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

Daniel L Pines
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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, a Special Task Force established by President Obama recently advocated the continued use of rendition operations, though with 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 individuals during rendition operations, or rendering individuals from a place of actual armed conflict or occupation – all of which prove to be narrow 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.

Introduction

On January 25, 1993, Pakistani national Mir Aimal Kasi parked his car outside the headquarters of the Central Intelligence Agency (CIA or the Agency) in Langley, Virginia. Brandishing an AK-47 assault rifle, Kasi proceeded to open fire on the

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automobiles waiting to turn into the intelligence agency’s entrance. Two Agency employees were killed, three others 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. For political reasons, 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 U.S., and delivered him to the Commonwealth of Virginia, which had an outstanding warrant for his arrest.1

The abduction and transfer of Kasi to the United States represents an example of what is known as a “rendition” operation. At its base, a “rendition” is the forcible movement of an individual from one country to another, without use of a formal extradition mechanism.2 Such operations are alternatively described as “abductions,” “kidnappings,” “seizures,” or “transfers,” depending to some degree on the sentiment of the commentator describing such activities.3

The United States has engaged in rendition operations since the late 1800s.4 Indeed, the United States has been conducting rendition operations longer than it has engaged in formal extraditions.5 Such operations can take a variety of 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.6 They are conducted by a slew of different U.S. government organizations – the FBI, CIA, Department of Defense (DoD), and Drug

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2 See John T. Parry, The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees, 6 MELB. INT’L L.J. 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.”); Ashley S. Deeks, COUNCIL ON FOREIGN RELATIONS, AVOIDING TRANSFERS TO TORTURE 16 (2008) (“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.”). 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 Id.
6 Examples of these various types of rendition operations are discussed infra section I.
7 Directors of the Central Intelligence Agency have publicly acknowledged for years that the CIA engages in rendition operations. See Director of the Central Intelligence Agency Michael Hayden, Remarks at the
Enforcement Administration (DEA) – and are utilized by both Democrat and Republican administrations. Regardless of when conducted, and by whom, American Administrations have constantly considered rendition operations to be a “vital tool” of U.S. foreign policy.

Questions arise as to the legality of such operations, however. Some commentators assert that the United States is restricted or prohibited from rendering individuals to the United States for trial. Others argue that the U.S. is currently precluded from rendering individuals from Iraq or Afghanistan, due to the U.S. invasion of, and continuing involvement in, those countries. 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. The most vehement criticism, however, focuses on so-called “extraordinary renditions,” in which commentators assert the United States purposefully renders individuals to third countries that will torture them. Many critics have called for the termination of all or some types of rendition operations, as well as the criminal investigation and prosecution

Council on Foreign Relations (Sept. 7, 2007), 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.”); Tracy Wilkinson & Bob Drogin, Missing Imam’s Trail Said to Lead from Italy to CIA, L.A. TIMES, Mar. 3, 2005, at A-1 (noting that “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]”; ‘We Don’t Do Torture,’ CIA Director Testifies, ASSOC. PRESS, Mar. 17, 2005 (noting how Director Goss defended rendition operations in his testimony).

8 See rendition cases cited infra section I.

9 See, e.g., Secretary of State Condoleezza Rice, Remarks Upon Her Departure for Europe (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57602.htm. (“Rendition is a vital tool in combating transnational terrorism. Its use is not unique to the United States, or to the current administration.”).

10 Yoo, supra note 3, at 1183-84 (citing numerous commentators who have argued that various rendition operations are illegal).


14 See, e.g., Satterthwaite, supra note 12, at 1333 (arguing that extraordinary rendition “perverts the rule of law”); Leila Nadya Sadat, Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror, 75 GEO. WASH. L. REV. 1200, 1204-05 (2007) (describing extraordinary renditions as reminiscent of “the Nazi practices of Nacht und Nebel”); Jules Lobel, The Preventative Paradigm and the Perils of Ad Hoc Balancing, 91 MINTN. 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 prevenetatively detain them without charge in order to obtain information to prevent future crimes”).

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of U.S. government officials who engaged in such operations, especially “extraordinary renditions.”

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 (the “Task Force”). 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.

Though the final report issued by the Task Force in August 2009 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. These policy recommendations focused on ensuring such individuals receive proper treatment, and suggest the creation of a monitoring mechanism to verify such treatment. The Task Force made no suggestions for legislative changes.

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 to decide what, if any, policy changes to make with regard to rendition operations, and to comprehend the impact such changes will have. Any proposed policy change that does not consider the underlying law

15 See, e.g., Human Rights Watch, US/Italy: Italian Court Challenges CIA Rendition Program (Apr. 15, 2008), http://www.hrw.org/en/news/2008/04/15/usitaly-italian-court-challenges-cia-rendition-program (noting that the terrorism and counterterrorism director at Human Rights Watch has stated that “[t]he CIA’s rendition program should be on trial in the United States” and that the “US Department of Justice has utterly failed in its responsibility to investigate and prosecute these serious crimes”); MAJORITY STAFF REPORT OF HOUSE 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), 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”); Eli Lake, Panetta Faces Rendition Queries, WASH.TIMES.COM (Jan. 15, 2009) (noting that President 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, at A18 (calling on then President-elect Obama to follow through on his intent to end “extraordinary rendition”); Mark Kukis, Closing Down the Dark Side, TIME, Dec. 8, 2009, at 34-35 (discussing the pressure on President Obama to halt rendition operations); Morton Kondracke, Say No to “War Crimes” Probe, WASH. TIMES, Dec. 26, 2008, at A-18 (urging then President-elect Obama to “put a stop” to calls to investigate or prosecute various anti-terrorist activities such as rendition operations).


17 Id.


19 Id.

20 Id.
regarding this critical national security issue risks being 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, analyzing the U.S. law governing both renditions to the United States as well as renditions of individuals from one foreign country to another (what I shall refer to as “foreign-to-foreign renditions”).21 Through this analysis, an interesting pattern emerges. Despite the numerous complaints and criticisms of rendition operations, U.S. law provides surprisingly few legal restrictions, and in the vast majority of situations no practical limitations, on the ability of the United States government to engage in rendition operations, whether to the U.S. or elsewhere. Further, only modest means exist to prosecute or sue U.S. officials involved in such operations.

Part I of this article provides a background on rendition operations, to include a summary of Supreme Court cases stretching back to the 1880s that have upheld such operations.

Part II 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, bi-lateral 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,22 this Part concludes that virtually all U.S. rendition operations are in fact 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, 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. In reality, however, even these restrictions impose few actual limitations on rendition operations.

Parts III and IV then turn to legal limitations on individual U.S. government officials, evaluating the possible criminal and civil repercussions respectively for U.S.

21 This article will not consider renditions *from* the United States, as there is no indication that such activities take place. See Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture*, CRS Report For Congress, RL32890, at 4 (Oct. 12, 2007). 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, Ensuring Lawful Interrogations § 4(a) (Jan. 22, 2009). For a general analysis of the legality of activities conducted by the CIA towards detainees, to include within the CIA’s detention program, see Kenneth J. Levitt, *The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror*, 1 J. NATL SEC. L. 341 (2005).

22 See supra notes 10-15.
government officials involved in renditions. 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 any farther, 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.

I. Background

There are numerous reasons why the U.S. government may feel compelled to forgo formal extradition proceedings and instead resort to rendition operations. In some cases, there may not be an extradition treaty in place. 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 Am flight 103. North Korea and Syria, countries antagonistic towards the United States, similarly lack extradition treaties with the U.S. In other cases, an extradition treaty may contain significant restrictions. For example, several extradition treaties explicitly preclude extraditing citizens of that foreign country, while other treaties permit extradition only for certain crimes.

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23 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.
24 Nadelmann, supra note 4, at 814; United States v. Cotten, 471 F.2d 744 (9th Cir. 1973) (noting that the U.S. rendered defendants to the United States from Vietnam since there was no extradition treaty between the two countries).
25 S. Res. 731, 102nd Cong. (1992) (requesting Libya turn suspects implicated in the Pan Am 103 bombing over to other countries for prosecution); Trevor Rowe, U.N. Presses Libya on Bombing, WASH. POST, Jan. 22, 1992, at A01 (describing the U.N. Security Council Resolution as necessary given Libya’s failure to turn the suspects over to the United States or the United Kingdom).
Even extradition treaties that appear strong on their face may prove useless if the foreign country’s current regime is antagonistic towards the United States. The U.S. has recently encountered difficulty extraditing Iranians from various countries which seem more sympathetic to the plight of Iran than that of the U.S. The foreign nation may also lack an adequate law enforcement capability to implement a formal transfer. 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. In other countries, bribes or threats by fugitives to local law enforcement or judicial officers have made formal extradition a non-viable option. Extradition has similarly proved 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 place, but allow the foreign country or leader to maintain plausible deniability.

