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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC

3 December 2024

Reference: ODNI Case No. DF-2022-00321

This letter provides an interim response to your Freedom of Information Act (FOIA) request to the Defense Intelligence Agency (DIA), dated 18 September 2017, requesting 18 specific theses written by students at the National Intelligence University. As previously noted by DIA, DIA transferred these cases to the Office of the Director of National Intelligence (ODNI) in 2022.

ODNI processed this request under the FOIA, 5 U.S.C. § 552, as amended and located 17 of the theses requested. Note, despite a thorough search, "Rationing the IC: The Impact of Private American Citizens on the Intelligence Community" was not located.

This interim response provides a response on ten of the theses. During the review process, we considered the foreseeable harm standard and determined that certain information must be withheld pursuant to the following FOIA exemptions:

- (b)(3), which applies to information exempt from disclosure by statute. Specifically, the National Security Act of 1947, as amended:
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  - Section 102A(m), as amended, 50 U.S.C. § 3024(m), which protects the names and identifying information of ODNI personnel.
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Sincerely,

Erin Morrison
Chief, Information Review and Release Group
Information Management Office

This thesis has been accepted by the faculty and administration of the National Intelligence University to satisfy a requirement for a Master of Science of Strategic Intelligence or Master of Science and Technology Intelligence degree. The student is responsible for its content. The views expressed do not reflect the official policy or position of the National Intelligence University, the Department of Defense, the U.S. Intelligence Community, or the U.S. Government. Acceptance of the thesis as meeting an academic requirement does not reflect an endorsement of the opinions, ideas, or information put forth. The thesis is not finished intelligence or finished policy. The validity, reliability, and relevance of the information contained have not been reviewed through intelligence or policy procedures and processes. The thesis has been classified in accordance with community standards. The thesis, in whole or in part, is not cleared for public release

GLOBAL REACH: RENDITIONS IN U.S. COUNTERTERRORISM OPERATIONS

by

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Submitted to the faculty of the
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The views expressed in this paper are those of the author and
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ABSTRACT

TITLE OF THESIS: Global Reach: Renditions in U.S. Counterterrorism Operations.

STUDENT: (b) (6), MSSI, 2009

CLASS NUMBER: NDIC 2009 **DATE:** July 2009

THESIS COMMITTEE CHAIR: (b) (6)

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In the context of an increasingly globalized world, the U.S. needs effective means to counter threats that transcend national borders. A rendition—an extrajudicial capture and transfer of a suspect from one country to another (including the United States) —can be an effective tool to neutralize violent extremists who, although operating in sovereign foreign countries, pose a threat to the national security of the U.S. After the attacks of September 11, 2001, the U.S. expanded its use of counterterrorism renditions to capture suspected terrorists around the globe. Within a few years, however, the U.S. rendition program was subjected to intense domestic and international criticism that questioned the program's legality, morality, and effectiveness. The research question is: How can the

U.S. modify the existing legal frameworks, parameters, and procedures regulating rendition operations in order to develop a strategically effective capability of neutralizing terrorists operating in sovereign foreign countries? The research hypothesis is that in order to conduct rendition operations effectively at the strategic level, the U.S. will need to redefine the parameters, legal framework, and procedures of renditions to minimize international and domestic controversy.

The research method focuses on multiple case studies to cover the legal, operational, strategic, and ethical aspects of rendition operations. The data collection strategy concentrates on a review of archived information and electronic databases. Complementing the research, the author's perspective is one of a law enforcement practitioner, most recently assigned to a Joint Terrorism Task Force (JTTF).

The research validates the hypothesis and, through several findings, leads to the following conclusion: Renditions can be modified to minimize controversy—found to negatively impact the strategic effectiveness of the program—while remaining operationally effective. In fact, after breaking down renditions into separate elements, the research shows that counterterrorism renditions can maximize their effectiveness by eliminating the two most controversial elements of the program—(a) enhanced interrogation techniques (and related mistreatment of detainees), and (b) detentions not subjected to judicial review. Furthermore, the research shows that executing overt, rather than covert, transfers of prisoners is likely to benefit the long-term survivability of the program. The research also finds that renditions to the U.S. are generally legal, effective, and ethical, while the legality and effectiveness of "extraordinary renditions" to foreign countries may depend on several variables. Finally, the research shows that interagency rivalries unduly shaped the program's evolution and unnecessarily limited renditions to

the U.S. With regard to policy implications, the findings suggest that, in order to improve the strategic effectiveness of counterterrorism renditions, the U.S. should (1) expand renditions to the U.S., and (2) limit extraordinary renditions only to cases where the receiving foreign country has an acceptable human rights' record and a legal case to detain a rendered suspect.

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CHAPTER 1

U.S. COUNTERTERRORISM RENDITIONS

The Topic

Six days after the terrorist attacks of September 11, 2001, President George W. Bush reportedly signed a classified presidential finding authorizing the Central Intelligence Agency (CIA) "to disrupt terrorist activity, including permission to kill, capture and detain members of Al-Qaeda anywhere in the world."[1] This finding allowed for an expansion of a covert counterterrorism program that became, according to press reports, the "largest CIA covert action program since the height of the Cold War."[2] With new broad authority and funding, the CIA bolstered its covert counterterrorism programs and greatly expanded its use of "Extraordinary Renditions," the practice of identifying, detaining and transferring a suspect from one country to another without following judicial proceedings related to extraditions and/or deportations.[3] "Ordinary" renditions (also known as "Renditions to Justice"), involving the extra-judicial apprehension and transfer of suspects from around the world to U.S. Courts, often following the issuance of a U.S. arrest warrant, had been a relatively non-controversial practice used for decades by

[1] Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *The Washington Post*, November 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html (accessed on March 25, 2009).
[2] Ibid.
[3] Ibid.

U.S. law enforcement agents, at times assisted by intelligence officers.[4] But the program of "extraordinary" renditions differed as it involved the CIA participation in the identification, detention and transfer of suspects between two foreign countries.[5] The CIA's program started only in 1995 and was initially conducted on a limited basis, until it was greatly expanded by the President of the United States in September 2001.[6] [7]

While "ordinary" renditions focused essentially on apprehending international fugitives and returning them to U.S. Courts, the initial emphasis of extraordinary renditions was to offer an alternative, in the absence of a U.S. legal case, to take Al Qaeda plotters "off the street" and to transfer them into a receiving foreign country's legal system. However, since 2001, the importance of legal proceedings—whether U.S. or foreign—was deemphasized and new emphasis was placed on obtaining information from suspects. To obtain relevant threat-related information, interrogations were conducted by U.S. authorities operating at foreign-based U.S. detention centers—CIA "black sites" and military bases such as the one in Guantanamo Bay, Cuba—and/or foreign authorities operating, in cooperation with U.S. Government officials, at foreign detention centers.[8] As details of these extraordinary renditions leaked to the public, questions arose with regard to the legality, effectiveness, and morality of renditions and the interrogations that followed. While the bulk of the controversy focused on the

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[4] Sangitha McKenzie Millar, "Extraordinary Rendition, Extraordinary Mistake," *Foreign Policy In Focus*, August 29, 2008, http://www.fpif.org/fpiftxt/5502, (accessed on March 25, 2009).

[5] Ibid.

[6] Jane Mayer, "Outsorcing Torture: The Secret History of America's 'Extraordinary Rendition' Program." *The New Yorker*, February 14, 2005, http://www.newyorker.com/archive/2005/02/14/050214fa_fact6, (accessed on March 25, 2009).

[7] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://foreignaffairs.house.gov/110/sch041707.htm, (accessed on March 25, 2009).

[8] Ibid.

interrogation techniques used on "rendered" detainees, the practice of rendition itself—and in particular "extraordinary rendition"—came under intense public scrutiny.

On January 22, 2009, President Barack Obama issued Executive Order 13491 with regard to "ensuring lawful interrogations."[9] In section 5 of the order, the President called for the establishment of a "Special Interagency Task Force on Interrogation and Transfer Policies."[10] In addition to reviewing interrogation practices and techniques, the Task Force was given the following mission with regard to extraordinary renditions:

> *to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.*[11]

The final report of the Task Force is due in July 2009, underscoring the timeliness, relevance, and importance of the topic of this thesis. While President Obama has ordered closure of CIA foreign-based detention facilities overseas, a halt to the use of "enhanced interrogation techniques" not consistent with *Army Field Manual 2 22.3*, and closure of the military detention center at Guantanamo Bay, "the Obama administration appears to have determined that the rendition program was one component of the Bush administration's war on terrorism that it could not afford to discard." [12] Indeed, as the trends of globalization progressed, increasingly facilitating movements across

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[9] Barack Obama, *Executive Order – Ensuring Lawful Interrogations,* The White House, January 22, 2009, http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/ (accessed on May 19, 2009).

[10] Ibid.

[11] Ibid.

[12] Greg Miller, "Obama Preserves Renditions as Counter-Terrorism Tool*," Los Angeles Times*, February 1, 2009, http://www.latimes.com/news/la-na-rendition1-2009feb01,0,7548176,full.story (accessed on May 19, 2009).

international borders, terrorist groups such as Al-Qaeda developed complex decentralized transnational networks to exploit vulnerabilities and conduct operations on a global scale. In this context, the need to apprehend and neutralize non-state actors operating in sovereign foreign countries was expected to remain an essential element of the U.S. counterterrorism strategy.

The Problem

For this thesis, the term "rendition" is used to refer to the practice of seizing and transferring a person from one country to another (including the United States) by means other than deportation and extradition. It should be noted that the term, at times used interchangeably with "extraordinary rendition," is generally used inconsistently by the media, researchers, and the National Security community. Indeed, at times it is used to include deportations and extraditions; other times it is used to refer to all extrajudicial transfers; while other times still it is in reference only to the transfers of detainees between two foreign countries.

After September 11, 2001, the U.S. increased the use of renditions to apprehend and neutralize terrorist suspects operating or transiting in sovereign foreign countries. In December 2005, then-U.S. Secretary of State Condoleeza Rice described extraordinary renditions as a "vital tool" in our global fight to safeguard Americans against terrorism. [13]

Outside of the war theaters of Iraq and Afghanistan, the U.S. rendition program relied heavily on the cooperation of foreign countries to apprehend suspects located in foreign

[13] House Committee on Foreign Affairs, *Extraordinary Renditions in U.S. Counterterrorism Policy: The Impact of Transatlantic Relations.* 110th Cong., 1st sess., April 17, 2007.

jurisdictions and to transfer them into U.S. custody. Once in U.S. custody, the U.S. transported suspects away from the country where they were apprehended and delivered them to detention facilities operated by either the U.S. or by foreign security services.

Media reports denounced the practice of "extraordinary renditions" and focused on allegations of torture and abuses of suspects. Under intense domestic and international criticism, allied countries denounced the rendition program and conducted aggressive investigations into allegations of their services' assistance with U.S. renditions. In addition to publicly denouncing the rendition program, some countries initiated criminal prosecutions against U.S officials and enacted guidelines for more limited cooperation with U.S. counterterrorism efforts. In the United States, the program was also subjected to intense domestic criticism. As the President ordered a thorough review of the use of renditions, the program's legality, morality, and effectiveness remained a highly-controversial topic.

This thesis focuses on the strategic value of the rendition program and incorporates legal, ethical, and operational considerations.

The Research Question

How can the U.S. modify the existing legal frameworks, parameters, and procedures regulating rendition operations in order to develop a strategically effective capability of neutralizing terrorists operating in sovereign foreign countries?

Hypothesis

In order to conduct rendition operations effectively at the strategic level, the U.S. will need to redefine the parameters, legal framework, and procedures of renditions to minimize international and domestic controversy.

Key Questions

- How does U.S. law currently address rendition?
- How has rendition evolved throughout the years?
- How effective has rendition been at the operational and strategic level?
- What elements of rendition cause ethical concerns and controversy?
- How can the parameters of rendition operations be modified to develop a more effective program at the strategic level?

Methodology

Research Design

This thesis research design focuses on the multiple case studies research method. This approach emphasizes the context of the phenomenon under consideration and is well-suited to deal with contemporary issues. This is particularly important since rendition operations have evolved rapidly in recent years and cannot be satisfactorily analyzed if

separated from the wider context of counterterrorism strategy and foreign policy. Moreover, the case study approach encourages focus on the trends, processes, and findings and allows focusing on selected rendition cases in great depth.

Data Collection and Analytical Strategies

The data collection strategy used for this thesis is primarily a review of archived information and electronic databases, to include books, articles, speeches, reports, legal cases, and Congressional hearings. Complementing the research, the author's perspective is the one of a law enforcement practitioner, having served both domestically and overseas as a Special Agent with the Diplomatic Security Service (DSS), U.S. Department of State, most recently assigned to the Al-Qaeda squad of a Federal Bureau of Investigation (FBI) Joint Terrorism Task Force (JTTF).

