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A Hypothetical Postulate for the Polemic of Extraordinary Rendition Vis-a-Vis the Paradigm of Asymmetric Warfare

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A HYPOTHETICAL POSTULATE FOR THE POLEMIC OF EXTRAORDINARY RENDITION VIS-A-VIS THE PARADIGM OF ASYMMETRIC WARFARE

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PREFACE

This article presents a controversial hypothetical approach to a side of the polemic regarding extraordinary rendition. War is not always controlled by rules, fairness, or ethics. The United States would prefer the foregoing if forced to go to war, but the enemy may not follow the same approach. As a result, the United States becomes hampered by unilaterally self-imposed rules and standards. Conceivably, we could fail to achieve our military objective because of the enemy's adherence to a very different approach and beliefs regarding warfare. Were we to have the privilege of fighting under relatively similar rules with the other side, the polemic on extraordinary rendition might not be an issue.

The author recalls the pre-Dream Team days of Olympic sports. The concept of amateurism was very important. The author posits that other nations, notably the Soviet Union, did not see it that way.¹ We lost basketball games under our concept. Perhaps reluctantly, we went to a professionally dominated Dream Team to balance the athletic battle.² Our Olympic response was in one sense a "cop out." In another sense, it was a calculated effort to deal with the new reality.

The author recognizes not only the unpopularity of extraordinary rendition, but also the higher aims and goals of our adherence to international norms of decency, even in war. Another, perhaps weaker, analogy is the retrenchment and yielding of precious First Amendment rights because of security and terrorism concerns. The United States also engaged in asymmetric warfare during the Revolutionary War, when the colonists used the Native American approach in fighting battles. The Native American approach differed dramatically from the British and European "open field" style of battle. Today, we call this guerilla warfare. One might even posit that extraordinary rendition, seen through the lens of asymmetric war, has two scopes: (1) a military scope; and (2) an academic scope. Both are appropriate; each comes from its own foundation, purpose, aim, and experience. While some academics have significant military experience, some military luminaries have significant academic experience. For example, General David Petraeus, Commander of the International Security Assistance Force and Commander of U.S. forces in Afghanistan, and Admiral William Crowe, former Chairman of the U.S. Joint Chiefs of Staff, each received a Doctor of Philosophy degree from Princeton University. In the author's view, academics tend to have a deontological or Kantian approach towards extraordinary rendition. Laws, rules, appropriateness, and the "right thing" to do, represent dominant modes of thought. Dominant modes represent proper motives and actions in a civilized society. The military, while

1. George Vecsey, *Amateurs at the Olympics? Not in Your Dreams*, N.Y. TIMES (Aug. 5, 2008), <http://nytimes.com/2008/08/06/sports/olympics/06vessey.html?pagewanted=print> (discussing Soviet Union's disregard for the concept of amateurism in the Olympics).

2. Damon Hack, *'Dream Team' Can Do No Better Than Bronze*, N.Y. TIMES (Aug. 27, 2004), <http://www.nytimes.com/2004/08/27/sports/olympics/27end-men-hoops.html> (discussing America's recruitment of professional basketball players for the 1992 Olympics in response to the Soviet Union's defeat of its all-amateur team in 1988).

cognizant of the foregoing in terms of rules of engagement and adherence to Geneva protocols and conventions, must nevertheless deal with actual combat encounters where the enemy may not have the same moral compass. As an analogy, an army using the Marquis of Queensbury rules may come up against street fighters using sticks and stones. This is where symmetrical and asymmetrical warfare impinge on the application of extraordinary rendition. Simply, and in recognition of the well-worn cliché, war is hell.

Finally, as a military air-combat veteran and an academic, the author has enjoyed discussion in both worlds, often taking the opposite side to further debate, discernment, and scrutiny. This preface merely sets the stage for recognition of the politically-incorrect approach towards the use of extraordinary rendition. This article posits another approach of the polemic on extraordinary rendition, along with a structural proposal.

I. INTRODUCTION

Secrecy, inherent in any activity carried out by the state's executive authorities, foments political posturing, accusations, and activist agendas. Such agendas often target the opposition party in power and magnify every possible hint of secrecy as evidence of ostensible abuse. The agendas also support allegations of maltreatment that obscure the boundary between inflammatory rhetoric and disinterested reality. For example, President George W. Bush's use of extraordinary rendition eschewed calm objectivity usually found in legal scholars with nefarious inferences that reify stellar fictions into a semblance of substantive facts. The result, in retrospect, consists of a largely inextricable convolution of myth with reason and consequently more obfuscation than clarity on the matter of resolving the core legal questions.

President Barack H. Obama, while still a candidate in 2007, announced his unequivocal intention to end the practice of extraordinary rendition if elected.³ Upon accession, however, the President acted contrarily, announcing instead his decision to maintain the noted practice.⁴ His response to critics has been an assurance that he would increase the level of monitoring in an effort to prevent incidences of harsh interrogation. Instead, the President has substantively preserved the integrity of the entire apparatus from the previous administration, including the same reliance on diplomatic safeguards against the possibility of harsh interrogation.⁵ The only apparent difference between the two administrations

3. Roger Strother, *Obama Administration to Continue Extraordinary Rendition Program, Promises Oversight*, OMB WATCH (Aug. 25, 2009), <http://www.ombwatch.org/node/10336> (relating, in part, the President's pronouncement in the July 2007 edition of *Foreign Affairs* to end "the practices of shipping away prisoners in the dead of night to be tortured in far-off countries," and contrasting this against the new administration's contrary decision to continue condoning the practice of extraordinary rendition while also promising to "rely on assurances from the receiving country" as its form of monitoring, exactly the same approach as taken by the previous administration).

4. *Id.*

5. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 27, 2009); See Strother, *supra* note 3; see also David Johnston, *U.S. Says Rendition to Continue, but with More Oversight*, N.Y. TIMES (Aug.

appears to be a plan to encourage the inspectors general of selected executive agencies, namely, the Departments of State, Homeland Security, and Defense, to file a joint annual report concerning the practice.⁶ Given the immediacy of the relevant events as they have reportedly transpired in prior cases of possible maltreatment of apprehended persons, merely encouraging a joint annual report is illusory at best and arguably farcical on balance. This is a curious turn of events in view of the vehement opposition to the practice voiced by supporters of the current President during his candidacy when decisions relating to the practice lay in the hands of the previous administration.

The opposition party's administration has, by now, enjoyed almost two years to study the issue and take the appropriate action to demonstrate whether the most extreme claims of the prior administration's violations of human dignity did indeed rise to a level that would merit correction by executive order. Yet no such demonstration has occurred.⁷ In light of this fact, it is worthy of concession that perhaps the practice of extraordinary rendition, actively pursued since early in the administration of President William J. Clinton,⁸ has always rested upon more solid legal ground than activist critics energetically attempted to portray during the last administration. This possibility suggests a new question for legal scholars: if the practice of extraordinary rendition suffers no lacunae of logic under the literal interpretation of the law, while nevertheless posing a hazard vis-à-vis the sensibilities of a civilized State, perhaps the real issue is a question of judicial failure, the inadequacy in the available judicial edifices to check unilateral action

24, 2009), <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html> (reiterating the former candidate's announcement to end the practice, contrary to his decision upon accession to duplicate the previous administration's use of ordinary diplomatic channels to seek assurances against torture).

6. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4895 (Jan. 27, 2009); Strother, *supra* note 3.

7. Greg Miller, *Obama Preserves Renditions as Counter-Terrorism Tool*, L.A. TIMES (Feb. 1, 2009), <http://www.articles.latimes.com/2009/feb/01/nation/na-rendition1> (relating the current administration's choice to preserve the practice of extraordinary rendition while evidently closing only the most visible CIA prison sites and the Guantánamo detention facility, creating the paradoxical effect of forcing the administration to rely more heavily on extraordinary rendition than under the previous administration due to the narrower range of counterterrorist options that remain; indeed a "little-noticed provision states that the instructions to close the CIA's secret prison sites 'do not refer to facilities used only to hold people on a short-term, transitory basis'"); see, e.g., Daphne Eviatar, *Obama Administration Seeks Re-Hearing in Extraordinary Rendition Case*, WASH. INDEP. (Jun. 12, 2009, 4:37PM), <http://www.washingtonindependent.com/46882/Obama-administration-seeks-re-hearing-in-extraordinary-rendition-case> (relating the fact that the new administration is continuing, hence condoning, the policy of combating lawsuits that allege torture by proxy under scenarios of extraordinary rendition by reference to the need to protect state secrets); see also Christina Cowger & Robin Kirk, *Extraordinary Rendition and a Missing Speaker*, NEWS & OBSERVER (Mar. 15, 2010, 9:20AM), <http://www.newsobserver.com/2010/03/15/385814/extraordinary-rendition-and-a.html> (recounting former Irish Defense Forces officer Edward Horgan, now an activist against extraordinary rendition, whose visa the U.S. State Department revoked without explanation prior to another of a series of annually planned visits to the U.S. to speak before public audiences; the article observes that the new administration's Department of Justice has continued to block legal challenges to extraordinary rendition in the same manner as under the previous administration).

8. Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, THE NEW YORKER, Feb. 14, 2005 at 106, available at http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer (providing details by Michael Scheuer, chief planner of the practice of extraordinary rendition under President Clinton from its inception in 1995 under Presidential Decision Directive 39, U.S. Policy on Counterterrorism, (Jun. 21, 1995).

on the part of the executive branch across national boundaries. In view of this possibility, it is high time to look at this old question and analyze the principles that should guide a resolution without the conceptual bias that hindered this goal during the first seven years of the current state of war.

Extraordinary rendition is the activity of transferring suspected terrorists or other criminal elements across national boundaries without benefit of formal legal proceedings, most commonly ascribed to various State foreign-intelligence apparatus, such as the Central Intelligence Agency (CIA) in the United States, the Säkerhetspolisen (Säpo) in Sweden, or Jihâz al-Mukhâbarât al-‘Âmmat al-Miṣriyyah⁹ in Egypt. Strictly understood, if standard rendition falls properly within the definition of extradition as governed by treaty, extraordinary rendition differs in the latter detail. Thus, it is simply extradition unbounded by treaty.¹⁰ Under this view, state executive authorities coordinate across national boundaries without legal or judicial review.¹¹ As a result, this type of rendition is construable as a perversion of an openly acknowledged but contestable practice, which manifests itself in part in State officials covertly rendering to foreign agencies individuals suspected of involvement in terrorism against private citizens or public entities.¹² Discussing the implications of permitting such a practice in democratic societies, Philippe Sands wrote, “[i]f you send out a message that you consider the rules to be obsolete and incapable of meeting new paradigms, you prevent yourself from challenging others who then act in the same way.”¹³ Sands’s deliberate use of the term “paradigms” is a reference to an interpretation under the previous administration of relevant laws in the current state of war, discussed below in Part IV. As noted above, the exercise of extraordinary rendition per se began early in the administration of President Clinton. A limited number of transnational transfers of this type reportedly occurred prior to the September 11, 2001 attacks against the U.S.¹⁴ These renditions have bypassed strict legal procedure normally expected in cases of treaty-based extradition. According to the activist Center for Human Rights and Global Justice, “[u]sual destinations for rendered suspects are reported to be States such as Egypt, Jordan, Morocco, Saudi Arabia, Yemen, and Syria, all of which have been implicated by the U.S. State Department for using torture in interrogation.”¹⁵ Harsh interrogation has allegedly followed under the aegis of certain foreign governments. In a few instances, the apprehended person was

9. Jihâz al-Mukhâbarât al-‘Âmmat al-Miṣriyyah [جهاز المخابرات العامة المصرية], [Egyptian General Intelligence Directorate].

10. Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1416 (Jun. 2008) (“Rendition operates within the rule of law; extraordinary rendition falls outside.”).

11. *Id.* (“Rendition brings suspects to federal or state court; extraordinary rendition does not.”).

12. *Id.* at 1432 (discussing President George W. Bush’s acknowledgment of renditions taking place “to protect people”).

13. Philippe Sands, Q.C., *Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality*, 29 HASTINGS INT’L & COMP. L. REV. 295, 312 (2005).

14. Fisher, *supra* note 10, at 1418–19.

15. ASS’N OF THE BAR OF THE CITY OF N.Y., COMM. ON INT’L HUM. RTS. ET AL., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 8 (2004) [hereinafter TORTURE BY PROXY].

evidently a victim of erroneous identification.¹⁶ Both of these outcomes, oversight and error, are of primary concern in any analysis that seeks to recommend a structural remedy.

The present discussion explores the interaction among the phenomenon of extraordinary rendition, the potential for subjecting apprehended suspects to harsh methods of interrogation, and the paradigm of asymmetric warfare,¹⁷ commonly known as the "New Paradigm."¹⁸ The objective is to identify possible lacunae in the domestic judicial structure that may be most visible, in light of the novel nature of asymmetric warfare. These lapses may be viewed through the prism of those principles of transnational law whose authors contemplated formal warfare between States and whose purpose was to protect the integrity of such States. Of particular concern is whether this tactic of transporting apprehended suspects across national boundaries may invite harsh interrogation by third-party States so compellingly and routinely as to defy even the most conscientious of executive intentions to forestall unintended consequences.¹⁹ To this end, this paper presents an analysis of the logic behind extraordinary rendition and the principles that should govern a straightforward solution for general practice in democratic societies.