The wars against narcotics and terrorism over the past few decades have only served to exacerbate the problems of formal extradition to the U.S. 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. Rendition proves an attractive alternative to allowing such actors to remain free overseas. 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.”

With regard to foreign-to-foreign renditions, numerous reasons may propel the United States to assist in having an individual rendered to a country other than the U.S. 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

29 Downing, supra note 28, at 576.
31 Secretary of State Condoleezza Rice, Remarks Upon Her Departure for Europe (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57602.htm. (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”); Downing, supra note 28, at 576.
32 Oberdorfer & Ottaway, Administration Alters Assassination Ban; In Interview, Webster Reveals Interpretation, WASH. POST, Nov. 4, 1989, at A1.
34 Nadelmann, supra note 4, 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); 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).
35 Nadelmann, supra note 4, at 820; Yoo, supra note 3, at 1185-88.
36 Greg Miller, Obama Lets CIA Keep Controversial Renditions Tool, CHI. TRIB., Jan. 31, 2009, at 10 (noting that even human rights groups recognize that there is a legitimate place and need for rendition operations in order to combat terrorism); Nadelmann, supra note 4, at 820; Yoo, supra note 3, at 1185-88.
37 Miller, supra note 36, at 10.
better debriefed in his/her home country than by U.S. officials. The theory there 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 to the divulgence of more efficient and useful information.\textsuperscript{38} 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.\textsuperscript{39}

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. Further, these countries may not want their cooperation with the other nation (or their involvement in the transfer) to be public knowledge. 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 in order to outsource torture to countries that will use techniques prohibited to U.S. officials.\textsuperscript{40}

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 and/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. Worse 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.\textsuperscript{41}

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 with regard to the rendition of individuals to the United States to stand trial.

The Supreme Court first considered rendition operations more than 120 years ago in the 1886 case of \textit{Ker v. Illinois}.\textsuperscript{42} 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 Peru to seek to extradite 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.\textsuperscript{43}

The Supreme Court found that prosecuting Ker under such circumstances violated neither the U.S. Constitution nor any U.S. statute. As the Court stated: “[F]or mere

\begin{itemize}
  \item \textsuperscript{38} Yoo, \textit{supra} note 3, at 1187.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} See, e.g., Lobel, \textit{supra} note 14, at 1408; Massimino, \textit{supra} note 13, at 75; Lavers, \textit{supra} note 13; Beth Henderson, \textit{From Justice to Torture: The Dramatic Evolution of U.S.-Sponsored Renditions}, 20 TEMP. INT’L & COMP. L.J. 189, 190-91 (2006).
  \item \textsuperscript{41} See, e.g., Massimino, \textit{supra} note 13, at 75; Garcia, \textit{supra} note 21, at 1-5.
  \item \textsuperscript{42} 119 U.S. 436 (1886).
  \item \textsuperscript{43} Id. at 437-38. One commentator theorizes that the representative did not seek extradition because, at the time, Chilean forces occupied Peru and there was no actual Peruvian government to approach regarding the possibility of extradition. \textit{See} Abramovsky, \textit{supra} note 3, at 157.
\end{itemize}
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.”

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 Peru at any time, or could have surrendered him to U.S. officials outside the treaty’s confines. Further, since Ker was not brought to the U.S. pursuant to the treaty, its terms did not provide him any defense.

The Supreme Court upheld this concept years later in the 1952 case of *Frisbie v. Collins*. Though not a true renditions case – in that the transfer occurred entirely within the United States – the opinion’s take on *Ker* is highly instructive. The defendant (Collins) claimed that, while he was living in Chicago, police officers from Michigan seized him and brought him to Michigan for trial. Collins claimed that this amounted to a forced kidnapping in violation of the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act, and that therefore his conviction should be overturned. The Supreme Court disagreed. With regard to the violation of the Federal Kidnapping Act, the Court found that sanctions for violating that law did not include setting a convicted felon free. 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.”

For decades afterwards, 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. 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*. Alvarez-Machain, a Mexican doctor, stood accused of assisting in the torture and killing of a DEA agent in Mexico. 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

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44 *Ker*, 119 U.S. at 438. This principle is sometimes referred to as “male captus, bene detentus” – i.e. bad capture, good detention. Henkin, *A Decent Respect, supra* note 3, at 231.

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

46 *Id.* at 443.

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

48 *Id.* at 443.

49 *Id.* at 443.

50 *Id.* at 519 (1952).

51 *Id.* at 520.

52 *Id.* at 523. Sanctions for violating the Kidnapping Act are discussed in more detail in section III.A infra.

53 *Frisbie*, 342 U.S. at 522.

54 *Id.* at 522.

55 *See, e.g.*, Abramovskv, *supra* note 3, at 156 (stating that “*Ker* was a judicial fluke and continued reliance upon it for our national policy is sheer folly”); *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”).


57 *Id.* at 657.
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. Alvarez-Machain alleged that he could not be tried in a United States court since the abduction violated the extradition treaty between the United States and Mexico, as well as customary international law. The Mexican government strenuously agreed.

The Supreme Court, however, held otherwise. 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. Then, turning to the extradition treaty argument, the Court concluded that the United States had not violated the terms of its treaty with Mexico since no express or implied provision of that extradition 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. 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.”

Turning then to Alvarez-Machain’s customary international law argument, the Court noted that Alvarez-Machain did not assert that customary international law “should inform the interpretation of the [extradition treaty] terms.” Though noting that the defendant may be correct that an 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 U.S. and Mexico should be read to preclude other mechanisms of bringing a defendant to trial, such as rendition operations. 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.”

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

55 Id.
56 Id. at 657-58.
57 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).
58 Id. at 660-62.
59 Id. at 663.
60 Id. at 668-69.
61 Id. at 666.
62 Id. at 667-69.
63 Id. at 670. Interestingly, upon remand, the District Court dismissed the criminal case against Alvarez-Machain before it went to the jury, which dismissal was upheld on appeal. Alvarez-Machain v. United States, 107 F.3d 696 (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).
64 Aceves, supra note 11, at 117-26 (discussing in detail the vocal international outcry to the decision).
65 See supra note 57 and accompanying text; see also BARRY E. CARTER ET AL., INTERNATIONAL LAW 723 (4th ed. 2003) (describing the various angry reactions of the Mexican government to the opinion).
Colombia and Canada, to name just a few. 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. 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 it. U.S. Journalists and academics denounced the opinion vociferously. Members of the U.S. Congress similarly expressed displeasure with the decision, introducing two eventually unsuccessful legislative proposals to limit or prohibit rendition operations.

These critics asserted that the Court’s decision to permit abductions renders extradition treaties meaningless, undercuts U.S. relationships with other countries, puts U.S. citizens at risk of being rendered to other countries, encourages federal agents to make ad hoc decisions that could alter or undermine larger U.S. policy interests, and generally undermines basic American values of due process. Supporters counter that, even if such criticism is accurate, the solution is not to return the rendered individual to the foreign country or set him free, but rather for the Executive Branch to work out a political solution and/or to punish the individuals involved in the rendition. Further, these commentators assert that an outright ban on renditions could potentially lead the United States government to take more drastic measures, such as an attempted targeted killing or even an invasion.

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66 Gurule, supra note 33, at 458 n.6; Carter, supra note 65, at 721-22 (describing the outrage by numerous countries to the Alvarez-Machain decision).
67 Carter, supra note 65, at 724; Downing, supra note 28, at 594.
68 Hoffman, supra note 63, at 421; Carter, supra note 65, at 722-23.
69 Gurule, supra note 33, at 458.
70 Id.; Hoffman, supra note 63, at 422.
71 Hoffman, supra note 63, at 423. But see Nadelmann, supra note 4, 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”).
72 Nadelmann, supra note 4, at 871-72 (after news of the rendition of a narco-trafficker from Honduras was released, Honduran nationals marched on the U.S. embassy in Tegucigalpa and set fire to part of it); Abramovsky, supra note 3, at 206 (noting the harm to U.S. relations with Mexico due to rendition operations there); Downing, supra note 28, at 592; Gurule, supra note 33, at 490.
73 Abramovsky, supra note 3, at 201; Downing, supra note 28, 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); United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (concurring opinion) (“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.”).
74 Abramovsky, supra note 3, at 203.
75 Henkin, A Decent Respect, supra note 3, at 231 (“When United States officials bring the abducted person to the United States for trial, the due process of law is contaminated.”); Glennon, supra note 73, 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.”).
76 Hoffman, supra note 63, at 437 (querying, in discussing the Alvarez-Machain case, “if 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?”); 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).
77 Glennon, supra note 73, at 755.
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 has ever been passed that precludes or limits prosecution of an individual who has been rendered to the U.S. to stand trial. Unfettered, federal courts have upheld such rendition operations in virtually every factual scenario conceivable.

