

THE PRACTICE OF EXTRAORDINARY RENDITION: INCREASING  
ACCOUNTABILITY AND OVERSIGHT

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## Introduction

Since the 9/11 terrorist attacks, the United States has transferred close to a hundred individuals suspected of terrorism to foreign jurisdictions through a process known as extraordinary rendition. This is an infamous program that allows for the transfer of individuals to a foreign jurisdiction for interrogation, detention, or trial. While the use of extraordinary rendition attracts widespread controversy regarding its use and legality, it remains a vital tool for combating international terrorism. Evidence in this thesis lends support to extraordinary rendition program, but recognizes that while the program strengthens the country's ability to gather vital intelligence to combat terrorism, there are methods to improve the program. The extraordinary rendition program requires an assessment of the totality of circumstances before a extraordinary rendition is permitted; reliance on diplomatic assurances from countries that hold a good human rights record; and subsequent monitoring of individuals rendered to foreign states to ensure that transfers comply with U.S. and international law.

Evidence suggests that extraordinary rendition aids in the ability to gather sensitive intelligence and serves as a gathering tool used by American presidents to preserve freedom and peace; however, in the eyes of critics, this program represents a perversely autonomous and un-American legal maneuver that avoids due process. This thesis seeks to discuss common misconceptions associated with the extraordinary rendition program and identify the major points of controversy. The first part explores the history of the extraordinary rendition program and provides an understanding of its roots and procedures. The second part, discusses the executive branch's attempts to conduct extraordinary renditions morally and responsibly, and examines the legal

oversight and accountability gaps surrounding the program. Part three identifies the line of authority empowering the President to conduct extraordinary renditions. It also outlines the struggle of the legislative, judicial and executive branches to strengthen the extraordinary rendition program's compliance with the rule of law by increasing oversight and accountability. Finally, Part four discusses the future of the extraordinary rendition program. The discussion presents possible solutions to correct oversight and accountability problems and suggests a multi-faceted approach that raises the bar for extraordinary renditions, thereby closing the oversight and accountability gaps.

## Part One: History of Rendition

Extraordinary rendition is the transfer of a foreign national suspected of terrorism with the involvement of the United States or its agents to the jurisdiction of another country for “justice” through interrogation, trial, or some other judicial process. This is typically a joint venture between the United States and a foreign state after receiving diplomatic assurances that the individual will not be tortured.<sup>1</sup> Extraordinary rendition does not offer any guarantee of due process and is often associated with indefinite terms of imprisonment.<sup>2</sup> This program has grown under the direction of the Bush Administration since the 9/11 attacks.<sup>3</sup>

As a result, controversy concerning extraordinary rendition has misled the public to believe that this covert action is a new practice invented by the Bush Administration; however, extraordinary rendition in its most recent inception has been employed in every administration since President Clinton.<sup>4</sup> This program is distinguished from rendition, which involves the transfer of a person from one jurisdiction to another for purposes of a trial.

The Clinton Administration paved the way for the rendition program in 1998.<sup>5</sup> In response to the wave of terrorist attacks—including the bombing of the World Trade Center in 1993, the bombing of a federal building in Oklahoma City, and a subway attack in Tokyo—President Clinton issued Presidential Decision Directives (PDD), PDD-39 in

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<sup>1</sup> Sapna G. Lalimalani, *Extraordinary Rendition Meets the U.S. Citizen: United States' Responsibility Under the Fourth Amendment*, 5 Conn. Pub. Int. L.J. 1, 13 (2005).

<sup>2</sup> J. Troy Lavers, *Extraordinary Rendition and the Self Defense Justification: Time to Face the Music*, 16 Mich. St. J. Int'l L. 385, 393 (2007).

<sup>3</sup> Ingrid Deter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C.J. Int'l L. & Com. Reg. 657, 665 (2008).

<sup>4</sup> Id.

<sup>5</sup> Beth Henderson, *From Justice to Torture: The Dramatic Evolution of U.S.-Sponsored Renditions*, 20 TEMP. INT'L & COMP. L.J. 189, 196 (2006).

June 1995 and PDD-62 in May 1998. These directives reiterated that terrorist threats were not just a law enforcement issue, but also a problem of national security. Clinton's directive declared:

Terrorism is a potential threat to national security as well as a criminal act and we will apply all appropriate means to combat it. In doing so, the U.S. shall pursue vigorously efforts to deter and pre-empt, apprehend and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks.<sup>6</sup>

PDD-39 allowed the United States to apprehend and render terrorists to foreign states. PDDs-39 and 62 outlined a key procedural responsibility: "rendition and disruption. ...If a terrorist suspect is outside of the United States, the CIA helps to catch and send him to...a third country.... If possible, they seek help from a foreign government."<sup>7</sup> The program focused renditions on a small number of targeted individuals transferred to a foreign state where they stood trial or faced detention. These individuals could not challenge their removal to the foreign state. The overall goals of rendition remained a focus on the deterrence of terrorist activities and a reliance on political convenience by bypassing the enforcement of extradition treaties.<sup>8</sup>

In response to 9/11, the Bush Administration re-defined the goals of the rendition program to adapt to the terrorist threat. As stated by Cofer Black, the previous Director of the Counterterrorist Center of the CIA "there was a 'before' 9/11 and 'after' 9/11.

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<sup>6</sup> See Presidential Decision Directive-39: U.S. Policy on Counterterrorism (June 21, 1995), at <http://www.fas.org/irp/offdocs/pdd39.htm>.

<sup>7</sup> The Committee on International Human Rights, *Torture by Proxy: International and Domestic Law applicable to "Extraordinary Renditions*, 60 *The Record* 13, 39 (2004).

<sup>8</sup> Matteo M. Winkler, *When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program*, 30 *LOY. L.A. INT'L & COMP. L. REV.* 33 (2008).



After 9/11 the gloves came off.”<sup>9</sup> President Bush signed secret directives on September 17, 2001, known as memoranda of notifications, which authorized the CIA without proper government approval and due process to engage in the extraordinary rendition of individuals suspected of terrorism.<sup>10</sup> The Bush Administration redefined the rendition program as the extraordinary rendition, which resulted in the transfer of aliens, suspected of terrorist activities to third-party countries for the purposes of detention and interrogation without the prospect of any formal charges.<sup>11</sup>

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<sup>9</sup> Robert Johnson, *Extraordinary Rendition: A Wrong Without a Right*. 43 U. RICH. L. REV. 1135 (2009).

<sup>10</sup> *Id.* at 42.

<sup>11</sup> Michael John Garcia, CRS Report RL32890 3, *Renditions: Constraints Imposed by Laws on Torture* (2009).

Enhanced tactics, such as forceful interrogations to pre-empt further terrorist attacks, were necessary to deal with terrorist suspects.<sup>12</sup> According to the Congressional Research Service Report on Renditions (CRS), written by Legislative Attorney Michael Garcia, extraordinary rendition post-9/11 is now routinely initiated for the purpose of arrest, detention, and/or interrogation by the state receiving the detainee.<sup>13</sup>

To support the aggressive use of extraordinary renditions, John Yoo, an attorney for the Department of Justice, wrote the now infamous memorandum that justified the President's authority to utilize broad powers during a time of war.<sup>14</sup> As a result, the extraordinary rendition program has engendered intense debate concerning the interrogation of terror suspects in various parts of the world. Law professors, journalists, human rights activists, editorial writers, reporters, policymakers, judges, and members of all branches of government have debated and scrutinized the particular practice of extraordinary rendition. The CIA and other U.S. government agencies state that extraordinary renditions are used for a "limited number of cases...designed only for the most dangerous terrorists and those believed to have...valuable information, such as knowledge of planned attacks, and that the intelligence retrieved from these and other detainees is critical in the war against terror."<sup>15</sup> Further, the United States maintains that using the process of extraordinary rendition is a method utilized to protect national security.<sup>16</sup> The ability to render an individual suspected of terrorist activities to a foreign state is a vital for strengthening and protecting national security because it allows

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<sup>12</sup> Frankopan, *supra* note 3, at 665.

<sup>13</sup> Garcia, *supra* note 11, at 3.

<sup>14</sup> Johnson, *supra* note 9, at 1136.

<sup>15</sup> Jay M. Zitter, *Challenges to Extraordinary Rendition*, 39 A.L.R. Fed. 2d, 1 (2010).

<sup>16</sup> Lavers, *supra* note 2, at 393.

continuing exchange of intelligence information from the foreign state.<sup>17</sup> However, critics claim that the rendition program is used to transfer terror suspects to foreign countries exclusively for interrogation, during which torture and human rights violations occur.<sup>18</sup> With the potential for human rights violations, opponents of the rendition program argue that it is difficult to understand the justification for extraordinary renditions.<sup>19</sup> The new United States model for extraordinary rendition has led to controversy, and opponents question whether the United States is upholding the rule of law.

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<sup>17</sup> Id. at 402.

<sup>18</sup> Seth T. Bridge, *Russia's New Counterterrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation*, 3 COLUM. J. E. EUR. L. 1, 54 (2009).

<sup>19</sup> Lavers, *supra* note 2, at 391.

## Part Two: Extraordinary Rendition: The Legal Controversies

Extraordinary rendition is an intelligence-gathering tool that transcends party lines.<sup>20</sup> When confronted with a dangerous foreign national, and limited options of detention or interrogation exist, proponents of the extraordinary rendition argue that this program offers a solution. The United States may not have the authority to detain the suspect due to a lack of admissible evidence, even though the U.S. has incontrovertible information that the individual poses a threat.<sup>21</sup> U.S. laws prevent indefinite detention of an individual. As a result, extraordinary rendition escapes U.S. jurisdiction by transferring the suspect to his home, or a third country for purposes of intelligence gathering.

According to Michael Scheuer, the chief architect of the extraordinary rendition program, “[extraordinary renditions are] an entirely appropriate and essential practice for the clandestine service of the United States to conduct in the defense of America.”<sup>22</sup> Scheuer stated that this program is the single most effective counterterrorism tool ever used by the government.<sup>23</sup> The CIA program focuses on the capture of high-level al-Qaeda leaders.<sup>24</sup> Leading counterterrorism expert Rohan Gunaratna, who consulted several intelligence agencies, argued that rough tactics “can save hundreds of lives.” He

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<sup>20</sup> Mario Silva, *Extraordinary Rendition: A Challenge to Canadian and United States Legal Obligations under the Convention Against Torture*, 39 CAL. W. INT'L L.J. 313, 331 (2009).

<sup>21</sup> *Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Adviser Before the House of Representative Subcommittee on International Organizations Human Rights, and Oversight Committee on Foreign Affairs*, 110th Con. (statement of John B. Bellinger, III, Legal Adviser, U.S. Department of State) (2008).

<sup>22</sup> Zak M. Salih, *Use of Extraordinary Renditions Has Changed; Risk of Torture Hasn't*, *Panellists Say* (2006), [http://www.law.virginia.edu/html/news/2006\\_spr/rendition.htm](http://www.law.virginia.edu/html/news/2006_spr/rendition.htm).

<sup>23</sup> Johnson, *supra* note 9, at 1145.

<sup>24</sup> *Id.*

asserted that, “when you capture a terrorist, he may know when the next operation will be staged, so it may be necessary to [render] ... a detainee. I disagree with physical torture, but sometimes the threat of it must be used.”<sup>25</sup>

David B. Rivkin Jr. and Lee A. Casey, both attorneys in Washington, D.C., served in the White House and U.S. Justice Department under Presidents Ronald Reagan and George H.W. Bush. They are proponents of extraordinary rendition. They argue that international law does not forbid the transfer of individuals from one country to another for the purposes of detention or interrogation, even if the government renders the detainee to a country with a poor human rights record. Extraordinary renditions may occur as long as the detainee is not tortured or treated in an inhumane manner.<sup>26</sup> “There is no doubt that mistakes can occur in [the] rendition process, just like they occur in the criminal justice system.”<sup>27</sup> Rivkin and Casey argue that the potential for a mistake must be weighed against the disaster that would follow from failing to pursue a lead and obtain vital intelligence in the war on terror. Further, intelligence officials struggle with the choice between risking another 9/11 attack or “aggressively prosecuting every terrorist lead and possibly detaining the wrong person.”<sup>28</sup>

Executive branch officials such as President Bush and the former Director of the CIA Michael Hayden defended the extraordinary rendition program by advancing a utilitarian view, stating that extraordinary rendition works because it produces valuable

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<sup>25</sup> Interview with Rohan Gunaratna, August 11, 2009.

<sup>26</sup> David Rivkin, Lee Casey, and Charles Stimson, *Common Article 3 of the Geneva Conventions and the U.S. Detainee Policy* (2009), <http://www.heritage.org/Research/Reports/2009/02/Common-Article-3-of-the-Geneva-Conventions-and-US-Detainee-Policy>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

intelligence.<sup>29</sup> Proponents of the program advance the policy that extraordinary renditions allow the United States to protect itself against terrorist attacks by arresting an individual and sending him or her country of origin or a third country with diplomatic assurances that the individual will not be tortured.<sup>30</sup> The debate over extraordinary rendition centers around the balance between the liberties extinguished versus the liberties preserved: it demands a choice. Extraordinary rendition raises the issue of whether presumed protections by the U.S., through the reliance on diplomatic assurances, are adequate to overcome human rights concerns. The Bush Administration advanced a utilitarian belief that morally wrong actions can be justified through a morally correct outcome. In short, the President took a stance that the ends justified the means.

James L. Pavitt, retired Director of the CIA supported the Administration's strategy, stating that the extraordinary rendition program had been "carefully vetted and approved by the National Security Council (NSC) and disclosed to the appropriate congressional oversight committees."<sup>31</sup> The CIA's Counter-Terrorism Center (CTC) analyzed the extraordinary rendition process through appropriate legal channels before approving any extraordinary rendition.<sup>32</sup> Specifically, the Director and legal counsel of the CIA, along with the NSC lawyers approved the legal brief supporting extraordinary renditions after scrutinizing all details and techniques.<sup>33</sup> Further, the head of CTC and Deputy of NSC received updates anytime there was a change in the procedure of a

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<sup>29</sup> Frankopan, *supra* note 3, at 685.