16. See the summary accounts below.

17. Bryan Bender, *DIA Chief Predicts Rise in 'Asymmetric Warfare,'* DEFENSE DAILY, Sept. 12, 1996, available at http://findarticles.com/p/articles/mi_6712/is_v192/ai_n28673609/. The term "asymmetric warfare" first occurs in generally available references wherein the author ascribed the term to Army Lieutenant General Patrick Hughes, who was at the time the Defense Intelligence Agency's director. *Id.* The author explained, "U.S. military action in the future will likely mirror the recent attacks on Iraq, where the punishment dealt did not fit the crime." *Id.* He added, quoting LTG Hughes, "An example where asymmetric measures could be taken is in countering terrorism. . . . Because terrorists do not respect borders, the U.S. would not be able to respond immediately in the case of an attack. . . . Instead, it could preclude further attacks in indirect ways." *Id.* Responding to the question of bypassing the option of a direct attack on Iraq, LTG Hughes said, "A symmetric response, tit for tat as it were, was not possible. . . . It would have killed many innocent people. It would have had much more political blowback than we have had and we would have had a much more difficult time engaging in the activity." *Id.* The full term "paradigm of asymmetric warfare" first occurs with reference to the "New Paradigm" during the administration of President G. W. Bush, but only in informal, online sources.)

18. The concept of the paradigm shift begins with Thomas Kuhn, philosopher of science. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* (3d ed. 1996). A paradigm shift occurs when there is an overabundance of new discoveries that demand theories that the current paradigm accommodates only with great empirical difficulty. The scientific establishment increasingly questions its underlying assumptions. The more this occurs, the more resistance the current paradigm imposes, until some scientists boldly introduce radically new frameworks of assumptions within which to elaborate theory. The retiring paradigm inevitably produces some fervent defenders for a while, who insist on debating the proponents of the new, even to the point of threatening careers. Moreover, insofar as political power in society at large rests to any extent on perpetuating the old paradigm, advocacy of the new becomes politically dangerous.

19. See Bob Drogin & John Goetz, *Accused Pilots Traced to Johnston*, NEWS & OBSERVER (Feb. 19, 2007, 5:43AM), <http://www.newsobserver.com/110/story/544844.html>, for extensive details linking both local CIA contractor Aero Contractors and three local pilots to the extraordinary-rendition program in general, specifically to that of Khâlid al-Masrî.

II. EXTRAORDINARY RENDITION IN THEORY

December 7, 1941, is more than a significant day in U.S. history, as it is likewise one of great significance in European history, but for a different reason. German Chancellor Adolf Hitler issued an order on that day known as the Night and Fog Decree.²⁰ This order directed German law enforcement to begin abducting people under German control in Europe who might be hostile to the German regime. The goal was to subject those people to military procedures or confinement in concentration camps. Pursuant to the Chancellor's executive order, German authorities abducted thousands of people from the territory then under German control. The Chancellor believed that the best deterrent to insurgency was furtive execution if merited by military proceedings, while leaving families only to ponder the fate of those so abducted.²¹

More surprising to observers in retrospect was the issuance of a similar decree by President Franklin D. Roosevelt against U.S. citizens and legal residents of Japanese, German, and Italian descent, pursuant to the same armed conflict, and by precisely the same method, namely, an executive order.²² The President ordered the abduction of thousands of U.S. citizens and residents based on a combination of ethnicity and loose suspicions of sympathy with the enemy, or in the case of Japanese citizens and residents, based on their ethnicity alone.²³ The assumption was that their ethnicity posed such a danger to U.S. stability as to trump constitutional guarantees of civil rights.²⁴

In summary, the actions of Chancellor Hitler and President Roosevelt were identical in that they were the result of an executive order. In neither case did the

20. *Nacht-und-Nebel-Erlass*.

21. The Fuehrer and Supreme Commander of the Armed Forces, Nazi Conspiracy and Aggression volume 7 Document No. L-90 (Dec. 7, 1941), in THE AVALON PROJECT (2008), available at <http://avalon.law.yale.edu/imt/1-90.asp>.

22. Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 446 (1999). See also Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) ("Authorizing the Secretary of War to Prescribe Military Areas"). Commentators have often cited the hypocrisy of President Roosevelt's Order in view of the sheer scale of the struggle that several States had to mount to defeat Hitler's regime, most singularly notorious for its maltreatment of the Jewish population in Germany's occupied zones. Cases brought before the Supreme Court as a consequence of this order included *Korematsu v. U.S.*, 323 U.S. 214 (1944), *Ex Parte Endo*, 323 U.S. 283 (1944), and *Hirabayashi v. U.S.*, 320 U.S. 81 (1943). Surprisingly, no president rescinded the order until April 1976, under Republican President G. Ford. Proclamation no. 4417, 41 Fed. Reg. 35 (Feb. 20, 1976).

23. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). See also Arthur Garrison, *National Security and Presidential Power: Judicial Deference and Establishing Constitutional Boundaries in World War Two and the Korean War*, 39 CUMB. L. REV. 609, 614 (2008-2009); FDR AND JAPANESE AMERICAN INTERNMENT (Franklin D. Roosevelt Presidential Library and Museum, ed.), <http://www.fdrlibrary.marist.edu/archives/pdfs/internment.pdf>.

FDR's military advisers recommended the exclusion of persons of foreign descent, including American citizens, from sensitive areas of the country as a safeguard against espionage and sabotage. The Justice Department initially resisted any relocation order, questioning both its military necessity and its constitutionality. *Id.*

But the shock of Pearl Harbor and of Japanese atrocities in the Philippines fueled already tense race relations on America's West Coast. In the face of political, military, and public pressure, Roosevelt accepted the relocation proposal. *Id.*

24. Mayer, *supra* note 8.

chief executive consult the legislature or submit a question for judicial review to justify the decision. In the U.S. case, the logic behind the extraordinary incarceration of innocent citizens and residents, which constitutes large-scale racial profiling, clearly lacked any constitutional backing despite the judicial defense of federal authority. In most cases the targeted individuals could not even be categorized as suspects to any treasonous activity.²⁵ Had the victims of the U.S. version of this abuse of power met the eventuality of their German homologues it is reasonable to expect that U.S. courts would have pronounced President Roosevelt's actions as war crimes. However, that eventuality is less than certain, as the result could have influenced events in the opposite direction, by mollifying and even nullifying the Nuremberg trials themselves, given the consequent absence of the necessary contrast.

This author asserts that for German mechanisms of judicial review, insofar as they functioned, to have supported the power of the German Chancellor to order abductions of the type described seems to be the product of intense political corruption. The German régime would have had to take effective control of the entire government and created a dictatorship by virtue of the assent of the non-executive branches. The argument would seem to continue on the premise that the German régime at the time of Chancellor Hitler's ascension lacked a reliable structure of democratic checks and balances. This argument appears plausible on its face, as few observers today would say that such a circumstance can easily emerge in a democratic society absent such intense corruption. Nevertheless, if that is the case, then what explains the U.S. example of the same basic infraction? Arguments of stark differences in governance between Germany and the U.S. in the 1940s serve to insulate commentators from the necessity to confront the implications of the similarities. One of the essential roles of intellectual honesty in the discipline of the law is to countenance the possibility that judicial failure in one democracy may yet hold implications for another.

Black's Law Dictionary defines rendition as "the return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime."²⁶ By comparison, it defines extraordinary rendition as the "transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation."²⁷ President George W. Bush explicitly refused

25. 131 CONG. REC. E5603 (extension of remarks Dec. 12, 1985) (statement of Rep. Leon E. Panetta) (discussing how Japanese-Americans were interned in violation of the U.S. Constitution).

26. BLACK'S LAW DICTIONARY 1410 (9th ed. 2009).

27. *Id.* The entry includes a clarifying note, as follows: "When an innocent person is subjected to extraordinary rendition, it is also termed *erroneous extradition*. When a transfer is made to a nation notorious for human-rights violations, it may be colloquially termed *torture by proxy* or *torture flight*." *Id.* Other sources refer to this practice as *black rendition* or *outsourcing torture*. *Id.* To be sure, the entry in Black's Law Dictionary is excessively narrow, given the logic of the terminology itself, as it implies that any rendition outside of legal parameters that does not pursue a rationale of terrorism must demand an alternative term. In fact, extraordinary rendition most logically and most simply refers to rendition absent a justifying legal apparatus.

to condone this practice insofar as it might lead to harsh interrogation. However, allegations that the CIA nevertheless pursued its own policies in this regard, either in defiance of or pursuant to the policies of the executive branch, led the Bush administration's most vehement critics to accuse the administration of having sought actively to permit it.²⁸ Such critics have decried the practice as an abuse of power by the executive branch that seeks only to "effect the transfer of persons to non-judicial authorities for interrogation or torture."²⁹ In other words, the tactic of extraordinary rendition enables a State's executive branch to subject targeted persons to harsh methods of interrogation in defiance of the State's own laws, by way of a third party whose legal apparatus ignores such constraints.

The Supreme Court has yet to address directly the legality of the practice of extraordinary rendition. It was relatively late in the period of the War on Terror³⁰ that Congress held its first hearings on the subject.³¹ It is a generally accepted practice to render an accused person to the U.S. to stand trial.³² Extraordinary rendition, by comparison, has historically had the goal of removing named foreign criminals from one State and returning them to other States to stand trial or in some other way suffer planned penalties for their infractions.³³ In the case of U.S. practice, as noted *supra*, the CIA evolved the practice of extraordinary rendition during the administration of President Clinton, evidently as a last resort in trying to manage an early phase of asymmetric warfare. It was often the case that officials knew where to find certain terrorists but were unable to prosecute them in U.S. courts due to concerns of national security.³⁴ In theory, the U.S. may request a foreign State to render a subject who had received a conviction *in absentia*. A formal dossier supports the request, and the legal counsel of the CIA authorizes

28. The commentary in the U.S. House of Representatives is notorious for its vociferous attacks against the opposition party, for which purpose rumors of extraordinary rendition were of some political value during the administration of President G. W. Bush. For example, in 2004 Representative Edward J. Markey of Massachusetts commented:

President Bush has asserted that 'the values of this country are such that torture is not a part of our soul and our being.' The legislation I am introducing today is designed to ensure that we not only ban torture conducted by our own forces but we also stop the practice of contracting out torture to other nations. Torture enabled by extraordinary rendition is outrageous and must be stopped.

150 CONG. REC. E1225 (June 23, 2004) (extension of remarks).

29. William G. Weaver & Robert M. Pallitto, *The Law: 'Extraordinary Rendition' and Presidential Fiat*, 36 PRESIDENTIAL STUD. Q., 102, 103 (2006); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Before the Subcomm. on Int'l Organizations, Human Rights, and Oversight and Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. (2007) [hereinafter *Hearings*].

30. As a defined era, the War on Terror is construable as beginning Oct. 7, 2001, when U.S. military forces began striking Tālibān targets and al-Qā'idah training camps in Afghanistan. Patrick Wintour et al., *It's Time for War, Bush and Blair Tell Taliban*, THE OBSERVER (Oct. 7, 2001, 2:13PM) <http://www.guardian.co.uk/world/2001/oct/07/politics.september11>.

31. *Id.*; *Hearings*, *supra* note 29.

32. *See* Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L.J. 907 (2002) (detailed background on the legality of renditions in recent U.S. history).

33. EUR. PARL. ASS., *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States*, 17th Sess. Doc. No. 10957 (2006).

34. *Id.*; *see also* Mayer, *supra* note 8.

each individual rendition.³⁵ However, public confirmation of the objectivity of proper legal review within the CIA is unattainable, so the expectation that the CIA may function properly lacks transparency and hence merit by definition. Exploiting the fiction that it is possible to ascribe civil conscientiousness to the CIA within certain historical boundaries in the utter absence of evidence, while claiming the opposite within other historical boundaries, opponents of the program allege that the practice was perfectly acceptable while President Clinton held executive office, but changed dramatically sometime in late 2001. The effect was to obviate the role of the CIA legal counsel, presumably consistent with a new goal to facilitate detention and interrogation, rather than removing terrorists from the territory.³⁶ The onset of a congressionally approved state of war did indeed establish the basis for revised logic regarding the President's appropriate realm of decision-making latitude (as explained below in Part IV), but the history of the executive branch's success against all legal challenges suggests no difference whatsoever in either administration's adherence to valid legal interpretations.

A. Examples of Extraordinary Rendition

The goal of the practice of rendering terrorism suspects for interrogation in Southwest Asian nations during the administration of President Clinton was to undermine the operating structure of al-Qâ'idah after the failed 1993 attempt by al-Qâ'idah affiliates to carry out the destruction of New York City's World Trade Center.³⁷ Michael Scheuer was among those CIA officials who appear to have established the programmatic structure to support the new policy. At the time, Scheuer was in charge of the CIA unit dedicated to addressing the challenge of Islâmist militancy.³⁸ Starting in 1996, Scheuer studied the operations and tactics of al-Qâ'idah. By 1997 he began planning the capture of Usâmah ibn Lâdin,³⁹ along with the central command team of the al-Qâ'idah executive apparatus. Richard Clarke, who was at the time serving as the acting director for counterterrorist operations for the National Security Council (NSC), instructed Scheuer to determine for himself how to erode the networks of Usâmah ibn Lâdin.⁴⁰

The core challenge lay in the U.S. judicial system's constraints of transparency and due process as they applied to persons encountered on or transported to U.S.

35. Mayer, *supra* note 8.

36. STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* 149 (2006). See also EUR. PARL. ASS., *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States*, 17th Sess. Doc. No. 10957 (2006); JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 189 (2006).

37. Al-Qâ'idah [القاعدة], meaning "the base" in Arabic, refers to an infamous organization of terrorists originally established in Afghanistan, who profess Islâmist rationales to justify their variegated attacks on Western civilians and other interests in many countries. See Jayshree Bajoria, *al-Qaeda, COUNCIL ON FOREIGN RELATIONS* (Aug. 29, 2011), <http://www.lcfr.org/terrorist-organizations/al-qaeda-k-al-qaida-al-qaida/p9126>. The common rendering is al-Qaeda.

38. Mayer, *supra* note 8.

39. 'Usâmah ibn Lâdin [بـن لادن أسامة], chief architect and once active commander of al-Qâ'idah. The common rendering is Usama bin Laden or Osama bin Laden.