This thesis incorporates multiple case studies to cover the legal, operational, strategic, and ethical aspects of rendition operations.

Overview of Remaining Chapters

Chapter II: Covering the legal aspects of renditions, this chapter examines relevant U.S. case law, Supreme Court decisions, U.S. statutes, U.S. Attorneys' guidelines, and relevant international treaties ratified by the United States, to address the legality, according to American law, of both ordinary and extraordinary renditions.

Chapter III: This chapter focuses on several key case studies to provide an historical perspective of the evolving nature of the rendition program. Reviewing the historical

shifts in procedures, this chapter attempts to quantify and sort data to identify trends in the rendition program, most notably the shift that transformed renditions from a primarily law enforcement program to an intelligence operation. This chapter will analyze in-depth the following two case studies: 1) The 1987 apprehension of *Fawaz Younis* in international waters and his transfer to a U.S. Court; 2) the apprehension of *Abu Omar* in Italy and his transfer to an Egyptian detention center.

Chapter IV: This chapter addresses the ethical implications of renditions and offers an evaluation of the overall strategic effectiveness of the rendition program, measuring both short-term and long-term successes and failures. This chapter also offers to identify which particular aspects of the rendition program have caused the most controversy. This chapter concludes with an ethical review of the rendition program using utilitarian, social contract, and deontological theories.

Chapter V: This closing chapter offers a summary of findings, recommendations, policy implications, recommendations for future research, and proposed suggestions for new parameters to be used in the rendition program.

CHAPTER 2

RENDITIONS AND THE LAW

Two Legal Questions

In order to evaluate both the legality and the context of renditions, it is useful to first consider the following scenario. A dangerous terrorist is plotting attacks against the U.S. while residing in a sovereign foreign country. Although the foreign country is "friendly," at least nominally, towards the U.S., officials in the foreign country might be reluctant to cooperate with the U.S. and/or might have limited legal instruments to arrest, prosecute, and convict the terrorist for serious offenses in their jurisdiction. What are the options for the U.S. Government to apprehend the terrorist? This scenario is not hypothetical. In 1995, the U.S. had information that *Khalid Sheikh Mohammed* (*KSM*) was living openly in Doha, Qatar, and working as a project engineer for the Qatari *Ministry of Electricity and Water*.[14] The U.S. considered *KSM* to be a dangerous terrorist because of his past and ongoing support and planning of attacks against the U.S., most notably the 1993 World Trade Center attack and the so-called "Bojinka" plot to bomb 12

[14] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (New York: W.W. Norton & Company, 2004), 147.

U.S. airliners in 1994-95[15]. In such a case and context, the U.S. can pursue the following different options to (1) apprehend the terrorist and (2) detain the terrorist once in custody.

(1) **Cooperative Extradition, Expulsions, or Deportation**: Request foreign officials in-country to execute an apprehension and a legal (according to the foreign country's laws), often judiciary-approved, transfer of the detained subject to the U.S or to another country following a request for extradition, in accordance with an existing extradition treaty or with an INTERPOL "Red Notice" (also regulated by treaty), or in accordance with existing procedures for expulsions and or deportations.

(2) **"Lure" into international waters/airspace**: Attempt to entice—basically "trick"—the terrorist to voluntarily travel to international waters/airspace. This can be done unilaterally, for example using recruited sources, or in cooperation with foreign authorities. A variation of this approach involves "luring" the terrorist to a foreign country willing to cooperate with the U.S. on the apprehension.

(3) **Cooperative Ordinary Renditions to the U.S.:** Request foreign officials in-country to execute an apprehension (possibly "assisted" by U.S. authorities) and an extrajudicial transfer of the terrorist to the U.S. to stand trial. The

[15] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (New York: W.W. Norton & Company, 2004), 147.

request might be made to a small number of "trusted" foreign officials to minimize possible compromises to the operations.

(4) **Cooperative Extraordinary Renditions.** Request foreign officials in-country to execute an apprehension (possibly "assisted" by U.S. authorities) and extrajudicial transfer of the terrorist to another country for detention and interrogation. The request might also be made to a small number of "trusted" foreign officials to minimize possible compromises to the operations.

(5) **Unilateral Ordinary Renditions to the U.S.** Unilaterally apprehend the terrorist in the sovereign foreign country, possibly using paid foreign agents, without first notifying the foreign officials and unilaterally transfer the terrorist to the U.S. to stand trial.

(6) **Unilateral Extraordinary Renditions.** Unilaterally apprehend the terrorist in the sovereign foreign country, possibly using paid foreign agents, without first notifying the foreign officials and unilaterally transfer the terrorist to another foreign country for detention and interrogation.

With regard to the last two options, it is important to note that purely unilateral extraterritorial apprehensions are extremely rare outside of war theaters, such as Afghanistan and Iraq, because of operational and diplomatic, not legal, considerations. Indeed, in the above-referenced 1995 case of *KSM*, according to then senior

counterterrorism White House official Richard Clarke, "both the CIA and FBI claimed to have no capability to operate a covert snatch in Qatar" and "the Defense Department's plans of their version of a snatch, as usual, involved a force more appropriate for conquering the entire nation than for arresting one man."[16] In the end, despite the U.S. having information suggesting that certain Qatari officials sympathetic to *KSM* might alert him of an impending arrest (KSM resided as a guest at one of the residences of *Abdullah ibn Khalid al Thani*, then the Qatari *Minister of Religious Affairs* and a member of the ruling family), the U.S. decided to ask for Qatari cooperation in apprehending and extraditing *KSM*.[17] *KSM* was reportedly "tipped-off" of the impending arrest and escaped to Pakistan.[18] *KSM* would later become the Al Qaeda "mastermind" of the attacks of September 11, 2001 against the United States.[19]

With regard to legal considerations, it is important to note that aside from the first and possibly (depending on the foreign country) second options, all of the other above-referenced approaches to "apprehension" and transfer of a suspect might be considered illegal—in essence a "kidnapping"—by the sovereign foreign country's legal system. As exploring specific foreign legal frameworks is outside the scope of this thesis, this chapter will only cover relevant U.S. statutes and case law, as well as international

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[16] Richard A. Clarke, *Against All Enemies: Inside America's War on Terror*, (New York: Free Press, 2004), 152-153.

[17] Terry Mcdermott, Josh Meyer and Patrick J. Mcdonnell, "The Plots and Designs of Al Qaeda's Engineer," *Los Angeles Times,* December 22, 2002, http://articles.latimes.com/2002/dec/22/world/fg-ksm22?pg=16 (accessed on May 26, 2009).

[18] Richard A. Clarke, *Against All Enemies: Inside America's War on Terror*, (New York: Free Press, 2004), 153

[19] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (New York: W.W. Norton & Company, 2004), 148.

treaties agreed to by the U.S. Therefore, with regard to the above-referenced rendition options, there are two fundamental legal questions that need to be answered:

(a) Is it legally permissible for the U.S. Government to forcibly abduct—whether unilaterally or with foreign assistance—a subject overseas and to "render" him back to the U.S. to stand trial?

(b) Is it legal for the U.S. Government to "render" a detained suspect from one foreign country to another foreign country?

Ordinary Renditions: "Kidnapped" to Stand Trial in the U.S.

Case Law: *Male Captus, Bene Detentus*

The U.S. Supreme Court's interpretation of applicable U.S. laws and the Constitution, in the absence of any U.S. statutes specifically covering renditions, provides the current legal framework endorsing the doctrine of *Male Captus, Bene Detentus* (Improperly Captured, Properly Detained), also referred to as the American *Ker-Frisbie* doctrine. Under this doctrine, Courts can "properly exercise jurisdiction over a defendant even though his or her presence was procured by forcible abduction."[20] This doctrine was upheld by the U.S. Supreme Court even in cases in which the U.S. had a valid extradition treaty with the foreign State, as long as the treaty did not explicitly prohibit abductions, and regardless of any objections of the foreign State.[21] Following is a review of the U.S.

[20] Silvia Borelli, "The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation," in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (United Kingdom: Hart Publishing, 2004), pp. 331 – 373.

[21] Ibid.

Supreme Court rulings in the two landmark cases that formed the legal justification for—and provide the name of—the *Ker-Frisbie* doctrine.

***Ker v. Illinois*, 119 U.S. 436, (1886).**

In 1886, the U.S. Supreme Court decided the case of *Ker v. Illinois*. In this case, Frederick M. Ker, a U.S. citizen that had defrauded a bank in Chicago, had fled to the city of Lima, in Peru, after being indicted on criminal larceny and embezzlement charges by the State of Illinois.[22] At the request of Illinois State officials, the U.S. Federal Government issued an extradition request and dispatched a private detective, Henry G. Julian of the Pinkerton Detective Agency, to travel to Peru as a "messenger" to deliver the extradition request to the Peruvian government.[23] Private Detective Julian traveled to Peru and, instead of proceeding with the extradition request, forcibly kidnapped Ker with the help of the Chilean Army occupying Peru. Julian then forced Ker on a ship and sailed back to the U.S., where he surrendered Ker to the authorities. After being convicted by the State of Illinois, Ker appealed the conviction on grounds that the kidnapping in Peru violated his due process of law, and that the existing extradition treaty between the U.S. and Peru required the U.S. to abide by extradition proceedings instead of forcibly seizing him in Peru.[24] In its landmark decision, the U.S. Supreme Court rejected Ker's arguments and commented as follows:

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[22] Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law, Continued," *American Journal of International Law*, April 1990, www1.law.nyu.edu/kingsburyb/fall01/intl_law/PROTECTED/unit5/rtf/lowenfeld_male%20captus_edit.rtf, (accessed on May 27, 2009).

[23] Ibid.

[24] Ibid.

> *Where the prisoner has been kidnapped in the foreign country and brought by force against his will within the jurisdiction of the state whose law he has violated, with no reference to an extradition treaty, though one existed, and no proceeding or attempt to proceed under the treaty, this Court can give no relief, for these facts do not establish any right under the Constitution or laws or treaties of the United States.*[25]

In fact, the U.S. Supreme Court articulated that the "Constitution or laws or treaties of the United States" guarantee no protection to Ker with regard to "how far his forcible seizure in another country and transfer by violence, force, or fraud to this country could be made available to resist trial in the state court for the offense now charged upon him."[26] Specifically, with regard of whether conducting abductions conflicted with the U.S. Government obligations prescribed by the treaty, the U.S. Supreme Court stated the following:

> *There is no language in this treaty or in any other treaty made by this country on the subject of extradition of which we are aware which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled. Indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind.*[27]

The U.S. Supreme Court thus established a legal precedent, followed by U.S. courts to this day, for allowing for the trial in the U.S. to proceed even though the defendant was brought before the Court after having been kidnapped in a foreign jurisdiction and then forcibly transferred to the U.S. But was the U.S. Supreme Court delegitimizing foreign anti-kidnapping laws? The foreign reaction to the kidnapping was not a matter for the Court to evaluate, although the Court did acknowledge that the "kidnapper" could be subjected to a proceeding "by the government whose law he violates."[28] But what if the

[25] Ker v. Illinois, 119 U.S. 436 (1886).
[26] Ibid.
[27] Ibid.
[28] Ibid.

kidnapping had occurred in the territorial U.S. rather than in a foreign jurisdiction? The U.S. Supreme Court addressed this exact question in the following case.

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

Sixty-six years after the *Ker* case, the U.S. Supreme Court reviewed the case of *Frisbie v. Collins*. In this case, Michigan state police officers had traveled to Illinois, outside their jurisdiction, to forcibly seize Shirley Collins, who was wanted for murder in Michigan. Since the Michigan officers had no legal authority in Illinois, their seizure of Collins was a direct violation of the Federal Kidnapping Act. The U.S. Supreme Court decided that a forcible abduction, even if conducted within the U.S. in direct violation of Federal law, was still not cause for the dismissal of a case against the individual seized.[29] Indeed, the U.S. Supreme Court noted the following.

> *This Court has never departed from the rule announced in* Ker v. Illinois, *119 U. S. 436*, *119 U. S. 444*, *that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases.*[30]

It is important to note that, according to the Court, asserting jurisdiction over an individual who was forcibly abducted does not absolve the officers who conducted the kidnapping within the U.S. These officers, if indeed guilty of violating the Federal Kidnapping Act, could still be tried and, if convicted, punished accordingly.[31]

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[29] Gregory S. McNeal and Brian Field. "Snatch and Grab Ops: Justifying Extraterritorial Abduction" *University of Iowa: Journal of Transnational Law and Contemporary Problems*, Winter 2007, http://works.bepress.com/gregorymcneal/7 (accessed on May 27, 2009).