<sup>30</sup> Still At Risk, Diplomatic Assurances No Safeguard Against Torture 114 (2005), <http://www.hrw.org/en/reports/2005/04/14/still-risk-0>.

<sup>31</sup> Louis Fisher, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post 9/11 America: September 20-21*, 57 *Am. U.L. Rev.* 1405, 1422 (2008).

<sup>32</sup> Stephen Grey, *Ghost Plane: The Story of the CIA Torture Program* 151 (St. Martin's Press 2006).

<sup>33</sup> *Id.*

extraordinary rendition. The highest level of authority approved extraordinary renditions and President Bush finalized the decision after all appropriate channels reviewed the decision. A former unnamed CIA agent stated that “everything we did, down to the tiniest detail, every [extraordinary] rendition...was scrutinized and approved by headquarters. And nothing was done without approval from the White House- from [Condoleezza] Rice herself and with a signature from John Ashcroft.”<sup>34</sup> While errors occurred “it is impossible not to have mistakes in the business of espionage and intelligence...it was deadly business, and if we were wrong, we were wrong. But the evidence pointed us toward what we did.”<sup>35</sup> Attorney General Alberto Gonzalez stated that the U.S. does not advance the policy of sending individuals “to countries where we believe or we know that they’re going to be tortured,” but he also conceded that the administration “can’t fully control” what occurs after a transfer to a third country.<sup>36</sup>

After the approval of an extraordinary rendition, the CIA transferred the suspect to a third country for outstanding legal process.<sup>37</sup> The President approved the extraordinary renditions, and the covert action did not depend on the availability of another country’s outstanding legal process against the suspect.<sup>38</sup> “The decision made the already successful [extraordinary] rendition program even more effective.”<sup>39</sup> Due to the

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<sup>34</sup> Id. at 151.

<sup>35</sup> Id. at 152.

<sup>36</sup> Louis Fisher, *Lost Constitutional Mooring: Recovering the war Power*, 81 *IND. L.J.* 1199, 1245 (2005).

<sup>37</sup> Johnson, *supra* note 9, at 1141.

<sup>38</sup> Michael Scheuer, *Extraordinary Rendition In the U.S. Counter Terrorism Policy: The Impact of Transatlantic Relations*, Statement before the House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight Subcommittee on Europe. 17 13 (2007). United States House of Representatives Committee on Foreign Affairs. 6 Jun 2009, <http://foreignaffairs.house.gov/110/sch041707.htm>.

<sup>39</sup> Id.

constraints of limited manpower, the extraordinary rendition program prioritized high-ranking officials of al-Qaeda with the goal to inflict as much damage as possible, specifically against financiers, field commanders, strategists, logisticians, terrorist operatives, and leaders. Scheuer stated that, to his knowledge, the CIA agents did not kidnap or detain a single target without substantial evidence. Scheuer and his successors presented evidence through written briefs that cited intelligence information that proved that the extraordinary rendition target was a threat to the U.S. or its allies. If the attorneys found the evidence did not persuade them for whatever reason, then the operation ceased, pending additional evidence against the target. Scheuer further said, “let me be very explicit and precise on this point. Not one single al-Qaeda leader has ever been rendered on the basis of any CIA officer’s hunch, guess, or caprice.”<sup>40</sup>

While the Bush Administration advanced the view that extraordinary rendition was the appropriate response to address the urgency for higher security, the creation of additional mechanisms to strengthen oversight and accountability would have helped to address the current gaps. President Bush missed a unique opportunity to establish a powerful policy to defend national security and establish clear guidelines for the process of extraordinary renditions to account for the loopholes in the program. The Administration believed that the best way to preserve national security was to take an ad hoc approach and rely on diplomatic assurances to deal with the transfer of terror suspects. While the Administration followed domestic and international law, the competing interests between preserving our country’s national security and building accountability to safeguard human rights created a rule of law dilemma. The major rule of law controversy centers on human rights concerns and the possibility of torture after

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<sup>40</sup> Scheuer, supra note 38, at 13.



the extraordinary rendition of an individual. As a result, there is an accountability gap because this program creates a procedure that eliminates plausible deniability and places extra weight on the obligation not to render a person back to a government that tortures. Hence, critics are left questioning who is accountable if a person rendered is, in fact, tortured.

Consequently, opponents of the extraordinary rendition program assert that extraordinary rendition harms the fight against terrorism and disrespects human rights.<sup>41</sup> Specifically, “components of the [extraordinary] rendition program, such as secret arbitrary detention and torture erode the moral high ground that the United States must maintain to defeat terrorism...”<sup>42</sup> Extraordinary renditions allow for the transfer of individuals to countries with underdeveloped human rights standards.<sup>43</sup> Critics of the extraordinary rendition program, such as Amnesty International and the American Civil Liberties Union (ACLU), repeatedly attack the extraordinary rendition program for its alleged abuses raising moral, judicial, and political allegations.

According to critics, the extraordinary rendition program’s ultimate goal remains to escape the jurisdiction of U.S. courts in order to avoid due process. In addition, the program allows foreign interrogators to extract information by means unavailable to U.S. officials.<sup>44</sup> To credit these allegations, top officials such as former CIA Inspector General Fred Hitz confirmed that extraordinary rendition offers the United States

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<sup>41</sup> Peter Johnston, *Leaving the Invisible Universe: Why all Victims of Extraordinary Rendition Need a Cause of Action Against the United States*, 16 J.L. & POL’Y 357, 362 (2007).

<sup>42</sup> *Id.*

<sup>43</sup> Andrew A. Moher, *The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. Jefferson L. Rev. 469, 480 (2004).

<sup>44</sup> Jillian Button, *Spirited Away (into a Blackhole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 FLA. J. INT’L L. 531, 536 (2007).

valuable intelligence without proper oversight and accountability. “We don't do torture, and we can't countenance torture in terms of we can't know of it. But if a country offers information gleaned from interrogations, we can use the fruits of it.”<sup>45</sup> Due to the lack of accountability and oversight, the extraordinary rendition program has been termed “torture by proxy” and “outsourcing torture.”<sup>46</sup> The United States continues to defend this program, which “no-one would have dreamt of publicly defending before September 11.”<sup>47</sup> The new paradigm is a strategy that allows for obtaining evidence quickly with little emphasis on the individual's rights.<sup>48</sup>

Critics assert that the action of holding and rendering individuals is unprecedented and fails to comply with the Constitution.<sup>49</sup> Reliance on diplomatic assurances when transferring individuals suspected of terrorism to countries with poor human rights records is common practice.<sup>50</sup> Consequently, many extraordinary renditions take place without adequate procedural safeguards. Even though a high-level executive in February 2005 defended the extraordinary rendition program, stating that transferred individuals will receive humane treatment, opponents remain skeptical.<sup>51</sup> Rendered individuals lack the ability to challenge their extraordinary rendition or diplomatic assurances to ensure that they will be treated justly.<sup>52</sup>

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<sup>45</sup> Moher, *supra* note 43, at 480.

<sup>46</sup> Button, *supra* note 44, at 537.

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

<sup>48</sup> Lalmalani, *supra* note 1, at 4.

<sup>49</sup> Erwin Chemerinsky, *Civil Liberties and the War on Terror: Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 *SMU L. Rev.* 3, 4 (2009).

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Still at Risk*, *supra* note 30, at 74.

<sup>52</sup> *Id.* at 75.

The former Director of Central Intelligence (DCI), Porter J. Goss testified on February 16, 2005, before the Senate Select Committee on Intelligence defending the extraordinary rendition program, but he stated that after a transfer occurs, the United States lacks control over whether or not the country has complied with the diplomatic assurance.<sup>53</sup> Goss stated, “we have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course once they're out of our control, there's only so much we can do.”<sup>54</sup> Similarly, Attorney General Gonzalez stated, “we can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us. If you're asking me, 'Does a country always comply?' I don't have an answer to that.”<sup>55</sup> Admissions regarding the inability to enforce diplomatic assurances after a extraordinary rendition lead opponents to criticize oversight of the program.<sup>56</sup>

In an Amnesty International report, *Rendition and Secret Detention: A Global System of Human Rights Violations*, Amnesty argues that extraordinary rendition provides an effective means to transfer individuals suspected of terrorism without the “red tape.”<sup>57</sup> The extraordinary rendition program involves human rights violations because most individuals are arrested and detained first illegally. Amnesty International reports that many individuals that are detained and transported to other countries have

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<sup>53</sup> Id. at 108.

<sup>54</sup> Id. at 109.

<sup>55</sup> Id.

<sup>56</sup> Id. at 111.

<sup>57</sup> Amnesty International, “Rendition” and Secret Detention: A global system of Human Rights violations Questions and Answers 5, POL 30/003/2006. <http://www.amnesty.org/en/library/asset/POL30/003/2006/en/db1dbfd1-d468-11dd-8743-d305bea2b2c7/pol300032006en.pdf>.

subsequently disappeared.<sup>58</sup> Due to the secrecy of the program, Amnesty is unable to estimate the program's scope. In 2005 Egypt's Prime Minister reported that approximately sixty to seventy detainees had been rendered to Egypt. The United States acknowledged that thirty high-value suspects were captured; however, the location of the detainees is unknown. Further, the report alleges that CIA investigations have led to erroneous extraordinary renditions of three-dozen individuals based on confusion of names or flawed evidence.<sup>59</sup>

According to Amnesty International, the extraordinary rendition program is synonymous with a disappearance program and is designed to evade scrutiny by the public.<sup>60</sup> Extraordinary rendition involves "multiple human rights violations, including abduction, arbitrary arrest and detention, and unlawful transfer without due process of law."<sup>61</sup> Furthermore, violations occur through the extraordinary rendition program, such as the inability of a detainee to challenge his or her detention or transfer to another country. This system is designed to obtain intelligence from detainees without any legal restriction or judicial oversight.<sup>62</sup> Critics are uncomfortable with extraordinary rendition's transformation from an "extra-legal method of bringing fugitives to an otherwise fair trial" to transfers that result in harsh interrogation without enforceable diplomatic assurances.<sup>63</sup>

The American Civil Liberties Union (ACLU) is another strong opponent of the CIA extraordinary rendition program. The ACLU states that the extraordinary rendition

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<sup>58</sup> Id. at 2.

<sup>59</sup> Id.

<sup>60</sup> Id. at 3.

<sup>61</sup> Id. at 2.

<sup>62</sup> Id.

<sup>63</sup> Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 72 (2009).

program consists of U.S. run detention facilities where legal safeguards do not apply. In the words of Robert Baer, a former CIA agent, “if you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear -- never to see them again -- you send them to Egypt.”<sup>64</sup> As a result, conceptually, the practice is a “rendition to torture.”<sup>65</sup> The ACLU has attempted to obtain records of individuals rendered in 2003 and 2004 through a Freedom of Information Act (FOIA) request to monitor the treatment of suspects.<sup>66</sup> However, the Department of Defense (DOD), along with other federal agencies, refused to release the records due to their interest in the preservation of national security.<sup>67</sup> While the ACLU was able to retrieve documents after filing a lawsuit in federal court, this was a small victory towards transparency. Overall, accountability and oversight of the extraordinary rendition program is still missing.

The European Union (EU) Parliamentary Assembly, United Nations (UN) High Commission for Human Rights, and other human rights organizations led an investigation in June 2006 supporting the allegations that the extraordinary rendition program lacked proper oversight.<sup>68</sup> According to opponents, the “global war on terrorism” allows for any individual to be picked up anywhere and rendered due to the lack of oversight, and

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<sup>64</sup> ACLU, Fact Sheet: Extraordinary Rendition (2005), <http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition>.

<sup>65</sup> Jaime A. Baron Rodriguez, Torture on Trial: How the Alien Tort Statute May Expose the United States Government’s Illegal “Extraordinary Rendition” Program through its Use of a Private Contractor, 14 *ILSA J INT’L & COMPL* 189, 199 (2007).

<sup>66</sup> The Committee on International Human Rights, Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions” 60 *The Record* 13, 43 (2005).

<sup>67</sup> *Id.*

<sup>68</sup> Johannes van Aggelen, The Bush Administration's War on Terror: The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims, 42 *CASE W. RES. J. INT’L L.* 21, 70 (2009).

thereby no one is accountable for the disappearance.<sup>69</sup> Defeating the terrorist threat requires the United States to adopt human rights policies according to human rights activists.<sup>70</sup> Recently, the International Commission of Jurists have called upon the nation to reverse its policies stating that “...torture and cruel, inhuman or degrading treatment, secret detentions, abductions, illegal transfers, refoulement, arbitrary, prolonged and incommunicado detention, unfair trials, and enforced disappearances - are not legitimate responses to the threat of terrorism. These practices are inconsistent with international law and human rights.”<sup>71</sup>

Human Rights Watch, another critic of the extraordinary rendition program, is troubled by the “unfettered discretion” the Bush Administration holds.<sup>72</sup> While the executive branch has always had wide discretion in matters of national security, a method to monitor the practices of extraordinary renditions is necessary to create transparency, accountability, and oversight for the extraordinary rendition program. Human Rights Watch concludes that reliance on diplomatic assurances is not adequate and amounts to “empty promises.”<sup>73</sup> It maintains the position that the United States can engage in extraordinary renditions, but only if the U.S. is certain that the third country receiving the suspect will not engage in torture.<sup>74</sup>

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<sup>69</sup> Kenneth Roth, A Cure Worse than the Disease?, Foreign Service Journal, 6 (2007). <http://www.afsa.org/fsj/sept07/cure.pdf>.

<sup>70</sup> Id. at 7.

<sup>71</sup> Michael P. O’Connor and Ceila M. Rumann, The Rule of Law & the Global War on Terrorism: Detainees, Interrogations, and Military Commissions Symposium: Article: Fanning the Flames of Hatred: Torture, Targeting, and Support for Terrorism, 48 WASHBURN L.J. 633, 666 (2009).

<sup>72</sup> John A. Radsan, A More Regular Process of Irregular Rendition, 37 SETON HALL L. REV. 1, 27 (2006).

<sup>73</sup> Id. at 28.

<sup>74</sup> Id. at 29.