40. Mayer, *supra* note 8.

civil jurisdictions. The CIA thus had concerns about bringing terrorism suspects to U.S. courts and having to face the possibility of divulging secrets about U.S. intelligence sources and methods.⁴¹ The array of parties of interest in the prosecution of terror suspects would have presented obstacles along the path to justice in this domain. Foreign governments might be reluctant to testify for fear of exposing their own methods and sources of intelligence. Simple tasks, such as that of establishing a chain of custody for a laptop computer, could expose methods and sources that would likewise prevent agency officials from testifying. The U.S. Department of State even halted the questioning of a relative of Usâmah ibn Lâdin out of deference to diplomatic immunity.⁴² Scheuer's mounting frustrations in designing a way to accomplish his goal reportedly caused him to look elsewhere for a way to capture and interrogate terrorism suspects.⁴³

As a key U.S. ally in the currently international campaign to address the threat of Islâmist terrorism, Egypt constituted a logical choice for Scheuer to consult for solutions. The Egyptian foreign-intelligence agency, Jihâz al-Mukhâbarât al-'Âmmat al-Miṣriyyah,⁴⁴ enjoys a reputation among Arab States for effectiveness in carrying out the mission of gathering foreign intelligence of interest to national security concerns.⁴⁵ Since Egyptian President Hosni Mubâarak⁴⁶ came to power following the assassination of President Anwar al-Sâdât,⁴⁷ Egypt has been under constant emergency rule. In the few years after 1990, the Egyptian government promulgated laws aimed at curtailing terrorist activity, which included conferring broad powers onto the executive branch to arrest and detain suspects. According to the activist organization Human Rights Watch, harsh interrogation in Egypt is now commonplace as a result. In a January 2001 report to the Commission on Human Rights, the U.N. Special Rapporteur on Torture cited 32 instances of prisoner deaths between 1997 and 1999 suspected to have resulted from methods of harsh interrogation.⁴⁸ Activist sources continue to assert that securing confessions by way

41. Specifically, its mission was to "detect, disrupt, and dismantle" al-Qâ'idah networks worldwide. *Id.*

42. *Id.*

43. *Id.*

44. See *supra* text accompanying note 9. Authors frequently refer simply to the "Mukhâbarât" in reference to Egypt's intelligence service. However, the word mukhâbarât [مخابرات], plural of mukhâbarah [مخبره], "communication" or "news traffic," alone fails to specify nationality, so the practice of referring exclusively to Egyptian intelligence without the associated adjective is unreasonable.

45. See the hyperbolic Neil MacFarquhar, *Heavy Hand of the Secret Police Impending Reform in the Arab World*, N.Y. TIMES (Nov. 14, 2005), <http://www.nytimes.com/2005/11/14/international/middleeast/14jordan.html>, stating that the secret police, or mukhabarat in Arabic, is one of the most powerful and ubiquitous forces in the Arab world.

46. Muḥammad Ḥusnī Mubâarak [محمد حسني مبارك].

47. Muḥammad Anwar al-Sâdât [محمد أنور السادات].

48. See HUMAN RIGHTS WATCH, *EGYPT: HUMAN RIGHTS BACKGROUND*, Oct. 2011, <http://www.hrw.org/legacy/backgrounder/mena/Egypt-bck-1001.htm>.

of harsh interrogation is a common source of support for politically motivated convictions in Egypt.⁴⁹

President Mubâarak's directives to defeat terrorism have targeted mainly radical Islâmists as political enemies. Many of these Egyptians have reportedly fled the country with the intention of joining al-Qâ'idah.⁵⁰ If this is true, then President Mubâarak would have had great interest in getting these people back for interrogation. News magazine commentators have reported that U.S. officials suggested initiating a program of planned renditions of Egyptian suspects back to Egypt from various world locations through the use of U.S. tracking and interception resources.⁵¹ This plan would have served both U.S. and Egyptian objectives. The U.S. would now have had a place to take its terrorism suspects, while Egypt would have had a way to retrieve its own terrorism suspects.

III. EXTRAORDINARY RENDITION IN PRACTICE

Extensive investigation by domestic and foreign entities and individuals has yielded large amounts of testimony about the program of extraordinary rendition. Some sources have alleged that the CIA runs the program by means of shell companies that manage a fleet of several aircraft. These allegations include purported records of thousands of flight plans said to match the timing of the renditions believed to have occurred, as well as the subcontractors associated with those flights.⁵²

One suspected company, Aero Contractors, allegedly participated in activity relating to the rendition of Lebanese Khâlid al-Miṣrî,⁵³ a German citizen who claimed that the CIA had abducted him while he was on vacation in Macedonia.⁵⁴ Al-Miṣrî reported that CIA operatives subjected him to harsh interrogation for five months in Afghanistan before releasing him in Albania.⁵⁵ It is conjectured that Al-Miṣrî was released when it was discovered he shared an identical name with an al-Qâ'idah suspect.⁵⁶ In May of 2006, a federal court dismissed a lawsuit filed by

49. Activist sources routinely cite Egyptian security services and law enforcement as subjecting detainees to harsh interrogation to promote the goals of interrogation against persons whose violent frame of reference defies standard interrogation practices. *Id.*

50. Mayer, *supra* note 8, at 112.

51. *Id.*

52. See generally GREY, *supra* note 36.

53. Khâlid al-Misri [خالد المصري]. The common rendering is Khaled el-Masri.

54. Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, at A01.

55. *Id.*

56. Activist sources have generally preferred to assert that al-Misri shared a similar, rather than identical, name to the al-Qâ'idah suspect, perhaps in an effort to portray U.S. intelligence agencies as inept. In fact, the names in Arabic are completely identical. Variations in the choice of the letter "e" or "a" in the Arabic definite article in proper names are exceedingly common among Arabs who live in societies that use the Roman script (except Turkey, which boasts firmly established transliteration norms regarding Arabogenic names). Indeed, one person's national-identification card may show one spelling, while his passport shows another. The same variation occurs with other transliteration artifacts, such as the frequent choice of "e" to represent the long [â] sound, the use of "ou" alongside "u" to represent [u] or [û], and the confusing use of "e" to represent the long [î] sound in some names.

attorneys for al-Miṣrī against the U.S. government, on the grounds of protecting state secrets. The Fourth Circuit Court affirmed the dismissal in March of 2007.⁵⁷

Likewise, Egyptian Ahmad ‘Ajīzah⁵⁸ claimed that the Swedish Security Service (Säpo)⁵⁹ had apprehended him on Swedish soil in December of 2001 and turned him over to CIA agents. ‘Ajīzah related that the latter had dressed him in overalls, applied shackles, and placed him on a private jet, purportedly a Gulfstream V, allegedly owned by a U.S. company.⁶⁰ ‘Ajīzah stated that the CIA then flew him to Egypt, where Egyptian security personnel subjected him to harsh interrogation.⁶¹

Another allegation involved Egyptian Muhammad Sa’d Iqbāl Madnī,⁶² who claimed that Indonesian security personnel had abducted him in January of 2002 based on intelligence allegedly supplied by the CIA. Madnī claimed that the CIA suspected him of being an acquaintance of British citizen Richard Colvin Reid, who had boarded a U.S. commercial aircraft with explosive devices inserted into his shoes for the purpose of igniting them while in flight. Madnī further claimed that the Egyptian government had formally asked for his extradition once he was in custody. Egyptian authorities specified no crime other than declaring Madnī a suspect in connection with terrorism. Receiving neither a hearing nor the benefit of legal counsel, Madnī was promptly flown to Egypt on a Gulfstream V.⁶³ An Indonesian agent thought that the extradition request provided a political obscurity for the CIA to carry out its intent. “This was a U.S. deal all along, [...] Egypt just provided the formalities.”⁶⁴

57. *El-Masri v. U.S.*, 479 F.3d 296, 296 (4th Cir. 2007).

58. Ahmad ‘Ajīzah [أحمد عجيزة], commonly rendered Agiza, following Egyptian phonology.

59. *Id.*

60. Since the earliest inferences of the CIA’s ostensibly routine use of Gulfstream V jets at various airports around the world, their reference in activist commentary has come to raise the expected specter of intrigue and imbue the said commentary with the appearance of greater legitimacy than it may deserve. In fact, Gulfstream V jets, manufactured by Gulfstream Aerospace, are very common among executives of both U.S. and Chinese companies that own private jets, in addition to the U.S., Greek, Israeli, and Japanese military forces and limited Saudi and Kuwaiti use. The U.S. Air Force refers to its jet of this type as the C-37A. Given their relatively common commercial and military use, a conscientious effort to trace CIA patterns of travel thus requires spotters to report tail numbers with great reliability, an outcome that too often defies objective confirmation by its very nature. See Dana Priest, *Jet is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004 at A01.

61. ASS’N OF THE BAR OF THE N.Y.C. & CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, *supra* note 15, at 9–10, n.21. The paper alleged that the Egyptian security service had arrested ‘Ajīzah in 1982 based on a suspicion that his cousin had participated in the assassination of President al-Sādāt. *Id.* Following his release, according to the report, the Egyptian security service continued to threaten and harass ‘Ajīzah, who finally filed a lawsuit against the Egyptian government in 1991. Fearing further persecution as a result, ‘Ajīzah said that he fled Egypt with his family to various Southwest Asian countries before ultimately settling in Iran. An Egyptian military tribunal tried ‘Ajīzah *in absentia* in 1999 for alleged membership in al-Jihād, an organization that the Egyptian government had listed as terrorist in nature, and sentenced him to 25 years’ imprisonment with hard labor, without possibility of appeal. See also AM. CIV. LIBERTIES UNION, *Biography of Plaintiff Ahmed Agiza*, (May 30, 2007), <http://www.aclu.org/national-security/biography-plaintiff-ahmed-agiza>.

62. Hāfīz Qārī Muhammad Sa’d Iqbāl Madnī [حافظ قارى محمد سعد إقبال مندى].

63. GREY, *supra* note 36. See also Coop. Research History Commons, *Profile: Muhammad Saad Iqbāl Madnī*, available at <http://www.cooperativeresearch.org/entity.jsp?entity=muhammadsaadiqbalimadni>.

64. See Coop. Research History Commons, *supra* note 63.

There was also the case of Syrian Mâhir 'Arâr,⁶⁵ a dual citizen of Syria and Canada suspected of ties to al-Qâ'idah. 'Arâr alleged that the CIA had abducted him in New York City during a routine change in flights from overseas.⁶⁶ Legal briefs suggest that U.S. officials had denied 'Arâr access to legal counsel due to his foreign citizenship.⁶⁷ 'Arâr stated that agents had held him for several days in the U.S. before his transport to Jordan and then to Syria, where he underwent detainment in a cramped, underground room for nearly a year before his release and return to Canada.⁶⁸ 'Syrian personnel allegedly subjected 'Arâr to several hours of beatings and forced him to falsely confess to having attended an al-Qâ'idah training camp in Afghanistan. Although Canadian officials evidently visited with 'Arâr and inquired about his condition throughout his captivity in the Syrian prison, 'Arâr gave no indication of his alleged subjection to harsh interrogation until after several meetings had taken place.⁶⁹ Finally, U.S. authorities were able to secure the return of 'Arâr from Syria to Canada.⁷⁰ 'Arâr likewise filed suit against the U.S., but the court dismissed his case on national security grounds.⁷¹

A 2006 *New York Times* article reported allegations that CIA and Italian Secret Service agents had grabbed Hasan Muṣṭafâ Usâmah Naṣr,⁷² a militant Egyptian cleric, off a street in Milan, Italy, in February of 2003 and flew him to Egypt, where Egyptian authorities subjected him to harsh interrogation.⁷³ Upon Naṣr's scheduled release nearly a year later, Egyptian authorities allegedly kept him in prison for a further two years before his ultimate release. In an affidavit that he wrote to Italian legal authorities, Naṣr recounted that his harsh interrogation consisted of subjection to "electric shocks while he lay on a wet mattress in a Cairo prison."⁷⁴ Egyptian authorities allegedly beat him repeatedly and "forced [him] to eat rotten bread in a pitch-black cell, while rats and cockroaches ran over his

65. Mâhir 'Arâr [ماهر عرار], often rendered incorrectly as Mâhir 'Ar'ar [ماهر عرعر]. The common spelling is Maher Arar.

66. Arar v. Ashcroft, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006), *aff'd on reh'g, en banc*, 585 F.3d 558 (2d. Cir. 2009). See also PETER JAN HONIGSBERG, *OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR* 188 (Univ. Cal. Press) (2009).

67. See Arar, 414 F. Supp. 2d at 250. See also HONIGSBERG, *supra* note 66.

68. GREY, *supra* note 36. See also Michael V. Sage, Note, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. W. INT'L L.J. 121 (2006) (discussing the case of Mâhir 'Arâr from the perspective of international law).

69. Arar, 414 F. Supp. 2d at 255 ("Prior to each visit [by Canadian officials], Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit.").

70. The Canadian government exonerated 'Arâr and compensated him in the amount of CAD10.5 million for its role in the error of information that led to these events. Beth Gorham, *U.S. Senator Expects Briefing Next Week from Attorney General on Arar Case*, CNEWS, Jan. 26, 2007, <http://cnews.cnoe.ca/CNEWS/Canada/2006/12/12/pf-2754203.html>.

71. Margaret L. Satterthwaite, *Extraordinary Rendition and Disappearances in the 'War on Terror'*, 10 GONZ. J. INT'L L. 70, 72 (2006).