Thus, the nationality of the rendered individual is irrelevant. Courts have permitted the prosecution of U.S. citizens rendered to the United States, as well as citizens of close U.S. allies. The method of the rendition also does not matter. Courts have upheld the Doctrine where the individual was prosecuted in the United States after being forcibly abducted overseas, tricked by U.S. agents into coming into the United States, or lured into international waters.

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, where the foreign country was paid by U.S. officials to conduct the rendition, where the foreign country failed to object after the rendition occurred, or, as in Alvarez-Machain, where the foreign nation emphatically objects.

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. At the time, Noriega served as commander of the Defense Forces of the Republic of Panama. He also served as one of the premier generals in the Latin American region. In 1990, Noriega was arrested by U.S. forces for alleged drug trafficking and terrorism. The U.S. government claimed that Noriega was a key figure in the drug trade and a threat to the stability of the region.

Regardless of the legal questions surrounding Noriega’s arrest, the case demonstrated the power of the Ker-Frisbie Doctrine in practice. The U.S. government had initially planned to try Noriega in Panama, but the Panamanian government refused to cooperate. The U.S. government then sought to try Noriega in the U.S. federal courts. The case was complex, with legal arguments on both sides. The U.S. government argued that Noriega was properly tried in the U.S., while Noriega’s attorneys argued that he should be tried in Panama.

After a series of legal challenges, the U.S. Supreme Court upheld the government’s position. The Court ruled that Noriega was properly tried in the U.S., and that the Ker-Frisbie Doctrine was not violated. The case was significant because it demonstrated the power of the Ker-Frisbie Doctrine in practice. It also underscored the importance of international cooperation in the prosecution of war criminals.

In conclusion, the Ker-Frisbie Doctrine is a powerful tool in the U.S. government’s efforts to bring to justice individuals who have committed serious crimes. The doctrine has been upheld in numerous cases, and has been used to try individuals from a variety of countries. The doctrine has also been challenged, but it has generally been upheld. Regardless of one’s opinion as to the moral or geopolitical propriety of the doctrine, the law of the land is clear. The doctrine has been upheld by the U.S. courts, and it is unlikely to be overturned in the near future.

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78 See, e.g., United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (upholding court’s jurisdiction over U.S. citizen rendered to the United State from the Bahamas); United States v. Cotten, 471 F.2d 744 (9th Cir. 1973) (same for two U.S. citizens rendered from Vietnam to the U.S.).


81 United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (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. Bridgewater, 175 F.Supp.2d 141, 144, 146 (D.P.R. 2001) (retaining jurisdiction over defendant 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); United States v. Wilson, 565 F.Supp. 1416, 1421-23 (S.D.N.Y. 1983) (holding that court retains jurisdiction over defendant who alleges the United States government fraudulently induced him to fly from Libya to the Dominican Republic, where he was arrested by United States marshals and flown to New York).

82 United States v. Yuris, 924 F.2d 1086 (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).

83 See 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 the defendant’s rendition from Thailand to the United States to face trial for violating parole); United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979) (permitting prosecution in the U.S. where Panamanian officials arrested defendant and turned him over to U.S. authorities outside extradition proceedings).

84 See United States v. Orsini, 424 F.Supp. 229, 231 (E.D.N.Y. 1976) aff’d without opinion, 559 F.2d 1206 (2d Cir. 1977) (noting that payments 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”).


cocaine traffickers in Latin America. 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. Within days of the announcement, President George H.W. Bush ordered U.S. troops to invade Panama in order to \textit{inter alia} “seize Noriega to face federal drug charges in the United States.” In the ensuing invasion, U.S. military troops took Noriega into custody and rendered him to Miami to face his pending federal charges. 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.\footnote{See United States v. Noriega, 117 F.3d 1206, 1209-1210 (11th Cir. 1997). See also Nadelmann, \textit{supra} note 4, at 879-80 (describing the invasion of Panama, the “primary objective” of which was to remove Noriega from power and bring him to the U.S. for trial).}

That a rendition, and foreign officials’ assistance with it, violates a foreign nation’s laws also has no impact on whether the rendered individual may be prosecuted in the U.S.\footnote{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 the defendant would not be subject to the death penalty).} 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 U.S.\footnote{See United States v. Pelaez, 930 F.2d 520 (6th Cir. 1991) (upholding jurisdiction where Colombian authorities re-arrested the defendant and rendered him to the United States after a Colombian court 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).}

Clearly, throughout history, U.S. courts have been highly supportive, and upheld the legality, of renditions to the United States for the purposes of prosecution. The next section will consider what limitations, if any, exist to 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 the purpose of interrogation as opposed to prosecution.

\section*{II. Potential Legal Restrictions on Rendition Operations}

As noted previously, various commentators have asserted that there are numerous legal restrictions to, if not outright prohibitions on, U.S. government involvement in rendition operations.\footnote{See \textit{supra} notes 10-15.} Specifically, questions have been raised as to whether rendition operations violate the U.S. Constitution, U.S. law and international treaties governing torture and other abuses, bi-lateral treaty law, international law, the 1949 Geneva conventions, and the Mansfield Amendment. As explored below, close examination of these areas of U.S. law reveal that few legal restrictions to rendition operations do in fact exist, and even those limitations are very narrowly tailored.

\subsection*{A. The U.S. Constitution}

The Supreme Court in both \textit{Ker} and \textit{Frisbie} made it clear that renditions to the United States for the purpose of prosecution do not violate the United States Constitution,
as the person is accorded due process through the trial proceedings themselves. As the Supreme Court in *Ker* framed it, “[t]he ‘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.” Ker acknowledged the possibility that there could theoretically be circumstances under which a rendition operation could trigger a Constitutional claim. 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. 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 Amendment or Fourteenth Amendments, as was the case in both *Ker* and *Frisbie*. In those cases, the Court found the rendition constitutional because the defendant was afforded due process through trial. Assuming the U.S. government had a lawful basis for holding and 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 U.S. (e.g. via a rendition operation). Rather, it is based solely on whether the individual receives adequate due process when on American soil. If the ability to hold and interrogate that individual passes constitutional muster, then so too would the rendition.

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. For the U.S. Constitution to prohibit or limit foreign-to-foreign

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91 *See supra* notes 42-51 and accompanying text.
92 *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”).
93 *Ker*, 119 U.S. at 440.
94 *See supra* text accompanying notes 78-89.
96 *See supra* notes 42-51 and accompanying text.
97 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. 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. The Court did not, however, evaluate nor question the method by which Hamdi arrived in the U.S., suggesting that, if the individual received adequate due process once in the United States, the manner in which he or she arrived would be irrelevant.
98 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 (4th Cir. 2007). However,
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. This would therefore apply to foreign-to-foreign rendition operations, which involve the external transfer of non-resident aliens from one foreign country to another outside the sovereign territory of the United States, and therefore preclude applicability of the Constitution to such activities.

Admittedly, the Supreme Court has recently expanded the reach of the Constitution beyond its traditional confines. Specifically, in the recent 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. However, in so doing, the Court expressly noted that, prior to its decision in *Boumediene*, it “has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution.” 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.” This, however, is a far cry from typical foreign-to-foreign rendition operations. Such activities, taking place on foreign nations’ sovereign territory, 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 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.

the court never evaluated this constitutional claim, as it dismissed the entire case under the State Secrets Privilege. *Id.* That privilege is discussed *infra* section IV.F.

99 United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) to uphold the proposition that the Court “reject[s] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).

100 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 located. United States v. Verdugo-Urquidez, 494 U.S. 259, 283 n.7 (1989) (Brennan, J., dissenting) (noting that “every Court of Appeals to have considered the question” has held 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 persons (alien and citizen alike) within the United States are entitled to due process and that citizens within or outside the United States are entitled to due process.”).


102 *Id.* at 2262 (emphasis added).