Overall, critics argue that extraordinary rendition would not be utilized if due diligence applied uniformly to prosecute and punish individuals suspected of criminal activity such as terrorism. The reality, though, remains that “U.S. federal law enforcement agents are faced with the difficult choice of either following customary extradition treaty and taking the chance that the terrorist or drug traffickers will avoid prosecution of their crimes or bypassing traditional legal channels by obtaining custody of fugitives through irregular rendition.”<sup>75</sup>

In addition to the choice that law enforcement officials are faced with, legal channels indicate that extraordinary rendition is an appropriate tool for self-defense. Article 21 adopted by the International Law Commission states that “the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.”<sup>76</sup> In addition, Article 51 of the UN Charter endorses self-defense by asserting that states can protect themselves and use force against an armed attack. However, there is debate regarding the U.S. interpretation of self-defense and its justification for extraordinary renditions. International law states that self-defense is just and is the “only unambiguously legitimate justification for the use of force.”<sup>77</sup> To defend against a credible threat through a preventative war defeats a pursuit of peace and reconciliation, which the international community argues is the right criterion to engage in war. Critics in the international community further argue that states are using war too quickly and defending their decisions as a method of self-preservation

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<sup>75</sup> Counterterrorism Threat Assessment and Warning Unit, National security Division, Terrorism in the United States 1997, 20, <http://www.au.af.mil/au/awc/awcgate/fbi/terr97.pdf>.

<sup>76</sup> van Aggelen, *supra* note 68, at 24.

<sup>77</sup> Neta C. Crawford, “Just War Theory and the US Counterterror War,” *Perspectives on Politics*, Vol. 1 # 1, 7, 21 (2003).

without attempting to use mediation and diplomacy.<sup>78</sup> As a result, democracy and human rights suffers because the U.S. defends a broad use of self-defense to engage in practices such as extraordinary rendition.<sup>79</sup>

However, supporters of extraordinary rendition argue that the self-defense model serves to maintain the new balance in the post-9/11 world between human rights and the new security threat.<sup>80</sup> General Philip Heymann, Harvard law professor and former Deputy Attorney General, justifies extraordinary renditions by stating:

The United States can reap the benefits of these activities, forbidden by international human rights conventions . . . if we attempt to export the counterterrorism costs of extensive searches, electronic surveillance, coercive interrogation, and limitations on association, detention, and speech. Each of these measures, controlled or forbidden by the United States Constitution, are likely to be promising ways of obtaining needed information about terrorists' plans and of otherwise preventing terrorist initiatives.<sup>81</sup>

Further, former Secretary of State Condoleezza Rice supported extraordinary rendition by stating, “[Extraordinary] renditions take terrorists out of action, and saves lives. In conducting such renditions, it is the policy of the United States, and I presume of any other democracies who uses this procedure, to comply with its laws.”<sup>82</sup> The Bush Administration argued that extraordinary rendition is a vital counterterrorism tool to fight terrorism and disrupt terrorist activities; this program has led to confessions and

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<sup>78</sup> Id.

<sup>79</sup> Id at 14.

<sup>80</sup> Alison Brysk and Gershon Shafir, National Insecurity and Human Rights, Democracies Debate Counter-terrorism, The Regents of the University of California, 11, 2007.

<sup>81</sup> Philip B. Heymann, Civil Liberties and Human Rights in the Aftermath of September 11, 25(2): 441–56, Harvard Journal of Law and Public Policy Terrorism, Freedom, and Security, Cambridge, Mass.: MIT Press (2003).

<sup>82</sup> Secretary Condoleezza Rice, Remarks Upon Her Departure for Europe, U.S. State Department, 5 Dec. 2005, <http://merln.ndu.edu/archivepdf/terrorism/state/57602.pdf>.



dismantled plots by rendering key individuals to a foreign state.<sup>83</sup> Much of the public discussion regarding extraordinary rendition was asserted as a policy for protection the United States; however the evidence or details of the program remained classified due to its detrimental effect on national security. Ultimately, the necessity of the situation may require the United States to engage in extraordinary renditions to protect national security, which may undermine the U.S. commitment to the rule of law and its own foundational commitment to humanity, unless stronger mechanisms are created to ensure accountability.

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<sup>83</sup> Part Two- Narrative- The Attacks of September 11, 2001, 224  
<http://www.gpoaccess.gov/serialset/creports/pdf/part2.pdf>

### Part Three: Rule of Law Analysis

Constitutionally, President Bush and his Administration defended the expansion of extraordinary rendition as an appropriate response to terrorism by relying on his inherent executive authority post-9/11.<sup>84</sup> Yoo described these powers in a memorandum for the United States Justice Department as Presidential war making powers and stated that the President has inherent authority to use force against terrorists.<sup>85</sup> This authority, in his view, comes from the history and the text of the U.S. Constitution. The President is entrusted with the responsibility to use military force during emergency situations.<sup>86</sup> Article II, Section 2 of the Constitution explicitly states that the “President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>87</sup> The Constitution vested the President with broad authority to respond to military threats to national security and foreign policy by using military force.<sup>88</sup> Further, the President has the executive power to implement the laws.<sup>89</sup> Therefore, the President may “dispose of the liberty of captured enemy personnel as he sees fit.”<sup>90</sup> Based on this analysis, whether the U.S. is complying with the rule of law is determined by a pivotal question – whether or not the United States is at war. Before the declaration of war, the United States abides

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<sup>84</sup> Gary Williams, National Security & The Law: Special Issue: Indefinite Detention and Extraordinary Rendition, 29 Los Angeles Lawyer 44, 46 (2006).

<sup>85</sup> David Schultz, David. Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post-9/11 World,” 38 GOLDEN GATE U.L. REV. 195, 213 (2008).

<sup>86</sup> John Yoo, Symposium: The Changing Laws of War: Do we Need a New Legal Regime After September 11th: Transferring Terrorists, 79 NOTRE DAME L. REV. 1183, 1185 (2004).

<sup>86</sup> David Schultz, David. Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post-9/11 World,” 38 GOLDEN GATE U.L. REV. 195, 213 (2008).

<sup>87</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>88</sup> Schultz, supra note 85, at 214.

<sup>89</sup> U.S. Const. art. II, § 1

<sup>90</sup> Fisher, supra note 31, at 1413.

by statutes and treaties, but once war is declared, the President trumps the law.<sup>91</sup> As a result, executive-made laws reign. Yoo asserts, “this is not to say that these [extraordinary renditions] are wholly ungoverned by law. It is only to make clear that these transfers are governed by a different set of rules - the laws of war - than those that apply in domestic, peacetime affairs.”<sup>92</sup>

President Bush defended the shift in U.S. policy and the increased use of extraordinary renditions stating, “that the attack on American sovereignty undermined both the security and the way of life of the American people, and therefore America was entitled to defend itself using virtually any means necessary.”<sup>93</sup> While the President may rely on his inherent authority to approve extraordinary renditions, oversight mechanisms exist to ensure these transfers conform to the rule of law. Congress asserted statutory control over covert operations such as extraordinary renditions in 1974 by passing the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961.<sup>94</sup> The Hughes-Ryan Amendment required that appropriated funds could not be used for CIA covert actions without Presidential approval and a national security concern.<sup>95</sup> The Hughes-Ryan Amendment standardized the issuance of covert actions such as extraordinary renditions by requiring a Presidential finding; this consisted of a signed document by the President discussing the operation and all parties involved.<sup>96</sup> Congressional oversight committees received notification of extraordinary renditions immediately thereafter. After receiving

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<sup>91</sup> *Id.*

<sup>92</sup> Yoo, *supra* note 86, at 1235.

<sup>93</sup> Alice Poole, *Convergent American and British Anti-Terror Paradigm; Dissonant Policy Implementation: US and UK Anti-Terror Policy Outcomes, September 2001-January 2006*, 11 *GEO. PUBLIC POL'Y REV.* 99, 102 (2005-2006).

<sup>94</sup> A. John Radsan, *An Overt Turn on Covert*, 53 *ST. LOUIS L.J.* 485, 521 (2009).

<sup>95</sup> Sec. 503(e) of the National Security Act of 1947 [50 U.S.C. 413b]).

<sup>96</sup> Radsan, *supra* note 94, at 521.

notice, Congress could either approve the action or prohibit the activity by denying funds.<sup>97</sup> The notice action timing was crucial for oversight. In its totality the Amendment did not provide clarity for the process of covert actions and failed to recognize the sustainability of executive actions despite zero congressional funding. However, the Amendment suggested a framework for the creation of jurisdiction for congressional committees to oversee intelligence activities such as the extraordinary rendition program.<sup>98</sup> Most importantly, the Hughes-Ryan Amendment precluded deniability of a President's knowledge of operations such as extraordinary renditions and laid the foundation for executive accountability.<sup>99</sup> As a result, the Amendment assigned responsibility to the President for all covert actions, and a total of eight committees received notification.<sup>100</sup>

The Hughes-Ryan Amendment forged major changes in the relationship between the CIA and Congress by enabling intelligence committees to review covert actions such as extraordinary renditions.<sup>101</sup> However, Congress recognized that in order for the execution of successful covert operations, secrecy was paramount. To enhance operational efficiency and maintain transparency, Congress passed the Intelligence Accountability Act, also known as the Intelligence Oversight Act of 1980.<sup>102</sup> This Act reduced the reporting requirement from eight different committees to only the

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<sup>97</sup> *Id.* at 522.

<sup>98</sup> *Id.*

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

<sup>100</sup> Marshall Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 *TEX. L. REV.* 575, 598 (1990).

<sup>101</sup> William C. Banks and Peter Raven-Hansen, *Targeted Killings and Assassination: The U.S. Legal Framework*, 37 *U. RICH. L. REV.* 667,711 (2003).

<sup>102</sup> Radsan, *supra* note 94, at 521

intelligence oversight committees, thereby increasing secrecy and efficiency.<sup>103</sup> The Act provided for two new congressional intelligence committees, the House Permanent Select Committee on Intelligence (House Intelligence Committee) and the Senate Select Committee on Intelligence (Senate Intelligence Committee), with the statutory framework for oversight for acts such as extraordinary rendition.<sup>104</sup> Congress ordered the CIA and other intelligence agencies under congressional appropriation and authorization for the first time.<sup>105</sup> Further, Congress amended the new law and added Section 501. This section authorized the Director of Central Intelligence (DCI), all heads of the departments and agencies, and entities involved in intelligence to remain “fully and currently informed of all intelligence activities...engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity” to report to the House and Senate Intelligence Committees.<sup>106</sup> Also, the Act provided that the DCI must report “any illegal intelligence activity or significant intelligence failure” in a “timely fashion.”<sup>107</sup> The Hughes-Ryan Amendment was simultaneously amended to incorporate Section 501. Therefore, the DCI had a duty to report covert activities, such as extraordinary renditions, to the intelligence committees. Further, “fully and currently informed” meant that the oversight committees be informed when the President authorizes initiation of any covert activity.<sup>108</sup>

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<sup>103</sup> Joshua A. Bobich, *Who Authorized This?!: An Assessment of the Process of Approving U.S. Covert Action*, 33 WM. MITCHELL L. REV. 1111, 1117 (2007).

<sup>104</sup> Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1662 (2006).

<sup>105</sup> Silverberg, *supra* note 95, at 596.

<sup>106</sup> *Id.* at 599.

<sup>107</sup> Radsan, *supra* note 94, at 526.

<sup>108</sup> *Id.*

In addition, Section 501 stated two exceptions pertinent to the written notification to congressional committees that affect extraordinary rendition. First, notice may be limited when the “President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States.”<sup>109</sup> Section 501 states that on such a finding, notice is limited to the intelligence committee’s chairman and ranking member, the Speaker and minority leader of the House, and Senate majority and minority leader.<sup>110</sup> While the executive branch may limit disclosure in certain cases, there is still a requirement to report routine covert actions to the intelligence committees. Second, Daniel Silver, CIA General Counsel, stated that oversight committees should have reports of anticipated or significant actions, subject to the President’s authority in exceptional cases.<sup>111</sup> Silver stated, “in what I would expect to be highly unusual cases, the President may act in the exercise of his constitutional authority or in rare circumstances, under the second preambular phrase, and not give prior notice to anyone in the Congress”<sup>112</sup> While members of Congress disagreed, stating that constitutional duties may not be altered, Congress chose not to challenge this understanding. Instead, Congress added section 501(b) stating: “The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.”<sup>113</sup> Therefore, in rare circumstances such as extraordinary rendition, the President may withhold information prior to a transfer; however, he or she

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<sup>109</sup> Silverberg, *supra* note 95, at 599.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 600.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

must inform the two oversight committees of the reason(s) for failure to provide timely notice.<sup>114</sup>

Congress passed the Intelligence Authorization Act in 1991, reinforcing the President's power to authorize covert activity, such as extraordinary renditions, on the premise that it is necessary for an identifiable national security objective.<sup>115</sup> The legislation had the same requirement as the Hughes-Ryan Amendment including a finding reported to Congress in writing before the authorization of any covert action; and a written record of the President's decision must be made "contemporaneously" and in writing within forty-eight hours if time does not permit preparation of the finding in writing.<sup>116</sup> Further, the finding may not authorize activities that have already occurred, unless there is an exceptional circumstance. All U.S. entities and third parties receiving funds or participating must be identified, and finally, violation of the Constitution will result in the denial of an authorization.

Equipped with congressional authorization, the Bush Administration claimed that federal courts lacked the authority and competence to review *habeas* claims of detainees, thereby reducing their constitutional jurisdiction.<sup>117</sup> The effect of this argument reduces the authority of the judicial branch as it is written in Article III, Section II of the Constitution, which states that judicial authority branch shall extend to "controversies to which the United States shall be a party."<sup>118</sup> The Administration argued "respect for separation of powers and the limited institutional capabilities of courts in matters of

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

<sup>115</sup> Radsan, *supra* note 94, at 531.

<sup>116</sup> *Id.* at 532.

<sup>117</sup> Michael P. Allen, George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change, 72 BROOKLYN L. REV. 871, 894 (2007).