72. Hasan Muṣṭafâ Usâmah Naṣr [حسن مصطفى أسامة نصر], known as Abû 'Umar, commonly rendered Abu Omar.

73. GREY, *supra* note 36, at 190–213 (providing details on his rendition and alleged CIA involvement).

74. Elisabetta Povoledo, *Egyptian Says He Was Tortured after Being Kidnapped in Milan*, N.Y. TIMES, Nov. 11, 2006, <http://www.nytimes.com/2006/11/11/world/Europe/11italy.html>.

body.”⁷⁵ In mid-2005, an Italian judge responded by identifying and issuing extradition warrants against several CIA agents, suspecting that they might have played a role in the kidnapping.⁷⁶

One method used by the American Civil Liberties Union (ACLU) to combat abuse has been to bring suit against those who play a supporting role in extraordinary renditions, particularly the aircraft and flight support companies. For example, in May of 2005, the ACLU sued Jeppesen Dataplan, Inc., on behalf of three alleged victims of extraordinary rendition. The complaint stated:

Since at least 2002, Jeppesen has provided direct and substantial services to the United States for its so-called “extraordinary rendition” program, enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they are placed beyond the reach of the law and subjected to torture and other forms of cruel, inhuman, or degrading treatment. Publicly available records demonstrate that Jeppesen facilitated more than seventy secret rendition flights over a four-year period to countries where it knew or reasonably should have known that detainees are routinely tortured or otherwise abused in contravention of universally accepted legal standards.⁷⁷

Jeppesen’s International Trip Planning service was the target of allegations that it had provided logistical support for the CIA in the extraordinary-rendition program.⁷⁸ The ACLU alleged that Jeppesen was aware of CIA intentions to permit individuals to be subject to harsh interrogation. A Jeppesen senior official stated in a closed-door meeting, “[w]e do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these end up that way.”⁷⁹ The ACLU had brought the lawsuit under the Alien Tort Statute, which allows aliens to bring claims in U.S. federal court for violations of international law or treaties.⁸⁰

IV. THE PARADIGM OF ASYMMETRIC WARFARE

After the attacks on the World Trade Center in New York City on September 11, 2001, the Bush administration enunciated a new outlook on the rules of engagement. Attorney General Alberto Gonzales used the term “New Paradigm” to

75. *Id.*

76. Ian Cobain et al., *Destination Cairo: Human Rights Fears over CIA Flights*, THE GUARDIAN, Sept. 11, 2005, available at <http://www.guardian.co.uk/uk/2005/sep/12/usa.politics>. See also Articles about Hassan Mustafa Osama Nasr, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/n/hassan_mustafa_osama_nasr/index.html (documenting the online series of N.Y. Times articles that pursued this story).

77. First Amended Complaint and Demand for Jury Trial at 1, Mohamed et al. v. Jeppesen Dataplan, Inc., No. 5:07-cv-02798-JW (N.D. Cal. Aug. 1, 2007).

78. Press Release, ACLU, ACLU Sues Boeing Subsidiary for Participation in CIA Kidnapping and Torture Flights (May 30, 2007), <http://www.overbrook.org/newsletter/0607/pdfs/ACLUsummer.pdf>.

79. *Id.* (quoting Jane Mayer, THE NEW YORKER, Oct. 30, 2006, http://www.newyorker.com/archives/2006/10/30/061030ta_talk_mayer).

80. See 28 U.S.C. § 1350 (2005).

describe this new outlook.⁸¹ Vice President Richard Cheney described its meaning on a *Meet the Press* interview, stating:

[T]he government needed to “work through, sort of, the dark side....” Cheney went on. “A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in. And so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.”⁸²

Deputy Assistant Attorney General John Yoo was among the major architects of the legal theories behind the Paradigm of Asymmetric Warfare. Yoo and others authored a series of memoranda that in their entirety advised the President that he had “almost unfettered latitude in his prosecution of the war on terror.”⁸³ They told the President that he was under no obligation to comply with the 1949 Geneva Convention in handling detainees. They classified the detainees as “enemy combatants,” a classification unprotected by the Geneva Convention. In January of 2002, the President suspended the applicability of the Geneva Conventions on enemy combatants in the War on Terror, and subsequently left wide deference to the CIA. In February, the President stated in a written memorandum that even though the Geneva Conventions fall short of applying to detainees captured in the War on Terror, those detainees should still receive humane treatment by the military personnel responsible for maintaining them.⁸⁴

The CIA arguably remained an exception in this regard due to the President never having addressed this concern specifically with reference to foreign-intelligence operations.⁸⁵ Yoo continued to design and voice the underlying ideology behind the Paradigm of Asymmetric Warfare within the context of the U.S. Constitution. At the core of the paradigm were the plenary powers of the Commander-in-Chief, combined with the gaps in the Geneva Conventions, which effectively excluded combatants who chose to operate outside the laws of any State. Yoo stated, “[w]hy is it so hard for people to understand that there is a category of behavior not covered by the legal system?”⁸⁶ He further stated that Congress lacked the power to prevent the President from dealing with asymmetric combatants in any manner in which he might see fit. Referring to the ongoing debate over whether to expand the category of torture to previously excluded interrogation techniques, Yoo stated that Congress has no authority to “tie the

81. JEREMY BRECHER, JILL CUTLER, & BRENDAN SMITH, IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 131 (2005). *See also* Mayer, *supra* note 8.

82. Mayer, *supra* note 8.

83. *Id.*

84. Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees to the Vice President et al. (Feb. 7, 2002), *available at* http://lawofwar.org/Bush_memo_Genevas.htm (last visited Oct. 3, 2011). *See also* Mayer, *supra* note 8.

85. *Id.*

86. David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 972 (Dec. 2009). *See also* Mayer, *supra* note 8.

President's hands in regard to torture as an interrogation technique. . . . [I]t's the core of the Commander-in-Chief function. They can't prevent the President from ordering torture."⁸⁷

V. U.S. FOREIGN POLICY AND THE PARADIGM OF ASYMMETRIC WARFARE

I also want to talk to you about national security. Make no mistake about it, we are at war. We're at war with an enemy that attacked us on September the 11th, 2001. We're at war against an enemy that, since that day, has continued to kill.⁸⁸

President George W. Bush left no doubt in the minds of either the U.S. citizenry or his administration about his commitment to defeating terrorism when he enunciated these words shortly after the Pentagon had undertaken to describe the War on Terror as "The Global Struggle Against Violent Extremism." The Paradigm of Asymmetric Warfare refers to a shift in policy dating from late 2001, under which the U.S. government took the position that the War on Terror is by definition a type of war, rather than a concerted campaign by law enforcement against transnational criminal interests.⁸⁹ The Paradigm of Asymmetric Warfare thus has implications for interpretations of traditional treaties, conventions, and legislation that had criminal activity as its focus. On this matter, Attorney General John Ashcroft noted that the primary focus of the War on Terror must be on "identifying threats of future terrorist acts, preventing them from happening, and punishing would-be perpetrators for their plans of terror."⁹⁰ This change in assumptions, from the previous paradigm of combating crime to the later one of waging war where transnational terrorism is at issue alters the constitutional premises for executive action. Specifically, if Congress recognizes a state of war, it may choose to authorize action on the part of the executive branch intended to prosecute that war expeditiously. In time of war, the urgent need for information to halt impending threats may overrule considerations of due process.⁹¹

The resulting National Security Strategy policies are more proactive, as they emphasize preemptive practices against opponents based on inferences of "hostile

87. Mayer, *supra* note 8.

88. President George W. Bush, Address at the Gaylord Texan Resort and Convention Center (Aug. 3, 2005) (discussing America's response to 9/11 in the context of the War on Terror).

89. President George W. Bush, President Discusses War on Terror at National Endowment for Democracy (Oct. 6, 2005) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/10/20051006-3.html>) (comparing war against Islamic radicalism to war against ideology of communism).

90. Memorandum from John Ashcroft, Attorney Gen. on Prevention of Acts Threatening Public Safety and National Security to Heads of Dep't of Justice Components, (Nov. 8, 2001), *available at* http://www.justice.gov/opa/pr/2001/November/01_ag_580.htm.

91. Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, Jul. 3, 2006, http://www.newyorker.com/archive/2006/07/03/060703fa_fact1.

capabilities and generally hostile intent.”⁹² Obtaining critical intelligence from detainees to protect against future terrorist acts outweighs the considerations of due process that would prevail under the assumption that international terrorism is a criminal matter rather than one involving wartime assumptions. In defense of his advice that none of the Geneva Conventions has any relevance to either the Taliban or al-Qa‘idah, Attorney General Alberto Gonzales wrote, “[i]n my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”⁹³ In agreement, Deputy Assistant Attorney General John Yoo argued in favor of the doctrine of unilateral executive action, given that the chief executive’s role as Commander-in-Chief affords the President plenary power under Article II of the U.S. Constitution, empowering him to bypass treaty restrictions and prevent congressional interference in waging war.⁹⁴ Despite this understanding of plenary powers in time of war, President Bush steadfastly refused to order extraordinary methods of interrogation. Other memoranda concluded that the Geneva Conventions bear no applicability to those elements of war in which the combatants refuse to observe the requisite protocols (such as the wearing of recognizable military uniforms).⁹⁵ Therefore, the memoranda conclude, President Bush has plenary power to use force in the War on Terror,⁹⁶ and the legal limits on the use of harsh interrogation are broader than under the assumption of criminal prosecution.⁹⁷

VI. U.S. POLICY COMPARED TO INTERNATIONAL LAW

A. Extraordinary Rendition as Against U.S. Policy

By definition, there can be no statute to authorize extraordinary rendition. Congress has expressed its intent to honor its duty to uphold U.S. obligations in laws and treaties against extraordinary methods of interrogation and the extradition of prisoners that may be subject to harsh interrogation in the target State. At the same time, the White House has maintained a policy of condemning extraordinary methods of interrogation. However, under both Presidents Bush and Obama, such

92. Arnel B. Enriquez, *The US National Security Strategy of 2002: A New Use-of-Force Doctrine?*, 18 *AEROSPACE POWER J.* 31, 32 (2004) (providing ample background on the change in National Security Strategy since that of the Weinberger-Powell Doctrine, which requires either vital national interests to be at stake or that the political objective be important, clearly defined, and comprehensible).

93. John Barry et al., *The Roots of Torture*, *NEWSWEEK*, May 24, 2004, at 26.

94. Mayer, *supra* note 8.

95. See Memorandum from Alberto R. Gonzales, White House Counsel on Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban to President George W. Bush (Jan. 25, 2002).

96. Peter Slevin, *Scholar Stands by Post-9/11 Writings on Torture, Domestic Eavesdropping; Former Justice Official Says He Was Interpreting Law, Not Making Policy*, *WASH. POST*, Dec. 25, 2002, at A3.

97. Memorandum from Jay S. Bybee, Assistant Attorney Gen. on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A to Albert R. Gonzales, Counsel to the President (Aug. 1, 2002).

methods have evidently been permitted, using identical rationales and with identical assurance of securing compliance from receiving States to abide by U.S. expectations.⁹⁸ Therefore, any policy that authorizes extraordinary rendition would contravene the espoused laws and policies of the U.S. government.

In enacting the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Congress clearly stated that it is contrary to U.S. policy to:

Expel, extradite, or otherwise affect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.⁹⁹

However, the FARRA only applies to transfers that originate from U.S. territory, so it may fall short of addressing the type of extraordinary rendition at issue. The ambiguity here is how the judiciary interprets the law regarding jurisdiction. A major presumption in the law is that the policy applies only to those within U.S. jurisdictions.¹⁰⁰ This interpretation removes any protections that this law might afford to any non-U.S. citizen facing extraordinary rendition. However, the intent of Congress is arguably inferable as seeking to prohibit U.S. officials from involvement in any transfers, whether inside or outside U.S. territory, to any State in which the likelihood of the suspect's subjection to harsh interrogation is greater than that of his freedom from the same. In an amendment to the Emergency Supplemental Appropriations Act for the Iraq War and Tsunami Relief of 2005 (P.L. 109-13), Congress recommitted itself to the principles of the FARRA. Congress stated that it would refuse to fund any program that "subject[s] any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States."¹⁰¹ Later, in an April 2005 press conference, President Bush responded to a query on extraordinary rendition by stating, "[i]t's in our country's interests to find those who would do harm to us and get them out of harm's way. And we will do so within the law, and we will do so in honoring our commitment not to torture people. And we expect the countries where we send somebody to, not to torture, as well."¹⁰² On balance, as enunciated here, the President's intention seems literally to have held, and likewise under the current

98. Strother, *supra* note 3.

99. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822 (1998).

100. 8 U.S.C. § 1231(a)(1)(A) (2006) ("[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States . . .") (emphasis added). See also, e.g., David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 608 n.105 (Summer 2006) ("[N]either the regulations governing extradition nor those governing removal proceedings under FARRA are designed to apply to persons being transferred by, or with the complicity of, U.S. actors outside the United States to third states.").

101. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1031, 119 Stat. 231, 256 (2005).

102. The President's News Conference, 1 PUB. PAPERS 680, 692 (Apr. 28, 2005).

President. Of particular note and of relevance to both administrations, such a position may yet invite the possibility of subjecting individuals to circumstances in which harsh interrogation may occur, albeit only by foreign States' agencies, while diplomatic assurances will also enjoy the reliability of all diplomatic communication, which ceases at the boundary of the foreign State in question.

In addressing domestic laws and extraordinary rendition, it is also important to note that the FARRA is a legislative product of the United Nations Convention Against Torture (CAT).¹⁰³ The FARRA implemented the CAT, as the CAT contains no provision for self-execution. Thus, by virtue of the FARRA, the U.S. now considers itself bound to the convention, but only within the limits of the corresponding legislation enacted by the U.S. Congress.

B. Extraordinary Rendition as Against International Law

In addition to the CAT, the United States is a party to the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁴ the Geneva Convention of 1949, and the Refugee Convention of 1951. These treaties prohibiting harsh interrogation have become customary international law, a norm, or *jus cogens*.¹⁰⁵ These treaties also prohibit refoulement, which refers to the transfer of an individual to a State where there is a "substantial likelihood" of subjecting to

103. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681-761, 2681-822 (1998); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85.

104. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; The U.S. Senate declared the ICCPR non-self-executing, adding reservations as follows:

(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.

S. EXEC. DOC. NO. 102-23 (1977).

105. BLACK'S LAW DICTIONARY 937 (9th ed. 2009). Latin for "compelling law," *jus cogens* is a "mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." *Id.*

extraordinary methods of interrogation.¹⁰⁶ While the CAT neglects to prevent refoulement to States in which individuals may face cruel treatment, the ICCPR is somewhat more rigorous, in that it does prohibit refoulement to States in which the individual may be “at risk” of harsh interrogation or cruel treatment.¹⁰⁷ The 1949 Geneva Convention prohibits both, but it only applies to prisoners of war and civilians classified as “protected persons” as related to armed conflict.¹⁰⁸ This creates a lacuna, which provides for the possibility of exploitation or error.

The three treaties—CAT, ICCPR, and the 1949 Geneva Convention—have required that the signatories criminalize extraordinary methods of interrogation by their officials or those who act under the direction of those officials.¹⁰⁹ According to the treaties, the U.S. is under obligation to investigate, for possible criminal sanctions, each case of extraordinary rendition to determine if there are reasonable grounds to infer an instance of harsh interrogation. If U.S. investigators determine that any agents of the U.S. had a part in unlawful extraordinary rendition, then they must initiate criminal proceedings.¹¹⁰

Thus, through the ratification of the CAT and its implementation by means of the FARRA, the U.S. has an obligation to prevent, prosecute, and punish extraordinary methods of interrogation or complicity to the same,¹¹¹ while under the ICCPR, the U.S. has an obligation to prevent extraordinary rendition per se. In the interpretation of the Human Rights Committee, Article 7 of the ICCPR requires that signatory States “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”¹¹² The Human Rights Committee may therefore find that the U.S. is liable for each instance of extraordinary rendition or refoulement of anyone under U.S. legal control.

Article III of the 1949 Geneva Convention warrants granting “combatants” status as prisoners of war (PWs) if they are members of armed forces. PWs merit certain protections and due process. The status of persons apprehended within the legal jurisdiction of the War on Terror is a key factor here. The U.S. has categorized these individuals as “enemy combatants” or “security detainees,” a category that affords no protection under the 1949 Geneva Convention.

106. BLACK'S LAW DICTIONARY 1394 (9th ed. 2009). More precisely, *refoulement* refers specifically to the transference of refugees between states, so it differs from rendition in that the transferred person's status is not a consequence of a condition of persecution or similar class of circumstances beyond his control. *Id.*

107. International Covenant on Civil and Political Rights, *supra* note 104. *See also, e.g.,* Satterthwaite, *supra* note 71.

108. TORTURE BY PROXY, *supra* note 15, at 31.

109. *Id.*

110. Satterthwaite, *supra* note 71, at 1394.

111. *Id.*

112. TORTURE BY PROXY, *supra* note 15, at 54 (quoting U.N. Rep. of the Human Rights Comm., Oct. 9, 1992, U.N. Doc. A/47/40 at 202.).

1. International Law Implicated

The Geneva Conventions are so outdated and are written so broadly that they have become a sword used by terrorists to kill civilians, rather than a shield to protect civilians from terrorists. These international laws have become part of the problem, rather than part of the solution.¹¹³

Generally, International Human Rights Law (IHRL) is in effect in a time of peace, while International Humanitarian Law (IHL), which implies the law of war, takes effect in a time of armed conflict. There are conflicting theories about whether the IHL supersedes the IHRL totally. Specifically, it is a point of debate whether only those portions of IHL treaties that contain derogation clauses supersede provisions of IHRL treaties, or whether all provisions exist concurrently, subject to interpretation against the context of contrary provisions.¹¹⁴

By definition, cruel, inhuman, or degrading (CID) treatment is contrary to international law. This is fundamentally a matter of *jus cogens*, as the terms cruel, inhuman, and degrading are normatively negative across political cultures. This author posits that, insofar as actions undertaken by a State are construable as cruel, inhuman, or degrading, other States will either oppose the actions or protest against the ascription in order to maintain political alliances, but no State will condone both the ascription and the target State's actions. Specific definitions, as applied to various treaties and within U.S. domestic legislation, vary considerably.¹¹⁵ The next sections will describe individual treaties that proscribe CID activities among signatory States.¹¹⁶

2. Geneva Conventions

Although the U.S. ratified the Geneva Conventions in 1949, it was only in 1996 that Congress, then under the control of the Republican Party,¹¹⁷ enacted the

113. Alan Dershowitz, *Rules of War Enable Terror*, BALT. SUN, May 28, 2004, at 17A (wherein the author explains the theory of the metaphorical "ticking time bomb," for which he advocates subjugating countervailing rules to the urgent necessity of obtaining intelligence data from terrorists).

114. See Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 700-04 (2006) (featuring a useful theoretical discussion); Elena Landriscina, *Criminalizing Extraordinary Rendition: Global Civil Society and the Promise of International Law* 3-7 (Centro Argentino de Estudios Internacionales, Working Paper No. 27, Mar. 5, 2007) (Arg.), available at <http://www.caei.com.ar/es/teoria.htm> (providing an analysis of the development of IHRM and IHL).

115. For an analysis of definitions of harsh interrogation, see Satterthwaite, *supra* note 71 at 2-4; David Weissbrodt, *Materials on Torture and Other Ill-Treatment*, SUPPLEMENTARY MATERIAL FOR INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (3d ed. 2001), 24; TORTURE BY PROXY, *supra* note 15, at 35-36.

116. *Id.*

117. This fact is significant in that the history of the outcry over extraordinary rendition seems to rely on the presence of a vocal opposition to the party in power; hence, a President of one party with a Congress of the other will appear to have engaged in the practice inordinately. In fact, however, the only serious attempt to broaden the applicability of the Geneva Conventions to U.S. policy has been the one noted here.

War Crimes Act to formally criminalize grave breaches thereof.¹¹⁸ Articles 13, 14, and 17 of the Third Geneva Convention cover Prisoners of War (GPW) and prohibit CID activities. Articles 130 and 131 render signatory States accountable for CID activities that occur at the hands of entities under their control.¹¹⁹ The Fourth Geneva Convention (GC) covers civilians, namely, persons affected by the waging of war who fall outside the GPW category. Articles 31 and 32 of this Convention prohibit CID activities undertaken against civilians. Analogous to the latter provisions of the Third Geneva Convention, Article 148 of the Fourth Geneva Convention again serves to hold States accountable for CID activities undertaken by way of entities under their control. Applied to civilians, Article 147 specifically tries to prohibit any instance of “willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person.”¹²⁰

Because international terrorists nominally or actually associated with al-Qâ'idah or the Ṭālibān refuse to abide by the protective provisions of the Geneva Conventions,¹²¹ President George W. Bush's legal counsel very carefully and correctly defined al-Qâ'idah and Ṭālibān detainees as falling outside the aegis of the Geneva Conventions.¹²² Opponents of those policies of President Bush that sought to address how to handle al-Qâ'idah and Ṭālibān detainees insisted that no category of person may fall outside either the GPW or the GC,¹²³ a patent misinterpretation of the design of the Geneva Conventions, which only addresses the jurisdictions and parties to a formal war between States.

As an ancillary matter, a popular argument in favor of this latter point of view, raised at the height of the public debate on the wars in Iraq and Afghanistan, is the fact that the U.S. Army Field Manual (FM) on prisoners of war outlines strict

118. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295, 343–47 (2007).

119. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 63 U.S.T. 3316, 3420 [hereinafter *GPW*].

120. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *GC*].

121. For example wearing recognizable uniforms, intentionally targeting civilians, and exploiting for use as staging grounds types of buildings and locations prohibited by the Geneva Conventions (for example, Islāmic religious shrines and cemeteries, which U.S. military forces avoid targeting except under the strictest use of authorization channels).

122. See Weissbrodt & Bergquist, *supra* note 118, at 300. The authors presented a framework for determining status *vis-à-vis* the Geneva Conventions, namely, the following sequence of questions: (1) Is there currently an armed conflict involving High Contracting Parties (*i.e.*, signatories to the Geneva Conventions)? (2) If the answer to the first question is negative, then does any High Contracting Party currently occupy any territory recognized to belong to another? (3) If the answer to either the first or the second question is affirmative, to whom do the Conventions afford protected-person status? (4) For those persons so identified, what rights and protections do the Conventions afford them? The authors then provided a critique of the rationales advanced by the Bush administration's legal counsel in defense of its declaring al-Qâ'idah and Ṭālibān terrorists exempt from the Geneva Conventions.

123. International Committee of the Red Cross, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 45, 6 U.S.T. 3516, 75 U.N.T.S. 287, 602, n.1 (Jean S. Pictet ed., 1958). This commentary suggests that every person possesses some status under the Geneva Conventions, whether that of prisoner of war (Third Convention), civilian (Fourth Convention), or member of a medical staff (First Convention). The arguments suggest that no one in enemy hands can possibly fall outside protection of the Geneva Conventions. *Id.*

procedures for safeguarding enemy combatants removed from the war zone, regardless of their status under the Geneva Conventions.¹²⁴ However, this is a product of U.S. Army doctrine per se, rather than international treaty or even superordinate U.S. policy. Army doctrine rejects disparate treatment by type of enemy combatant, excepting the segregation of persons by rank (officers versus enlisted personnel).¹²⁵ This is a question of efficiency, rather than propriety, as by this method, Army officials are able to forgo lengthy debates about the appropriate manner of treating prisoners before expeditiously prosecuting violations. Part of the U.S. Army's history is the My Lai incident in Vietnam, which arguably provided considerable fodder for opponents of the war and consequently constrained the U.S. government's latitude to prosecute the war as the situation dictated.¹²⁶ This ultimately led to an inability to manage the arrangement which would have concluded the war as worked out in 1972, serving instead as an opportunity for the enemy to regroup and force U.S. forces to abandon the war zone prematurely.¹²⁷ As a consequence of that experience, the U.S. Army treats all PWs as though they fall under the Geneva Conventions, whether this would be a valid or an invalid inference, to eliminate the possibility of error in that judgment.¹²⁸ That the noted FM may provide a useful model for general U.S. policy is another matter, one possibly worth exploring. However, the components of U.S. Army doctrine must fit the totality of the same. On balance, arguments that the executive branch must follow FM practices relating to PWs merely betray naïveté about military practices.

A 2004 memorandum authored by Assistant Attorney General Jack Goldsmith provided legal support for the practice of transferring detainees from the war in Iraq to other countries for the purpose of interrogation.¹²⁹ Given the different nature of the war in Iraq from that against al-Qâ'idah or Ṭālibān operatives, this practice may violate Article 49 of the Fourth Geneva Convention, which prohibits the transfer of protected individuals away from a territory under military occupation.¹³⁰

124. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 19-40 – ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND DETAINED PERSONS (Nov. 1952) [hereinafter ARMY FIELD MANUAL 19-40] available at <http://www.enlisted.info/field-manuals/fm-19-40-enemy-POW-civilian-internees-and-detained-persons.shtml>; see also U.S. DEP'T OF ARMY, REG 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES 1-5(a)(2) (Oct. 1, 1997) [hereinafter ARMY REG 190-8] (“All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.”).

125. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE § III ¶ 92, available at <http://www.enlisted.info/field-manuals/fm-27-10-the-law-of-land-warfare.shtml> (regulating equality of treatment of prisoners of war aside from provisions relating to rank and sex); see also ARMY REG. 190-8, *supra* note 124 (“All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria.”).

126. See generally, e.g., William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. Rev. 671 (Summer, 2000).

127. *Id.*

128. See ARMY FIELD MANUAL 19-40, *supra* note 124, at 1–2; ARMY REG. 190-8, *supra* note 124.

129. See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A01.

130. Memorandum from Jack L. Goldsmith, Assistant U.S. Att’y Gen. on Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq to Alberto R. Gonzales, Counsel to the

Significantly, Goldsmith warns near the end of his memorandum that observers may possibly consider the practice in Iraq a grave breach as defined under GC Article 147 and raise accusations of war crimes under domestic law.¹³¹ That President George W. Bush sought clarification of this restriction demonstrates an informed concern for the Geneva Conventions. Specifically, the difficulty presented by this provision revolves around the identification of a unique category of enemy combatant. The Geneva Conventions fail to consider the intrusion onto occupied territory of an enemy whose intent is as much harm to the occupier as it is to the occupied population. Nevertheless, by entering territory occupied by coalition forces, terrorists actually benefit from a new kind of protection, despite the fact that they also represent a new kind of danger, in essence seeking to kill all parties, rather than the occupier alone. In this scenario, the Geneva Conventions' quest to protect non-combatants in a war between States inadvertently hampers the power of military forces to assist in that protection.

3. U.N. Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT)

I want to reiterate the United States Government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman, or degrading treatment or punishment worldwide. The President of the United States has made clear that 'torture anywhere is an affront to human dignity everywhere' and that 'freedom from torture is an inalienable human right.' Beyond the protections in our Constitution..., United States criminal laws prohibit torture. There are no exceptions.¹³²

The 2006 annual report issued by the Committee against Torture criticized the U.S. for purported violations of both human rights law and humanitarian law. It also demanded an end to extraordinary rendition.¹³³ However, the Committee's failure to distinguish between military and civilian contexts in its inconsequential statement undermines the legitimacy of its arguments. For its part, the U.S. considered itself as acting within CAT boundaries.¹³⁴ Attorney General Gonzales contended that, in the case of enemy combatants who fall outside the protections of

President, (Mar. 19, 2004), available at http://library.uchastings.edu/library/foreign-and-international-research/Iraq-research/doj_march_19.pdf.