[30] Frisbie v. Collins, 342 U.S. 519 (1952).

[31] Ibid.

Reinforcing the *Ker-Frisbie* Doctrine

The above-referenced two cases thus formed the basis for the *Ker-Frisbie* doctrine, the legal basis for ordinary renditions to the U.S., holding that "a court may assert jurisdiction over an indictee without regard to the manner in which his physical presence in the court's jurisdiction was attained."[32] In rulings throughout the years, the U.S. Supreme Court never abandoned the *Ker-Frisbie* doctrine, although the U.S. Court of Appeals for the Second Circuit—in their rulings in the cases of *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) and *Lujan v. Gengler*, 510 F.2d 62 (2nd Cir.), *cert. denied*, 421 U.S. 1001 (1975)—tried to limit its application to kidnappings conducted with methods that did not "shock the conscience" and did not involve "extreme misconduct." [33]

In 1992, the U.S. Supreme Court reinforced the *Ker-Frisbie* doctrine with another landmark ruling, in the case of *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), providing further legal justification for extraterritorial forcible abductions. In this case, a Mexican doctor suspected of participating in the kidnapping and murder of U.S. Drug Enforcement Administration (DEA) Special Agent Enrique "Kiki" Camarena Salazar, was forcibly abducted in Mexico, by Mexican agents cooperating with DEA officials, and transferred to the U.S. for trial. While the defendant, and the Mexican Government, had

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[32] Gregory S. McNeal and Brian Field. "Snatch and Grab Ops: Justifying Extraterritorial Abduction" *University of Iowa: Journal of Transnational Law and Contemporary Problems*, Winter 2007, http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=gregorymcneal, (accessed on June 24, 2009).

[33] U.S. Department of Justice, "Deportations, Expulsions, or Other Extraordinary Renditions," U.S. Attorneys' Manual, USAM 9-15.610, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00610.htm (accessed on June 1, 2009).

protested that the kidnapping was a violation of the extradition treaty between Mexico and the U.S., the Supreme Court ruled that "the Treaty says nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if abduction occurs."[34] The defendant also argued that he should be returned to Mexico because the kidnapping was a violation of international law, as the U.S. had violated the sovereignty of Mexico. The U.S. Supreme Court, however, declared that, "while respondent may be correct that his abduction was 'shocking' and in violation of general international law principles, the decision whether he should be returned to Mexico, as a matter outside the Treaty, is a matter for the Executive Branch."[35]

U.S. Statutes

To date, only one provision of the United States Code specifically mentions renditions. Title 10, U.S.C. Section 374 (b)(1)(D), titled "Maintenance and Operation of Equipment," permits the Department of Defense (DOD), upon request from the head of a Federal law enforcement agency, to make DOD personnel available to operate equipment with respect to "a rendition of a suspected terrorist from a foreign country to the United States to stand trial."[36]

[34] United States v. Alvarez-Machain, 504 U.S. 655 (1992).
[35] Ibid.
[36] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).

U.S. Department of Justice Guidelines

The current legal frameworks, as outlined by the above-referenced U.S. Supreme Court rulings, allow for a suspect to be forcibly abducted, or kidnapped, to stand trial in the U.S. In the current *United States Attorneys' Manual* issued by the U.S. Department of Justice, the guidelines for "Deportations, Expulsions, or Other Extraordinary Renditions" specify the following:

> *In* United States v. Alvarez-Machain, *504 U.S. 655 (1992), the Supreme Court ruled that a court has jurisdiction to try a criminal defendant even if the defendant was abducted from a foreign country against his or her will by United States agents. Though this decision reaffirmed the long-standing proposition that personal jurisdiction is not affected by claims of abuse in the process by which the defendant is brought before the court, it sparked concerns about potential abuse of foreign sovereignty and territorial integrity.*
>
> *Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of* Alvarez-Machain *type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an* Alvarez-Machain *type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with OIA before such return.*[37]

In response to the first legal question, it can therefore be concluded that it is permissible, according to the American legal system, for the U.S. Government to forcibly abduct—whether unilaterally or with foreign assistance—a subject overseas and to render him back to the U.S. to stand trial, as long as any existing treaty, signed and ratified by the U.S. and the foreign country in question, does not explicitly prohibit such a forcible seizure.

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[37] U.S. Department of Justice, "Deportations, Expulsions, or Other Extraordinary Renditions," *U.S. Attorneys' Manual*, USAM 9-15.610, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.600 (accessed on June 1, 2009).

Extraordinary Renditions: Illegal If We Know They Torture

The legality of extraordinary rendition, the extrajudicial transfer of a detained suspect from a foreign country to another foreign country, depends on several variables and can be open to different interpretations of applicable U.S. laws. In most circumstances, an extraterritorial extraordinary rendition of a non-U.S. citizen will be considered legal when properly authorized by Presidential executive order. However, if U.S. authorities "render" a person *with the intention of facilitating torture,* it would be a clear violation of U.S. Federal law, regardless of Presidential authorization.[38] Moreover, it remains open to interpretation whether other legal restrictions might apply as well. Following is a review of the principal legal elements and restrictions applicable to extraordinary renditions.

The U.N. Convention Against Torture (CAT)

In 1994, the U.S. ratified an international human rights treaty known as the *United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (CAT), albeit with several reservations, declarations, and understandings. One such understanding was that the U.S. did not consider the treaty to be "self-executing," and thus would not have the power of domestic law but would instead need implementing legislation to take effect.[39] Article 3 of CAT reads as follows.

[38] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).
[39] Ibid.

> *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*[40]

The U.S. interpreted the CAT Article 3 reference to "substantial grounds for believing that [a person] would be in danger of being subjected to torture" to apply to cases where "it is more likely than not that [a person] would be tortured." [41] Therefore, according to the above, it would appear that, in order for an extraordinary rendition to comply with CAT, the U.S. would need to believe that a subject is being rendered to a country where it is not "more likely than not" that the subject would be tortured. This is not the case, however, since from the onset the Executive Branch interpreted that "the obligation in Article 3 does not apply with respect to individuals who are outside the territory of the United States," according to the former Legal Adviser of the U.S. Department of State.[42] Also of relevance to extraordinary renditions, Article 16 of CAT requires the State "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." [43] This was also interpreted as not applying extraterritorially, allowing for U.S. officials to legally subject detainees to "cruel, inhuman or degrading treatment," as long as such treatment did not occur within "any territory under its jurisdiction." Therefore, both Article 3 and 16 of CAT would not apply to a rendition of an individual transferred

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[40] United Nations, "Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment," *Office of the High Commissioner for Human Rights,* http://www.unhchr.ch/html/menu3/b/h_cat39.htm, (accessed June 2, 2009).

[41] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 209.

[42] U.S. House Committee on Foreign Affairs, *Diplomatic Assurances and Renditions to Torture: the Perspective of the State Department's Legal Adviser*, 110th Cong., 2nd sess., 2008, 9.

[43] United Nations, "Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment," *Office of the High Commissioner for Human Rights,* http://www.unhchr.ch/html/menu3/b/h_cat39.htm, (accessed June 2, 2009).

between two foreign countries, according to this interpretation of compliance with *the letter*, if not necessarily *the spirit*, of CAT.

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)

Since the U.S. had declared, in its *understanding* of CAT, that the treaty was not "self-executing," and thus needed implementing legislation in order to have the weight of domestic law, Congress passed the Foreign Affairs Reform Act of 1998 (FARRA) to implement CAT Article 3. In FARRA, Section 2242 (a), reads as follows:

> *It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.*[44]

The above statement would appear to suggest that Congress interpreted CAT Article 3 to apply, as stated, "regardless of whether the person is physically present in the United States." However, according to testimony of the former Legal Adviser for the U.S. Department of State, the above statement is "not an interpretation of the treaty. That is a statement that is included in a congressional act," a "statement of policy."[45] In the end, the distinction might be somewhat irrelevant with regard to extraordinary renditions, since FARRA, Section 2242 (b), excludes "from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B))."[46] Therefore, several categories of non-U.S. citizens are excluded from the protection of FARRA, including an alien who "is believed, on the basis of reasonable

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[44] *Foreign Affairs Reform Act of 1998*, Public Law 15-277, *U.S. Statutes at Large* 144 (1998), 822.
[45] U.S. House Committee on Foreign Affairs, *Diplomatic Assurances and Renditions to Torture: the Perspective of the State Department's Legal Adviser*, 110th Cong., 2nd sess., 2008, 37.
[46] *Foreign Affairs Reform Act of 1998*, Public Law 15-277, *U.S. Statutes at Large* 144 (1998), 822.

grounds, to be a danger to the security of the United States."[47] Since this last category could easily be applied to all persons subjected to extraordinary renditions, FARRA appears to pose no significant legal limitations to extraordinary renditions.

The Federal Torture Statute: 18 U.S.C. § 2340

On December 5, 2005, then U.S. Secretary of State Condoleezza Rice declared the following:

> *The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.*[48]

While the effectiveness of the "diplomatic assurances" in actually preventing torture has been open to intense debate, the U.S. seeks these assurances, whether in writing or verbally (depending on the type and origin of the transfer), before transferring an individual to a country where it suspects that torture might occur.[49] From a legal standpoint, these assurances are needed with regard to extraordinary renditions not for CAT or FARRA, if indeed interpreted as not applying extraterritorially, but for compliance with the Federal Torture Statute. This statute was also passed by Congress as a result of the above-referenced *understanding*—expressed in the ratification of CAT—that CAT would not be self-executing and would need implementing legislation.

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[47] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).

[48] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).

[49] Ibid.

Implementing CAT Articles 4 and 5, the Federal Torture Statute, Title 18, United States Code, Section 2340A, reads as follows:

> ***(a) Offense.***— *Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.*[50]

The statute specifically criminalizes acts of torture "outside of the United States," as torture within the U.S. is already covered by other Federal Statutes. The statute also specifies the following:

> ***(c) Conspiracy.***— *A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.*[51]

Therefore, a person who extraterritorially either commits torture, or participates in a conspiracy to commit torture, is committing a felony in direct violation of this U.S. Code. This statute defines torture as follows:

> *"Torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.*[52]

This statute is relevant to extraordinary renditions because it cannot be overridden by Presidential orders. Therefore, if any U.S. officials render a suspect to a country, knowing that torture will occur outside of the U.S., they could be participating in a conspiracy to commit torture. In fact, on March 13, 2002, the Office of Legal Counsel of the U.S.

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[50] *Federal Torture Statute, U.S. Code*, Title 18, sec. 2340A (2001).
[51] Ibid.
[52] *Federal Torture Statute, U.S. Code*, Title 18, sec. 2340 (2001).

Department of Justice issued a memorandum to the Department of Defense stating the following:

> *To fully shield our personnel from criminal liability, it is important that the United States not enter in an agreement with a foreign country, explicitly or implicitly, to transfer a detainee to that country for the purpose of having the individual tortured. Such an agreement would not have to be explicit to be prosecuted, as an agreement "can instead be inferred from the fact and circumstances of the case."* Iannelli v. United States *420 U.S. 770, 777 n.10 (1975). So long as the United States does not intend for a detainee to be tortured post-transfer, however, no criminal liability will attach to a transfer. Even if the foreign country receiving the detainee does torture him.*[53]

This explains why the foreign country's assurance of "no torture" remains legally important even if CAT does not apply extraterritorially, as it could be used in a court of law to show that U.S. officials did not intend for any torture to occur. Thus, as then President George W. Bush stated on April 28, 2005, "We operate within the law, and we send people to countries where *they say* they're not going to torture people."[54] Whether the fact that "they say they're not going to torture" would be enough, in a court of law, to convincingly distance U.S. officials from any torture that might then occur remains questionable, and yet to be legally tested. But with regard to the value of diplomatic assurances, the author of the CIA rendition program and former chief of the CIA Bin Laden Unit, Michael Scheuer, provided the following testimony at a Congressional hearing on extraordinary renditions.

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[53] Jay S. Bybee, "Memorandum to William J. Haynes, II, General Counsel, Department of Defense – Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations," *Office of Legal Counsel, U.S. Department of Justice,* March 13, 2002, http://www.usdoj.gov/opa/documents/memorandumpresidentpower03132002.pdf, (accessed on June 24, 2009).

[54] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 214.