<sup>118</sup> U.S. Const. Article III, Sect. 2.

military decision-making in connection with an ongoing conflict” ought to eliminate entirely any individual process, thus restricting the court’s involvement.<sup>119</sup> The Bush Administration asserted that the judicial branch should not review Presidential designations that have legal authorization. Based on this viewpoint, the President was not required to specify charges against an individual, which resulted in a lack of oversight and accountability of the extraordinary rendition program.<sup>120</sup> While the President has the plenary authority of the commander in chief powers under Article II, Section 2 to render individuals, circumstances have arisen where the individual was tortured in violation of the Convention against Torture. As a result, extraordinary renditions create accountability and oversight gaps that fail to meet the rule of law standards.

While the Supreme Court has not specifically indicated that extraordinary renditions require stronger oversight and accountability mechanisms, the Court has addressed the need for regulation and accountability in detention cases that provide possible solutions to address the loopholes in extraordinary renditions. In response to the President’s overreaching claim of inherent authority, the judicial branch reinforced its authority under Article III by giving deference to Presidential decisions during war, but limiting his or her authority to uphold the rule of law with unanimity in detention cases. The Supreme Court has consistently emphasized the role of the judiciary and its intent to preserve the separation of powers in *Hamdi v. Rumsfeld*, *Rasul v. Bush*, *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, holding that all three branches of government must be involved to provide adequate protection of the rule of law.<sup>121</sup> While detention differs

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<sup>119</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (U.S. 2004) (quoting Respondents' Brief).

<sup>120</sup> Id. at 597-98.

<sup>121</sup> Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77, 105 (2008).



from extraordinary rendition because it results in the transfer of individuals to centers under U.S. control, the substance of these decisions may be applied to extraordinary rendition. The Court signals that authority, oversight, and accountability must be maintained during the War on Terror. While clear authority through congressional authorization and the President's inherent authority exist for extraordinary renditions, the findings may provide solutions to increase accountability and oversight when suspects are transferred to foreign countries where the United States does not have control, but the possibility of torture exists.

In a fractured decision in *Hamdi v. Rumsfeld*, the Court established that the executive branch does not have a "blank check," and the powers within the Constitution "envisions a role of all three branches when individual liberties are at stake."<sup>122</sup> The President has the authority to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks...in order to prevent any future acts of international terrorism" based on congressional authorization through the Authorization for the Use of Military Force (AUMF) Law against Terrorists.<sup>123</sup> However, the Court held that the Constitution envisions active participation of all three branches of government in dire times, rather than power concentrated in a single branch of government.<sup>124</sup>

The *Hamdi* decision resulted in the creation of accountability and oversight of detention by providing an American citizen designated as an enemy combatant an

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<sup>122</sup> *Id.* at 535.

<sup>123</sup> Authorization for Use of Military Force. S.J. Res. 23, 107th Cong. (2001) (enacted).

<sup>124</sup> Calhoun, *supra* note 121, at 108.

opportunity to contest his status in the presence of a fair decision maker.<sup>125</sup> The Court held that the executive's classifications and detentions are not presumed correct without an opportunity for the individual to challenge the evidence to ensure the process is constitutional.<sup>126</sup> To provide oversight of detentions in a manner that simultaneously protects national security, the Court recognized that civilian courts are not the only courts that dispense due process.<sup>127</sup> The plurality opinion stated that it was proper for Hamdi to challenge his detention before a United States federal state also known as an Article III court. This challenge through a writ of *habeas corpus* would allow for procedural protections, such as an opportunity to present and rebut facts.<sup>128</sup> The Court acknowledged that hearsay and the burden of proof was in favor of the government. Lastly, the Court agreed that the President had the authority granted by the Constitution and congressional authorization through the AUMF to detain Hamdi.<sup>129</sup> The Court held that the capture and detention of combatants are important incidents of war; however, indefinite detention was not permitted based on the AUMF or the Geneva Conventions.<sup>130</sup>

*Hamdi* does not directly apply to extraordinary rendition because detention was an incident of war and congressionally authorized through the AUMF. Extraordinary renditions, on the other hand, occur through the detention of an individual who may or

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<sup>125</sup> Mehmet Munur, The Future of Judicial Review for the Detainees of the war on Terrorism after *Hamdan v. Rumsfeld*, 36 CAP. U.L. REV. 159, 171 (2007).

<sup>126</sup> *Id.* at 607.

<sup>127</sup> *Id.*

<sup>128</sup> Allison Elgart, Recent Development: *Hamdi v. Rumsfeld*: Due Process Requires that Detainees receive Notice and Opportunity to Contest Basis for Detention, 40 Harv. C.R. C.L. L. Rev. 239, 243 (2005).

<sup>129</sup> *Id.*

<sup>130</sup> Jenny S. Martinez, Process and Substance in the "War on Terror," 108 Colum. L. Rev. 1013, 1045 (2008).

may not be deemed an illegal enemy combatant before transferring him or her to a foreign state for the purposes of detention, interrogation, or trial. While the President has the authority to rely solely on his inherent authority to render individuals to third countries, there are concerns that the individual might face torture.<sup>131</sup> While the Court recognized that there is an urgency to detain an individual on the battlefield, they still maintained that “any process in which the Executive's factual assertions go wholly unchallenged... falls constitutionally short.”<sup>132</sup> In the case of extraordinary renditions, the government already has the suspect in custody, and, therefore, a stronger case for some sort of process should apply to provide for oversight. *Hamdi* suggests that transfers do not require a formal civilian trial and full application of the rules of evidence; however, at a minimum the decision mandates independent review to comply with the Constitution.<sup>133</sup> *Hamdi* signals that the process of judicial review can help enhance transparency and accountability before an extraordinary rendition occurs.

*Rasul* further solidified the notion that the United States must maintain constitutional standards and balances of power during operations abroad.<sup>134</sup> In response to the judicial branch’s maneuver to provide oversight of detentions, the government argued that detainees labeled as unlawful combatants were denied protections of Common Article 3 of the Geneva Convention and, therefore, outside the laws of war.<sup>135</sup> However, the Court held that individuals held at Guantanamo indefinitely were still entitled to due process. Prior to *Rasul*, the prisoners detained at Guantanamo endured

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<sup>131</sup> *Id.* at 607.

<sup>132</sup> *Id.* at 537.

<sup>133</sup> *Id.* at 533.

<sup>134</sup> See *Rasul et al. v. Bush*, 159 L. Ed. 2d 548 (2004).

<sup>135</sup> Margaret L. Satterthwaite, Symposium on the New Face of Armed Conflict: Enemy Combatants After Hamdan v. Rumsfeld: Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L. Rev. 1333, 1397 (2007).

indefinite detainment without transparent procedural protection.<sup>136</sup> After the *Hamdi* and *Rasul* decisions, the Bush Administration created an ad hoc system that provided for oversight and accountability by granting individuals minimum process.

*Hamdan* once again addressed issues of separation of powers and the rule of law. The Court held that the President could not create military commissions by executive order that departs from the procedures enacted by Congress.<sup>137</sup> The President must comply with the rule of law, and designated enemy combatants require trial via “a regularly constituted court affording all the judicial guarantees as indispensable by civilized people.”<sup>138</sup> While the Court acknowledged that expedited judicial review is justified in times of war, the majority was concerned with the President’s lack of consultation with Congress regarding whether Hamdan possessed any rights.<sup>139</sup> In the concurring opinion, Justice Kennedy asserted that trial via military commission raised separation of powers concerns. It concentrated power in the executive branch by “plac[ing] personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.”<sup>140</sup> It is imperative that full and proper authority exists for the Presidential directive to establish military tribunals. The broader implication of this ruling signifies that it does not matter how the President labels an individual or where the conflict occurs; the Constitution mandates oversight and accountability of detentions.<sup>141</sup>

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<sup>136</sup> Baher Azmy, Symposium: Constitutional Implications of the War on Terror: *Rasul v. Bush* and the Intra-Territorial Constitution, 62 N.Y.U. Ann. Surv. Am. L. 369, 421 (2007).

<sup>137</sup> Calhoun, supra note 121, at 111.

<sup>138</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 642.

<sup>139</sup> Calhoun, supra note 121, at 111.

<sup>140</sup> *Hamdan*, supra note 138, at 638.

<sup>141</sup> Satterthwaite, supra note 135, at 1349.

In a reciprocal response to *Hamdan*, Congress passed the Military Commissions Act in October 2006, requiring military commissions to meet the requisite standard set forth by Article 3 of the Geneva Convention. On July 20, 2007, President Bush issued an executive order stating that Common Article 3, prohibiting “violence, mutilation, cruel treatment and torture,” and “humiliating and degrading treatment”, applied to the CIA.<sup>142</sup> In terms of extraordinary rendition, once again the underlying message in *Hamdan* signifies that a detainee should receive minimum process to ensure accountability and oversight before his transfer to a foreign state in compliance with the Geneva Convention.

The Supreme Court continued to preserve the separation of powers and demanded an explanation for detentions of individuals.<sup>143</sup> The Court addressed extraordinary rendition cases in a more direct manner in *Boumediene*, holding that “the political branches [do not] have the power to switch the Constitution on or off at will” by moving individuals to “law-free zones.”<sup>144</sup> The Supreme Court took a functional approach and applied an “objective degree of control” test.<sup>145</sup> Based on this test, the Court provided that protections for detainees in Guantanamo included a need for *habeas* review. The Supreme Court had the option to limit the ruling in *Boumediene* by strictly applying it to Guantanamo Bay detainees; however, the Court used the “objective degree of control,” which has broader implications for U.S. actions such as extraordinary renditions.<sup>146</sup> In the lens of *Boumediene*, when the executive branch authorizes the extraordinary rendition

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<sup>142</sup> Fisher, *supra* note 31, at 1450.

<sup>143</sup> Calhoun, *supra* 121, at 78.

<sup>144</sup> See *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

of an individual, the U.S. in effect maintains an “objective degree of control”, and therefore, the process may require *habeas corpus* before the transfer.<sup>147</sup>

The combination of the Supreme Court decisions in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* provide signals that the Supreme Court requires accountability and oversight, even when the executive branch has the authority through inherent powers and congressional authorization to render individuals to third countries.<sup>148</sup> While extraordinary rendition is a different process because the President possesses the inherent authority to approve such covert actions in addition to congressional approval via the AUMF, the transfers must still comply with the rule of law. A gap exists regarding the degree of accountability the President and Congress hold after an individual is rendered to a foreign government where he or she may face torture. The decisions in *Hamdi*, *Rasul*, *Hamdan* and *Boumediene* manifest the Court’s intent to ensure that the doctrine of separation of powers is upheld, even during times of national emergency. The Court’s holdings suggest that Article III courts may be appropriate to provide due process. Further, a system independent from the existing courts based on the President’s war powers, though appropriate, is still subject to some habeas corpus review. Extending the principles in detention cases, the Court provided possible solutions for oversight and accountability for extraordinary rendition.

In response to providing for oversight for extraordinary renditions, the President looked towards the states secret doctrine as an alternative means to provide judicial review while simultaneously protecting national security. The states secret doctrine preserved secrecy by restricting intelligence access to members of the executive branch,

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

<sup>148</sup> Calhoun, *supra* 121, at 81.

but at the same time implementing procedural due process as required by the prior rulings of the Supreme Court. The state secret doctrine balanced the President's autonomy with providing rendered suspects process. This is not a new paradigm introduced by the Bush Administration, but, rather, it has existed since the beginning of the Republic.<sup>149</sup> The state secret privilege allows the government to deny the release of certain evidence that can potentially endanger national security.<sup>150</sup> The doctrine serves as a constitutional protection of "information whose secrecy is necessary to its military and foreign-affairs responsibilities."<sup>151</sup> Without the protection of the executive branch against litigation, the U.S. might suffer detriment regarding foreign affairs and the security of its citizens.<sup>152</sup> Therefore, the Supreme Court has historically recognized the constitutional necessity of the state secret doctrine and deferred to the executive branch.<sup>153</sup>

*Totten v. United States* first asserted the rule that barred judicial review of claims against the United States based on the existence of a secret agreement of espionage.<sup>154</sup> This is a Civil War case involving a Union Spy. The plaintiff brought suit against the government on behalf of the estate of William A. Lloyd alleging that an agreement existed between Lloyd and President Lincoln to spy on the Confederacy. The Supreme Court held that the President under the commander in chief powers had the authority to

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<sup>149</sup> Victor Hansen, Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand, 33 N.C.J. INT'L L. & COM. REG. 629, 631 (2008).

<sup>150</sup> Ilana A. Schoenbach, No Statutory Exceptions: The Case of Maher Arar and a Call to End Extraordinary Renditions, 14 SW. J.L. & TRADE AM. 119, 142 (2007).

<sup>151</sup> *El-Masri v. U.S.*, 479 F.3d 296, 303 (4th Cir. 2007).

<sup>152</sup> David Aronofsky and Matthew Cooper, 2008 Sutton Colloquium Edition: The War on Terror and Its Implications for International Law & Policy: The War on Terror and International Human Rights: Does Europe Get it Right?, 37 Denv. J. Int'l L. & Pol'y 567, 581 (2009).

<sup>153</sup> *Id.*

<sup>154</sup> John Harrington, Carrie Newton, Walter Gary Sharp Sr., Barry Kelman, Jonathon Granoff, and Derek Gilman, Public International Law, 40 Int'l Law, 487 (2006).

enter agreements during time of war. The Court ruled to preserve the secrecy of these agreements by holding that disclosure of the secret agreement would either compromise or embarrass the government. The holding of the Court thereby acknowledged the state secrets privilege.<sup>155</sup>

Thirty-seven years later, *Firth Sterling Steel Co. v. Bethlehem Steel Co.* [1912], expanded the state secret privilege by “encompass[ing] the power of a court to actively preclude certain testimony rather than merely allowing a party claiming the privilege to refrain from answering.”<sup>156</sup> In that case, the plaintiff initiated an infringement action after the defendant unlawfully tried to obtain copies of secret drawings of armour-piercing projectiles for a patent. The court held that the information in the drawing existed as confidential government information and must be excluded for public policy reasons.<sup>157</sup> “This exclusion on the basis of policy reasons which attached to the documents on account of their subject matter marked a unique shift away from the other historical privileges which generally arose out of some form of personal relationship.”<sup>158</sup> In addition, *United States v. Reynolds* [1952] further placed matters of national security and the country’s safety before the interest of a few citizens during the Cold War. Three families brought a tort action against the United States for the death of their spouses in a military crash. During military testing of secret electronic equipment by the civilians, a fire broke out killing three out of the four civilians. The government refused both the Plaintiff’s and District Court’s release of the Air Force accident investigation report and any statements made by the survivors due to highly secret military equipment and

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<sup>155</sup> Hansen supra note 149, at 629.