131. *Id.* at 14 n.14.

132. John B. Bellinger III, Dep't of State Legal Advisor, Opening Remarks at the U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), in *U.S. Periodic Report to Committee Against Torture* 100 AM. J. INT'L L. 703, 703 (2006); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984).

133. Bellinger, *supra* note 132, at 705.

134. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. OF INT'L L. 585, 610 (2006) (for extensive analysis of the applicability of CAT to the practice of extraordinary rendition).

the Geneva Conventions, the U.S. must observe restrictions against CID actions only with regard to persons within U.S. territory.¹³⁵ Should U.S. agents extradite such persons to foreign countries in which CID actions constitute a standard mode of interrogation, there is no legal authority to obstruct it, principally because the enemy combatants themselves have rejected the Geneva Conventions. Meanwhile, the U.S. ratified the CAT with the declaration that Articles 1-16 are non-self-executing, a position that federal courts have upheld.¹³⁶ Although irrelevant to the case of persons who lack Geneva Conventions protection, the U.S. has further defined "substantial grounds" as constituting a subjective probability (by way of the ordinary advisement process in national security affairs) greater than 50%.¹³⁷ This position is particularly problematic, as national security advice must depend on diplomatic assurances from receiving countries that specify detainees will remain free from the threat of harsh interrogation.¹³⁸ In those cases in which such assurances emanate from countries previously criticized by the U.S. for human-rights violations, the difficulties associated with subjective estimates, even by experts, become more manifest, since there is virtually no expeditious way to monitor compliance.¹³⁹

4. Refoulement and the ICCPR

The ICCPR fails to include any specific prohibitions of refoulement. Nevertheless, some have argued that extraordinary rendition violates Article 7.¹⁴⁰ The Human Rights Committee, which oversees due observance of this treaty among signatory States, has in fact enunciated this understanding, in association with the practice of *forced disappearance*.¹⁴¹

5. International Criminal Court (ICC)

The Rome Statute indicates which actions constitute crimes against humanity, prosecutable in the International Criminal Court (ICC). The ICC lists forced

135. Sage, *supra* note 68, at 138.

136. Chesney, *supra* note 114, at 676–91 (for analysis of the possible mechanisms to implement Article 3).

137. 136 CONG. REC. 36192-93 (1990).

138. Sage, *supra* note 68, at 137 (suggesting that the action of turning Mâhir 'Arâr over to Jordanian authorities, where he allegedly incurred beatings prior to his transfer to Syria, sought to lessen the "perceived foreseeability of Arar's eventual torture").

139. See generally U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2006). Individual country reports on Egypt, Syria, and Jordan, which have been destinations for U.S. rendition for persons detained in the War on Terror, have criticized these countries for using methods of harsh interrogation, contrary to assurances made to U.S. authorities as a condition for rendition.

140. Satterthwaite, *supra* note 71, at 19–26 (examining the interpretation of Article 7 through construction and purpose, specifying U.S. reluctance to recognize the prohibition of *refoulement* in the ICCPR, which includes CID treatment as well as torture, while Article 3 of the Third Geneva Convention prohibits only torture *per se*).

141. Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309, 322 (2006).

disappearance as falling among the crimes within its jurisdiction, in addition to complicity, aiding, and abetting, on the matter of CID treatment.¹⁴²

The common premise for differentiating the War on Terror from traditional wars in the past, particularly the refusal of enemy combatants to wear identifiable uniforms, the lack of clear battlefields, and the enemy's blatant violations of the Geneva Conventions in all other ways, was also applicable to the Vietnam War. Author Joseph Margulies points out that the U.S. adopted a policy in Vietnam regarding the treatment of enemy combatants that observed the provisions of the Geneva Conventions, despite the opportunity to argue that they failed to apply in that case as well.¹⁴³ Specifically, enemy combatants in Vietnam who refused to wear a uniform arguably removed themselves from protection under the Geneva Conventions. In that conflict, it was the unilateral choice of the U.S. to apply Geneva Conventions rules.¹⁴⁴ Nevertheless, the distinction between enemy combatants in Vietnam and those in the War on Terror is much graver than merely a question of uniforms, as those enemies in the latter conflict also fail to represent any State in their actions. That the Geneva Conventions seek to regulate relationships among States, rather than policies within States, is a critical distinction, which differentiates the scope of international law in conventional and asymmetric types of warfare.

Opponents of the Paradigm of Asymmetric Warfare have contended that the Yoo and Bybee memoranda amounted to sheer misstatements of the law.¹⁴⁵ If the Paradigm of Asymmetric Warfare is difficult to construe under current international law, it is inherently problematic. This is because such an observation, if shared by the international community, could make the U.S. appear to disregard its obligations under international law. In turn, it is conceivable that such a conclusion could constitute some manner of precedent to justify more egregious actions by other States, which may fail to observe the difference between categories of persons protected under the Geneva Conventions and those whom the Geneva Conventions ignore. While it is hardly rational to speculate that those entities responsible for international terrorism will escalate their destructive activity upon claims that the U.S. appears to have violated international law, it is nevertheless conceivable that such entities will use whatever arguments they find available to try to foment sympathy for their cause against the U.S.

142. TORTURE BY PROXY, *supra* note 15, at 11.

143. MARGULIES, *supra* note 36, at 79–81.

144. *Id.*; see also GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964–1973 61 (1975).

145. See generally Sylvie Kauffmann, *La Bataille pour la Démocratie: Une Affaire de Principe*, LE MONDE, Oct. 26, 2004; MARGULIES, *supra* note 36, at 89–95; Mayer, *supra* note 8. For details on extraordinary renditions that have allegedly taken place outside of Iraq, see GREY, *supra* note 36; MARGULIES, *supra* note 36.

VII. DEFENSES

A. Diplomatic Assurances

Where detainees are subject to transfer, the United States has relied on “diplomatic assurances” from target States as a basis for proper transfer. Diplomatic assurances are letters or statements from target States that individuals delivered into their custody will remain safe from subjection to extraordinary methods of interrogation. Relating to the CAT:

[R]egulations implementing CAT provide that if assurances are obtained by the secretary of state from the government of a specific state “that an alien would not be tortured there if the alien were removed to that country” and such assurances are forwarded to the attorney general or the secretary of the Department of Homeland Security, the official to whom this information is forwarded shall determine, in consultation with the secretary of state, whether such assurances are “sufficiently reliable” to permit the alien’s removal to that state without violating U.S. obligations under Article 3 of CAT.¹⁴⁶

There is no requirement for the U.S. Departments of State, Justice, and Homeland Security to disclose their uses of diplomatic assurances.

The U.S. used diplomatic assurances in the ‘Arâr case. There, U.S. officials received assurances that ‘Arâr would enjoy protection from extraordinary methods of interrogation.¹⁴⁷ After holding ‘Arâr for ten months, Syrian officials found no connection between him and al-Qâ'idah. ‘Arâr was subsequently released. This case may illustrate that U.S. efforts to obtain diplomatic assurances of freedom from the threat of extraordinary methods of interrogation may fall short of good faith.¹⁴⁸

Human Rights Watch also reported on the ‘Ajîzah case. As previously noted, Swedish officials rendered ‘Ajîzah to Egypt, having obtained diplomatic assurances that ‘Ajîzah would be safe from harsh interrogation or other maltreatment, would receive a fair trial, and would be free of any threat of a death sentence.¹⁴⁹ Human Rights Watch alleged that ‘Ajîzah underwent harsh interrogation while in Egypt, and that Swedish officials may have expected such treatment.¹⁵⁰

Reliance on diplomatic assurances to address the determination of the likelihood of harsh interrogation may indeed be permissible under international

146. MARGULIES, *supra* note 36.

147. HUMAN RIGHTS WATCH, CASES INVOLVING DIPLOMATIC ASSURANCES AGAINST TORTURE; DEVELOPMENTS SINCE MAY 2005 18–20 (2007), <http://www.hrw.org/reports/2007/01/23/cases-involving-diplomatic-assurances-against-torture-0>.

148. MARGULIES, *supra* note 36, at 143.

149. *See generally id.*

150. HUMAN RIGHTS WATCH, *supra* note 147, at 14–15.

law, but this is still a gray area. The effectiveness of such assurances, as evidenced by past extraordinary rendition cases, raises many questions. However, the suggestion that diplomatic assurances are ineffectual as a general matter of international law is even more problematic, for international law must emphatically begin with the premise that all non-contending States are existential equals, and their pronouncements valid, until such a time as one State adopts a policy *vis-à-vis* another that formally questions such promises.

B. State Secrets

The major weapon used by the U.S. government against lawsuits that seek to challenge extraordinary rendition is the state secrets privilege. The ACLU's visceral disdain for the Bush administration's effective application of this theory is visible in its commentary:

The state secrets privilege, when properly invoked, permits the government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security. However, the Bush administration is increasingly using the privilege to dismiss entire lawsuits at the onset. The government has invoked the privilege to evade accountability for torture, to silence national security whistleblowers, and even to dismiss a lawsuit alleging racial discrimination. This once-rare tool is being used not to protect the nation from harm, but to cover up the government's illegal actions and prevent further embarrassment.¹⁵¹

In February 2008, a District Court sided with the U.S. government and dismissed the lawsuit under the state secrets principle. According to dejected ACLU staff attorney Ben Wizner, "U.S. courts once again accepted flawed arguments from the Bush administration and handed the government the ability to engage in torture, declare it a state secret, and escape legal scrutiny and accountability."¹⁵² The U.S. Government has historically used the state secrets privilege rather easily. Opponents of the Bush administration in particular have sought with vigor to undermine it, but to no avail.¹⁵³ The agencies that may declare state secrets to avoid scrutiny are those that receive protection from the privilege. They are under no requirement to reveal if there is in fact a state secret at issue.

In March 2008, New York Representative Jerrold Nadler introduced legislation to limit the use of the state secrets privilege. The ACLU reported the bill as follows:

151. *Background on the State Secrets Privilege*, ACLU, Jan. 31, 2007, <http://www.aclu.org/national-security/background-state-secrets-privilege>.

152. Press Release, ACLU, ACLU Appeals Dismissal of Extraordinary Rendition Lawsuit against Boeing Subsidiary (Mar. 14, 2008), <http://www.aclu.org/national-security/aclu-appeals-dismissal-extraordinary-rendition-lawsuit-against-boeing-subsidiary>.

153. *Id.*

Congressman Nadler's legislation will reinstate the role of the judiciary as a check against abuse of power as it will require a court more closely to examine the government's national security claims for legitimacy. We can't allow our president's actions to go consistently unchallenged when there is evidence of government misconduct, simply because the government invokes 'state secrets.'¹⁵⁴

Despite the most skillful efforts of its opponents, the great care that the Bush administration took to leverage the complex detail of the interacting legal premises in the pursuit of its goals in the War on Terror have successfully defied all attempts to unravel the Paradigm of Asymmetric Warfare. The Nadler bill failed to achieve its goal on behalf of the opposition.

1. Domestic and International Response

Some European States, including Italy, Germany, Sweden, Spain, and Iceland, have thus far attempted to address that portion of the practice of extraordinary rendition that has allegedly made use of their airspace or territory to conduct investigations and have occasionally pursue prosecution.¹⁵⁵ The effectiveness of the Bush administration's legal apparatus is manifest in the fact that Federal courts dismissed all cases so filed, based on national security concerns.

The best gauge of the extent of the international response to the practice of extraordinary rendition comes from a report prepared by the European Parliament after several months' investigation by a temporary committee established to investigate the alleged participation of European countries in extraordinary rendition operations.¹⁵⁶ Members of that temporary committee appeared before the House Subcommittee on International Organizations, Human Rights, and Oversight, to defend its findings.¹⁵⁷

The 77-page report asserted that the practice of extraordinary rendition on the part of various States' foreign intelligence agencies is only construable as illegal. Although the committee observed that terrorism constitutes a legitimate threat to EU security and requires legal means for combating it on EU member States' territories,¹⁵⁸ it opined that any rendition that leads to secret detention must by definition constitute a case of enforced disappearance,¹⁵⁹ which the EU should disclaim as unacceptable. An underlying assumption of the committee's conclusions was that no one on EU territory may fall outside the protections of the combination of national, EU, and international treaties on the matter of due

154. Press Release, ACLU, ACLU Lauds Introduction of House State Secrets Bill (Mar. 13, 2008), <http://www.aclu.org/national-security/aclu-lauds-introduction-house-state-secrets-bill>.

155. John Harrington et al., *National Security*, 40 INT'L LAW. 487, 493-94 (2006).

156. See generally European Parliament, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, EUR. PARL. DOC. A6-9999 (2007).

157. *Hearings*, *supra* note 29.