103 *Id.*

104 As noted previously, the United States has never rendered an individual from American soil. See *supra* note 21.

105 But see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION* 294 (Fifth Ed., 2007) (arguing that Constitutional limitations should be extended to apply to non-citizens since 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
A shocking decision by the Court to do so, however, would not portend a prohibition to such activities, since the mere applicability of 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, “[t]here 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.” 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 country to which the 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

There is no explicit statutory prohibition on rendition operations. However, there are legal restrictions on torture and abuse that can pose limitations on such activities. 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), which President Reagan signed in 1988, and the Senate consented to in 1990. Pursuant to this international treaty, the United States enacted legislation prohibiting its officials from engaging in torture. That legislation clearly precludes U.S. officials from torturing an individual during an actual rendition operation. Therefore, such activity is absolutely prohibited under U.S. law.

they may be.”); Yin, supra note 100, at 414 (arguing that nonresident aliens “have a cognizable liberty interest in being free from confinement”).

107 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 Yoo, supra note 3, at 1223-24 (noting that U.S. restrictions on torture stem from the CAT); Chesney, supra note 3, at 670 (same); Garcia, supra note 21, at 7 (same).
108 Yoo, supra note 3, at 1228.
110 It is worth noting that, prior to the enactment of the anti-torture statute, the Second 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 (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 105, at 294 (“Toscanino was distinguished by the District of Columbia and the First, Second, Fourth, Sixth Eighth, and Ninth Circuits,
Critics allege that the provisions of the CAT go beyond merely prohibiting torture during a rendition operation, and actually forbid the United States from rendering an individual to a nation where the individual may be tortured. Such an assertion, however, is erroneous.

Article 3 of the CAT, which is the key provision in this area, provides that “[n]o 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.” However, the Supreme Court has held that acts of Congress, to include consent to international treaties, “do not have extraterritorial application unless such an intent is clearly manifested.” In this case, the Senate’s consent to the CAT did not “clearly manifest” an intention that the CAT have extraterritorial application. Thus, the United States interprets the CAT, including Article 3, as being non-extraterritorial. As several commentators have noted, this means that, under U.S. law, Article 3 does not apply to foreign-to-foreign rendition operations, as such activities naturally take place outside U.S. territory.
Furthermore, the express language of Article 3 precludes that provision’s applicability 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.\footnote{See supra note 112.} 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.”\footnote{Sale, 509 U.S. at 180 (internal quotation marks omitted).} 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.\footnote{Id. at 183 and n.40 (noting that even the United Nations High Commissioner for Refugees had implicitly acknowledged this fact). See also Yoo, supra note 3, at 1229 (noting that the Sale Court found the terms “expel” and “return (‘refouler’)” to not impact movement of individuals from one foreign country to another).} 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 individual from the United States to another country through the formal process of an extradition treaty.\footnote{BLACK’S LAW DICTIONARY (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”).}

Thus, by using the terms expel, return and extradite, Article 3 applies only to transfers the United States makes from its 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.\footnote{See, e.g., Satterthwaite, supra note 21, at 17-18 (noting that critics could object to this narrow interpretation).} However, this narrow interpretation is nonetheless the interpretation accepted by the United States and its courts,\footnote{Parry, supra note 2, at 530; Yoo, supra note 3, at 1229; Satterthwaite, supra note 12, 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”); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 180-83 (1993) (noting that the Refugee Convention, by using the terms “expel” and “return (refouler),” bears no applicability on activities taking place outside the United States).} 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. The most critical limitation for our purposes here was the Senate’s declaration that the CAT would not be “self-executing.”\footnote{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) (discussing the Senate “understandings” of the CAT, the court provided: “We think it so plain a proposition that the United States may attach an understanding interpreting the meaning of a treaty 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
of action, i.e. an ability to sue, to enforce the CAT’s provisions absent passage of specific legislation by Congress.\textsuperscript{123}

To implement the provisions of Article 3, Congress did pass legislation, i.e. the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA or FARR Act).\textsuperscript{124} Subsection (a) of the FARRA expressly provides that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the voluntary 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.”\textsuperscript{125} On its face, the last part of this provision would appear to indicate that the FARRA applies to overseas rendition operations.

However, a closer analysis of the phrasing of this odd sentence suggests otherwise. Specifically, the sentence provides that the phrase “regardless of whether the person is physically present in the United States” applies only to situations in which the United States seeks to “expel, extradite, or otherwise effect the \textit{voluntary} return” of individuals.\textsuperscript{126} Therefore, this provision would not apply to the \textit{involuntary} return of an individual to a foreign country, as would occur with a rendition.\textsuperscript{127}

Further, as subsection (a) of the FARRA itself states, it is merely a policy statement, and has no legal effect.\textsuperscript{128} Indeed, its apparent wide sweep is completely contradicted by the substantive provisions of the FARRA. 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].”\textsuperscript{129} Subsection (d) of the FARRA then further provides:

\begin{quote}
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), \textit{except as part of the 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”}; \textsc{Restatement (Third) of Foreign Relations Law} § 314 cmt. (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”).
\end{quote}

\textsuperscript{123} Pierre v. Attorney General 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 3, at 1228.

\textsuperscript{124} Pierre v. Attorney General of U.S., 528 F.3d 180, 185-86 (3d Cir. 2008); Pierre v. Gonzales, 502 F.3d 109, 114 (2d Cir. 2007); Mironescu v. Costner, 480 F.3d 664, 666 (4th Cir. 2007).


\textsuperscript{126} \textsc{Id.} (emphasis added).

\textsuperscript{127} See Garcia, supra note 21, at 19 (suggesting the phrasing of subsection (a) of the FARRA indicates an intention for the language to apply only to voluntary transfers).

\textsuperscript{128} See Yoo, supra note 3, 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”).

\textsuperscript{129} 8 U.S.C. § 1231 note § b.
review of a final order of removal pursuant to section 242 of the Immigration and National Act (8 U.S.C. 1252).\textsuperscript{130}

Per its terms then, the FARRA applies solely to, and creates restrictions only for, removal proceedings. As the Supreme Court recently stated in \textit{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.”\textsuperscript{131} 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.”\textsuperscript{132} 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.”\textsuperscript{133} In both cases, the courts determined that, under the terms of the FARRA, the courts had no jurisdiction to review extradition claims to determine if the individual might be tortured.\textsuperscript{134} 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.\textsuperscript{135} The Department of Homeland Security (DHS), the Department of Justice (DoJ), and the State Department have all issued regulations pursuant to the FARRA.\textsuperscript{136} There is no indication that any other agency, including the CIA or DoD, has issued such regulations.\textsuperscript{137} DHS’ regulations expressly apply only to

\textsuperscript{130} Id. § d (emphasis added).
\textsuperscript{131} 128 S.Ct. 2207, 2226 n.6 (2008)
\textsuperscript{132} Mironescu v. Costner, 480 F.3d 664, 674 (4th Cir. 2007).
\textsuperscript{133} Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1086 (9th Cir.), 
\textit{vacated as moot}, 389 F.3d 1307 (9th Cir. 2004) (en banc). It is worth noting that a prior divided Ninth Circuit panel in \textit{Cornejo-Barreto} came to the opposite conclusion, Cornejo-Barreto v. Siefert, 218 F.3d 1004, 1015-16 (9th Cir. 2000), and Professor Chesney believes this earlier divided panel has the better argument. Chesney, \textit{supra} note 3, at 689-90. In view of the Fourth Circuit and Supreme Court decisions in this area, both of which were issued subsequent to both \textit{Cornejo-Barreto} and the publication of Professor Chesney’s article, the tide clearly seems in favor of the conclusion reached by the later \textit{Cornejo-Barreto} panel, quoted in the text.
\textsuperscript{134} \textit{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.”); \textit{Cornejo-Barreto}, 379 F.3d at 1086. \textit{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.
\textsuperscript{135} See Henderson, \textit{supra} note 40, 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).
\textsuperscript{136} 8 C.F.R. §208.16-.18 (2008) (DHS); 8 C.F.R. § 1208.16-.18 (2008) (DoJ); 22 C.F.R. § 95.2 (2008) (State Dept.).
\textsuperscript{137} Massimino, \textit{supra} note 13, at 75 (noting that CIA has not issued regulations pursuant to FARRA); Chesney, \textit{supra} note 3, at 682-83 (noting that DoD has not issued such regulations). Professor Chesney suggests that transferred individuals may be able to force DoD, and presumably other government agencies such as the CIA, to enact such regulations under the Administrative Procedures Act. Chesney, \textit{supra} note 3, at 684-85.
exclusion, deportation or removal of an individual from the United States. The same is true of DoJ’s regulations. The State Department’s regulations apply only to extradition requests. 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 the rendered individuals during the operation itself. 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.