<sup>156</sup> Jason A. Crook, From the Civil War on Terror: The Evolution and Application of the State Secret Privilege, 72 Alb. L. Rev. 57, 59 (2009).

<sup>157</sup> Id. at 60.

<sup>158</sup> Id.



national security concerns. On appeal, the Supreme Court granted the plaintiffs a favorable ruling holding that the state secrets privilege remained valid under Federal Rules of Civil Procedure, Rule 34 which permitted the government to refuse privileged information.<sup>159</sup>

The state secrets privilege is founded on English precedent in *Duncan v. Cammel, Laird & Co* [1942]. When considering how courts should deal with the state secrets privilege the House of Lords held that:

The court must treat the decision of the non-judicial official as 'conclusive'...that it is not proper for a judge to inspect the documentation to determine if the public interest requires its exclusion, but rather that the privilege must be asserted in such a manner to satisfy the judge that the proper executive department head has seen and reviewed the information.<sup>160</sup>

Even though there is debate that the decision reached in *Duncan* is not correct, the Supreme Court established the common law interpretation of the state secret doctrine based on the precedent set-forth in *Duncan*. As a result, the Supreme Court permitted the government to withhold privileged information. The Supreme Court viewed the state secrets privilege under the law of evidence. The government must assert the privilege and it should not be lightly invoked. After the privilege is asserted, the court finally rules whether the privilege is necessary. The difficulty when assessing the state secrets privilege is determining whether the privilege exists without disclosure of the privileged information. The Court analogized the state secrets privilege with self-incrimination stating, "some formula of compromise should be developed and applied in the state secret

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<sup>159</sup> Daniel J. Huyck, Comment: Fade to Black: *El-Masri v. United States* Validates the Use of the State Secrets Privilege to Dismiss "Extraordinary Rendition" Claims, 17 Minn. J. Int'l L. 435, 442 (2008).

<sup>160</sup> *Id.*

context.”<sup>161</sup> The *Reynolds* court held that when determining the balance between full disclosure of evidence with accepting the state secret’s privilege on face value, disclosure is not a requirement of the court.<sup>162</sup> The Court reasoned that the government should not automatically be required to disclose information that is *ex parte and in camera* even to the judge who is making the privilege assessment.<sup>163</sup> Due to the danger of exposing national security information and military secrets, disclosure of such material is not required. Based on this assessment, the Court held that disclosure of information by the government to a judge is not necessary; however, the government must demonstrate a necessity to invoke the privilege.

The judiciary grants the executive branch a high level of deference to exercise this privilege.<sup>164</sup> However, without reforms the privilege holds the potential to violate legal and constitutional rights if the evidence is not subjected to judicial scrutiny.<sup>165</sup> The Supreme Court stated that the privilege cannot be given to the officials without judicial control; however, the standards set forth in *Reynolds* for the level of review for lower courts to measure what constitutes a state secret remains ambiguous.<sup>166</sup> The Supreme Court allowed the lower courts to rule with little consistency by providing an unclear standard:

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<sup>161</sup> Hansen supra 149, at 634.

<sup>162</sup> Margaret Ziegler, Annual Review: 2008 Privacy: Note: Pay No Attention to the Man Behind the Curtain: The Government’s Increased Use of the State Secrets Privilege to Conceal Wrongdoing, 23 Berkeley Tech. L.J. 691, 712 (2008).

<sup>163</sup> Hansen supra 149, at 634.

<sup>164</sup> Stephanie A. Fichera, Article II: The Uses and Abuses of Executive Power: Note: Compromising Liberty for National Security: The Need To Rein in the Executive’s Use of the State-Secrets Privilege in Post-September 11 Litigation, 62 U. Miami L. Rev. 625, 635 (2008).

<sup>165</sup> Id. at 638.

<sup>166</sup> Christopher D. Yamaoka, Note: The State Secrets Privilege: What’s Wrong With It, How It Got That Way, and How the Courts Can Fix It 35 Hastings Const. L.Q. 139, 146 (2007).

Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters, which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security, which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.<sup>167</sup>

This ruling is unclear because the Supreme Court does not describe the specific types of information that qualify as a “state secret” or explain the assertion of this privilege within the constructs of the law. Consequently, lower courts rule with little consistency as to what constitutes a state secret. When this privilege is exercised with absolute deference by judges, it reduces the public’s trust and confidence in the judiciary. As a result, despite announcements that there is absolute deference to the executive branch, courts maintain that they review what information the privilege is trying to shield and whether the claim is proper when they determine whether the state secrets doctrine applies.<sup>168</sup>

The Supreme Court deferred to the authority of the executive branch in *El-Masri v. Tenet* and *Arar v. Ashcroft*.<sup>169</sup> In both cases the use of the extraordinary rendition program allowed for the transfer of both suspects to another country. El-Masri and Arar both alleged the U.S. violated their human rights by mistaking them as terrorists, rendering them to a foreign state, and then torturing them.<sup>170</sup> The government moved for summary judgment and dismissal on state secret grounds. In *El-Masri*, Judge T.S. Ellis

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<sup>167</sup> Reynolds, 345 U.S. at 9-10.

<sup>168</sup> Anjetta McQueen, Security Blanket: The State Secrets Privilege Threat to Public Employment Rights, 22 LAB. LAW 329, 336 (2007).

<sup>169</sup> Holly Wells, The State Secrets Privilege: Overuse Causing Unintended Consequences, 50 Ariz. L. Rev. 967, 979 (2008).

<sup>170</sup> Michael V. Sage, 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, 125 (2006).

stated, “courts must not blindly accept the Executive Branch’s assertion...but must independently and carefully determine...[whether] the claimed secrets deserve the protection of the privilege.”<sup>171</sup> According to Judge Ellis, the courts must determine whether the U.S. possesses adequate evidence to assert the privilege. However, Ellis also noted “the courts must bear in mind the Executive Branch’s preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicating the effect of a particular disclosure of national security.”<sup>172</sup> The court addressed concerns of the overuse of the state secret’s doctrine without judicial scrutiny by recognizing that the government has the burden to prove the doctrine’s applicability.<sup>173</sup>

El-Masri believed that the executive’s state secret privilege should not extend to the CIA’s extraordinary rendition program and argued that litigation would have no consequence to national security because the program has been widely discussed. He suggested special procedures to protect any sensitive information during discovery.<sup>174</sup> However, the court held that if they proceeded in a civil action, exposure of sensitive information remained a strong possibility, specifically, “the roles the defendants played in the events and, thus, in the CIA organization, and...how the CIA organizes and supervises its intelligence and operations.”<sup>175</sup> Furthermore, without the privileged evidence, the defendants would be unable to defend themselves: “Virtually any conceivable response to El-Masri’s allegations would disclose privileged information.”<sup>176</sup>

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<sup>171</sup> United States v. Reynolds, 345 U.S. 1, 10 (U.S. 1953).

<sup>172</sup> Khaled El-Masri v. George Tenet, et al., Case No. 1:05cv1417, 8 (May 12, 2006).

<sup>173</sup> Afronofsky and Cooper, supra note 152 at, 581.

<sup>174</sup> El-Masri, 479 F.3d at 308 (citing Appellant’s Brief at 38).

<sup>175</sup> Afronofsky and Cooper, supra note 152, at 581.

<sup>176</sup> El-Masri, supra note 152, at 310.

Therefore, dismissal served as an appropriate remedy because the circumstances made it clear that litigation would threaten privileged information.<sup>177</sup>

In *Arar*, the court once again deferred to the authority of the state secret privilege and dismissed his claims because they lacked standing, “given the national security and foreign policy considerations at stake.”<sup>178</sup> The Second Circuit affirmed the decision based on the Supreme Court’s indication that national security is “an arena of executive action in which courts remain hesitant to intrude” further, “a reminder of the undisputed fact that claims under consideration involve significant national security decisions made in consultation with several foreign powers.”<sup>179</sup>

The Supreme Court’s reluctance to review extraordinary rendition cases raises questions as to whether or not courts are willing to insert themselves in executive matters. Many legal scholars argue that the Supreme Court avoids cases when foreign policy issues arise and may recuse itself by stating that the issue is a political question and therefore nonjusticiable.<sup>180</sup> The rationale to side-step questions of foreign policy is based on the fact that legal interference of a political question “delegitimizes the Court and possibly tips the balance of power inappropriately toward the judicial branch.”<sup>181</sup> However, opponents of this view assert that the Supreme Court has repeatedly issued opinions and while some provide support for the executive branch, the Court has also ruled against it when addressing foreign policy. They argue that there are two different

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<sup>177</sup> *Id.* at 306.

<sup>178</sup> *Arar v. Ashcroft*, 532 F.3d 157, 201 (2008).

<sup>179</sup> *Id.* at 183.

<sup>180</sup> Kimi Lynn King and James Meernik, “The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy,” *Political Research Quarterly*, Vol. 52 # 4, 801, 802 (1999).

<sup>181</sup> Kimi Lynn King and James Meernik, *The “Sole Organ” before the Court: Presidential Power in Foreign Policy Cases, 1790-1996*, *Presidential Studies Quarterly*, Vol. 28, 666 (1988).

scenarios where the Supreme Court considers the constitutional claim of authority and issues an opinion. In the first scenario, the President is within his strongest claim of authority based on Article II powers, the Supreme Court advances the view that the Constitution must be read with discretion in matters of foreign affairs, but more often than not the court has upheld the President's claim. In the first instance, the Court accepts the President's policy decision because the "legislature's rubber stamp" of approval.<sup>182</sup> In the second, scenario the court is faced with a "gray zone" because the President's powers are not expressly permitted or denied. Consequently, the Court exercises greater discretion to circumvent the executive's authority. Therefore, in instances when civil liberties are at stake and authority is ambiguous the Court has asserted itself as the guardian of rights and ruled against the executive branch. Applied to extraordinary rendition, the Court is likely to intervene to provide checks and balances because the President's authority is ambiguous and civil liberties are at stake.<sup>183</sup>

While the Supreme Court provided review in the cases of *Arar* and *El-Masri*, the Court remained reluctant to rule on the legality of the extraordinary rendition program. The President's reliance on inherent constitutional powers is legal, and courts are providing quasi-review for extraordinary renditions like the cases in *Arar* and *El-Masri*, the harder analysis remains whether the use of extraordinary rendition conforms to international law. *Arar* and *El-Masri* both illustrate that there is a need to provide a balance between national security and human rights. The United States holds the dual responsibility of protecting its citizens from terrorist attacks and maintaining a good human rights record. Most attacks regarding the extraordinary rendition program are

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<sup>182</sup> *Id.*

<sup>183</sup> Kimi and Meernik supra note 180, at 807.

focused on the illegality under international law.<sup>184</sup> The U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), U.S. domestic implementation of the CAT, and the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) provides the legal framework for the extraordinary rendition of individuals to third countries.<sup>185</sup> Both pieces of legislation generally ban extraordinary rendition of individuals to third countries where they will more likely than not be tortured.<sup>186</sup>

The international community's commitment to prohibit torture has existed since World War II through treaties and declarations.<sup>187</sup> Torture is a violation of human rights and the universal laws of nations. Further, under international law torture is prohibited during the transfer of an individual to a foreign state.<sup>188</sup> Therefore, the United Nations adopted the CAT on December 10, 1984, which provides restrictions on transfers where there is a substantial likelihood that the individual will face torture. The CAT specifically prohibits the infliction of severe physical or mental suffering under the color of law.<sup>189</sup> The CAT's primary objective is the prohibition of torture and requires signatory nations to enact and enforce criminal laws against torture.<sup>190</sup> The United States ratified the CAT in 1994 and articulated that Articles One through Sixteen of the

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<sup>184</sup> Schoenbach, *supra* note 150, at 121.

<sup>185</sup> James R. Silkenat & Peter M. Norman, Stein Center Colloquium on Legal Issue surrounding Guantanamo Bay: Essay: Jack Bauer and the Rule of Law: The Case of Extraordinary Renditions, 30 *Fordham Int'l L.J.* 535, 542 (2007).

<sup>186</sup> *Id.*

<sup>187</sup> Jane C. Kim, 1234 Nonrefoulement under the Convention Against Torture: How U.S. Allowances for Diplomatic Assurances Contravene Treaty Obligations and Federal Law, 32 *Brooklyn J. Int'l L.* 1227, 1233 (2007).

<sup>188</sup> Sage *supra* note 150, at 136.

<sup>189</sup> *Id.* at 137.

<sup>190</sup> *Id.* at 136.

Convention under U.S. domestic law was not self-executing.<sup>191</sup> In 1998 Congress passed FARRA, which implemented Article 3 of the CAT's prohibitions on torture and refoulement. Section 2242 of FARRA states that the U.S. could not "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."<sup>192</sup>

The Bush Administration's interpretation of torture has led to controversies surrounding the extraordinary rendition program. The Administration maintained that extraordinary renditions follow a legal standard and comply with the CAT. First, the Administration argued that the United States does not condone torture, nor does it transport individuals from one country to another for purposes of torture. The focal point of the Administration's argument is "purpose."<sup>193</sup> The purpose of the extraordinary rendition program is not torture, but, rather, to obtain intelligence.<sup>194</sup>

Second, the legal analysis of what constitutes torture is instrumental for supporting the argument that the extraordinary rendition program abides by the rule of law. The United States considered the obligation not to torture under Article 16 of the CAT to prevent "cruel, inhuman or degrading treatment or punishment" as the Fifth, Eighth, and/or Fourteenth Amendments of the United States Constitution define it.<sup>195</sup> The Department of Justice, Office of Legal Counsel, and Assistant Attorney General Jay Bybee authored (and subsequently disavowed) a controversial memorandum addressing

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<sup>191</sup> Radsan, *supra* note 72, at 16.

<sup>192</sup> Katherine Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 *Geo. Immigr. L.J.* 213, 228 (2006).