158. Report on The Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. A6-9999 (2007) at 5-6.

159. *Id.* at 4.

process.¹⁶⁰ In particular, the committee cited Article 10 of the ICCPR as requiring the conferring of due process rights on any persons detained on EU territory.¹⁶¹ On the matter of theory, the committee specified that the peremptory norm of international law (*jus cogens*) prohibits extraordinary methods of interrogation *per se*.¹⁶² Significantly, the committee concluded that U.S. sources had left too many questions unanswered as posed by alleged victims, non-governmental organizations (NGOs), media sources, and government representatives. The committee went on to say that this silence has cast some degree of doubt over the U.S. position that its activities have excluded CID treatment.¹⁶³ The committee also opined that extraordinary rendition constitutes an extra-judicial practice that will fail to hold up to international standards of human rights if indeed it involves arresting suspects, as opposed to convicted terrorists.¹⁶⁴ Finally, the committee expressed a belief that extraordinary rendition is ineffectual as a way to combat international terrorism.¹⁶⁵

The committee called for intensified cooperation among governments in fighting the War on Terror within a legal framework. It stressed the existence of established rules of law that require harmonious observance and noted that if there are challenges that require a change in such laws, it should constitute a joint action rather than a unilateral one.¹⁶⁶ The committee pointed to the need to afford all suspects and detainees on EU territory the due process of law, in the same manner as U.S. agents have interpreted the treatment of detainees on U.S. territory. During the hearings, Representative Dana Rohrabacher defended the position that international terrorists fall outside the protections of the Geneva Conventions, but acknowledged the possibility that the pursuance of policies that are overly broad may inadvertently compromise the civil rights of innocent civilians in the process.¹⁶⁷ CIA Director Michael Hayden had previously complained privately to diplomats at the German Embassy in Washington about EU officials' criticisms of the extraordinary rendition program.¹⁶⁸

In December of 2005, Representative Markey introduced a bill that would have directed the Secretaries of State, Defense, and Homeland Security, as well as the Attorney General, to supply selected details to the House of Representatives that relate to the possibility of extraordinary rendition operations in the case of certain foreign individuals.¹⁶⁹ The bill received a poor reception on the House floor, so Representative Markey submitted another bill that more generally called for the prohibition of extraordinary rendition.¹⁷⁰ To date, no bill introduced into the U.S.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 7.

164. *Id.* at 10.

165. *Id.*

166. *Id.* at 30.

167. *See generally Hearings, supra* note 29, at 39.

168. Walter Pincus, *CIA Chief Complains About Agency's Critics in Europe*, WASH. POST, Apr. 17, 2007, at A12.

169. H.R. Res. 593, 109th Cong. (2006).

170. H.R. Res. 1352, 110th Cong. (2007).

Congress to curtail extraordinary rendition has succeeded, even under the dominance of the opposition (Democratic) party since January of 2007.

VIII. A CONCEPTUAL INQUIRY INTO THE POLITICO-LEGAL SYMMETRY

The administration of President George W. Bush was careful to review and observe the legal implications of all of its wartime activities. In so doing, it was successful in warding off all challenges to questions concerning the practice of extraordinary rendition. The correctness of the administration's adherence to legal detail arguably reflects both iron-clad legalism and sufficient control over the actual processes at issue, contrary to the most vociferous claims of vocal activists and activist groups during the seven years that the Bush administration watched over the Paradigm of Asymmetric Warfare. Had there been any meaningful gaps between law and practice, the sheer scale of the onslaught of accusations by the administration's energetic opponents on the question of extraordinary rendition would have resulted in more observable effects than merely a few bills in the U.S. House of Representatives devoid of any compelling logic. The administration was correctly uncooperative with inquiries into allegations against the CIA or its operatives, as it operated strictly within careful legal interpretations and was under no compulsion to sacrifice executive prerogative for the sake of appeasing critics.

For example, the administration refused to extradite CIA operatives identified by Italian authorities as possibly complicit in a kidnapping that had occurred on Italian soil.¹⁷¹ Indeed, it would have been wrong for the administration to comply with such an order, as the relevant authority is patently lacking on the part of the Italian judicial branch. However, on the matter of pursuing a resolution to the question of extraordinary rendition, what is most interesting about the Italian order is the asymmetry of governance that it highlights between the Italian and U.S. postures on the matter. The Italian judicial branch lacks both authority over and even symmetry with the U.S. executive branch. Perhaps more interesting still is the unasked question of whether the Italian judge was even aware of his consequent inefficacy in this matter (a reasonable assumption, given that the contrary proposition presupposes a level of ignorance on his part that is frankly unfathomable) and thus had greater motivation to issue the order, knowing its inert nature. This substantive politico-legal asymmetry hints at the core of the solution to the problem at hand.

Neutral observers and visceral opponents alike should by now recognize that the essence of the problem of extraordinary rendition as a legal matter lies in the question of rendition, rather than in what is construable as extraordinary. Opponents sought all variety of ways to undermine the policies of the administration of President George W. Bush, but to no avail. By now it has become clear that the administration of President Obama fully assents.

Furthermore, even before President Obama's accession, the return of both houses of Congress to the opposition party in January of 2007 changed nothing

171. Craig Whitlock, *U.S. Won't Send CIA Defendants to Italy*, WASH. POST, Mar. 1, 2007.

with regard to the desire to change U.S. policy, a fact that only highlights the legal correctness of the prior administration's policies, regardless of how vehemently the administration's opposition, particularly the ACLU, insisted on challenging them. Even more striking is the fact that since January of 2009, the opposition party's considerable margin of dominance in both Congressional houses and the executive branch failed to challenge the previous administration's policies on extraordinary rendition.¹⁷² The combination of inaction on the part of a supremely powerful Democratic party and explicit announcements by Democratic President Obama that President Bush's policies will remain intact must force the objective observer to accept the legal validity of both presidents' positions, even if only in retrospect with regard to President Bush.

The War on Terror continues, albeit under the guise of new terminology, and the Chief Executive has issued no Executive Orders to contravene explicitly any practice that the previous administration might indeed have condoned on the matter of extraordinary rendition. Suddenly, the opponents of the administration of President Bush are almost completely silent on this question. With few exceptions, they are forgoing the opportunity to seek to hold the current administration to the same standards, with the same insistence, as they did the previous, by demanding the same transparency and changes in executive branch policy.

Clearly, a proper analysis of the phenomenon should thus return to the definition itself. As previously indicated, extraordinary rendition is rendition devoid of the backing of treaty. Thus, it is inherently transnational in nature. Conversely, no action may fall under this definition unless it transcends national borders. Disregarding the specific details of relevant laws, it is an overarching principle of politico-legal structural symmetry that the practice of rendition in the absence of treaty has lacked.¹⁷³ It is thus an adherence to a principle of politico-legal structural symmetry that renders extraordinary rendition ordinary.

172. David Johnston, *U.S. Says Rendition to Continue, But With More Oversight*, N.Y. TIMES, Aug. 24, 2009 (revealing that Congress has not acted to prevent the Obama administration from continuing the Bush administration's policy of extraordinary rendition).

173. Traditionally, the concept of legal symmetry only appears in discussions of tort law, as they confront questions of balancing the penalty for the harm done to a party against the degree of that harm, or by extension inferring similarly deep degrees or broad jurisdictions of reasonable care on the part of all parties of equal legal status (for example, Jeremiah Smith, *Liability of Landowners to Children Entering without Permission*, 11 HARV. L. REV. 349, 364 (1898)). Nevertheless, the principle of legal symmetry enjoys a long history in matters involving codes of law (for example, Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 MICH. L. REV. 89, 105 (1904); James Brown Scott, *The Work of the Second Hague Peace Conference*, 2 AM. J. INT'L L. 1, 2 (1908)), and it is so implicit in legal structures that arise therefrom that its ubiquity goes unnoticed. A notable example is the close similarity of politico-legal structures across the fifty United States, despite the absence of compulsion toward such a creation. Theorists in the organizational sciences refer to this effect as "mimetic isomorphism." Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147 (1983). The same term is certainly applicable in the legal disciplines, but all that is necessary in the present discussion is to refer to the observation of the symmetry of generally accepted political and legal objectives both across democratic political jurisdictions and between civilian and military jurisdictions of a given national jurisdiction. For want of a more convenient but sufficiently specific term, the present exploration will refer to this fairly universal legal principle, which precedes the enactment of statutes to create the resulting edifices, simply "politico-legal symmetry."

A principle of politico-legal symmetry should begin with the identification of the core action, which involves apprehending an individual in a State's territory. Whether in a time of war or a time of peace, an apprehension requires a legal justification. In a time of war, any inference of hostile intent in a jurisdiction of combat is sufficient to justify apprehension. The controlling authority (*i.e.*, occupying military forces) in that jurisdiction carries out the apprehension so as to reduce the potential for harming anyone who turns out to be an innocent bystander. Inferences of hostile intent in such a context constitute exceedingly rapid appraisals with a high margin of error, so the whole process of apprehension must structurally include opportunities for applying an opposite, exceedingly low, margin of error.¹⁷⁴ This structural feature consists of provisional incarceration, which allows time for inspection. Incarceration is feasible because the inherent hazard of a jurisdiction of combat already compromises innocent bystanders' safety and restricts their liberty. Thus, the principle that justifies provisional incarceration in a jurisdiction of combat implicitly seeks a balance against the potential for preserving incarcerated individuals' liberty outside of that jurisdiction.

In a time of peace, by comparison, law enforcement authorities must make a different kind of inference involving the probability of identity. The controlling authority (*i.e.*, law enforcement) in a peaceful jurisdiction carries out the apprehension so as to increase the potential for capturing anyone who turns out to be a party to an alleged crime. As in the military case, inferences of identity constitute rapid appraisals with a high margin of error. The process of apprehension must therefore structurally include an opportunity for applying an opposite, low margin of error. Provisional incarceration is briefer than in the military case, as it benefits from no justification based on dangers in the environment, but the relevant inspection is easier than in the military case, because it merely involves a task of positive identification. This task appears to be made easier in a time of peace by the fact that identifying credentials are typically more readily available than under the

174. The concept of error as applied to the law is almost as unconscious, but just as theoretically substantive, as that of politico-legal symmetry discussed above. Nevertheless, common-law court systems incorporate as a matter of design a safeguard to minimize error in convictions, namely, the adversarial process and the principle of innocence unless there is proof of guilt beyond a reasonable doubt. Opposing parties in a criminal case must make an effort to lay out convincing evidence of their respective positions. However, the prosecutor has the more difficult task. Rather than happenstance, this inequality seeks to minimize erroneous convictions. By doing so, it also happens to increase the proliferation of erroneous acquittals, but this is an acceptable cost in common-law societies for the greater objective of preserving a maximally free social structure. Viewed statistically, the process minimizes the less desirable margin of error, namely, that which would undermine freedom if applied generally. Legal discussions do broach the topic of margin of error occasionally, when discussing matters of broad concepts of legal structure, for example William L. Ransom, *The Layman's Demand for Improved Judicial Machinery*, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 166 (1917), but it is conceivable that such principles warrant more common dialog than is currently the case.

By extension from underlying statistical premises of criminal law in common-law States, it is feasible to discuss the relationship between margin of error and the compensatory legal structures that exist in zones of peace and war, respectively, while understanding the distinct legal processes that operate therein based on their distinct levels of characteristic urgency and order, along with the unequal nature of the flow of information in each. The reader will recognize that this is the logic pursued herein, as this is consistent with the breadth of the concepts of legal structure that the present discussion seems to warrant.

chaotic conditions that prevail in a time of war, which includes the possibility of many homeless parties who are unable to secure any identifying credentials.

The difference between a time of war and a time of peace in this sense involves the legal authority behind the apprehension. Part of this difference involves a definition of the domain of war and the domain of peace, discussed below. Meanwhile, in a time of war, the legal authority also constitutes the enforcement authority. By comparison, in a time of peace, the legal authority constitutes an independent judicial authority. This is the essence of the changing prerogatives of the executive under the two conditions. What is missing with respect to the present task of resolving the question of extraordinary rendition is the matter of transferring an apprehended person across politico-legal boundaries. Resolving this matter by reference to a principle of politico-legal symmetry restores the judicial authority to the relevant process in the military case, thus effacing the structural difference by virtue of the transnational nature of the action.

The first element of the principle of politico-legal symmetry involves the observation that a military authority has legal jurisdiction over a military zone, while a judicial authority has legal jurisdiction over a non-military zone. Transference of any apprehended person from one zone to another must occur, as a matter of principle, through the common assent of the relevant judicial authorities, even though the executive authorities conduct the transition. In the military zone, the judicial authority is identical to the enforcement authority, while in the non-military zone, the two authorities constitute separate entities in a government of separately empowered branches. In essence, the transference of an apprehended person across the boundary between a military and a non-military jurisdiction requires military authorities in the former to talk to judicial authorities in the latter. A proxy for such a conversation is, of course, a treaty, which represents the judicial pronouncements of a non-military jurisdiction and thereby permits direct contact between the military authorities and law enforcement, respectively.¹⁷⁵ Absent a treaty, judicial authorities must engage in conversation over questions of transference. Those judicial authorities, where they are separate from enforcement authorities, thus offer the necessary assent for the executive body to take action where appropriate.

It is critical, and indeed a valid target of legal activism, to delineate military and civilian jurisdictions of territory completely. It is illogical to construe U.S. territory as in a state of war merely because the U.S. is itself in a state of war against a defined overseas enemy (particularly a stateless enemy). Under martial law, U.S. territory is by definition in a state of war, but outside of that context, it constitutes civilian territory, even if the U.S. currently occupies a foreign territory militarily. Congress may be in a position to alter existing delineations where necessary, such as by proscribing, for example, Manhattan Island as provisionally

175. The question of the effect of treaties is a critical point, because an ideal structure will be consistent with one guided by treaty without necessitating treaty. By virtue of this, it will abide by the same principles in both cases, rather than the countenancing the prospect of arbitrariness. Thus, the principle of politico-legal symmetry will also result in a solution that is both recognizable and imitable by other States and hence accommodate the evolution of more compatible transnational structures.

in a state of war for a specified time. Similarly, whether by treaty or protocol, specific jurisdictions in an occupied land, such as Afghanistan at the present time, may warrant similar distinctions, possibly including contingent zones of dual authority (e.g., U.S. and Afghan military) according to established protocols.