> *Mr. MARKEY: (...) Now, how do you feel about this idea of accepting diplomatic assurances from countries like Syria that they won't torture someone who we send to them?*
>
> *Mr. SCHEUER: It isn't, sir, as Mr. Roosevelt's Vice President said at one time, worth a bucket of warm spit, sir.*
>
> *Mr. MARKEY: So you don't feel comfortable accepting a diplomatic assurance then?*
>
> *Mr. SCHEUER: If you accepted an assurance from any of the Arab tyrannies who are our allies that they weren't going to torture someone, I have got a bridge for you to buy, sir.*[55]

In addition to the risk that an extraordinary rendition could be interpreted as a "conspiracy to torture," it should be noted that any U.S. officials directly subjecting an individual to torture, operating at any foreign-based detention facility, would be violating this U.S. law. Whether specific "enhanced interrogation" techniques utilized by U.S. officials overseas constituted torture has been open to intense debate and different executive interpretations, but not yet conclusively decided by the judiciary. The legality of specific "enhanced interrogations" methods is a crucial issue, but outside of the scope of this thesis. But any interrogation method amounting to "torture" would clearly be illegal under U.S. law.

In conclusion, under this statute, U.S. officials abroad cannot conduct or facilitate torture in any way. Therefore, if U.S. officials conduct an extraordinary rendition to a foreign country, *knowing* (regardless of foreign "assurances") that torture will occur, they could be found to be in violation of 18 U.S.C. § 2340 and subjected to severe penalties.

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[55]U.S. House Committee on Foreign Affairs, *Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* 110th Cong., 1st sess, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf (accessed on June 3, 2009).

Other Relevant U.S. Case Law, Statutes and Treaties

The 1949 Geneva Conventions: The U.S. Supreme Court decided in 2006, in the case of *Hamdan v. Rumsfeld*, that certain protections of the Geneva Conventions applied to Al Qaeda members detained by the U.S. as part of an armed conflict.[56] These protections, however, were not interpreted as including renditions to countries which might use torture.[57] Specifically, the *Military Act of 2006* provides that it is a violation of Article 3 of the Geneva Conventions to subject an individual held "in the custody or control of the United States" to torture or cruel treatment.[58] This, however, has been interpreted as not covering individuals rendered to a foreign country and then subjected to torture or cruel treatment, as this would occur while "in custody or control" of foreign authorities. [59]

The War Crimes Act: Prohibiting violations of the laws of war, this Act also criminalizes "conspiring" to inflict torture or cruel treatment. However, similar to the above-cited *Military Act of 2006,* this act covers only subjects in the "offender's custody and control" and would not apply to subjects transferred to the custody and control of a foreign entity.[60] This Act does provide an exception in criminalizing conspiracies to commit acts such as rape, mutilation or maiming, or causing "serious bodily injury" against individuals protected by the Geneva Convention, regardless of who is detaining

[56] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.

them.[61] However, an application of this statute to extraordinary renditions would appear to provide no additional legal limitations other than what is already covered by the Federal Torture Statute.[62]

International Covenant on Civil and Political Rights (ICCPR): Article 7 of this treaty, ratified by the U.S. in 1992, prohibits subjecting individuals "to torture or to cruel, inhuman, or degrading treatment or punishment."[63] In ratifying this treaty, the U.S. expressed the reservation that the treaty was not "self-executing," and would thus need implementing legislation in order to be considered U.S. law. While the monitoring body of the ICCPR, the United Nations Human Rights Committee, opined that Article 7 of this treaty should apply to transfers of subjects to another country, the U.S. has not enacted any laws to comply with this opinion, which is not considered legally binding.[64]

Universal Declaration of Human Rights: Adopted by the U.N. General Assembly in 1948, this Declaration prohibits "the arbitrary arrest, detention, or exile of persons, as well as torture and cruel, inhuman, or degrading treatment." This Declaration is not a treaty, and thus not legally binding.[65]

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[61] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.

Legal Conclusions

While ordinary renditions to bring suspects back to the United States have been allowed by U.S. law for over a century, the legality of extraordinary renditions is tied to the treatment an individual received once in a foreign country and to whether U.S. officials knew that such a treatment would be occurring. Specifically, a U.S. official that renders an individual to a foreign country in order to have such an individual tortured would be violating the Federal Torture Statute, regardless of any Presidential authorizations and/or of "diplomatic assurances." In the end, the legality of "extraordinary renditions" revolves around the interpretation of what acts constitute "torture," as well as the actual level of complicity of any U.S. officials in committing such acts. And since 2001, two consecutive U.S. administrations have had contrasting interpretations as to what constitutes "torture." For example, under President George W. Bush, the Executive Branch considered the interrogation method known as *waterboarding* not to be torture, according to White House spokesman' statements made as late as 2008.[66] But, on April 29, 2009, President Barack Obama stated, "I believe that *waterboarding* was torture and, whatever legal rationales were used, it was a mistake."[67] In the absence of specific judicial rulings and specific legislation, the legality of extraordinary renditions thus appears to remain open to executive interpretation.

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[66] Greg Miller, "Waterboarding Is Legal, White House Says," *Los Angeles Times*, February 7, 2008, http://www.latimes.com/news/nationworld/nation/la-na-torture7feb07,0,1028317.story (accessed June 3, 2009).

[67] Ewen MacAskill, "Obama: I Believe Waterboarding Was Torture, and It Was a Mistake," *The Guardian*, April 30, 2009, http://www.guardian.co.uk/world/2009/apr/30/obama-waterboarding-mistake (accessed June 3, 2009).

CHAPTER 3

THE EVOULUTION OF RENDITIONS

The Three Phases of Renditions in U.S. Counterterrorism

As highlighted by the case law reviewed in the previous chapter, since at least the late 1800's, U.S. law enforcement agencies have conducted ad-hoc law enforcement renditions for the purpose of bringing suspects back to the U.S. to stand trial. In the late 1970's, the terms "rendition" and "extraordinary renditions" were introduced and used interchangeably to describe the practice of extraterritorial apprehension of a suspect transferred to the U.S. for trial (referred to as an "ordinary rendition" or "rendition to U.S. Justice," in this thesis).[68] According to the former Associate Director for Operations for the U.S. Marshals Service (and former New York City Police Commissioner), Howard Safir, "we called it extraordinary rendition because, although it was legal under US law, it was not always legal under the law of the country in which the fugitive was residing." Such practice, according to Safir, "could range from luring a fugitive to a friendly country or 'an outright snatch.'"[69] With regard to U.S. counterterrorism efforts,

[68] William Safire, "Foreign Policy Leads Us Into an Odd Wordscape," *The New York Times,* June 20, 2004, http://www.taipeitimes.com/News/editorials/archives/2004/06/20/2003175843 (accessed on June 15, 2009).

[69] Ibid.

renditions first started with a failed attempt in 1985, followed by a successful rendition in 1987 (both are discussed in detail below). Over the following years, U.S. counterterrorism renditions evolved through three broad historical phases. Each phase was characterized by the introduction of a new rendition practice which complemented—not substituted—previously utilized practices. The three phases of U.S. counterterrorism renditions can roughly be divided as follows: (1) Starting in 1985, counterterrorism renditions to the U.S. for trial; (2) from 1995 onward, counterterrorism renditions from one foreign country to another foreign country's legal system; and (3) starting in 2001, counterterrorism renditions from a foreign country to either (a) another foreign country's detention center, not necessarily in relation to a foreign legal case, or (b) to CIA and U.S. military detention centers located abroad. In reviewing the specific characteristics of each phase, it is useful to identify the general trends, analyzing the context leading to a change in procedures, and to focus on a few key case studies.

Phase I: Renditions to U.S. Justice

The *Achille Lauro* and a First Attempt (1985)

In 1985, the U.S. attempted to execute its first counterterrorism rendition. On October 7, 1985, four members of the *Palestine Liberation Force* (PLF) seized an Italian cruise ship, the *Achille Lauro,* and killed an American passenger, Leon Klinghoffer. The PLF terrorists then negotiated with the Egyptian government, who was unaware that anyone on board had been harmed, for a safe escape to Tunisia on an Egyptian-provided

Boeing 737.[70] On October 10, 1985, as the Egyptian plane—with the PLF terrorists aboard—was airborne, the U.S. dispatched four F-14 Tomcat fighters from the USS *Saratoga*.[71] The U.S. fighters intercepted the Egyptian aircraft and, threatening to shoot it down, forced it to land at the NATO base in Sigonella, Sicily. Once on the ground, in the middle of the night, the airliner was reportedly surrounded by approximately fifty "American Delta Force Commandos," who had arrived at Sigonella, traveling aboard C-141's, with orders from Presidential Reagan to "arrest the terrorists" and take them to the United States.[72] The Italian government, however, reportedly notified by the U.S. Government only at the last moment (after the Governments of Tunisia and Greece denied landing privileges to the aircrafts), did not approve of what it considered as a unilateral U.S. operation on Italian soil and jurisdiction.[73] On orders of Italian Prime Minister Craxi, Italian troops surrounded the U.S. soldiers at the NATO base, triggering a tense five-hour standoff, with U.S. and Italian soldiers pointing weapons at each other while attempting to deconflict orders.[74] The standoff was resolved only when President Reagan and Italian Prime Minister Craxi agreed, over the telephone, to allow Italian troops to take custody of the terrorists. The Italians, however, arrested the PLF members but released the *Palestine Liberation Organization* (PLO) representatives, who had negotiated the escape and were also on the plane. Among the PLO representatives was Abul Abbas, whom U.S. officials believed to be the overall mastermind of the *Achille*

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[70] Christopher H. Pyle. *Extradition, Politics, and Human Rights* (Philadelphia: Temple University Press, 2001), 275-276.

[71] Christopher H. Pyle. *Extradition, Politics, and Human Rights* (Philadelphia: Temple University Press, 2001), 275-276.

[72] Ibid.

[73] Ibid.

[74] Editorial, "Sigonella 1985: 'Così Fermammo gli USA,'" *La Repubblica*, April 16, 2003, http://www.repubblica.it/online/esteri/abbas/sigonella/sigonella.html (accessed on June 9, 2009).

Lauro hijacking.[75] The U.S. thus learned that it could not always count on foreign governments, even NATO allies, to support its counterterrorism operations, and would therefore need to develop a unilateral capability to carry out renditions. The first successful U.S. counterterrorism rendition would indeed be unilateral and, occurring almost two years after the first failed attempt, would be in response to a terrorist hijacking that had taken place, in the Mediterranean, four months before the seizure of the *Achille Lauro*.

Case study: The First Counterterrorism Rendition (1987)

On June 11, 1985, in Beirut, Lebanon, five armed assailants—brandishing AK-47 assault rifles, hand grenades, and several other automatic weapons—hijacked a Jordanian passenger airliner, *Alia* (later renamed *Royal Jordanian Airlines*) Flight 402, scheduled to travel from Beirut to Amman.[76] After subduing and brutalizing the eight Jordanian air marshals aboard the plane, the terrorists threatened to kill the seventy-four hostages, one by one, if the plane did not divert to Tunisia.[77] As the Arab League was assembled in Tunis for a summit, the terrorists wanted to use Tunis as a stage to meet Arab League delegates and demand for the expulsion of Palestinians from Lebanon.[78] As the plane needed refueling, the terrorists first diverted the plane to Larnaca, Cyprus. Then, as the Tunisian Government repeatedly denied requests to land in Tunis, the terrorists had the

[75] Christopher H. Pyle. *Extradition, Politics, and Human Rights* (Philadelphia: Temple University Press, 2001), 275-276.
[76] United States of America v. Fawaz Yunis, 867 F. 2d 617 (D.C. Court of Appeals, 1989).
[77] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.349.
[78] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 262.

plane make several additional stops to replenish food and fuel supplies: first in Palermo, Sicily, then again in Cyprus, and finally in Beirut, where additional hijackers came aboard as reinforcements.[79] On the morning of June 12th, 1985, the terrorists attempted to have the plane fly to Damascus, but after the Syrians denied permission to land, the hijackers decided to end their thirty-hour tour of the Mediterranean by returning back to Beirut. In Beirut, the hijackers—led by a man named Fawaz Younis—announced their demands in front of international media and, after evacuating the hostages, blew up the Boeing 727 on the tarmac and escaped.[80]

After a wave of high-profile terrorist attacks in the early 1980's, the U.S. enacted sweeping antiterrorism legislation, such as the *Hostage Taking Act of 1984* and the *Omnibus Diplomatic Security and Antiterrorism Act of 1986.* In addition to establishing major antiterrorism provisions, including the creation of the Diplomatic Security Service within the U.S. Department of State, these laws expanded the U.S. jurisdiction for terrorism and certain other crimes that targeted U.S. nationals even though they occurred outside of the United States. As President Reagan's administration was eager to assert its new legal jurisdiction, U.S. officials soon identified the leader of the *Alia* hijackers, a Lebanese man named Fawaz Younis, as a viable, and relatively accessible, target to show the new global reach of U.S. counterterrorism efforts.[81] Indeed, although Younis had hijacked a Jordanian airliner on Lebanese and international soil, he had violated American law, as two passengers on the *Alia* flight were U.S. citizens.

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[79] United States of America v. Fawaz Yunis, 867 F. 2d 617 (D.C. Court of Appeals, 1989).