<sup>193</sup> Fisher, *supra* note 31, at 1427.

<sup>194</sup> *Id.*

<sup>195</sup> Miri Lim, *Redefining Torture in the Age of Terrorism: An Argument against the Dilution of Human Rights,* 13 *Wash. & Lee J. Civil Rts. & Soc. Just.* 83, 98 (2006).



torture on August 1, 2002.<sup>196</sup> The memo described the legal standard for conduct during interrogations and asserted that the Administration was in compliance with the CAT under 18 U.S.C. sections 2340-2340A.<sup>197</sup> Under section 2340 for an act to constitute torture, “it must inflict pain that is difficult to endure.”<sup>198</sup> Consequently, the Bybee memo stated that torture was confined to egregious acts producing physical pain, which must be “equivalent in intensity to pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>199</sup> The memo determined that the statute, interpreted as a whole, only prohibits extreme acts. As a result there was a “significant range of acts that might constitute cruel, inhuman, or degrading treatment or punishment [that] fail to rise to the level of torture.”<sup>200</sup>

Congress ratified the CAT defining torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering...upon another person within his custody or physical control.”<sup>201</sup> Critics argue that the implementation of this definition is contrary to the CAT, which requires only a general intent requirement. By allowing specific intent, an act that may be considered cruel, inhuman, or degrading is legally permitted if the actor only had general

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<sup>196</sup> Craig Forcece, Review Essay: The Myth of the Virtuous Torturer: Two Defenses of the Absolute Ban on Torture: Why not Torture Terrorists? Moral, Practical, and Legal Aspects of the “Ticking Bomb” Justification for Torture, by Yunuv Ginbar and The Absolute Violation: Why Torture must be Prohibited, Richard Matthews, 46 Osgoode Hall L.J. 853, 855 (2008).

<sup>197</sup> Julie Lobel, Symposium” 9/11 Five Years On: A Look at the Global Response to Terrorism: The Preventative Paradigm and Perils of Ad Hoc Balancing, 91 Minn. L. Rev. 1407, 1419 (2007).

<sup>198</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C.2340-2340A (Aug. 1, 2002) [hereinafter Bybee Memo].

<sup>199</sup> Id.

<sup>200</sup> Forcece, supra note 197, at 855.

<sup>201</sup> Id.

intent. However, the DOD Working Group Report (WGR) supported the legal analysis of the Bybee memo and subsequently issued a report in April 2003. The DOD argued that torture under the CAT must be pain inflicted upon an individual “of such a high level of intensity that the pain is difficult . . . to endure.”<sup>202</sup> As a result both departments held the view that cruel and unusual punishment, which does not amount to the level of severity indicated, is not torture under criminal law in the United States.

The Bybee memo and the WGR received harsh criticism from opponents, mainly because the definition of torture was so narrow and failed to comply with international standards. Many opponents of the Bybee memo, such as the State Department, argued that this was legally and morally damaging to our national interest. The memo ignored and misunderstood U.S. obligations to prohibit torture and cruel and inhuman treatment as described by the CAT.<sup>203</sup> Opponents argue that the narrow definition of torture allows for poor oversight. As a result the United States can resist responsibility if torture exists after the extraordinary rendition of an individual to a foreign country.<sup>204</sup> The United States can render individuals to foreign countries and enjoy the “fruits of information gathered,” while simultaneously having no “direct knowledge of the host country's interrogation methods.”<sup>205</sup> As a result opponents categorize the extraordinary rendition program as the U.S. program of outsourcing torture.<sup>206</sup>

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<sup>202</sup> David D. Hutt and Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive versus the Court*, 33 *Ohio N.U.L. Rev.* 113, 138 (2007).

<sup>203</sup> Jose Alvarez, *Symposium: Torture and the War on Terror: Torturing the Law*, 37 *Case W. Res. J. Int'l L.* 175, 179 (2006).

<sup>204</sup> Lim, *supra* note 196, at 91.

<sup>205</sup> *Id.* at 93.

<sup>206</sup> M. Cherif Bassiouni, *Symposium: Torture and the War on Terror: The Institutionalization of Torture and the Bush Administration*, 37 *Case W. Res. J. Int'l L.* 389, 412 (2006).

To address the oversight and accountability gaps, the United States allows for the consideration of diplomatic assurances from third countries in extraordinary rendition decisions pursuant to the CAT. Specifically, Article 3 governs extraordinary rendition by establishing the requirement that “all evidence relevant to the possibility of future torture shall be considered.”<sup>207</sup> Furthermore “competent authorities shall take into account . . . the existence . . . of a consistent pattern of gross, flagrant or mass violations of human rights.”<sup>208</sup> Based on Article 3, an individual subject to extraordinary rendition may be transferred to a foreign state provided that the Secretary of State reviews all evidence and receives “sufficiently reliable” assurances that the individual will not be tortured. According to the Center for Human Rights and Global Justice, to comply with this standard, CAT protections assert that these assurances must be greater than a mere suspicion that the rendered individual will not be subject to torture; however, it does necessitate raising the standard to a high probability.<sup>209</sup> An attorney for the Department of Justice, Martin Lederman, asserts that “[The CAT] only applies when you know a suspect is more likely than not to be tortured, but what if you kind of know? That’s enough. So there is no way around it.”<sup>210</sup> Therefore, when the U.S. receives a reliable assurance that an individual will not be tortured, initially an inherent violation of the CAT or its domestic legislation does not exist.<sup>211</sup> The interpretation of the “more likely than not” standard is not an invention of the Bush Administration; rather, this precedent was adopted by the Senate in 1990 and then ratified in 1994. This standard is used

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<sup>207</sup> *Id.* at 230.

<sup>208</sup> *Id.*

<sup>209</sup> Sage, *supra* note 150, at 136.

<sup>210</sup> *Id.* at 137.

<sup>211</sup> Garcia, *supra* note 11, at 16.

commonly in the U.S. justice system when courts make a determination whether to withhold an individual's removal based on fear of persecution.<sup>212</sup>

There are several criticisms that the U.S. practice of obtaining diplomatic assurances undermines international law. Critics assert the transfer of individuals to states with poor human rights record coupled with the secrecy of assurances renders them unreliable. The responsibility of the United States to ensure its compliance with the CAT does not diminish after an extraordinary rendition. Many times the transfer occurs even when the receiving country may have a questionable human rights record.<sup>213</sup> These concerns are raised not only by Amnesty and Human Rights Watch, but the U.S. State Department as well. After the extraordinary rendition of a suspect, it remains difficult to monitor the assurance: "Torture is conducted in secret and regimes that use torture have become adept at hiding it."<sup>214</sup> As a result there is a possibility that diplomatic assurances may just be a rubber stamp in complying with the CAT. Article 3 of the CAT does not provide guidance regarding what standards govern a diplomatic assurance and what considerations lead to the determination that an individual should be rendered. In addition there is no documentation available that provides insight on the legal evaluation of diplomatic assurances.<sup>215</sup>

While criticisms from groups like Amnesty and the ACLU exist, the use of diplomatic assurances creates a system of accountability that places additional oversight to uphold the rule of law and serves as a vehicle for the U.S. to ensure that the foreign

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<sup>212</sup> *Id.* at 8.

<sup>213</sup> Isaac L. Linnartz, *The Siren Song of International Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 *Duke L.J.* 1485, 1500 (2008).

<sup>214</sup> *Id.* at 1501.

<sup>215</sup> Hawkins *supra* note 193, at 22.

state will not engage in torture. The U.S. determines whether “this particular individual is more likely than not to be tortured if we send them back. And that is where the diplomatic assurances come into play. If the country has a bad human rights record, there is immediately going to be a yellow light about whether we would send someone back.”<sup>216</sup> As a result diplomatic assurances are used in an ad hoc manner based upon a number of factors including: the identity of the individual providing the assurance; the use of torture within the military, prison, or criminal justice system of the receiving state; the willingness of the country to abide by the CAT; and the priority the foreign state places on maintaining bilateral relations with the United States.<sup>217</sup> The use of diplomatic assurances is a sign that the U.S. is committed to its obligations under the CAT.

Diplomatic assurances can reduce the risk of torture when an individual is transferred based on Article 3 of the CAT because the U.S. has direct contact with top-level officials from foreign governments regarding the extraordinary rendition.<sup>218</sup> Further, in many cases according to John B. Bellinger, III, Legal Adviser, U.S. Department of State, after an extraordinary rendition, the U.S. continues to pursue reports and take necessary action when assurances are not upheld by the receiving state.<sup>219</sup>

While U.S. policy dictates that an individual will not be rendered to a country if he or she may be subject to torture, the applicability of Article 3 is limited. Human rights treaties, such as the CAT, “apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international

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<sup>216</sup> Bellinger *supra* note 21, at 21.

<sup>217</sup> *Id.* at 15.

<sup>218</sup> *Id.*

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

community.”<sup>220</sup> The U.S. State Department confirmed this analysis stating that the CAT Article 3 does not apply to individuals outside U.S. jurisdiction; however, the State Department indicated that transfers of individuals are guided by the policy of the CAT. Opponents of this view contend that a narrow interpretation of Article 3 diminishes the goal to prevent torture. In response the U.S. maintains that Article 3 of the CAT does not have reach outside the U.S., and this analysis is supported by the rest of the CAT, the negotiation history of the treaty, and the U.S. Record of Ratification.<sup>221</sup> While there is an inherent law-policy split, the U.S. maintains that it follows the policy of Article 3 of the CAT. This is evidenced by the fact extraordinary renditions are not an expedited process because the U.S. must first ensure that a reliable assurance exists.<sup>222</sup> Lastly, the U.S. adheres to its commitment to Article 3 of the CAT and maintains that an individual will not be transferred based on “any kind of balancing of interests, or harms, even in cases involving the possible removal...of an individual who may pose a threat to the safety and security of the American people.”<sup>223</sup>

The concept of diplomatic assurances for extraordinary rendition and assurance of due process, however, appears to be a toothless vehicle. Nonetheless, the United States seeks to enforce these assurances because no better alternatives exist under FARRA, U.S. immigration laws, and international laws.<sup>224</sup> The use of diplomatic assurances is important to guard the United States’ national security and public safety interests.<sup>225</sup> If an individual is suspected of terrorism, the United States does not want the suspect within its

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<sup>220</sup> Maj. Derek Grimes, Maj. John Rawcliffe and CPT Jennine Smith, *Operational Law Handbook*, 51 (2006) <http://www.fas.org/irp/doddir/army/law2006.pdf>.

<sup>221</sup> Bellinger *supra* note 21, at 8.

<sup>222</sup> *Id.* at 9.

<sup>223</sup> *Id.* at 8.

<sup>224</sup> Hawkins *supra* note 168, at 228.

<sup>225</sup> Bellinger *supra* note 21, at 18.

borders posing a threat to U.S. citizens. Additionally, the United States cannot imprison the suspect because he or she will eventually be released back into the country. Also, no possibility exists for indefinite detention within the United States because this policy would offend the 6<sup>th</sup> amendment and due process. As a result the best alternative to maintain national security is to seek diplomatic assurances from another country and render the individual. However, measures to strengthen assurances will alleviate human rights concerns and strengthen accountability. Currently, the lack of responsibility after an extraordinary rendition raises concerns even though the United States appears to adhere to domestic and international laws by receiving diplomatic assurances. Consequently, raising the bar when an individual is rendered, as described below, based on the human rights record of the foreign state will increase oversight and accountability.

To mitigate the risk of torture and strengthen U.S. compliance with the rule of law, the U.N. Human Rights Committee, which monitors compliance with the CAT, provides additional oversight mechanisms that will strengthen accountability. The Committee has three requirements governing assurances that serve as an instructive guide for extraordinary renditions. Assurances must have clear and established procedures, must be subject to judicial review, and must ensure post-transfer monitoring of the individual. Currently the U.S. approach for ensuring that individuals rendered will not be subject to torture does not meet the entire procedural threshold of the CAT due to the lack of oversight post-extraordinary rendition.<sup>226</sup> To effectively remedy this gap and reduce the risk of torture, the United States should create a formalized procedure that raises the legal requirements before an extraordinary rendition and insist that an individual is only rendered to a foreign country that does not systemically violate the CAT. After an

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<sup>226</sup> Satterthwaite, *supra* note 135, at 1381.

extraordinary rendition, the U.S. should create post-monitoring mechanisms that would also serve as a check to decrease the possibility of torture. This would help reduce the tension between the national security goals of the United States to obtain intelligence and obligations under the CAT. Further, human rights violations will subsequently decrease because there is a concerted effort to strengthen oversight and increase accountability.

In addition to the CAT, the U.S. governs its actions according to the Geneva Convention of 1949, which places certain limitations on U.S. extraordinary renditions. Common Article 3 of the Geneva Convention protects specific categories of individuals and states that when there is an armed conflict that is not international, each state must provide “de minimum” protections to individuals that do not take active part in hostilities.<sup>227</sup> States are required to treat individuals humanely and are prohibited from using violence, cruel treatment, or torture. The Bush Administration initially held that the Geneva Convention did not apply to enemy combatants.

The Administration asserted that Common Article 3 applies to conflicts that are not international conflicts and the conflict at hand has an international scope.<sup>228</sup> Specifically, the administration argued that the war on terror is neither international because it does not involve a “state against state” conflict nor is it non-international “because it transcends national boundaries.”<sup>229</sup> Rather, this is a global war on terror and therefore the Geneva Convention does not apply. However, the United States Supreme Court held otherwise.<sup>230</sup> The Court in *Hamdan* highlighted the importance of the Geneva Convention, holding that there are minimum levels of protections even if the

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<sup>227</sup> Third Geneva Convention, art. 12; Fourth Geneva Convention, art. 45.

<sup>228</sup> Panellists, Presidential Power: Article and Poetry: A Forum on Presidential Authority, 6 Seattle J. Soc. Just. 23, 50 (2007).

<sup>229</sup> Id.

<sup>230</sup> Satterthwaite, supra note 135, 1397.



Convention's provisions do not cover a person.<sup>231</sup> Based on the precedent set forth in *Hamdan*, the United States has subsequently accepted the application of the Geneva Convention generally.<sup>232</sup> *Hamdan* suggests that a rendered individual should receive minimum process before transfer to a foreign state.