2. Cruel and Unusual Punishment

What has come to be known as the McCain Amendment provides that “[n]o 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.” The latter terms are defined as the cruel, unusual, and inhumane treatment and punishment prohibited by the U.S. Constitution. The Amendment then makes clear that “[n]othing in this section shall be construed to

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138 8 C.F.R. § 208.16-208.18 (2008) (discussing how an asylum official is to apply the CAT relating to the “exclusion, deportation, or removal of an alien” to a foreign country).
139 8 C.F.R. § 1208.16-1208.18 (2008) (discussing how an asylum official is to apply the CAT relating to the “exclusion, deportation, or removal of an alien” to a foreign country).
140 22 C.F.R. § 95.2(b) (2008) (discussing obligations imposed by the CAT “with respect to extradition”).
141 Secretary of State Condoleeza Rice, Remarks Upon Her Departure for Europe (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57602.htm. (Statement by Secretary of State Condoleezza Rice that “[t]he 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 appropriate, the United States seeks assurances that transferred persons will not be tortured.”); President George W. Bush, Press Conference (Mar. 16, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html (Statement by President Bush 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.”); White House Press Secretary Scott McClellan, Press Briefing (Mar. 17, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050317-4.html (“When people are rendered to another country, we seek assurances that they won’t be tortured . . . .”). Such assurances would appear to be all that is necessary to comply with the CAT. See Chesney, supra note 3, at 698 n.193 (providing a list of critics who concede the legality of relying on assurances); DEEKS, supra note 2, at 9 and 18 (noting that Canada and European countries rely on such assurances in transfer cases). Some critics of the practice, however, disagree that assurances suffice. See DEEKS, supra note 2, at 21-24 (outlining the considerable criticism about the use of assurances); Satterthwaite, supra note 12, at 1379-86 (questioning the propriety of relying on assurances in rendition operations); Human Rights Watch, “Empty Promises”: Diplomatic Assurances No Safeguard Against Torture, at 4-5, http://hrw.org/reports/2004/un0404/diplomatic0404.pdf (noting that “diplomatic assurances . . . are inadequate safeguards against torture and ill-treatment”); 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).
143 Id. §2000dd(d).
impose any geographical limitation on the applicability of the prohibition." 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 applies only in instances in which U.S. officials themselves engage in such abuse during a rendition operation. As with the torture prohibition, however, the McCain Amendment 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.

3. Other Abuses

U.S. law does not prohibit abuses that fall below or outside those outlined in the above two sub-sections. This includes not only abuse 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.” Even allegations that the defendant had been beaten, abused or tortured by the foreign country before being rendered does not have an impact. As the Second Circuit has noted in evaluating such an allegation, “where 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].” 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.

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144 Id. §2000dd(b).
145 As discussed infra section III.C, the McCain Amendment also lacks any penalty or enforcement provision.
146 Parry, supra note 2, at 530 (noting that the CAT precludes only torture and not lesser forms of abuse); Radsan, supra note 13, at 17 (same). Both the Parry and Radsan articles were published before the enactment of the McCain Amendment provided an additional restriction.
149 United States v. Lira, 515 F.2d 68, 71 (2d Cir. 1975). Situations where United States officials are alleged to have been involved in, or supported, the abuses are discussed infra sections III and IV.
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 transfer of individuals.\(^{150}\) While such a restriction on rendition operations may exist in theory, as a matter of practice, it is a nullity.

This is because no U.S. extradition treaty actually precludes rendition operations to the United States or elsewhere. I have reviewed every single U.S. extradition treaty currently in effect.\(^{151}\) 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,\(^{152}\) 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.\(^{153}\) Further, not a single 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).\(^{154}\) Even the U.S. extradition treaty with Mexico does not prohibit renditions,\(^{155}\) despite Mexico’s vociferous objection to the rendition of *Alvarez-Machain* from its territory.\(^{156}\) Indeed, Mexico continues to operate under the same 1980 extradition treaty with the U.S. that the *Alvarez-Machain* Court found did not prohibit rendition operations.\(^{157}\)

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\(^{150}\) United States v. *Alvarez-Machain*, 504 U.S. 655, 664-66 (1992). *See also* United States v. *Best*, 304 F.3d 308, 313 (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); 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.”).


\(^{152}\) Hoffman, *supra* note 63, at 421 (comment of Ralph Steinhardt).

\(^{153}\) *See generally* KAVASS, *supra* note 26, and citations in *supra* note 151. Since the mid-1990s, extradition treaties signed between the United States and foreign countries have followed a basic formula. *See Letter of Submittal by Strobe Talbot, Department of State, to the President of the United States* (Feb. 2, 1999), *reprinted in* KAVASS, *supra* note 26, 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.*, KAVASS, *supra* note 26, at 487.13-487.26 (extradition treaty between the United States and Korea).


\(^{155}\) Id. at 590.1.

\(^{156}\) *See supra* note 57 and accompanying text.

Court decisions validate this research. Both Circuit courts and District courts have routinely and continuously found specific extradition treaties pose no bar to rendition operations. This proves true even in cases where the United States had pending extradition proceedings in the country. 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. However, though both parties signed the treaty, it was never submitted to the United States Senate for its advice and consent. As an unratified treaty, it lacks the force of law in the United States. 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. Though a 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 which 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

2001. Id. However, the protocol made only minimal changes to the treaty; 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).

158 United States v. Anderson, 472 F.3d 662, 666-67 (9th Cir. 2006) (finding that the extradition treaty between the United States and Costa Rica does not preclude the United States from prosecuting an individual rendered to the U.S.); United States v. Arbane, 446 F.3d 1223, 1225 (11th Cir. 2006) (same for 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).

159 United States v. Anderson, 472 F.3d 662, 666-67 (9th Cir. 2006) (finding that the extradition treaty between the United States and Costa Rica does not preclude the United States from rendering the individual to the U.S., even if an extradition application is pending); Kasi v. Angelone, 300 F.3d 487, 500 (4th Cir. 2002) (finding the U.S.-Pakistan extradition treaty does not preclude renditions to the United States, even if formal extradition proceedings had been initiated).

160 CARTER, supra note 65, at 723-24; Aceves, supra note 11, at 136.

161 CARTER, supra note 65, at 723-24; Aceves, supra note 11, at 136.

162 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.”).

163 Louis Henkin, International Law: Politics, Values and Functions, 216 RECUEIL DES COURS 9, 97 (1989 IV) (“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 the law of the United States.”) [hereinafter Henkin, International Law]; Malvina Halberstam, In Defense of the Supreme Court Decision in Alvarez-Machain, 86 AM. J. INT’L L. 736, 741-42 (describing how the 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) (arguing that “the President never possesses the unilateral authority to violate a treaty; he must always obtain congressional approval”).
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.”

These commentators point to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) for support for the former assertion, and to the United Nations Charter and general customary international law principles to argue the latter position.

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.” The ICCPR precludes arbitrary arrest or detention, and entitles detainees to a trial “within a reasonable time.” However, even critics of the U.S. rendition policy have acknowledged that “the text of the ICCPR does not specifically prohibit forced disappearances,” such as renditions. In addition, the United States has consistently taken the position that the ICCPR does not apply outside the sovereign territory of the United States, 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. However, 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 U.S. In sum, then, as the Third Restatement of Foreign Relations notes, “[n]one of the international human

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164 Henkin, A Decent Respect, supra note 3, at 231. See also Lavers, supra note 13, at 400-06 (“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.”); Fisher, supra note 2 (asserting that foreign-to-foreign renditions for the purpose of interrogation violates international law, though not providing any coherent basis for this determination); Glennon, supra note 73, 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.”).

165 Lavers, supra note 13, at 397; Henkin, A Decent Respect, supra note 3, at 231; Sadat, supra note 14, at 1223; Parry, supra note 2, at 531. 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).


168 Sadat, supra note 14, at 1223.

169 Parry, supra note 2, at 531.


171 Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (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 . . . imposing legal obligations’”).
rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law.”

The United Nations 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 that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .” Commentators claim that this principle is now subsumed in customary international law to prohibit rendition operations.

However, clearly there is no violation of a foreign nation’s territorial sovereignty when the nation implicitly accepts, much less overtly assists in, a rendition operation, as is often the case. More 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.” 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.”