[80] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 263.

[81] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.350.

Fawaz Younis (often referred to as "Fawaz Yunis," in a variation of his last name's spelling) was a Shiite Moslem and a relatively high-ranking tactical officer in the *Amal Movement*, which was considered one of the most important Shiite Muslim militias in the Lebanese civil war.[82] The day before the hijacking, Younis, still recovering from a slight wound in the head and shoulders suffered from an exploding grenade, received orders to hijack the plane from an *Amal Movement* military commander, Akel Hamiah. Two days after the conclusion of the *Alia* hijacking, Younis reappeared side by side with Imad Mugniyah—the head of the *Islamic Jihad*—as a reinforcement to board TWA Flight 847, another hijacked plane stationed in Beirut. Shortly before his arrival, an American hostage, Navy diver Robert Stethem, had been shot in the head and thrown out of the aircraft. This hijacking ended days later, after negotiations, with the release of the remaining hostages.

In January of 1986, President Reagan reportedly signed a classified executive order that expanded the authorities of the CIA to undertake covert action with regard to counterterrorism, including the authority to engage and support efforts to extraterritorially apprehend and render terrorists to the U.S. for trial. With its expanded counterterrorism authority, the CIA developed a "substantial"[83] dossier on Younis. The 26-year-old son of a Beirut policeman, Fawaz Younis was born in Baalbeck, Lebanon, but grew up in the Shiite slums of Beirut. In 1979, after having completed two years of high school, Younis started working as a used-car salesman and joined the *Amal Movement*. Younis rose through the ranks in the *Amal Movement* and, when *Amal* took

[82] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 265.
[83] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.350.

control of West Beirut in early 1984, became an *Amal* military officer. As of 1986, Younis was living in Beirut with his wife and two young sons—10 months and 4 years old—and, out of a job, was attempting to make money in the drug trade.[84]

Younis' connection to the drug trade would prove crucial in his capture. Indeed, with the help of the CIA, the U.S. Drug Enforcement Administration (DEA) had previously recruited a Lebanese informant, Jamal Hamdan, who had moved from Beirut to the coastal town of Larnaca, in Cyprus.[85] Hamdan, whom the DEA considered a reliable informant, had known Younis since 1981. Hamdan had been a roommate of Younis for about six months in 1983, and he had acted as Younis' personal driver and factotum for a short period of time. The two had remained in contact throughout the years and, in 1985, Younis had gone to visit Hamdan at his residence in Poland, when Hamdan had resided there. After determining that Hamdan would be capable of luring Younis out of Lebanon, the CIA enlisted Hamdan's help in order to capture Younis.[86] For his collaboration in the rendition operation, Hamdan demanded money and relocation in the U.S., under the Witness Protection Program, for him and his family. Although Hamdan's request raised some ethical concerns, (Hamdan had been responsible for several murders during the Lebanese Civil War, including the murder of his own sister-in-law, accused of adultery, for which Hamdan had served six-months in a Lebanese jail), a deal was eventually struck.[87]

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[84] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.350.

[85] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 265.

[86] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.347-360.

[87] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 266.

In early 1987, the National Security Council held several high-level meetings, as part of the Coordination Subgroup (CSG), to coordinate efforts to bring Younis to justice. The senior representatives in attendance at the CSG included Ambassador L. Paul "Jerry" Bremer, the Department of State's Coordinator for Counteterrorism, Richard Armitage, the Department of Defense's Assistant Secretary of Defense for International Security Policy, Lt. Gen. Tom Kelly, the director of the special operations agency for Joint Chiefs of Staff, Oliver "Buck" Revell of the FBI, Duane "Dewey" Clarridge of the CIA, and Charlie Allen of the National Intelligence Office.[88] In the end, a plan was chosen to have the CIA run an operation to deliver Younis in international territory (water or airspace), where the FBI would arrest him and maintain custody of him—while keeping him in international territory—until he reached the U.S., thus satisfying a Department of Justice's request for an unbroken line of jurisdiction, while also avoiding any incidents similar to the 1985 standoff at Sigonella NATO base. In February of 1987, CIA Director William Casey, Secretary of State George Shultz, and FBI Director William Webster signed the order to proceed with the rendition of Younis, or what the FBI called "Operation Goldenrod."[89]

In March 1987, at the CIA's request, Hamdan started to refresh his friendship with Younis.[90] Over the next seven months, the two would have more than 60 phone conversations and three face-to-face meetings. In July 1987, at one of such meetings in Hamdan's apartment in Larnaca, Cyprus, Younis began to brag, after a few drinks, about his role in the Jordanian hijacking. He confirmed his role in the hijacking, stating that he

[88] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 266.
[89] Ibid.
[90] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.347-360.

had been acting under direct orders of Nabih Berry, the head of the *Amal* militia and the Lebanese Minister of Justice. Younis also spoke freely about the role he had played in the TWA 847 hijacking. As the apartment was being monitored by U.S. officials, Younis admissions were recorded and safeguarded as evidence of a crime.

In the subsequent meetings, Hamdan purposefully began to impress Younis with CIA-provided money, on one occasion casually lending $4000 to Younis. Finally, in mid-August 1987, Hamdan asked Younis if he was interested in working with "Joseph," a wanted drug dealer who supposedly headed a lucrative drug-ring. Enthusiastic about the prospect, Younis went back to Lebanon and waited for Hamdan to call him as soon as he could arrange a meeting with "Joseph."

U.S. officials planned to "lure" Younis to meet with the secretive "Joseph" on a yacht located at least 12 miles off the coast of Cyprus, in international waters. The CIA had arranged for Hamdan and his brother Ali (who had been acting as a middleman in dealing with Younis in Beirut) to bring Younis onto the yacht where FBI agents of the Hostage Rescue Team (HRT), posing as "Joseph" and his crew, would arrest Younis.[91] After the arrest, Younis would be brought to the U.S. without ever touching foreign soil, thus avoiding any possible jurisdictional and diplomatic problems. A date for the rendition operation was set for September 13, 1987.[92]

In the early days of September 1987, the operation was well under way. A CIA Clandestine Service's maritime officer had been dispatched to Cyprus to train Hamdan's brother Ali to drive the motorboat that would bring Younis to Joseph's yacht. [93]-[94] To

[91] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.346-360.
[92] Ibid.
[93] Ibid.

support the operation, FBI HRT agents and CIA officers of the newly-established Counterterrorism Center (CTC) had been traveling in small groups from the U.S. to Cyprus, using mostly commercial airlines and going through different routes (primarily Italy and Greece) in order not to raise suspicion. Joseph's yacht, a rented eighty-one-foot sailing yacht given the name *Skunk Kilo*, was ready to sail. On September 7, Attorney General Edwin Meese communicated to those involved in the operation that they had the blessing of President Reagan, who was enthusiastic about the mission.[95]

Meanwhile, the USS *Butte*—a 564-foot Navy ammunition ship of the Sixth Fleet, with aboard a five-inch rapid-fire cannon and two H-46 helicopters—began sailing southerly around Cyprus.[96] The ship had aboard the operations command post, manned by a senior CIA officer, the Naval Task Force Commander Rick Holley, the Captain of the USS *Butte*, Commander Joe Davis, a Navy representative from NATO headquarters, several FBI officials, including Oliver "Buck" Revell (the senior FBI official), David "Woody" Johnson (the FBI-HRT commander), and Tom Hansen (the case agent from the FBI Washington Field Office).[97] At about the same time, the *Skunk Kilo* with aboard CIA and FBI personnel began sailing northerly around the coasts of Cyprus. The two ships were slowly proceeding toward their prearranged offshore meeting point.

On September 10, 1987, Younis arrived in Cyprus. After learning that Cypriot authorities had placed Younis on a watch-list and were looking to apprehend him, the CIA decided to move Younis and Hamdan to a different location. Indeed, Cypriot

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[94] Stephen Engelberg, "Terrorism Trial in U.S. Moves Minor Actor to Center Stage," *New York Times,* February 14, 1989, http://www.nytimes.com/1989/02/14/world/terrorism-trial-in-us-moves-minor-actor-to-center-stage.html?pagewanted=all (accessed on June 15, 2009).

[95] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 269.

[96] Ibid.

[97] Ibid.

authorities had been aware of the relationship between Younis and Hamdan, which made Hamdan's apartment in Larnaca too risky of a place to stay. The CIA instructed Hamdan to move to the newly constructed Sheraton Limassol Hotel, and to get rooms one floor below the CIA's command post, which was located in the top-floor honeymoon suite.[98] CIA officers checked-in the hotel and, after subtly discouraging an over-eager hotel manager from sending up gifts, set up a SATCOM antenna and other communication equipment, which they had brought to the room in large aluminum boxes disguised as containing photographic materials.[99] The CIA at the hotel, thus, established direct contact, via satellite, with CIA headquarters, the U.S. Military Command in Stuttgart, Germany, and with the USS *Butte* and the *Skunk Kilo*. Aboard the USS *Butte,* after realizing that the FBI HRT's SATCOM system was not compatible with the Navy's antennas, the FBI HRT established its SATCOM communication with an improvised solution: a broomstick-mounted antenna on the Flag Bridge.[100]

On September 11, a federal magistrate in Washington, D.C. signed an arrest warrant for Younis. On Saturday, September 12, the *Skunk Kilo* and the USS *Butte* met offshore where CIA personnel left the *Skunk Kilo* to FBI Special Agents. The FBI agents decided to bring on the yacht, in addition to their own weapons, a couple of M-14 rifles borrowed from the *Butte*'s armory. On the same day, Hamdan's brother reserved a rental speedboat for the following morning.

On the morning of the 13th, Ali picked up the speedboat from the hotel marina at approximately 8 a.m., exactly as planned. Hamdan and Younis, however, had spent a late

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[98] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.346-360.
[99] Ibid.
[100] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 270.

night drinking and partying with Colombian prostitutes, and Hamdan was having a hard time waking up Younis. After a few hours of additional rest, Younis—5'9" tall, 175 pounds, wearing a beige shirt, green shorts, sandals, and a gold necklace and expensive Ted Lapidus watch—and Hamdan finally left the hotel and approached the pier where Ali was awaiting them. As they were boarding the motorboat, a CIA officer, disguised as a tourist, confirmed the positive identification of Younis. This was the crucial "U.S. eyes on the target" moment that triggered the extraction process, in a country nearby, of Hamdan's family, which had tickets and visas ready for the appropriate moment to discretely depart the region without compromising the mission.[101]

As navigating in open sea can be particularly difficult, the CIA had arranged for Ali to secretly follow another boat with aboard two CIA officers—a former SEAL and a former Army officer, disguised as a tourist couple—that would lead, from a distance, to the prearranged position of the *Skunk Kilo.*[102] To facilitate this task, radio communication was to be maintained between the lead-boat, the command center in the hotel, and a picket-boat placed near the *Skunk Kilo*. Unfortunately, the *Skunk Kilo* had sailed out of position and the picket-boat was having problems finding it. When the picket-boat finally found the yacht, they were unable to communicate their new position to the lead boat, as the hand-held radios at their disposal worked only intermittently.[103] In search for the off-track *Skunk Kilo* and picket-boat, the lead boat overshot its destination. Fortunately, radio communication improved enough to allow the lead and picket boats to communicate again and, using as reference a large Limassol-bound Soviet ship that had unexpectedly

[101] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), 356-357.
[102] Ibid, 346-360.
[103] Ibid, 357.

crossed both of their paths, to determine their new positions and direct the lead boat back to the *Skunk Kilo*.[104] After approximately ninety minutes of sailing, the motorboat carrying Younis finally reached the yacht, located in international waters south of Cyprus.

On the *Skunk Kilo*, two female FBI agents in their bikinis offered a welcoming sight to the awaited trio, while other members of the HRT team posed as Joseph and his bodyguards. Other members of the HRT were on one of the H-46 helicopters aboard the USS *Butte* ready to intervene, if necessary.[105] Younis stepped aboard the yacht and was frisked, a procedure he was expecting as part of the meeting with drug-dealing Joseph. Younis was handed a cold beer and was escorted by FBI Special Agent (SA) George Gast, acting as one of the narcotic contacts, to the stern of the boat where they joined SA Donald Glasser. After only 2 minutes aboard, the two FBI agents "took down" Younis on the deck, breaking both of his wrists in the process. An Arabic-speaking FBI agent, SA Dimitry Droujinsky, communicated to Younis that he was under arrest.[106] Younis was then strip searched, re-dressed in a bulky green jumpsuit, handcuffed, and bound in leg irons. Then the *Skunk Kilo* sailed for over an hour through extremely rough and choppy seas before meeting with the USS *Butte*.