While the CAT and the Geneva Convention provide a framework for the treatment of individuals subject to extraordinary renditions, and diplomatic assurances are utilized to increase accountability, extraordinary rendition still presents a rule of law problem. All governments that engage in extraordinary renditions face this challenge. There is an inherent lack of agreement in the international community regarding how to permit extraordinary renditions while maintaining oversight and accountability. The international community acknowledges that the United States must be held accountable and should uphold human rights obligations during transfers.<sup>233</sup> The Bush Administration's wide discretion regarding the extraordinary rendition program undermined confidence within the international community. The Administration implemented an expansive extraordinary rendition policy while using diplomatic assurances; however, they failed to establish a set of standards to keep themselves accountable.

As early as 1994, the State Department published annual reports concluding that Egypt uses:

torture...to extract information. ... Detainees are frequently stripped to their underwear; hung by their wrists with their feet touching the floor or forced to stand for prolonged periods; doused with hot and cold water;

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<sup>231</sup> See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: a Human Rights Analysis*, 19 *Harv. Hum. Rts. J.* 123, 151-153 (2006).

<sup>232</sup> Satterthwaite, *supra* note 135, at 1398.

<sup>233</sup> *Id.*

beaten; forced to stand outdoors in cold weather; and subjected to electric shocks.<sup>234</sup>

The Egyptian Organization for Human Rights confirmed the use of torture stating that there were 567 cases of torture within police stations, 167 deaths resulting from torture, and mistreatment between 1993 and July 2007.<sup>235</sup> The State Department has annually confirmed that Syria also engages in torture, stating that “torture and abuse of detainees was...common. Many instances of abuse went unreported.”<sup>236</sup> The use of written diplomatic assurances with countries that hold poor human rights records based on the State Department’s assessment is a violation of the CAT. The continued use of extraordinary renditions to countries with poor human rights records deteriorates the program’s compliance with the rule of law and international standards.<sup>237</sup>

President Bush and his Administration had an opportunity to set a benchmark by which the U.S. could measure the rule of law and its applicability to extraordinary renditions. Instead of creating a stronger regulatory framework to create oversight and prevent human rights violations, the Administration chose an ad hoc see as you go approach. As a result extraordinary renditions run the risk of rule of law violations because they create structural problems due to the lack of proper oversight and accountability.<sup>238</sup> While the President obtained authorization through the AUMF to conduct extraordinary renditions, the Supreme Court’s decisions in *Hamdi*, *Rasul*,

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<sup>234</sup> U.S. State Department, Egypt Human Rights Practices, 1995, March 1996. [http://dosfan.lib.uic.edu/ERC/democracy/1995\\_hrp\\_report/95hrp\\_report\\_nea/Egypt.html](http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_nea/Egypt.html).

<sup>235</sup> U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Egypt, March, 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100594.htm>.

<sup>236</sup> U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Syria, March, 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100606.htm>.

<sup>237</sup> Allen, supra note 117, at 890.

<sup>238</sup> Jon D. Michaels, All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror, 96 Calif. L. Rev. 901, 932 (2008).

*Hamdan*, and *Boumediene* suggest that some oversight measures should be adopted to decrease institutional harms. The President has the authority to constitutionally conduct extraordinary renditions; however, this does not account for his moral authority internationally when claims of torture exist. The ad hoc nature of the extraordinary rendition program makes oversight difficult due to the creation of partnerships outside a transparent framework. Creating a legal regime that enforces stronger standards of accountability and less operational flexibility will strengthen the extraordinary rendition program's compliance with the rule of law. This will shift the burden to the executive branch to adhere to the law when making decisions to render an individual to a foreign state.

Extraordinary renditions also create an accountability gap because many allegations of torture have arisen post-transfer, yet the U.S. government has successfully denied responsibility through the use of the state secret privilege. Allowing for accountability during extraordinary renditions will not prevent the executive branch from transferring suspects to achieve policy goals; rather, it creates consistency and assumes responsibility for U.S. national security objectives.<sup>239</sup> To close the accountability gap before and after a extraordinary rendition, the United States must raise the bar and refuse to render individuals to countries that have well-documented suspicious human rights records. To further enhance accountability post-extraordinary rendition, the United States should monitor the transfer to ensure that the foreign state is abiding by their diplomatic assurances. This will provide greater oversight and accountability of extraordinary renditions. The creation of a stronger oversight mechanism will ensure that the executive branch does not allow an extraordinary rendition that could potentially

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<sup>239</sup> Id.

violate the rule of law and forces officials to consider the human rights records of a foreign state before authorizing them.

While the President has the authority to conduct extraordinary renditions, the U.S. must increase accountability and oversight to deter continuous human rights allegations of torture. Extraordinary renditions have taken place to countries such as Syria, Egypt, Jordan, Morocco, and numerous other foreign states where coercive interrogations and torture occur. Regardless of claims that individuals will not be sent to countries that “violate our human values” by President Bush and now the current Obama Administration, the lack of stronger regulations reinforces the idea that extraordinary renditions may sometimes result in a legal backwater for torture.<sup>240</sup>

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<sup>240</sup> Wadie E. Said, 2008 Annual Meeting of the American Society of Comparative Law: The Exceptional Nature of Terrorism: The United States and Middle Eastern Legal Systems, 32 *Hastings Int'l & Comp. L. Rev.* 831, 839 (2009).

#### Part Four: Future of Extraordinary Rendition

The Bush Administration failed to establish clear guidelines for the extraordinary rendition of individuals suspected of terrorism and to make a forceful statement that the United States complies with the rule of law and international treaties. Unfortunately, with extensive reliance on executive power, extraordinary renditions lack the appearance of objective accountability and buck a tradition of the balance of power set forth in the Constitution. As a result the rule of law is the ultimate casualty. The three branches of government must work together to determine a middle ground that checks executive supremacy with the rule of law; this will allow the U.S. to balance the nation's security with its integrity. However, one quick resolution or congressional bill will not provide a solution. Reforming extraordinary rendition requires a multi-faceted approach, which includes: an assessment of the totality of circumstances before an extraordinary rendition is permitted; diplomatic assurances; and post-monitoring of individuals rendered to foreign states. These additional oversight mechanisms will strengthen compliance with the rule of law in the United States.

To address policy gaps in the extraordinary rendition program, there are possible solutions that could strengthen accountability and oversight. The President and Congress could require a pre-extraordinary rendition review via an Article III court, thereby mimicking *habeas corpus* review as suggested by the Supreme Court in the detention cases of *Rasul* and *Hamdi*.<sup>241</sup> The Supreme Court recognized and society accepted the protections offered by Article III courts as a means of ensuring a fair trial. The

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<sup>241</sup> Kevin E. Lunday and Harvey Rishikof, *Due Process is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 Cal. W. Int'l L.J. 87, 91 (2008).

Constitution embodies both procedural and substantive due process.<sup>242</sup> Substantive due process means that the government will not detain an individual against his or her will without a constitutional basis for his or her detention. Next, procedural due process offers safeguards so that the individual is protected from loss of liberty and life.<sup>243</sup> As a result it seems evident that detention of an individual before transferring him or her to a foreign state requires some due process to abide by the rule of law.

Applied to extraordinary renditions, Article III courts can balance the national security interest the state against of the rendered suspect against his or her liberty interest.<sup>244</sup> To adequately balance the interests of the individual against the government, Article III courts could ensure the diplomatic assurance is valid and review the foreign country's human rights record, provided by the State Department, before an extraordinary rendition occurs. To protect the government's national security interests, the court may utilize safeguards within the state secret privilege to prevent disclosure of sensitive information during the trial regarding the extraordinary rendition.<sup>245</sup>

Supporters of the use of federal courts argue that courts have handled matters of national security successfully in the past.<sup>246</sup> Article III courts are equipped to ensure that the rule of law is upheld and to provide an equilibrium between national security interests and the civil liberties of the rendered detainee. This additional review would enhance transparency and strengthen oversight. In terms of accountability, after all appropriate

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<sup>242</sup> The Committee on Federal Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, 59 *The Record* 41, 150 (2004).

<sup>243</sup> *Id.*

<sup>244</sup> Bellinger, *supra* note 21, at 16.

<sup>245</sup> *Id.* at 118.

<sup>246</sup> Catherine Powell, *Scholars' Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 *Colum. J. Transnat'l L.* 339, 341 (2009).

entities have authorized the extraordinary rendition and ensured that a diplomatic assurance exists with a country that complies with the CAT, the third country would be liable under the CAT and international law for violations that occur.

Even though reports by Human Rights First suggest that the justice system is well equipped to handle terrorism cases, Article III courts will face similar obstacles while reviewing extraordinary rendition as detention cases including: i) the dangers of individuals obtaining access to classified information and subsequent disclosure of classified evidence to the public; ii) strict standards for evidence that prevents admission of certain evidence; iii) security challenges and threats of physical harm to trial participants; iv) lack of consistency; and v) difficulty reviewing diplomatic assurances.

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While Article III courts have the ability to review extraordinary rendition cases, critics note that they face the danger of suspects obtaining classified information and the subsequent potential disclosure of classified intelligence to the public, either inadvertently or due to the nature of the trial.<sup>248</sup> During a criminal trial, discovery rules compel disclosure of the government's evidence and the list of witnesses. As a result the defendant is privy to intelligence that may be revealed to co-conspirators and can potentially pose a hazard to national security. Other times the defendant may seek disclosure of sensitive information to corner the government into divulging sensitive intelligence or forgoing prosecution. While the prosecution may have a protective order to prevent disclosure of classified information by allowing for generic descriptions of

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<sup>247</sup> The Committee on Federal Courts *supra* note 216, at 153.

<sup>248</sup> *Id.*

data, the reality remains that the actual presentation of proof remains open to the public.<sup>249</sup>

Article III courts also face a stringent standard for admission of evidence that remains unchangeable.<sup>250</sup> Critics argue that Article III courts are too strict, and information that is compelling would be inadmissible because of hearsay restrictions, authentication requirements, and the application of the exclusionary rules to illegal searches. During extraordinary rendition cases evidence may come in numerous forms, such as eyewitness testimony, hearsay, and physical or documentary searches, which the rules of evidence would not permit.<sup>251</sup> The evidence rules could potentially serve as an obstacle because it may prevent the admission of compelling evidence to render an individual. As a result the extraordinary rendition is thwarted, which prevents the gathering of potentially valuable intelligence.

Next, Article III courts remain a costly solution for pre-extraordinary rendition review, due to the classification requirements for sensitive evidence, maintaining the physical safety of proceedings, and providing protection for witnesses.<sup>252</sup> Article III courts have difficulty maintaining the physical security of detention trials. As a result these trials require armed guards and twenty-four hour protection for federal judges that prosecute individuals tied to al-Qaeda. Similarly extraordinary rendition cases require secure facilities and authorized personnel holding high security clearances to protect classified information. In addition there are reoccurring challenges when trying to protect this intelligence, such as the possible impairment of attorney-client

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<sup>249</sup> Ruth Wedgwood, *Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions*, 96 A.J.I.L. 323, 330 (2002).

<sup>250</sup> The Committee on Federal Courts *supra* note 216, at 153.

<sup>251</sup> *Id.* at 331.

<sup>252</sup> *Id.*



communication because defense counsel lacks the appropriate clearance, a lack of clearance for staff, and delays in proceedings due to clearance processing.<sup>253</sup> A decision to render an individual is based on classified intelligence, and, as previous Attorney General Michael Muksey stated, detentions cannot become “a smorgasbord of classified information for our enemies.”<sup>254</sup> The United States must prevent disclosure of valuable information after a transfer occurs. As a result Article III courts will not provide the best model for U.S. reliance on a key tactical tool to combat terrorism.

Article III courts also create a lack of consistency because case holdings depend on the respective district the case is tried in. There are numerous factors, such as the facility and resources available to each court, which will dictate the outcome of reviewing classified evidence. In some cases districts have a Sensitive Compartment Information Facility (SCIF), which allows for the review of classified information in a secured facility. However, other districts lack this option and may have to store sensitive information in a nearby district, which can delay the trial.<sup>255</sup> The differing procedural protections and variables presenting a lack of overall consistency raise serious legitimacy issues to review of extraordinary rendition cases in Article III courts.

The protected information gathered during an extraordinary rendition is critical to national security, and Article III courts are not operationally or procedurally equipped for the challenges presented. A former FBI official on a National Public Radio (NPR) interview stated that Article III courts become a “public process that after a point you can no longer really control. It becomes very public what you knew about the person, and

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<sup>253</sup> Gregory S. McNeal, Article: Beyond Guantanamo, Obstacles and Options, 103 Nw. U.L. Rev. Colloquy 29, 45 (2008).

<sup>254</sup> Id.

<sup>255</sup> Id. at 47.

that avenue of gathering information or creating new sources is kind of cut off.”<sup>256</sup> In addition, Article III courts may not be able to readily review the diplomatic assurances for the extraordinary rendition of an individual between the United States and the third country due to the classification of the information.<sup>257</sup> Requirements exist on the use of the information and how the information will be protected when a diplomatic assurance is formed between the United States and a foreign state. Due to the manner of sharing intelligence, the originator controls the information. Consequently, the foreign state will be less likely to allow for the dissemination of information for review by federal courts or a court martial.<sup>258</sup> Overall, extraordinary rendition review by Article III courts remains problematic and faces numerous challenges that pose a threat to national security.<sup>259</sup>

The ultimate goal for the extraordinary rendition program is to comply with the new paradigm of prevention of future terrorist attacks, while simultaneously upholding the rule of law. Article III courts do not meet the requirements for the reform due to their lack of consistency coupled with the numerous other challenges discussed above.

Therefore, another option for extraordinary rendition review is a trial by non-Article III tribunals. These tribunals can meet under special conditions of heightened secrecy, similar to military commissions and review all extraordinary renditions before the transfer occurs.<sup>260</sup> Military commissions have been utilized during or after wars on an ad

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<sup>256</sup> Ari Shapiro, As Domestic Spying Rises, Some Prosecutions Drop, NPR Morning Edition (July 11, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91968094>.

<sup>257</sup> Id.

