the entire lawsuit.³⁴⁷

The Fourth Circuit recently used this privilege to dismiss a lawsuit regarding an alleged foreign-to-foreign rendition operation.³⁴⁸ The court found that public disclosure of the information related to the rendition operation would cause serious damage to U.S. national

341. *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

342. *Reynolds*, 345 U.S. at 7.

343. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

344. *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *see Fitzgerald v. Penthouse*, 776 F.2d 1236, 1241-42 (4th Cir. 1985) (discussing the appropriate intervention of the government when litigation involved classified military secrets).

345. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege.").

346. *Reynolds*, 345 U.S. at 11.

347. *CIA v. Sims*, 471 U.S. 159, 179-81 (1985) (dismissing claim that would have required disclosure of individual names and their institutional affiliations after the Director of Central Intelligence invoked the State Secrets Privilege); *Reynolds*, 345 U.S. at 11 (protecting a military report from disclosure after Secretary of the Air Force invoked State Secrets Privilege); *Zuckerbraun*, 935 F.2d at 548 (dismissing entire case when key purported evidence was impermissible under the State Secrets Privilege).

348. *See El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007) (holding that dismissal of claims against the government are required as the government's defenses could not be properly litigated without disclosure of state secrets).

security and, because such information was central to the plaintiff's claims, the lawsuit could not proceed.³⁴⁹ The same fate recently befell a case before the Ninth Circuit alleging that a U.S. company, Jeppesen Dataplan, Inc., was complicit in helping the CIA with foreign-to-foreign renditions and renditions to CIA secret detention facilities.³⁵⁰ The court, in a closely divided en banc decision, held that Jeppesen's alleged role in providing logistical support to the CIA's rendition program could not be litigated, and therefore had to be dismissed under the State Secrets Privilege, "because there is no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets.*"³⁵¹ The same result could well occur with regard to other claims based on rendition operations, as virtually all such operations likely involve information which could harm national security.

Courts may also decide to dismiss rendition lawsuits under the Political Question Doctrine. The doctrine finds its roots in the landmark decision of *Marbury v. Madison*, wherein Chief Justice Marshall stated: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."³⁵² A century-and-a-half later, the Supreme Court sought to clarify this doctrine by outlining a series of factors that would constitute political questions and thus require dismissal of a case, including that the matter is constitutionally committed to another political branch of government; that the court would need to make a policy determination not meant for judicial consideration; or that the court's opinion would show a lack of respect for another branch of government.³⁵³

Whether a court would apply the Political Question Doctrine to a rendition operation is unclear. The contours of the doctrine itself are notoriously "murky and unsettled,"³⁵⁴ and no published opinion has directly considered the issue in a rendition context. Two cases that have addressed the doctrine in matters analogous to rendition operations have come out on both sides of the equation. A district court in Pennsylvania held that, at least at the preliminary stages of litigation, the doctrine did

349. *Id.* at 312–13.

350. *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

351. *Id.* at 1087.

352. *Marbury v. Madison*, 5 U.S. 137, 170 (1803); *see also* *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005) (recognizing *Marbury v. Madison* as the launching point of the Political Question Doctrine).

353. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

354. *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring)).

not bar an alien's claim to defer his removal from the United States under the CAT, where the alien sought to challenge the reliability of assurances the U.S. government received from the Egyptian government that the alien would not be tortured if sent to that country to face murder charges.³⁵⁵ On the flip side, the D.C. Circuit found the doctrine required dismissal of a claim that the United States and the former National Security Advisor were involved in the failed kidnapping attempt of Chile's President, as such a claim implicated matters best left to the political branches of government.³⁵⁶ How a court would decide the issue in a renditions case likely will be highly fact-specific, dependent on the foreign policy implications of the particular rendition. Nonetheless, it could be expected that a court would give serious consideration to dismissing a rendition case pursuant to the Political Question Doctrine, especially where the United States government allegedly engaged in the rendition for sensitive policy reasons.

VI. CONCLUSION

The foregoing analysis reveals that the U.S. government and its officials face few legal restrictions on rendition operations. Whether that is a cause for rejoicing or condemnation is a matter for the reader to determine. It does, however, undermine assertions by critics that current U.S. policy relating to rendition operations violates U.S. law. It also brings into question the legal basis for current calls to prosecute government officials allegedly involved in such operations.

What should not be overlooked, however, is that stated U.S. policy has sought to fill the void created by gaps in the law. Thus, while U.S. law would not appear to consider the Geneva Conventions to apply to members of the Taliban, the United States nonetheless has asserted that it will extend these protections to such individuals as a matter of course.³⁵⁷ Similarly, though U.S. law does not prohibit the foreign-to-foreign rendition of individuals to a country where they may be tortured, U.S. officials have continuously stressed that the United States has not and will not transfer anyone to any country where it is more likely than not that he or she will be tortured.³⁵⁸

Whether to turn such policies into law is a matter for the Obama Administration and Congress to decide.³⁵⁹ The legislative branch, with

355. *Khouzam v. Hogan*, 497 F. Supp. 2d 615, 624–26 (M.D. Pa. 2007).

356. *Schneider v. Kissinger*, 412 F.3d 190, 198 (D.C. Cir. 2005).

357. Chesney, *supra* note 5, at 708–10.

358. *See supra* note 159.

359. *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998) (“Congress has

or without executive branch prompting, has the means to either change or solidify the status quo, to make law match stated policy, or to veer off in a different direction. Congress can take small actions, such as amending the FARRA to apply to rendition operations. Or it can undertake sweeping change, to include enacting new legislation banning some or all rendition operations, or placing significant restrictions on such activities. Alternatively, Congress can pass laws explicitly condoning unfettered rendition operations, and providing immunity for individuals who engage in such operations.

Any congressional action, or none at all, will presumably be based on that body's assessment of the need for rendition operations, countered by the implications of the current, virtually limitless legal authority for such activities. On the one hand, rendition operations provide an efficient mechanism for bringing perceived criminals to justice, especially in places where politics effectively preclude extradition as an option. Countering this, of course, are the potential abuses that can occur, as well as the geopolitical implications of plucking individuals from foreign nations, especially in instances where the foreign nation feels its territorial sovereignty has been violated.

Perhaps of greater concern, though rarely considered, is the implication these operations have on American citizens. Given the flexibility provided to the U.S. government to conduct renditions under U.S. law, it is difficult to envision a valid basis to object if, for example, Iran were to abduct a U.S. citizen residing in the Middle East (or even in the United States), and bring him or her to Iran for interrogation, prosecution, or even execution. As the United States countenances such practices when placed before both our and other judicial systems, the question arises as to what possible argument could our nation raise if you or I were similarly abducted from our homes and tried overseas?

the power to create statutory exceptions to the *Ker-Frisbee* doctrine . . ."). Admittedly, the President could issue an Executive Order banning or limiting rendition operations. However, as I have discussed in detail elsewhere, a presidential directive, such as an Executive Order, is not law, and may be unilaterally rescinded in whole, or exceptions granted to it in part, by a President at any time and without public notice. Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?*, 84 IND. L.J. 637, 653-56 (2009).