Once on the USS *Butte,* Younis was given a medical examination by a naval medical internist, Dr. Clarence Braddock. The USS *Butte* then began sailing westward through the Mediterranean. During the four days of sailing, Younis, although in precarious physical and mental conditions, agreed to speak without a lawyer and was

[104] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), 356-357.
[105] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 262-273.
[106] Ibid, 272.

interviewed nine times by Droujinsky and his partner, SA Thomas Hansen. Younis confessed his involvement in both the *Alia* and the *TWA 847* hijackings.[107] On September 17, the USS *Butte* finally reached its meeting point, between the Balearic Islands and the island of Corsica, with the aircraft carrier USS *Saratoga.* A CH-46 transport helicopter transported Younis and his FBI entourage from the *Butte* to the *Saratoga.* Once aboard the USS *Saratoga,* a sedated Younis was immediately transferred aboard a Viking S-3 jet. After taking off, the jet would fly non-stop for 4,000 miles, escorted by two F-14 fighters and a KC-10 tanker, in order to arrive, thirteen hours later, at Andrews Air Force Base, in Maryland, without having touched foreign soil. Younis was eventually convicted—on charges of conspiracy, aircraft piracy, and hostage-taking—and sentenced to 30 years in prison, although he would end up serving only a portion of his sentence. On February 18, 2005, Younis was released from the U.S. Bureau of Prisons and immediately placed in the custody of U.S. immigration officials. On March 29, 2005, nearly 18 years after his arrest, Younis was deported back to Lebanon. He had been the first international terrorist rendered to the U.S. for trial.[108]

Renditions to U.S. Justice Continue to Evolve

After the case of Fawaz Younis, counterterrorism renditions of suspected terrorists to the U.S. became an established, and legally-tested, counterterrorism tool. However, while Fawaz Younis had been unilaterally lured and apprehended, most

[107] Oliver "Buck" Revell and Dwight Williams, *A G-Man's Journal*, (New York: Pocket Books, 1998), 272.

[108] Federal Bureau of Investigation, "A Byte Out of History: The Case of the Yachted Terrorist," *FBI Headline Archives*, September 15, 2004, http://www.fbi.gov/page2/sept04/yachted091504.htm, (accessed on June 15, 2009).

subsequent U.S. renditions were executed in cooperation with foreign authorities (with the notable exceptions of apprehensions in recent war theaters, such as Iraq and Afghanistan). U.S. law enforcement officials from different agencies—generally including the Federal Bureau of Investigation (FBI) and the Diplomatic Security Service (DSS)—cooperated with foreign counterparts, and were often supported by the Central Intelligence Agency (CIA), to locate and apprehend terrorists abroad and transport them back to the U.S.[109] . For example, on July 15, 1993, terrorist Omar Mohammed Ali Rezaq was arrested by Nigerian authorities, transferred to FBI custody, and rendered to the U.S. for trial.[110] Also, as rendition to the U.S. evolved, U.S. authorities relaxed some of the restrictive conditions that had been set in the Fawaz Younis case, which had made it an exceptionally complicated and expensive operation. As former CIA operations officer Duane Clarridge, who had been in charge of the CIA role in the Younis rendition, commented as regards to "rules of engagement" in the Younis rendition:

> *The Justice Department, which would prosecute the case once Yunis arrived in the States, set most of the ground rules. They needed to establish a clean and unbroken line of jurisdiction, from the time of his apprehension to his delivery to U.S. soil. This meant that Yunis had to be apprehended by the FBI in international waters or airspace, remain in constant custody of the feds, and remain clear of the turf of any other sovereign nation—for the entire duration of his four-thousand-mile journey to the United States.*[111]

Aside from creating burdensome logistical requirements, the above-referenced DOJ request for a "clean and unbroken line of jurisdiction" was legally unnecessary, although possibly desirable from both a diplomatic and prosecutorial standpoint. In fact, according

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[109] Samuel M. Katz, *Relentless Pursuit: The DSS and the Manhunt for the Al-Qaeda Terrorists,* (New York: Forge, 2002).

[110] United States of America v. Omar Mohammed Ali Rezaq, 134 F.3d 1121, (D.C. Court of Appeals, 1998).

[111] Duane R. Clarridge, *A Spy for All Seasons*, (New York: Scribner, 1997), p.351.

to U.S. law (as covered in the previous chapter), the U.S. Supreme Court had ruled, more than once, that a suspect could be kidnapped—by anybody—overseas and brought to trial to the U.S. without compromising the Court's jurisdiction. But while, the Department of Justice (DOJ) requirement of "remaining clear of the turf of any other sovereign nation" was relaxed in subsequent renditions to the U.S., the FBI would maintain that its involvement from apprehension to court was necessary for successful prosecution, in what appeared to be more of an effort to secure a dominant role in renditions to the U.S.—and gain the upper-hand in potential turf battles with other agencies—than to satisfy any legal requirement.

A case-in-point is presented by one of the most high-profile counterterrorism renditions to the U.S. of the 1990's, the arrest of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing in New York City. After being tracked down by DSS agents in Pakistan, Yousef was arrested, on February 7, 1995, by a capture team comprised of DSS agents, assisted by DEA agents, and Pakistani officials.[112]-[113] Although the Yousef capture was considered "a DSS operation from start to finish," after Yousef was transferred to the custody of the FBI and rendered to the U.S., the FBI took full credit for the arrest.[114] Indeed, "just as the State Department was getting ready to publicize its role in the historic arrest, a Justice Department official put in a call to Secretary of State Warren Christopher" asking "to minimize the role of his own DSS

[112] Fred Burton, *Ghost: Confession of a Counterterrorism Agent,* (New York: Random House, 2008), 241-260.
[113] Samuel M. Katz, *Relentless Pursuit: The DSS and the Manhunt for the Al-Qaeda Terrorists,* (New York: Forge, 2002), 155-197.
[114] Ibid.

agents."[115] This was reportedly done "because of the potential impact on Yousef's prosecution," a claim with no discernible legal grounding.[116] And as the DOJ and the FBI imposed self-serving and risk-adverse interpretations of the law, elevating the FBI's extraterritorial involvement in counterterrorism renditions to a legal requirement, they reduced the overall agility of counterterrorism renditions to the U.S., which had been fundamental to the capture of Ramzi Yousef. As counterterrorism renditions to the U.S. became to be considered legally complicated, logistically burdensome, and expensive, the U.S. developed an alternative rendition program.

Phase II: Extraordinary Renditions to Foreign Justice

The CIA Rendition Program

In the summer of 1995, the CIA started its covert Rendition Program.[117] Presidential Directives 39 and 62, issued by President Clinton, gave authority to the CIA to conduct counterterrorism renditions and disruptions.[118] CIA official Michael F. Scheuer testified before Congress that he authored the CIA Rendition Program and then "ran and managed it against Al-Qaeda leaders and other Sunnis Islamists from August,

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[115] Peter Lance, *1000 Years for Revenge: International Terrorism and the FBI,* (New York: HarperCollins, 2003), 291-292.

[116] Ibid.

[117] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

[118] Christopher Kojm, "Transcript of the 9/11 Commission Hearings," *Washington Post,* March 24, 2004, http://www.washingtonpost.com/wp-dyn/articles/A20349-2004Mar24.html, (accessed on June 16, 2009).

1995, until June 1999."[119] For the first six years of this program, the CIA would arrange for the apprehension and transfer of a terrorist to a foreign country "which had an outstanding legal process for him."[120] According to Scheuer's testimony, the CIA Rendition program had initially only the following two goals:

1. *Take men off the street who were planning or had been involved in attacks on U.S. and its allies.*
2. *Seize hard-copy of electronic documents in their possession when arrested; Americans were never expected to read them.*[121]

Scheuer also declared that "interrogation was never a goal under President Clinton." [122] As the U.S. would render suspects to countries suspected of committing systematic human rights abuses, the CIA would "get each receiving country to guarantee that it would treat a person according to its own laws," according to Scheuer.[123] The fact that, always according to Scheuer, such diplomatic assurances guaranteeing that a suspect would not be tortured were not, in reality, "worth a bucket of warm spit," did not appear to be an impediment to the CIA extraordinary rendition program.[124]

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[119] Christopher Kojm, "Transcript of the 9/11 Commission Hearings," *Washington Post,* March 24, 2004, http://www.washingtonpost.com/wp-dyn/articles/A20349-2004Mar24.html, (accessed on June 16, 2009).

[120] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

[121] Ibid.

[122] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

[123] Ibid.

[124] Ibid.

Renditions to U.S. Justice vs. Extraordinary Renditions

If the goals of extraordinary renditions, as delineated above, were to capture Al Qaeda operatives, in order to take them "off the street," and to seize their "pocket litter," could not these same goals be achieved by the existing practice of ordinary renditions to U.S. justice? According to Scheuer, returning "those that were seized to the United States" would have been "absolutely" the preferred option to achieve these same goals, if nothing else to avoid the foreseeable public criticism of the CIA.[125] However, according to the author of the CIA's Rendition Program, President Clinton's administration "made it clear that they did not want to bring those captured to the U.S. and hold them in U.S. custody." Although the rationale for this strategic approach remains unclear, it appears to be based, at least in part, on the perception that U.S. legal requirements were too inflexible and inadequate for prosecuting some of the terrorists captured in foreign environments. Scheuer appears to share this view of the American legal requirements, according to the following quotes from an interview:

> *And you know from the way American law works, when someone is arrested, the FBI officer involved has to be able to testify in court that he was there when it happened, and the man was not abused; the man was not roughed up; the man was not deprived or tortured or anything like that. So it very seldom happens that that can be done in a Third World country.*
>
> *In addition, some of the most important information we get from people who are captured comes in either hardcopy documents or documents on a laptop or a Palm Pilot or a floppy disk or a CD-ROM. Again, for American courts, the FBI officer has to swear that he was there when that information was picked up, and he had, if you will, rode herd on it over the whole process. It was never tampered with; it was never changed; it was never added to or subtracted from.*

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[125] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

> *Both of those almost always are a non-starter in the Third World. The Kuwaiti police or the Kuwaiti intelligence service are not going to let the FBI knock the door in and go in and make sure the chain of custody is correct. So because that's so impossible overseas, the FBI M.O. is ... seldom, I would say, applicable. And that devolves the issue to the Intelligence Service: How do you take care of these people? How do you get these people off the street?*
>
> *And then we move into an area where the CIA is the lead agency. And you have to, a lot of times, improvise ways of trying to find people you can put away. ...*[126]

As reviewed in the preceding chapter covering applicable U.S. laws, there is no legal requirement to have any U.S. law enforcement officer present during the initial apprehension and transfer of a suspect to the U.S., although this has been understandably the preferred option for the FBI and the DOJ. Moreover, even admitting that American evidentiary procedures cannot allow for more latitude than suggested by Scheuer's quote, the seized "pocket litter" could still be exploited for intelligence purposes, if not for prosecution. In this scenario, the prosecution of such case would need to rest on evidence, other than the one obtained incident to the apprehension of the suspect, in order to convince a jury of a suspect's guilt "beyond a reasonable doubt." While building such a legal case might be arduous, it is not forbidding. Indeed, as ordinary renditions to the U.S. continued throughout the years, convictions were obtained in these cases where international terrorists had been taken "off the streets" and rendered to the U.S. The following chart, published by the U.S. Department of State, provides a partial list of international terrorists that were transferred to the U.S. for trial between 1993 and 1999 (Note: Ramzi Yousef is erroneously listed as an extradition, instead of a rendition):

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[126] Michael Scheuer, "The Torture Question: Interview with Michael Scheuer," *PBS Frontline,* July 21, 2005, http://www.pbs.org/wgbh/pages/frontline/torture/interviews/scheuer.html, (accessed on June 16, 2009).

Figure 3-1: Extraditions and Renditions of Terrorists to the U.S. (1993-1999).[127]

Date	Name	Extradition or Rendition	From
March 1993	Mahmoud Abu Halima (February 1993 World Trade Center bombing)	Extradition	*
July 1993	Mohammed Ali Rezaq (November 1985 hijacking of Egyptair 648)	Rendition	Nigeria
February 1995	Ramzi Ahmed Yousef (January 1995 Far East bomb plot, February 1993 World Trade Center bombing)	Extradition	Pakistan
April 1995	Abdul Hakim Murad (January 1995 Far East bomb plot)	Rendition	Philippines
August 1995	Eyad Mahmoud Ismail Najim (February 1993 World Trade Center bombing)	Extradition	Jordan
December 1995	Wali Khan Amin Shah (January 1995 Far East bomb plot)	Rendition	*
September 1996	Tsutomu Shirosaki (May 1986 attack on US Embassy, Jakarta)	Rendition	*
June 1997	Mir Aimal Kansi (January 1993 shooting outside CIA headquarters)	Rendition	*
June 1998	Mohammed Rashid (August 1982 Pan Am bombing)	Rendition	*
August 1998	Mohamed Rashed Daoud Al-Owhali (August 1998 US Embassy bombing in Kenya)	Rendition	Kenya
August 1998	Mohamed Sadeek Odeh (August 1998 US Embassy bombing in Kenya)	Rendition	Kenya
December 1998	Mamdouh Mahmud Salim (August 1998 East Africa bombings)	Extradition	Germany
October 1999	Khalfan Khamis Mohamed (August 1998 US Embassy bombing in Tanzania)	Rendition	South Africa
* Country not disclosed			

[127] U.S. Department of State, "Appendix E: Extraditions and Renditions of Terrorists to the United States, 1993-1999." Office of the Coordinator for Counterterrorism, April 30, 2001, http://state.gov/s/ct/rls/crt/2000/2466.htm, (accessed on June 17, 2009).