Examples abound of foreign courts accepting jurisdiction over rendered individuals. Probably the most famous is Israel’s abduction in 1960 of high-ranking Nazi officer Adolf Eichmann from Buenos Aires, Argentina, where he had been living for more than a decade. 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

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172 Restatement (Third) of Foreign Relations § 432 Reporters’ notes, at 330 (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).
173 U.N. Charter art. 2, para. 4.
174 See supra note 165.
175 See supra notes 83-85.
176 Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004). 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 since “a defendant ‘cannot rely upon a mere violation of international law as a defense to the court’s jurisdiction.’”); Al-Zarhany v. Rumsfeld, 2010 WL 535136, at *10, 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”).
177 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, International Law, supra note 163, at 310 (“[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 163, at 737-38.
competence to try him once he is within the area of its jurisdiction.”\(^{179}\) French, British, Canadian, German, Palestinian, Hungarian and South African courts, as well as the International Tribunal for Yugoslavia, have reached similar conclusions.\(^{180}\) While some foreign courts and commentators disagree that renditions are uniformly accepted in the international sphere,\(^{181}\) even critics of the practice have been forced to acknowledge that, at the very least, “there appears to be no uniform state practice on forcible abductions.”\(^{182}\)

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,\(^{183}\) 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 the purpose of interrogation.\(^{184}\) There is no reason to believe though 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, an issue not affected by whether an individual is being abducted from a country for interrogation or for trial. Further, as noted above, no article in the IPPCR, the Declaration of Human Rights, or any other international human rights convention actually prohibits rendition operations, regardless of the purpose.\(^{185}\) 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 the purpose of interrogation. Based on this, so long as the interrogation complies with the domestic laws of the relevant nation (whether the U.S. or a foreign country), it is difficult to envision an international law or other legal

\(^{179}\) Id. at 308.  See also Abramovsky, supra note 3, at 202 (describing several more recent Israeli cases upholding rendition operations.)

\(^{180}\) See Re Argoud, 45 I.L.R. 90, 98 (1964) (where a French court provided that rendition operations do not “entail of themselves the nullity of the prosecution); Glennon, supra note 73, at 750 n.23 (providing examples of British, Palestinian and Hungarian courts upholding renditions); Halberstam, supra note 163, at 738 (Canadian, French, German, British and Israeli courts); Kovac, supra note 85, at 632-33, 638-40 (French and South African courts, and International Criminal Tribunal for Yugoslavia); United States v. Cordero, 668 F.2d at 36 n.5 (British, Belgian, Israeli courts).

\(^{181}\) See Henkin, A Decent Respect, supra note 3, at 231-32; Glennon, supra note 73, at 750 n.22; Lavers, supra note 13, at 401-402; Aceves, supra note 11, at 146-48.

\(^{182}\) Lavers, supra note 13, at 401.  See also Glennon, supra note 73, at 750 (asserting that some nations have tried rendered individuals, while others have not).

\(^{183}\) See supra notes 61-63.

\(^{184}\) The only U.S. court to have had an international law claim before it based on an alleged foreign-to-foreign rendition for the purpose of interrogation dismissed the case under the State Secrets Privilege. See El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).  The State Secrets Privilege is discussed infra section IV.F.  Louis Fisher asserts that the U.S. 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 2, at 1407-12.  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.

\(^{185}\) See supra notes 166-72 and accompanying text.
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 various individuals in places of armed conflict. Portions of two of those Conventions – the Third and Fourth Conventions -- bear relevance to rendition operations. 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.” 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. 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. Insurgents captured in Iraq would similarly appear to fail to meet the definition of POWs.

Further, as noted above, the GPW does not preclude the transfer of POWs. 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 following the Geneva Conventions. These criteria should not be difficult for the United States to fulfill. Every nation in the world, with the exception of Nauru, is a party to the Geneva Conventions, so the first criteria poses no problem. Simple assurances from the receiving country that they will comply with the Geneva Conventions would appear to fulfill the second requirement. Thus, the Geneva Conventions would not appear to greatly limit transfers of POWs, to include renditions, to either the U.S. or another nation.

186 Weissbrodt & Bergquist, supra note 12, at 301-02; Yoo, supra note 3, at 1223-27; Chesney, supra note 3, at 705-06.
188 Id. art. 4(a). See also Chesney, supra note 3, at 714-32.
189 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 3, at 713-32; Yoo, supra note 3, at 1226-27; Yin, supra note 100, at 352 (noting that al Qa’ida members “lack prisoner of war status”). It is worth noting that 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 187, art. 3.
190 See supra note 187 and accompanying text.
191 See GPW, supra note 187, art 12.
192 See Chesney, supra note 3, at 705 (noting that “[t]he first prong of Article 12 has no practical impact”).
193 See Yoo, supra note 3, at 1225-26 (noting that such assurances should suffice for compliance with Article 12 of the Third Convention).
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.” The GC further prohibits transfers of “protected persons” from an “occupied territory” to any other territory “regardless of their motive.” Violations are considered grave breaches of the Geneva Conventions.

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.” The GC explicitly excludes from this definition “[n]ationals 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. Ironically, due to the particularities of the 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 countries 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). 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. 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.

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 ....” 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.” At the current time, only Iraq and Afghanistan could possibly fall within these definitions. Commentators, however, remain uncertain whether

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195 Id. art. 49.
196 Id. art. 147 (stating that the “unlawful deportation or transfer or unlawful confinement of a protected person” constitutes a grave breach of the GC).
197 Id. art. 4.
198 Id. It has long been acknowledged that this terminology is not extremely illuminating. 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) (where the premier commentator on the Geneva Conventions, Jean Pictet, noted that the definition of “protected person” does “not stand out very clearly”).
199 Chesney, supra note 3, at 733-34.
200 Id. at 735.
201 Id. at 732-37. See also Yoo, supra note 3, at 1226-27. But see Weissbrodt & Bergquist, supra note 12, at 298-303 (arguing that the Fourth Geneva Convention applies to the Taliban, though not al-Qa’ida).
202 GPW, supra note 187, art. 2.
203 The prohibition applies for one year after the end of the occupation. GC, supra note 193, 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).
the United States remains an occupying force in either Iraq or Afghanistan.\textsuperscript{204} At least one district court has even gone so far as to hold that the “armed conflicts” in Iraq and Afghanistan ended several years ago,\textsuperscript{205} 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. The Mansfield Amendment**

The Mansfield Amendment, an admittedly obscure provision, provides in relevant part that “[n]o 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.”\textsuperscript{206} At least one commentator has suggested that this Amendment may limit renditions operations involving narcotics matters.\textsuperscript{207}

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,\textsuperscript{208} if the activity is part of a maritime law enforcement operation,\textsuperscript{209} or if the activity is undertaken as part of a Status of Forces arrangement.\textsuperscript{210}

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, and have 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:

1. 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;
2. were present at the eventual arrest conducted by El Salvadoran officials;
3. took custody of defendants.

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\textsuperscript{204} See Weissbrodt & Bergquist, \textit{supra} note 12, at 303-07; Sadat, \textit{supra} note 14, at 1216 n.74 (noting that the Iraqi government clearly exerts sovereignty as well as the functions of government, “[t]he question remains, of course, whether Iraq is still ‘occupied’ for purposes of Geneva’s application.”).

\textsuperscript{205} United States v. Prosperi, Crim. No. 06-10116-RGS, slip op. at 32 (D. Mass. Aug. 28, 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 accept this bold determination.


\textsuperscript{207} Abramovsky, \textit{supra} note 3, at 195-99.

\textsuperscript{208} 22 U.S.C. § 2291(c)(3) (2006) (“[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.”).

\textsuperscript{209} 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.”).

\textsuperscript{210} Id. § 2291(c)(6) (“This subsection does not apply to the activities of the United States Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements.”).
at an El Salvadoran airport.\textsuperscript{211} Courts have also held that the Mansfield Amendment does not apply to arrests made on a ship flying the flag of a foreign country.\textsuperscript{212}

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.\textsuperscript{213} Thus, as one court has described it, “[t]he Mansfield Amendment is silent as to remedies for its breach, and no court has ever implied a remedy for a defendant alleging its violation.”\textsuperscript{214} Even the commentator who suggested that the Mansfield Amendment could limit rendition operations acknowledges that the Amendment is at best “underinclusive. At worst, in its application, it is an abjekt failure.”\textsuperscript{215} Thus, it would appear to provide no actual limitation on rendition operations.

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 the United States from itself torturing the individual during the rendition, subjecting him or her to cruel and usual treatment during that rendition, or transferring the individual in violation of the Geneva Conventions. As shown above, however, even these prohibitions have very narrow real impact on rendition operations.

III. Potential Criminal Claims Against U.S. Government Employees Involved in Renditions Operations.

The potential prosecution of government employees for their involvement in renditions raises an initial question as to whether the United States government would actually ever consider taking such an action. The rendition was 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


\textsuperscript{212} \textit{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 the Amendment applies to a Coast Guard arrest on a vessel flying a Panamanian flag).

\textsuperscript{213} \textit{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 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.”).