<sup>258</sup> Id. at 48.

<sup>259</sup> Benjamin V. Madison, III, The Military Commissions Act of 2006: An Unnecessary Scheme for Second-Class Justice or an Essential Means to Prosecute Persons Who Otherwise Would Escape Accountability?, 55 Naval L. Rev. 213, 246 (2008).

<sup>260</sup> McNeal supra note 254, at 43.

hoc basis during major conflicts such as the Revolutionary War, the Civil War, and World War II.<sup>261</sup>

During the War on Terror, President Bush implemented the use of military commissions post-9/11 to try individuals suspected of terrorism. Modifications are necessary; however, President Bush's strategy remains instructive for procedures that could address the concerns with the extraordinary rendition program. Tribunals will alleviate the burdens of Article III courts by allowing the United States to shift from its current policy that lacks proper accountability and oversight towards a legal framework that allows the U.S. to strategically combat terrorism in a system of legally accepted norms.<sup>262</sup> In addition military commissions follow international law by complying with Article 75 of the International Covenant on Civil and Political Rights (ICCPR), which provides a framework for universal standards of due process for individuals suspected of terrorism.<sup>263</sup>

Military commissions provide many procedural safeguards for the accused that would strengthen oversight and accountability for extraordinary rendition cases. Each commission consists of between three to seven commissioned U.S. Officers appointed by the Secretary of Defense to oversee the trial. A two-thirds vote is sufficient to convict the individual. Many of the rules, standards of proof, and presumptions of innocence are similar to Article III courts. The individual has access to a military counsel or may retain outside counsel.<sup>264</sup> The burden of proof necessary for a conviction is the same for a military commission as it is for a civilian court: guilty beyond a reasonable doubt. While

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<sup>261</sup> Madison *supra* note 260, at 214.

<sup>262</sup> *Id.* at 124.

<sup>263</sup> Lunday and Rishikof, *supra* note 242 at 108.

<sup>264</sup> *Id.* at 249.

similarities exist between Article III courts and commissions, there are also many procedural differences that allow the commissions to better maintain national security and efficiently review instances of extraordinary rendition. The review of extraordinary renditions poses similar demands that detention cases require, specifically the admission of evidence that may not pass the stringent requirements imposed by the Federal Rules of Criminal Procedure, a need for secrecy based on the classified nature of the intelligence, and personnel security.

Military commissions are not required to divulge information as frequently as Article III courts. Commissions are designed to allow for a broader evaluation, thereby including all forms of evidence that a reasonable person would find probative, such as hearsay.<sup>265</sup> Military commissions also protect classified information through rules that apply to “Protected Information.”<sup>266</sup> This includes classified information protected by law, information that could threaten national security, the safety of an individual involved in the proceedings, or law enforcement.<sup>267</sup> Government counsel may protect classified information through a motion. When the military judge finds the evidence relevant to the offense, the judge has three options to protect the intelligence: the redaction of the classified information; the substitution of the portion of the document with unclassified information; or the substitution of the facts that the classified information intended to prove. Further, tribunals are equipped with intelligence protections that Article III courts lack, such as counsel that hold the appropriate security clearance, security for administrative staff, and clear procedural standards for handling classified information.

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<sup>265</sup> Wedgwood, *supra* note 250, at 331.

<sup>266</sup> Madison, *supra* note 260, at 251.

<sup>267</sup> McNeal, *supra* note 254, at 52.

Overall, tribunals are a viable option for pre-extraordinary rendition reviews before individuals are transferred to foreign states due to their secrecy.

Foreign countries are more apt to rely on a military commission when diplomatic assurances are reviewed because there is greater confidence that military commissions secure information appropriately. As a result a military commission would protect classified information, while simultaneously allowing a judge to monitor the decisions of the General Counsel of the CIA, top officials, and oversight committees in Congress. This would ensure that extraordinary renditions are in compliance with the rule of law and strengthen procedures to ensure that torture will not occur after extraordinary rendition of the individual a foreign state.

Opponents of the use of a new tribunal may put forward the same criticisms they have against the use of military tribunals in detention cases. Critics argue that military commissions curtail human rights and depart from the rule of law. Commissions minimize the system of checks and balances and allow the executive branch to supplant judicial functions.<sup>268</sup> Further, critics assert that military commissions are biased because they serve the interests of national security and give more weight to the government's safety concerns over the interest of a rendered individual.<sup>269</sup> While military commissions are not the perfect solution, modifications to tailor the process to provide oversight and accountability over the extraordinary rendition program will strengthen this vital counter-terrorism tool. To allow for military commissions to review extraordinary renditions, Congress should enact a statute analogous to the Military Commissions Act (MCA)

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<sup>268</sup> Edward Rial Armstrong, *Essay and Review: Dying Men, Falling Like Princes: Reflections on the War on Terror*, 29 U. Ark. Little Rock L. Rev. 529, 549 (2007).

<sup>269</sup> Sarah A. Weiss, *Due Process Rights: Rendition of a citizen Terrorist*, 34 Wm. Mitchell L. Rev. 5195, 5211 (2008).

passed after *Hamdan*. The MCA provided for a legal framework that created procedural rules for commissions and a system of checks and balances.<sup>270</sup> Congress passed guidelines that dictated how the tribunal would operate and ensured oversight by allowing individuals to appeal decisions of military judges to a civilian justice system. If the appeal was denied, then an additional oversight mechanism was placed to review the detention for the final time by the United States Court of Appeals in the District of Columbia.<sup>271</sup> Further, the Act specifically provided oversight by providing that detentions must not be inconsistent with the Detainee Treatment Act of 2005, which strictly prohibits cruel and degrading treatment.

Military tribunals could strengthen oversight and accountability of extraordinary renditions to better comply with the rule of law. Tribunals allow for a neutral decision maker to determine whether the individual subject to the extraordinary rendition will be subject to torture. Each decision should be consistent with the CAT. Further, the decision to render a suspect should include a factors test based on: the identity of the individual providing the assurance; the use of torture in the military, prison, or criminal justice system of the receiving state; the difference in treatment between a common criminal and an individual suspected of terrorism; the willingness of the country to abide by the CAT; the priority the foreign state places on maintaining bilateral relations with the United States; and the agreeability of the foreign country to allow the U.S. to monitor compliance with the CAT. This determination must be coupled with the individual's testimony regarding his or her relationship with the receiving state. This creates a quasi-

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<sup>270</sup> van Aggelen, *supra* note 68, at 45.

<sup>271</sup> Chris Manella, *Boumediene v. Bush: A Meaningful Defense of Human Rights or Forced Response to the Guantanamo Bay Nightmare?*, 11 Rutgers Race & L. Rev. 151, 185 (2009).

adversarial process, which allows the court to reach a better decision regarding the rendition.

In addition to the factors test, the court should consider unclassified materials such as human rights reports prepared by the U.S. State Department and non-governmental agencies such as Human Rights Watch and Amnesty International. This will provide the court with a balanced assessment of the country's human right records and allow judges to make an independent factual determination regarding whether the rendered individual is more likely than not to face torture. Further, the court creates transparency by allowing the public to access materials that the judge has based his or her independent ruling on.

After the court has used a multi-faceted approach through the factors test, consideration of human rights records, and validity that the diplomatic assurance abides by the CAT to support a extraordinary rendition, the U.S. should implement a post-monitoring mechanism. This allows the United States to have some oversight and accountability over the extraordinary rendition. While the main crux of extraordinary rendition is to transfer an individual outside the realm of U.S. control, the limits of the rule of law constrain decisions that will lead to torture. Post-monitoring will allow the U.S. and the receiving state to not only exchange vital intelligence information obtained from the rendered suspect, but also ensure that treatment is in compliance with U.S. and international legal instruments.

Achieving compliance according to international standards and building accountability with the U.S. Constitution is a task President Obama should take more seriously than his predecessor. However, compliance and accountability do not require

curbing the use of extraordinary rendition at the expense of national security. The Obama Administration understands this fact and embraces extraordinary rendition. President Obama recognizes renditions value in the War on Terror.<sup>272</sup> To respond to the criticisms of the extraordinary rendition program, President Obama created a Special Task Force on Interrogation and Transfer Policies pursuant to Executive Order 13491 on January 22, 2009.<sup>273</sup> The task force evaluated the transfer of individuals and its compliance with domestic law and international obligations to circumvent undermining the rule of law.<sup>274</sup> The order states that the Administration will only use extraordinary rendition to transfer individuals to foreign states that comply with U.S. and international law.<sup>275</sup>

In August 2009, the task force made recommendations to the extraordinary rendition program to ensure that transfers complied with U.S. and international law and did not result in the use of torture. In terms of assurances, the task force advised strengthening the procedure for obtaining and evaluating them before an extraordinary rendition.<sup>276</sup> This includes allowing the State, Homeland Security, and Defense Departments to coordinate reports on transfers annually. To improve monitoring post-extraordinary rendition, the task force suggested that the U.S. insist on a mechanism to

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<sup>272</sup> Johnson, *supra* note 9, at 1168.

<sup>273</sup> Ved P. Nanda, *The War on Terror and Its Implications for International Law & Policy: Introductory Essay: International Law Implications of the United States' "War on Terror,"* 37 *Denv. J. Int'l L. & Pol'y* 513, 518 (2009).

<sup>274</sup> Marjorie Cohn, *Panel 3: Civil Liberties for Civil Rights: Justifying Wartime Decline of Civil Liberties by a Gain of Civil Rights: Trading Civil Liberties for Apparent Security is a Bad Deal,* 12 *Chap. L. Rev.* 615, 626 (2009).

<sup>275</sup> *Id.*

<sup>276</sup> *Contemporary Practice of the United States Relating to International Law: U.S. Task Force Report on Interrogations and Transfers* 103 *A.J.I.L.* 760, 762 (2009).



monitor the individual or establish a method to allow for access to the individual without advance notice to the foreign state.

Attorney General Holder stated: “There is no tension between strengthening our national security and meeting our commitment to the rule of law, and these new policies will accomplish both.”<sup>277</sup> However, in response to the task force findings, human rights advocates still have many of the same criticisms and concerns. While the executive order ensures humane treatment of individuals consistent with the Bush Administration’s policy, it fails to specifically guarantee that individuals rendered to foreign states will be free from cruel, inhumane, or degrading treatment that does not amount to torture. As a result the policy and the accountability gaps remain unchanged.

The Obama Administration’s reliance on the extraordinary rendition program is publicly known. Attorney General Holder expressed his concerns regarding extraordinary renditions to countries that would not treat suspects consistent with U.S. laws; however, he further stated that he does not want to “restrict the ability of our government to use all the techniques that we can to keep the American people safe, but in using those tools, we have to do so in a way that’s consistent with our treaty obligations and values as a nation.”<sup>278</sup> CIA Director Leon Panetta champions the same standard implemented by the Bush Administration, asserting that the CIA will continue to render individuals. While the extraordinary rendition program serves the national security interests of the U.S., the Obama Administration must create additional accountability,

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<sup>277</sup> Department of Justice. “Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President,” press release, August 24, 2009, <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html>.

<sup>278</sup> Nanda, *supra* note 274, at 530.

transparency, and oversight to generate greater confidence that individuals are afforded process and that the program complies with the rule of law.<sup>279</sup>

President Obama's policies convey an understanding of the importance of the extraordinary rendition program and express recognition that the program must be regulated by the rule of law. The question remains whether President Obama is willing to invest the time and political capital needed to succeed where President Bush failed. Is President Obama willing to release some control of the extraordinary rendition program to create a multi-faceted approach that aggressively implements and enforces congressional regulations and acquiesces to judicial oversight? While this decision is pending, the Obama administration must consider that Americans are safer today due to extraordinary rendition program. Terrorists such as Khalid Sheikh Muhammed, Abu Zubaydah, Mr. Hambali, Ibn Shaykh al-Libi, Khalid bin Attash, and several dozen other senior al-Qaeda leaders were rendered by the United States. As a result, proponents of the extraordinary rendition program assert that this policy remains the single most effective counterterrorism operation ever conducted by the United States.<sup>280</sup>

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<sup>279</sup> Powell, *supra* note 247, at 349.

<sup>280</sup> Bellinger, *supra* note 15, at 16.

## Curriculum Vitae

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### Education:

Indiana University Purdue University – Indianapolis, IN

Master of Arts: Emphasis in state and local politics, February 2012

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The Ohio State University – Columbus, OH

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### Experience:

Barnes & Thornburg LLP, Columbus, OH – *Attorney* (2011 - Present)

- Facilitate legislative consulting for pharmaceuticals, healthcare, technology, insurance, manufacturing clients, energy, government procurement opportunities, and conduct bill analysis and drafting at state level.
- Assist multi-national corporations with filing temporary and permanent employment-based immigration visas including: applications for professionals, treaty traders and investors, inter-company transferees, persons with extraordinary abilities, PERM/Labor certification process, and legal permanent residence status.
- Compose weekly memos analyzing foreign labor and employment law to determine best practices for establishing international corporate branches and subsidiaries.

Department of State, Washington, D.C. – *Political Military Affairs Regional Arms Transfer Intern* (Summer 2010)

- Resolved Middle East security sector assistance issues on behalf of senior leadership in Political Military Affairs.
- Drafted action memos for foreign military funding, third party transfer requests and change in end-use violations.
- Prepared congressional report on the major transfers of conventional and unconventional arms sales by the United States and other countries to the Middle East pursuant to 404(c) of the Foreign Relations Authorization Act.

Attorney General's Office, *Law Clerk for Criminal Appeals Division* Indianapolis, IN (Fall 2009)

- Assisted with all phases of litigation including investigating facts, conducting legal research, and preparing appellate briefs on behalf of Deputy Attorney General.
- Presented case facts and research to assigned attorney to assist with hearings and trials.
- Participated in trial strategy meetings and discussed issues that may arise during litigation.

Judge Richard Magnus, Singapore – *Terrorism Analyst* (Summer 2009)

- Prepared confidential legal profiles of ASEAN participants to analyze each country's implementation of the U.N. Security Council Terrorism Resolutions.
- Developed ASEAN country reports to determine the judicial response to the Internal Security Act.
- Wrote a legal brief espousing Singapore's superior application of the rule of law during national emergencies.