While renditions to the U.S. continued, the CIA developed a robust program of extraordinary renditions—transferring suspects from the country where they were apprehended to another foreign country—as a viable alternative to neutralize international terrorists. Therefore, once it apprehended a terrorist, the U.S. would now have the option of either rendering him to the U.S. or to a foreign country. As stated by the Deputy Executive Director of the *National Commission on Terrorist Attacks Upon the United States* (9/11 Commission), Cristopher Kojm:

> *If a terrorist suspect is outside of the United States, the CIA helps to catch and send him to the United States or a third country. Overseas officials of CIA, the FBI and the State Department may locate the terrorist suspect, perhaps using their own sources. If possible, they seek help from a foreign government.*[128]

Interagency Rivalries

A review of the evolving history of renditions suggests that interagency rivalry—primarily between the FBI and the CIA—might have also played a role in the shaping of alternative rendition programs, one dominated by the FBI and the other by the CIA. Indeed, just as the author of the CIA's Rendition Program believed that a legal requirement dictated that the FBI be present during all aspects of a rendition, it appears that the FBI and the DOJ also exaggerated the FBI's dominant role in renditions to the U.S., adopting an unnecessarily rigid legal interpretation that would marginalize other agencies. Instead of being relegated to "assisting" the FBI in renditions, the CIA

[128] Christopher Kojm, "Transcript of the 9/11 Commission Hearings," *Washington Post,* March 24, 2004, http://www.washingtonpost.com/wp-dyn/articles/A20349-2004Mar24.html, (accessed on June 16, 2009).

developed a covert counterterrorism rendition program that completely bypassed the FBI. Of note, the author of the CIA Rendition's Program, Michael Scheuer, provided the following testimony, before Congress, with regard to his counterpart at the FBI, John O'Neill (who, after retirement, was hired as a security consultant at the World Trade Center, in New York City, and would tragically be killed there in the terrorist attacks of September 11, 2001).

> *Mr. DELAHUNT. And John O'Neill, who was the FBI Chief of Counterterrorism, you had this to say about him: ''Mr. O'Neill was interested only in furthering his career in disguising the rank incompetence of senior FBI leaders.''*
>
> *Mr. SCHEUER. Yes, sir. I think I also said that the only good thing that happened to America on 11 September was that the building fell on him, sir.*[129]

Extraordinary Renditions from 1995 to 2001

On September 13, 1995, the CIA reportedly carried out its first extraordinary rendition under the new program: Abu Talal Al-Qasimi (aka Talaat Fouad Qassem), one of Egypt's most wanted terrorists, was transferred from Croatia to Egypt, where he would later be executed.[130] Before September 2001, the CIA would conduct a total of over 70 extraordinary renditions, according to former CIA Director George Tenet.[131] In 1997, the CIA reportedly established a Rendition Branch, also known as the Rendition Group,

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[129] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

[130] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 142.

[131] George Tenet, "Transcript of the 9/11 Commission Hearings," *Washington Post,* March 24, 2004, http://www.washingtonpost.com/wp-dyn/articles/A20349-2004Mar24.html, (accessed on June 16, 2009).

within the CIA's Counterterrorist Center (CTC).[132] The Rendition Group used non-marked executive jets, operated by a front company, to transfer suspects around the world.[133]

In 1998, between June and August, the CIA conducted one of its biggest pre-9/11 extraordinary rendition operations. According to the accounts of officers of the Albanian National Intelligence Service (the *Shërbimi Informativ Kombëtar* or SHIK), the CIA tracked down a terrorist cell, connected to *Al-Qaeda* and the *Egyptian Islamic Jihad,* that was operating in Albania and was plotting to attack the U.S. Embassy,[134] Four terrorists were arrested—one other was killed—by Albanian authorities, working in "total cooperation" with the CIA, while two terrorists escaped and another suspect was tracked down in Sofia and arrested by Bulgarian authorities.[135] After being questioned, the five Egyptian terrorists were rendered, by the CIA, to Egypt.[136] The five were convicted and sentenced by an Egyptian court, and two of them (already tried and convicted, *in absentia*, before being rendered) would then be executed.[137] The five rendered terrorists—Ahmed Saleh, Mohamed Hassan Tita, Shawki Attiya, Ahmed al-Naggar, and Essam Abdel-Tawwab—would allege that they were severely tortured by the Egyptians, including being given electric shocks to the genitals.[138] Although an unquestionable tactical success, the extraordinary rendition of the five—and the allegation of torture that followed—would also be exploited by violent extremists to incense their audiences. On

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[132] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 143.
[133] Ibid, 142.
[134] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 143.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.

August 4, 2008, *Al Qaeda* and the *Egyptian Islamic Jihad* issued a statement, under the banner of *The International Islamic Front for Jihad*, referring to the "handing over of three of our brothers from some Eastern European countries [to Egypt]," and warning:

> *We are interested in telling the Americans, in brief, that their message has been received, and a reply is currently being written. We hope they read it well, as, God willing, we will write it in the language they understand.*[139]-[140]

Three days later, on August 7, 1998, Al-Qaeda attacked the U.S. Embassies in Kenya and Tanzania, killing 257 people and injuring over 5,000. Although the terrorist attacks had been planned since at least 1993, some scholars noted that "it was telling that *Al Qaeda* made a point of viewing the violent kidnappings in Tirana into the greater casual narrative of events justifying their east Africa attacks." [141]-[142] After the Embassy bombing, the U.S. continued to execute extraordinary renditions to foreign countries. As stated by then Director of Central Intelligence (DCI) George Tenet, in his testimony, on March 21, 2000, before a Senate committee:

> *Since July 1998, working with foreign governments worldwide, we have helped to render more than two dozen terrorists to justice. More than half were associates of Usama Bin Ladin's Al-Qa'ida organization. These renditions have shattered terrorist cells and networks, thwarted terrorist plans, and in some cases even prevented attacks from occurring*[143].

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[139] Stephen Grey, *Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 143.

[140] Christopher Deliso, *The Coming Balkan Caliphate: The Threat of Radical Islam to Europe and the West*, Westport: Praeger Security International), 40.

[141] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (New York: W.W. Norton & Company, 2004), 68-70.

[142] Christopher Deliso, *The Coming Balkan Caliphate: The Threat of Radical Islam to Europe and the West*, Westport: Praeger Security International), 40.

[143] George Tenet, *Statement by Director of Central Intelligence George J. Tenet Before the Senate Foreign Relations Committee on The Worldwide Threat in 2000: Global Realities of Our National Security*, Central Intelligence Agency, March 21, 2000, https://www.cia.gov/news-information/speeches-testimony/2000/dci_speech_032100.html, (accessed on June 17, 2009).

Former DCI Tenet referred to the rendering of suspects "to justice," because CIA's extraordinary renditions, prior to 2001, had been limited to rendering a captured terrorist to a foreign country's legal system. [144] According to the author of the CIA's Rendition Program,

> *This was a hard-and-fast rule which greatly restricted CIA's ability to confront al-Qaeda because we could only focus on al-Qaeda leaders who were wanted somewhere for a legal process. As a result, many al-Qaeda fighters we knew of and who were dangerous to America could not be captured."*[145]

This limitation, however, would be removed following the terrorist attacks of September 11, 2001.

Phase III: Extraordinary Renditions to "Disappear"

After the terrorist attacks of September 11, 2001, (9/11), the U.S. almost completely abandoned the practice of ordinary renditions to U.S. Justice. In fact, in the five years after 9/11, the U.S. returned only a handful of suspects to the U.S.[146] Instead, the U.S. made extraordinary renditions to foreign detention centers—whether controlled by the CIA, the military, or a foreign government— its preferred method of handling captured terrorists.

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[144] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

[145] Ibid.

[146] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 145.

Extraordinary Renditions to Extraterritorial U.S. Detention Centers

On September 17, 2001, President Bush reportedly signed a Memorandum of Notification (MON) expanding the CIA's extraordinary rendition program. According to press reports, the MON granted the CIA the authority to directly detain and interrogate rendered suspects, and to carry out extraordinary renditions without prior approval from either the White House, or the Department of Justice, or the Department of State.[147]-[148] In order to directly detain and question rendered terrorists, the U.S. established extraterritorial detention centers—such as the military detention center at Guantanamo Bay and CIA detention centers at undisclosed locations abroad—that could operate outside of the U.S. criminal justice system. The CIA detention program, with secret facilities scattered around the world, overall held "fewer than 100 people," according to General Michael Hayden, former CIA Director.[149] On September 6, 2006, President Bush publicly acknowledged the existence of this secret detention program by stating the following:

> *In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.*[150]

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[147] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 149.

[148] Shaun Waterman, "Ex-CIA Lawyer Calls for Law on Rendition." United Press International, March 9, 2005, http://www.spacewar.com/news/2005/upinews-030905-1410-52.html, (accessed on June 18, 2009).

[149] Michael V. Hayden, "General Hayden's Remarks at the Council on Foreign Relatons" Central Intelligence Agency, September 7, 2007, https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html, (accessed on June 18, 2009).

[150] George W. Bush, "Transcript: President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all, (accessed on June 18, 2009).

In his speech, President Bush also clearly declared that the main goal of extraordinary renditions to U.S. extraterritorial detention centers was to obtain intelligence from the detained terrorists. Indeed, according to President Bush:

> *The CIA program has detained only a limited number of terrorists at any given time. And once we have determined that the terrorists held by the CIA have little or no additional intelligence value, many of them have been returned to their home countries for prosecution or detention by their governments.*[151]

Even for detainees that would not be turned over to foreign authorities, such as Khalid Sheikh Mohammed (KSM) and other high-value detainees directly responsible for the 9/11 attacks, President Bush declared:

> *We have largely completed our questioning of the men, and to start the process for bringing them to trial, we must bring them into the open.*[152]

Therefore, the pre-9/11 main goals of renditions—taking a terrorist "off the street" and obtaining intelligence from items seized during the apprehension—were compounded by the goal of obtaining intelligence, through interrogations, of the detained suspects.

Interrogation Techniques and "Turf Battles"

Why did intelligence-gathering interrogations of detainees need to occur outside of the U.S.? The CIA held that utilizing coercive "enhanced interrogation techniques" would be one of the most effective means to extract information from hardened terrorists. Of note, the FBI did not share this assumption, holding instead that it was "the FBI's long-standing beliefs, based on years of experience, that rapport-based interview

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[151] George W. Bush, "Transcript: President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all, (accessed on June 18, 2009).

[152] Ibid.

techniques are the most effective means of obtaining reliable information through custodial interviews." [153] President Bush, however, endorsed the CIA use of "enhanced interrogations techniques" and, since such techniques would be considered unlawful if used within the U.S. (as covered in the previous chapter), these interrogations needed to occur abroad, giving the CIA the lead role vis-à-vis the FBI.

Once again it appears that a "turf battle" between the FBI and the CIA had shaped the counterterrorism strategy approach to rendered terrorists. A case in point occurred shortly after a suspected top Al Qaeda operative Zayn al-Abidin Muhammad Husayn, better known as Abu Zubaydah, was captured in Pakistan, in March 2002, and rendered to a secret CIA facility.[154] Zubaydah was the first detainee of the CIA "detention and interrogation program," according to General Michael Hayden, the former CIA Director.[155] As regards Zubaydah, President Bush stated:

> *During questioning, he, at first, disclosed what he thought was nominal information and then stopped all cooperation.*[156]

In an attempt to explain the value of the CIA "enhanced interrogation techniques," President Bush added:

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[153] U.S. Department of Justice, "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq," Office of Inspector General, May 2008, http://www.usdoj.gov/oig/special/s0805/final.pdf, (accessed on June 18, 2009), 354.

[154] U.S. Department of Justice, "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq," Office of Inspector General, May 2008, http://www.usdoj.gov/oig/special/s0805/final.pdf, (accessed on June 18, 2009), 67.