\textsuperscript{215} Abramovsky, \textit{supra} note 3, at 197.
would likely require revelation of classified information related to the operation, thus putting national security issues at risk of exposure.\textsuperscript{216} Should the government nonetheless decide to pursue prosecution, only a few potential criminal sanctions would appear applicable: kidnapping statutes, the Anti-Torture Statute, the McCain Amendment and the War Crimes statute. As shown below, even these potential sanctions are fairly restricted.\textsuperscript{217} Further, at the time of this writing, no 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 seizes, confines, inveigles, decoys, 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 . . . .”\textsuperscript{218} Conspiracy to engage in such activity is also a crime.\textsuperscript{219}

On its face, this would appear to apply to all rendition operations, which are effectively transportations of seized individuals in “interstate or foreign commerce.”\textsuperscript{220} However, the Fifth Circuit, the only court to have considered the issue, has raised questions as to whether that assumption is in fact 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.\textsuperscript{221}

\textsuperscript{216} See Arar v. Ashcroft, 585 F.3d 559, 576 (2d Cir. 2009) (en banc) (discussing the various amounts of classified information that would be revealed in a renditions case), cert. denied, 78 U.S.L.W. 3730 (U.S. June 14, 2010). It should be noted that the Classified Information Procedures Act, 18 U.S.C. app. (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).

\textsuperscript{217} Some commentators have suggested that international forums may prove to be more viable arenas to try such cases. This would include the International Court of Justice or a foreign national court. See Glennon, *supra* note 73, at 754-55; Weissbrodt & Bergquist, *supra* note 12, at 347-355. 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, and/or the cases may prove too politically sensitive to try.


\textsuperscript{219} *Id.* § 1201(c).

\textsuperscript{220} The Supreme Court in *Frisbie*, discussed *supra* notes 47-51, 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.

\textsuperscript{221} United States v. McRary, 665 F.2d 674, 675 (5th Cir. 1982).
The Fifth Circuit overturned the conviction. The Fifth Circuit noted that the Federal Kidnapping Act stemmed from the Lindbergh baby kidnapping; indeed the Act at one point was even referred to as the Lindbergh law. The purpose of the 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.” With this background in mind, 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 therefore 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.” 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.

The Circuit questioned that conclusion almost a decade later, in United States v. De La Rosa. There, 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.” The Fifth Circuit 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.” Based on that, the Fifth Circuit concluded that the term “foreign commerce,” as used in the Act “means to or from the United States.” 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 a transportation to or from the U.S.

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,

222 Id. at 677.
223 Id. This is bolstered by a prior Fifth Circuit case, cited to in McRary, that 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).
224 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.
225 Id.
226 911 F.2d 985 (5th Cir. 1990).
227 Id. at 989.
228 Id. at 989-90.
229 Id. at 990.
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 part of the conspiracy, be punished” with imprisonment.\(^{230}\) This statute has been used in conspiracy to murder cases,\(^ {231}\) but does not appear to have been used to convict anyone for overseas kidnappings.\(^ {232}\) It is therefore difficult to know if a conspiracy charge under it would be enforced in situations, such as rendition operations, where the Federal Kidnapping Statute itself would not be violated. However, an argument could certainly be raised that the language in § 956 that requires “an act that would constitute the offense of . . . kidnapping” if committed in the United States, precludes § 956’s application in situations in which the Federal Kidnapping Statute itself would not apply. Further, a court may be loathe to allow a prosecutor to use a conspiracy statute (§ 956) to circumvent limitations Congress appears to have intended to impose via the Federal Kidnapping Statute.\(^ {233}\)

**B. Anti-Torture Statute**

The U.S. Anti-Torture Statute, enacted pursuant to the CAT,\(^ {234}\) 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.\(^ {235}\) The term “torture” is defined as an act “specifically intended to inflict severe physical or mental pain or suffering....”\(^ {236}\)

No published cases have 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.\(^ {237}\)

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, torture involves the infliction of *severe* physical or mental pain or suffering. As courts have stated, this high-


\(^{231}\) 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 U.S. to kill an individual in Haiti).

\(^{232}\) 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. *U.S. v. Sattar*, 395 F.Supp.2d 79, 82 (S.D.N.Y. 2005).

\(^{233}\) Nonetheless, as indicated *supra* section III.A, courts have used § 956 to convict individuals 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); 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).

\(^{234}\) Discussed *supra* section II.B.1.


\(^{236}\) *Id.* § 2340.

\(^{237}\) When consenting to the CAT in 1988, the Senate stated that “in 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 (2006) (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 § (f)(2) (2006) (using the Senate definition of “torture” for the FARRA) with 28 U.S.C. § 1350 note § 3(b)(2) (2006) (same for the TVPA).
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.”

It is therefore “usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.”

Furthermore, the government official must have specifically intended that such pain or suffering would occur when he or she engaged in the activity. Thus, “in 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.” The government actor must him or herself have 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. 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, that the country may engage in indefinite detention in violation of international law, or that there are reports that the country engages in physical beatings of prisoners. Willful blindness or deliberate indifference on the part of government officials also does not meet the standard of specific intent in this instance. Even “proof of knowledge on the part of government officials that severe pain or suffering will be the practically certain result” does not meet the test. Rather, there must be a showing that “a

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238 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).

239 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 which 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).

240 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.”).

241 Auguste v. Ridge, 395 F.3d 123, 145-46 (3d Cir. 2005). See also Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008) (“[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.”).

242 Auguste v. Ridge, 395 F.3d 123, 145-46 (3d Cir. 2005); Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008).

243 Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008) (“While [the 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.”).


245 Id. at 154.

246 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).

prospective torturer will have the goal or purpose of inflicting severe pain or suffering.”248 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.249 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 preclude prosecution under the Anti-Torture Statute.250 Overall, then, it would seem that the Anti-Torture Statute establishes an extremely high threshold which will be difficult for prosecutors to meet.251

C. The McCain Amendment
The McCain Amendment, discussed previously,252 provides that “[n]o 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.”253 However, the Amendment contains no explicit sanction for violation, nor any particular means of enforcement. The Amendment does require the President to “take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.”254 President Bush delegated that responsibility to the Director of National Intelligence,255 though it is unclear what action, if any, the DNI has taken in response.256

D. War Crimes
U.S. law authorizes criminal sanction, including lifetime imprisonment, for violation of a “war crime.”257 One such war crime is a grave breach of the Geneva Conventions.258 However, 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. Thus, there may be limited 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. However, such acts must have been committed in the context of an “armed conflict.” 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. This uncertainty, coupled with the high threshold to prove at least “torture,” may greatly limit the applicability of these provisions of the war crimes statute to rendition operations.

IV. Potential Civil Claims Against U.S. Government Employees Involved in Rendition Operations

U.S. law does offer the possibility of civil sanction against individuals involved in rendition operations, but only in fairly limited 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….” However, it 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.”

For years, an argument ensued amongst 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 that therefore such officials should be susceptible to an FTCA claim. The Supreme Court,

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259 See supra section II.E.
260 18 U.S.C. §§ 2441(d)(1)(A) and (B) (2008). 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).
261 Id. § 2441(c).
262 See supra notes 202-05 and accompanying text.
263 See supra notes 238-51 and accompanying text.
264 28 U.S.C. § 1346(b) (2006). See also 28 U.S.C. § 2679(b)(1) (2006) (“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 23, 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.
however, laid to rest the “headquarters doctrine” in the civil claim that arose out of the Machain-Alvarez 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. Alvarez-Machain subsequently filed suit against individuals allegedly involved in his rendition from Mexico, including several U.S. government employees. One of his main claims was made pursuant to the FTCA, where 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 headquarters doctrine would “swallow the foreign country exception whole.” The Court thus dismissed Alvarez-Machain’s entire FTCA claim, holding that “the 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.” The same result should occur with regard to any other rendition operation, whether to the U.S. or to a third country, as all such rendition operations undertaken by U.S. government officials take place overseas.

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, that “[t]he 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.” Enacted in 1789, the statute stood in hibernation for 170 years, providing jurisdiction for only one case during that period.

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.” Given that “the time” of the ATS’ enactment was 1789, when few international law violations were considered to exist, the Court stated that “we 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.” 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. As the Court concluded, “a single illegal

267 Id.
268 The other main claim, raised pursuant to the Alien Tort Statute, will be discussed in the next section.
269 Sosa, 542 U.S. at 703.
270 Id. at 712. See also Al-Zahrani v. Rumsfeld, 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).
271 As noted supra note 21, the United States does not render individuals from U.S. soil.
273 Sosa, 542 U.S. at 712.
274 Id. at 724 (emphasis added).
275 Id.
276 Id. at 725.
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].”