The second element of the principle of politico-legal symmetry involves the recognition of natural asymmetries in politico-legal structures across distinct politico-legal jurisdictions. That is, different States have different laws and often very different legal definitions.¹⁷⁶ The transfer of an apprehended person from one jurisdiction to another requires legal symmetry. A person may be guilty of a crime within the context of one jurisdiction, without affecting his status in the other. At one extreme of a continuum of possible asymmetries, there may lie a presumption of innocence in the receiving jurisdiction, despite valid findings of a crime in the jurisdiction of origin. At the other extreme, there may lay existential agreement on every detail of judicial review. Even under the umbrella of a single State, civilian and military conditions are often sufficiently distinct to render a person who would be innocent in the former subject to incarceration in the latter, at least for the duration of hostilities.¹⁷⁷

Nevertheless, without judicial review there can be no conclusion about judicial symmetry. Thus, military law enforcement authorities, which lack legal authority outside military jurisdictions, have no philosophically coherent capacity to transfer apprehended persons directly across politico-legal boundaries. If they do so, they will conceivably subject a person suspected of a crime under one jurisdiction's definitions to another jurisdiction in which the interplay among legal definitions, social expectations, and political criteria might result in a different judicial outcome. An extradition treaty resolves this asymmetry by creating a common legal justification for apprehension in both jurisdictions. Absent a treaty, there must be an apparatus for supplying the structure of judicial authority to permit the transfer of apprehended persons across politico-legal boundaries.

An overview of the possible modes of common judicial structure across jurisdictions includes a variety of potential combinations. Between military jurisdictions under the same overarching military authority, the transfer of apprehended persons must have the consent of the latter. Between independent military jurisdictions, the transfer must have the consent of common accord between the respective military authorities, which necessarily includes review by

176. See, e.g., Mahdi Zahraa, *Legal Personality in Islamic Law*, 10 ARAB L.Q. 193, 193 (1995) (legal definitions change across political borders in a multitude of ways, such that one State's rape, for example, may fall short of a crime in another State which discusses a fundamental distinction in the definition of a legal person under shari'ah, compared to common and civil law, which can lead to critical differences in certain findings of criminal behavior).

177. This is a common claim on behalf of detainees at Guantánamo Bay Naval Base. While it is plausible to propose that all detainees appeared to have hostile intent on the field of battle and therefore merited incarceration, the greater margin of error in observations of guilt and innocence in a war zone (due to the combination of the relative level of chaos and the more rapid determination that observers must make) creates a mathematical expectation of manifest error. Until such a time as it is feasible, from the perspective of the interests of national security, to try those people, it is conceivable that the incarcerated include some innocent men.

the super-ordinate executive authorities. From a military to a non-military jurisdiction under the same State apparatus, the transfer must have the consent of a judicial authority in the latter, and in the opposite case it must begin with a finding of merit for apprehending the person in question and then benefit from the assent of the military authority to receive him. Between military and non-military jurisdictions under distinct State apparatus, judicial authorities on both sides, sufficient to represent the respective interests of the States in question (as opposed to subordinate entities within them) must consent to the transfer based on their respective judicial criteria.

Whether the U.S. alone adopts such a structure and the associated policy, or whether other States do likewise, is immaterial. Whichever the case, each State must observe its own policies of interaction between the judicial and executive branches. Reliance on diplomatic assurances remains unchanged in this sense. Thus, the controlling authority behind whether a given State's diplomatic assurances are sufficient is the judicial authority, which in turn must rely for such decisions on congressional determinations of law.¹⁷⁸ Absent either a congressional determination or a practice of international law that Syria, for example, constitutes a judicial exception in cases of transferring apprehended persons across national boundaries, the judicial authority must assent to it, as long as the evidence of the requisite legal parameters is manifest. Such legal parameters are again a product of Congress or firmly established standards of international law, which may possibly proscribe the rendition of suspects (absent a treaty), while approving that of convicted persons.

IX. A STRUCTURAL PROPOSAL TO ACCOMMODATE EXTRAORDINARY RENDITION

A structure to accommodate the communication of the requisite assent between parties (enforcement agencies and judicial agencies, as the interface between the two politico-legal jurisdictions indicates) would involve little more than a closed court of rendition, under the structure of the Supreme Court in some fashion.¹⁷⁹ The requisite statutory language might amount to an amendment to the

178. That is, diplomatic assurances from receiving States that transferred persons will not undergo harsh interrogation must maintain their merit based on the concept that sovereign States are equals in matters of transnational activity. However, in this interpretation, it is no longer the executive branch that judges the validity of such assurances on its own. Here, the judicial authority may identify a basis in international law for withholding assent.

179. The term "national-security court" appears frequently in that segment of the popular press dedicated to questions of holding enemy combatants under the Paradigm of Asymmetric Warfare. See, e.g., Stuart Taylor, Jr., *The Case for a National Security Court*, THE ATLANTIC, Feb. 2007; Neal Katyal, *A National Security Court: Not Now, Not Yet*, GEO. SEC. L. CMT. (Oct. 1, 2008), <http://www.securitylawbrief.com/commentary/2008/10a-nationalsecu.html>; Bill West, *National Security Court? We Already Have One*, IPT NEWS (Jan. 26, 2009); GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (2009). But See David Latin, *Revolutionary Change in Somalia*, 62 MERIP REP. 6, 12 (Nov. 1997) (Nevertheless, the term is both too vague (given that the proposals to set up a "national-security court" usually wish merely to create a secret court, separate from the ordinary apparatus that currently requires so much transparency as to compromise questions of national security) and indeed somewhat problematic, as past usage of the term has often referred to something quite different, such as Somalia's special court for prosecuting high crimes that

Antiterrorism and Effective Death Penalty Act (AEDPDA) of 1996,¹⁸⁰ which includes provisions for an Alien Terrorist Removal Court. The judicial process undertaken in such a venue must exclude the possibility of contending parties that present contending arguments, as its deliberations must remain secret. However, such a court would then be able to operate in a condition of judicial review, without the necessity to defer to exceptions for the protection of state secrets. A congressional committee may receive reports from such a body to communicate the extent to which the executive branch has complied with its judgments. Such a congressional body would, in turn, have authority to investigate inconsistencies by appointing an independent counsel (or desirably by some other method that proves more expeditious). Importantly, a closed court of rendition cannot merely amount to a secret court with specially appointed judges and counsel, for that remedy by itself resolves nothing. The principle of politico-legal symmetry must be present in its construction.¹⁸¹

CONCLUSION

Extraordinary rendition has evolved from a system for the interstate transfer of suspected criminals based on treaty under an assumption of due process, to what opponents describe as an elaborate network of secret prisons, sites dedicated to

might compromise the 1969 revolution); José Murilo de Carvalho, *Armed Forces and Politics in Brazil, 1930-45*, 62 THE HISP. AM. HIST. REV. 193, 209 (1982) (court with a similar purpose in 1930s Brazil). See also Pub. L. No. 104-132, 110 Stat. 1216 (1996) (Likewise, the term has sometimes referred to the U.S. Foreign Intelligence Surveillance Court, a product of the Foreign Intelligence Surveillance Act (FISA)); Christopher H. Pyle, *The Invasion of Privacy*, 34 PROC. OF THE ACAD. OF POL. SCI. 131, 136 (1982). A more specific term, such as "closed court of rendition," may possibly avoid confusion.

180. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). (Speaker of the House Newt Gingrich introduced the bill as part of the Republican Congress's "Contract with America" commitments, the precursor of this particular commitment in the "Contract with America" was the terrorist bombing of the federal building in Oklahoma City. The Supreme Court upheld the law's limited suspension of the writ of *habeas corpus* in *Felker v. Turpin*, 518 U.S. 651 (1997)).

181. It is conceivable that the legal procedure carried out by a closed court of rendition should seek to disconfirm the merits of a proposed rendition, rather than seek to confirm them, and to do so rapidly. Seeking to disconfirm gives those apprehending the authorities the benefit of the doubt, so the court would constitute a minimally obstructive legal intercessor in matters of national security, a compromise that would increase the margin of error by comparison to criminal procedure. Meanwhile, the court should also have a contingent option to order very limited incarceration pending some manifest likelihood of the emergence of disconfirming material, such as might have occurred in the case of Mâhir 'Arâr, had there been an authority equipped with a means of verifying a matter of identity that legal counsel could have pursued within such a structure, a process that might compensate for the higher margin of error just mentioned, in a way that still minimizes interference with national security. Requiring rapid decisions, rather than permitting slow processes, such as in criminal proceedings, would also increase the margin of error in favor of findings of merited rendition, so to compensate the structure might well require accommodating the role of a public counsel with the authority to pursue targeted information even after the court has permitted a rendition. Meanwhile, failure to disconfirm the merits of a proposed rendition would remain a separate matter from that of assenting to a receiving country. Ultimately, a closed court of rendition would probably eliminate all instances of renditions that might have occurred with the furtive objective of enabling harsh interrogation and thus limit themselves to those that are conducive to mutual cooperation across States on matters of managing transnational terrorism.

extraordinary methods of interrogation, shell companies, extreme legal theories, and human-rights abuses. Some challenges to the U.S. program of extraordinary rendition have emerged abroad, but even the current administration seeks no change to the policies of the previous. Political relations may suffer some strain if the costs of this program ultimately start to outweigh the benefits. At any rate, it seems desirable for U.S. policy to come to a point at which it is no longer necessary to refer to any transnational practices as extraordinary. The recommendation of a closed court of rendition may offer a simple solution to what has evidently been an exceedingly complicated question from the perspective of the principles that have historically guided U.S. policy, even if the intricate legal details upon which U.S. policy has assumed its present posture have proved impermeable so far.

Inter arma silent leges is Cicero's maxim that recognizes that *laws are silent in time of war*. This maxim presumes the existence of applicable law, as in the case of extraordinary rendition. As previously noted, there are several domestic and international laws, treaties, conventions, and doctrines that could justify curtailing the practice in principle. The question that remains, viewed from the perspective of international law itself, is to what extent the U.S. policy should try to mold its legal instruments more coherently around a core set of principles that concords with U.S. cultural history, rather than continue to pursue the letter of the body of U.S. and international law with little concern over the fact that perhaps the spirit has left the body.

In the aforementioned hearings by the temporary committee, Baroness Sarah Ludford accused the U.S. of being anxious to enforce international law as it might pertain to intellectual property, while wishing to evade international law on the matter of international terrorism.¹⁸² Some commentators have expressed similar views regarding the role of the U.S. in helping found the International Criminal Court for the enforcement of international law, only ultimately to refrain from subjecting U.S. citizens to its jurisdiction.¹⁸³ Still others have argued that some of the policies of the Paradigm of Asymmetric Warfare, including that of extraordinary rendition, seek by design to obtain maximum intelligence from the subjects with minimal accountability under the law.¹⁸⁴ If those questions were valid during the previous administration, they remain equally valid under the current.

In a memorandum to the General Counsel of the Secretary of the Air Force, Major General Jack L. Rives, Deputy Judge Advocate General, noted disagreements with some of the opinions of the Department of Justice Office of Legal Counsel and described some of the techniques used abroad as violations if

182. *Hearings, supra* note 29 (indicating that, while the U.S. is anxious to enforce its intellectual property rights laws, it cannot choose to enforce one area of law while neglecting another).

183. *See, e.g.,* Gary D. Solis, *The ICC and Mad Prosecutors*, in *INTERNATIONAL LAW* 1102, 1102-03 (Barry E. Carter, et al. eds., 4th ed. 2003).

184. For detailed analysis of the question of accountability in the War on Terror, see generally JENNIFER K. ELSEA, *CONG. RESEARCH SERV.*, RL 32395, *U.S. TREATMENT OF PRISONERS IN IRAQ: SELECTED LEGAL ISSUES* (2005); Reed Brody, *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, 17 *HUM. RTS. WATCH*, No. 1(G), 2005 at 16.

committed under the jurisdiction of domestic criminal law.¹⁸⁵ Rives expressed worries about the liability of the interrogators and chain of command in employing such techniques and noted that prosecution was a possibility in future political regimes, as well as by the international community.¹⁸⁶ In his memorandum to the President, Attorney General Gonzales cited the Secretary of State as disagreeing with the President's conclusion that the protections of the Third Geneva Convention fall short of applying to al-Qâ'idah and Ṭâlibân detainees under any circumstances. Gonzales assured the President that the Department of Justice had concluded differently and that the President had the constitutional authority to make that determination final. He then went on to note both the positive and negative consequences of doing so and concluded that the arguments for reversing the determination as requested by the Secretary of State were unpersuasive.¹⁸⁷ Gonzales thus revealed full awareness of the situation when he opined that the U.S. had never previously denied the application of the Geneva Conventions and that the U.S. would be unable to invoke the GPW against any al-Qâ'idah or Ṭâlibân operatives who might capture U.S. troops abroad.¹⁸⁸ Likewise, allied States of the U.S. would probably condemn any invocation of the War Crimes Act in that context. This may have the effect of deterring other countries from extraditing suspects to U.S. custody, which "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat."¹⁸⁹ Given the context of these concerns, particularly the implicit reference to the prospect that al-Qâ'idah might one day decide to operate according to the terms of the Geneva Conventions, they would seem to represent legal theories almost as extreme as those that opponents have ascribed to the Bush administration. It may be worth noting that such broad warnings of the possibility of incidental breaches of international standards of conduct, while worthy of discussion on the matter of crafting a coherent remedy for all irregularities in U.S. foreign policy might have affected the present administration's policies if they possessed merit. Nevertheless, the present administration's insistence on duplicating the applicable policies of the previous one appears to have rendered such warnings extraordinarily silent.

185. Memorandum from Major General Jack L. Rives, U.S. Air Force, *Final Report and Recommendations of the Working Group to Assess the Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held By the U.S. Armed Forces in the War on Terrorism* (Feb. 5, 2003) (This affirms the prior note about the distinction in definitions across politico-legal boundaries, which can render an innocent man guilty or conversely nullify a crime under certain circumstances.)

186. *Id.*

187. Gonzales, *supra* note 95.

188. Admittedly, any expectation that al-Qâ'idah or Ṭâlibân operatives might treat U.S. captives according to the terms of the Geneva Conventions are barely worth considering. These groups are by their nature at odds with international law in all domains of their behavior.

189. *Id.*