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. As noted above, rendition operations are not universally condemned but rather, to the contrary, are authorized and upheld by a large number of nations, suggesting a clear lack of universal recognition that such activities are illegal. 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. 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. This is particularly true given the passage of the Torture Victim Protection Act, which we will turn to next, since it evinces Congressional and Presidential condemnation of torture.

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 “individual who, under actual or apparent authority, or color of law, of any foreign nation... subjects an individual to torture.” 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.” 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.

277. Id. at 738.
278. 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”).
279. See supra notes 177-82.
280. 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).
282. See Almog v. Arab Bank, PLC, 471 F.Supp.2d 257, 274 (E.D.N.Y. 2007) (finding ATS to cover genocide and crimes against humanity); Doe v. Exxon Mobil Corp., 393 F.Supp.2d 20, 25 (D.D.C. 2005) (suggesting that torture could violate the law of nations and fall under the ATS, though plaintiffs there did not adequately plead such a violation); Mujica v. Occidental Petroleum Corp., 381 F.Supp.2d 1164, 1179 (C.D. Cal. 2005) (asserting that ATS includes torture claims since “there is a customary international law norm against torture”).
283. 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.”).
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.\textsuperscript{287} 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.”\textsuperscript{288} Instead, the U.S. officials alleged 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.”\textsuperscript{289} 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.”\textsuperscript{290}

Thus, unless a U.S. official engaged in a rendition operation on behalf of a foreign government (and not on behalf of the U.S. government), 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.\textsuperscript{291}

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 \textit{Bivens v. Six Unknown Named Federal Narcotics Agents}.\textsuperscript{292} However, the Court has authorized such so-called \textit{Bivens} claims only for purported violations of the Fourth Amendment, the

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\textsuperscript{287} Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc), \textit{cert. denied}, 78 U.S.L.W. 3730 (U.S. June 14, 2010).
\textsuperscript{288} \textit{Id.} at 568.
\textsuperscript{289} \textit{Id.}
\textsuperscript{290} \textit{Id.}
\textsuperscript{291} \textit{See supra} sections I and II.A.
\textsuperscript{292} 403 U.S. 388 (1971).
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Equal Protection portion of the Fifth Amendment, and the Eighth Amendment. It has expressly refused to extend Bivens claims to numerous other areas. 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 . . .,” which the Court has not yet found is covered by Bivens.

The likelihood that the Court would extend Bivens into that area appears remote. The Court has itself noted that it has “responded cautiously to suggestions that Bivens remedies be extended into new concerns.” Indeed, for the past 25 years it has steadfastly refused to extend Bivens claims beyond the narrow constitutional areas outlined above. Thus, Bivens claims based upon 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.” The “special factors” include whether an alternative branch of government is better suited than the courts to create a remedy. When “congressional inaction has not been inadvertent,” the Court will defer to Congressional decision and not create a judicial remedy under Bivens. National security, foreign policy, and military concerns are also “special factors” that counsel hesitation in expanding Bivens claims.

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 immediately

294 Arar, 585 F.3d at 571-72 (listing various contexts under which the Supreme Court has rejected expansion of Bivens).
295 U.S. CONST. amend. V.
296 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).
297 Malesko, 534 U.S. at 67 (2001) (“Since Carlson [v. Green, 446 U.S. 14 (1980)] we have consistently refused to extend Bivens liability to any new context or new category or defendants.”).
301 Arar v. Ashcroft, 585 F.3d 559, 574-81 (2d Cir. 2009) (en banc) (listing various “special factors” established by the Supreme Court over the decades, to include military, foreign policy and national security concerns), cert. denied, 78 U.S.L.W. 3730 (U.S. June 14, 2010); Al-Zahrani v. Rumsfeld, 2010 WL 535136, at *6-7 (Feb. 16, 2010) (noting that the possible danger of obstructing U.S. national security constitutes a “special factor” in refusing to extend Bivens to Guantanamo detainees).
preceding section on the TVPA. 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.”

Any such case would require analysis of U.S. security issues, classified information, as well as the actions of 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. In the end, the court noted its limited competence in this area, and stated that the appropriate area of competence was in the Congress, which had the ability to create a remedy for individuals such as the plaintiff if it so chose. 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 court to do so.

The same analysis would likely apply to rendition operations, especially foreign-to-foreign ones where national security and foreign policy matters are at a zenith, and 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 in section III, *supra*, into civil claims, given that those criminal statutes confer no private right of action on individual plaintiffs. 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.” 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.” As noted above, the McCain Amendment does not provide for any sanction, whether criminal or civil. The FARRA

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302 *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 99-105. In this case, the plaintiff’s constitutional rights stemmed from the fact that he was in the United States when removed.

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

304 *Id.* at 574-81.

305 *Id.* at 580-81.

306 *Id.* at 565 and 580-81.

307 As a general matter, civil claims cannot be brought based on criminal statutes, absent a fairly 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 Group, 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”).


310 *See* section III.C.
and its enacting regulations explicitly provide that they do not create a private right of action, as does the War Crimes statute.

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. As noted above, courts have explicitly determined that the CAT is not self-executing and therefore permits no private right of action. The same is true for the Geneva Conventions, the United Nations Charter, and the ICCPR. The Universal Declaration of Human Rights similarly has no private right of action since, as discussed above, it has no binding impact on the U.S. Finally, courts have held that customary international law does not afford a civil claim for rendition operations.

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. 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. The privilege is quite

311 See FARRA § D (stating regulations promulgated pursuant to the FARRA do not create a private right of action); 8 CFR § 208.18(e) (2008) (same); 8 CFR § 1208.18(e) (2008); 22 CFR § 95.4 (2008).


313 Aceves, supra note 11, at 162-63; U.S. 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.”).

314 See supra note 122.

315 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 163, at 126-29 (noting that U.S. courts have uniformly held that the Geneva Conventions do not provide a private right of action).


317 Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) (noting that “the 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 (“[T]he ICCPR does not create judicially-enforceable individual rights.”); U.S. 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 11, at 170-74 (noting that courts have found no private right of action to enforce treaties such as the ICCPR).

318 See supra notes 171-72 and accompanying text.

319 Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003) (en banc) reversed on other grounds by Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (noting that there is no basis for a civil claim based on customary international law as there is no uniform prohibition on the activity).


321 Reynolds, 345 U.S. at 6.
The United States can intervene and assert the privilege even if it is not a party to the litigation. Judicial scrutiny of a properly asserted state secrets claim is extremely limited. When properly invoked, no party may use the protected information at trial. 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, dismiss the entire lawsuit.

The D.C. Circuit recently dismissed a lawsuit regarding an alleged foreign-to-foreign rendition operations, pursuant to the State Secrets Privilege. The court found that exposure of the information related to the rendition operation would cause serious damage to the nation’s national security and, since such information was central to the plaintiff’s claims, the lawsuit could proceed. The same fate could well befall other claims based on rendition operations, as such operations typically involve matters involving sensitive foreign policy issues as well as classified information.

Courts may also decide to dismiss rendition lawsuits pursuant to 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.” 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.

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324 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.”).
325 *Reynolds*, 345 U.S. at 11.
326 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 v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991) (dismissing entire case when key purported evidence is impermissible under the State Secrets Privilege).
327 See El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
328 Id. at 312-13. The Ninth Circuit, considering another foreign-to-foreign rendition operation, refused to dismiss the case pursuant to the State Secrets Privilege, arguing the correct approach is to wait for discovery requests before analyzing the Privilege. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 961 (9th Cir. 2009). The Ninth Circuit has granted rehearing en banc of the matter, however. Mohammed v. Jeppesen Dataplan, Inc., 586 F.3d 1108 (9th Cir. 2009).
329 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (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).
How 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," 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 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. 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. How a court would decide the issue in a rendition case will likely be highly fact-specific, dependant 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 cases pursuant to the Political Question Doctrine, especially where the United States government would appear to have engaged in the rendition for sensitive policy reasons.

**Conclusion**

The above 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. Similarly, though U.S. law does not prohibit the transfer 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 they will be tortured.

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331 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., opinion)).
334 Chesney, supra note 3, at 708-10.
335 David Johnston, *Rendition to Continue, but with Better Oversight, U.S. Says*, NYTimes.com, Aug. 25, 2009 (noting that both President Obama and Administration officials have pledged not to send individuals to places where they may be tortured); Secretary of State Condoleezza Rice, Remarks Upon Her Departure for Europe (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57602.htm (“The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured.”); President George W. Bush, Press Conference (Mar. 16, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html (Statement by President Bush 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.”).
Whether to turn such policies into law is a matter for the Obama Administration to consider, and for Congress to eventually decide. The legislative branch, with or without Executive Branch prompting, has the means to either change or solidify the status quo, to have 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 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?

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