[155] Michael V. Hayden, "General Hayden's Remarks at the Council on Foreign Relatons" Central Intelligence Agency, September 7, 2007, https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html, (accessed on June 18, 2009).

[156] George W. Bush, "Transcript: President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all, (accessed on June 18, 2009).

> *As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so, the CIA used an alternative set of procedures.*[157]

After emphasizing that such procedures were considered lawful and safe, President Bush then underscored their effectiveness:

> *Zubaydah was questioned using these procedures, and soon he began to provide information on key Al Qaeda operatives, including information that helped us find and capture more of those responsible for the attacks on September the 11th.*[158]

While President Bush provided an account of the interrogation of Abu Zubaydah that emphasized both the effectiveness and the necessity of CIA-administered "enhanced interrogation techniques," a different account of events would surface, three years later, from one of the FBI interrogators of Zubaydah. On May 13, 2009, FBI Special Agent Ali Soufan provided testimony, before the Senate Judiciary Committee, emphasizing the effectiveness of traditional interrogation approaches (referred to as *Informed Interrogation Approach*). FBI SA Soufan's account of events was corroborated by the official FBI reports submitted to the Committee. Of note, SA Soufan's testimony also provided a glimpse of how CIA-FBI rivalries at headquarters, in contrast to CIA-FBI cooperation on the field, played a role in determining different interrogation approaches.

> *Immediately after Abu Zubaydah was captured, a fellow FBI agent and I were flown to meet him at an undisclosed location. We were both very familiar with Abu Zubaydah and have successfully interrogated al-Qaeda terrorists. We started interrogating him, supported by CIA officials who were stationed at the location, and within the first hour of the interrogation, using the Informed Interrogation Approach, we gained important actionable intelligence.*
> *The information was so important that, as I later learned from open sources, it went to CIA Director George Tennet* [sic] *who was so impressed that he initially ordered us to be congratulated. That was apparently quickly withdrawn as soon*

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[157] George W. Bush, "Transcript: President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all, (accessed on June 18, 2009).

[158] Ibid.

> *as Mr. Tennet* [sic] *was told that it was FBI agents, who were responsible. He then immediately ordered a CIA CTC interrogation team to leave DC and head to the location to take over from us.*[159]

As Zubaydha had been seriously injured during capture, he was moved to a hospital to be given more substantial medical treatment. Then, according to FBI SA Soufan:

> *We were once again very successful and elicited information regarding the role of KSM as the mastermind of the 9/11 attacks, and lots of other information that remains classified. (It is important to remember that before this we had no idea of KSM's role in 9/11 or his importance in the al Qaeda leadership structure.) All this happened before the CTC team arrived.*
>
> *A few days after we started questioning Abu Zubaydah, the CTC interrogation team finally arrived from DC with a contractor who was instructing them on how they should conduct the interrogations, and we were removed. Immediately, on the instructions of the contractor, harsh techniques were introduced, starting with nudity. (The harsher techniques mentioned in the memos were not introduced or even discussed at this point.)*
>
> *The new techniques did not produce results as Abu Zubaydah shut down and stopped talking. At that time nudity and low-level sleep deprivation (between 24 and 48 hours) was being used. After a few days of getting no information, and after repeated inquiries from DC asking why all of sudden no information was being transmitted (when before there had been a steady stream), we again were given control of the interrogation.*
>
> *We then returned to using the Informed Interrogation Approach. Within a few hours, Abu Zubaydah again started talking and gave us important actionable intelligence. This included the details of Jose Padilla, the so-called "dirty bomber." To remind you of how important this information was viewed at the time, the then-Attorney General, John Ashcroft, held a press conference from Moscow to discuss the news. Other important actionable intelligence was also gained that remains classified.*
>
> *After a few days, the contractor attempted to once again try his untested theory and he started to re-implementing* [sic] *the harsh techniques. He moved this time further along the force continuum, introducing loud noise and then temperature manipulation.*

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[159] Ali Soufan, "Testimony before the Senate Judiciary Committee: 'What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration,'" *Subcommittee on Administrative Oversight and the Courts*, May 13, 2009, http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7906, (accessed on June 18, 2009).

> *Throughout this time, my fellow FBI agent and I, along with a top CIA interrogator who was working with us, protested, but we were overruled. I should also note that another colleague, an operational psychologist for the CIA, had left the location because he objected to what was being done.*
>
> *Again, however, the technique wasn't working and Abu Zubaydah wasn't revealing any information, so we were once again brought back in to interrogate him. We found it harder to reengage him this time, because of how the techniques had affected him, but eventually, we succeeded, and he re-engaged again.*
>
> *Once again the contractor insisted on stepping up the notches of his experiment, and this time he requested the authorization to place Abu Zubaydah in a confinement box, as the next stage in the force continuum. While everything I saw to this point were nowhere near the severity later listed in the memos, the evolution of the contractor's theory, along with what I had seen till then, struck me as "borderline torture."*
>
> *As the Department of Justice IG report released last year states, I protested to my superiors in the FBI and refused to be a part of what was happening. The Director of the FBI, Robert Mueller, a man I deeply respect, agreed passing the message that "we don't do that," and I was pulled out.*[160]

In fact, as the CIA continued to employ "enhanced interrogation techniques," the FBI decided that "it would not participate in joint interrogations of detainees with other agencies in which techniques not allowed by the FBI were used."[161] In a mutually beneficial exchange, the CIA would thus keep justifying the use of "enhanced interrogation techniques" as both necessary and highly effective, while the continued use of such techniques, in turn, justified keeping the CIA as lead agency in counterterrorism interrogations.

In 2006, the Supreme Court ruled, in the case of *Hamdan v. Rumsfeld*, that certain protections of the Geneva Conventions applied to Al Qaeda members detained by the

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[160] Ali Soufan, "Testimony before the Senate Judiciary Committee: 'What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration,'" *Subcommittee on Administrative Oversight and the Courts*, May 13, 2009, http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7906, (accessed on June 18, 2009).

[161] U.S. Department of Justice, "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq," Office of Inspector General, May 2008, http://www.usdoj.gov/oig/special/s0805/final.pdf, (accessed on June 18, 2009), 370.

U.S.[162] "The Supreme Court's recent decision has impaired our ability to prosecute terrorists through military commissions and has put in question the future of the CIA program," stated President Bush, on September 6, 2006, somewhat understating the fact that the U.S. Supreme Court had just ruled that holding suspects, incommunicado, at undisclosed CIA detention centers had been unlawful.[163] On the one hand, President Bush showed that, despite his understatement, he clearly understood the significance of the Supreme Court ruling. Indeed, he declared the following:

> *So I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay.*[164]

President Bush added, for further clarification, that "The current transfers mean that there are now no terrorists in the CIA program."[165] On the other hand, however, President Bush appeared to remain open to creative interpretations of U.S. law, possibly carving some future exceptions to the Supreme Court ruling, by stating the following:

> *But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical, and having a CIA program for questioning terrorists will continue to be crucial to getting lifesaving information.*[166]

On January 22, 2009, President Obama issued Executive Order 13491 prohibiting the use of "enhanced interrogation techniques" not consistent with the Army Field

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[162] Congressional Research Service, "Renditions: Constraints Imposed by Laws on Torture," *CRS Report for Congress*, January 22, 2009, http://assets.opencrs.com/rpts/RL32890_20090122.pdf (accessed on June 1, 2009).

[163] George W. Bush, "Transcript: President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all, (accessed on June 18, 2009).

[164] George W. Bush, "Transcript: President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all, (accessed on June 18, 2009).

[165] Ibid.

[166] Ibid.

Manual 2 22.3. [167] The President, in his own words, would "categorically reject the assertion that these are the most effective means of interrogation."[168] In section 4 of the order, the President also ordered the following:

> *(a) CIA Detention. The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.*[169]

Moreover, as discussed in Chapter I of this thesis, the President established a "Special Interagency Task Force on Interrogation and Transfer Policies" to review both interrogation practices/techniques and the practice of extraordinary rendition.[170] In addition to the above, President Obama signed Order 13492 ordering the closure, within a year, of the military detention center at Guantanamo Bay.[171] Under President Bush, out of the approximately 800 individuals overall detained at Guantanamo, 525 had been either released or transferred to foreign countries, and only 3 had been convicted.[172]-[173] As the U.S. reviewed its counterterrorism practices, including renditions, the President would emphasize the need to develop a more sustainable and effective counterterrorism framework.[174]

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[167] Barack Obama, *Executive Order – Ensuring Lawful Interrogations,* The White House, January 22, 2009, http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/ (accessed on May 19, 2009).

[168] Barack Obama, *Remarks by the President on National Security*, The White House, May 21, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (accessed on June 18, 2009).

[169] Barack Obama, *Executive Order – Ensuring Lawful Interrogations,* The White House, January 22, 2009, http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/ (accessed on May 19, 2009).

[170] Ibid.

[171] Barack Obama, *Executive Order – Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities,* Federal Register, January 22, 2009, http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf, (accessed on June 18, 2009).

[172] Ibid.

[173] Barack Obama, *Remarks by the President on National Security*, The White House, May 21, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (accessed on June 18, 2009).

[174] Ibid.

Extraordinary Renditions to Foreign Detention Centers

While, prior to 9/11, extraordinary renditions had been limited to countries with an outstanding legal process against a suspect, post-9/11 the U.S. started transferring suspects to foreign countries for the sole purposes of detention and interrogation—not prosecution.[175] In fact, the U.S. transferred suspects to foreign countries that were willing to detain and interrogate suspects, often acting on a specific request of the U.S.[176] Of note, the U.S. Department of State, in its annual Human Rights Report, identified some of these destination countries as serious human rights abusers. Destination countries reportedly included Egypt, Jordan, Morocco, Pakistan, Saudi Arabia, Uzbekistan, and Syria.[177] The rendered suspects, once released, would often report being subjected to severe physical and psychological abuse while in foreign custody. According to former CIA Director Gen. Michael Hayden, the U.S., as of September 2007, had performed less than one hundred such extraordinary renditions.[178] But while such renditions often resulted in the immediate tactical success of taking a terrorist "off the streets," the intelligence value and long-term benefits were at times less evident. The following case study provides a detailed account of one such rendition.

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[175] Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals,* (New York: Random House, 2008), 101-138.

[176] Ibid.

[177] U.S. House of Representatives, "Directing/Requesting Certain Information Related to Extraordinary Renditions," Committee on International Relations, February 8, 2006, http://commdocs.house.gov/committees/intlrel/hfa26017.000/hfa26017_0f.htm, (accessed on June 19, 2009).

[178] Michael V. Hayden, "General Hayden's Remarks at the Council on Foreign Relatons" Central Intelligence Agency, September 7, 2007, https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html, (accessed on June 18, 2009).

The Italian Job: The Extraordinary Rendition of Abu Omar (2003)

Shortly after the September 2001 decision to expand extraordinary renditions, the CIA Chief of Station assigned to the U.S. Embassy in Rome, Italy, contacted Italian Admiral Gianfranco Battelli, then director of the SISMI (*Servizio per le Informazioni e la Sicurezza Militare*), the Italian military intelligence service.[179] According to Adm. Battelli, the CIA Chief advised him that, given that the U.S. administration had decided to expand the practice of extraordinary renditions, the CIA would like to enlist the help of the SISMI for rendition operations in Italy. [180] Adm. Battelli stated that the Italian government (the Italian Prime Minister's administration) would have to approve for the SISMI to help the CIA on such operations.[181] Adm. Battelli also advised that since he was being replaced at the end of September 2001, he would refer the matter to his replacement, General Niccoló Pollari.[182]

While the CIA Chief in Rome was trying to establish a CIA-SISMI collaboration on extraordinary renditions in Italy, the CIA representative at the U.S. Consulate in Milan had been working with his Italian counterparts on monitoring the activities of an Egyptian citizen believed to be a dangerous *Al Qaeda* operative.[183] Osama Mustafa Hasan Nasr, better known as Abu Omar, was an Imam at the popular radical Mosque in *Via Jenner* in Milan. In the 1980's and early 1990's, Abu Omar had aided the *mujahedeen* movements in Pakistan and Afghanistan, and then moved to Albania to help

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[179] Paolo Biondani, "L'ex Capo del Sismi Teste Contro Pollari," *Corriere Della Sera*, July 22, 2006, http://archiviostorico.corriere.it/2006/luglio/22/capo_del_Sismi_teste_contro_co_9_060722117.shtml (accessed on March 25, 2009).

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

Islamic militant groups in the Bosnian war.[184] He had reportedly strong links to *Al Qaeda*, *Ansar al-Islam*, and the Egyptian terrorist group *Al-Gama'a al-Islamiyya*.[185] In 1997, he was expelled by Albanian authorities for plotting an attack against a visiting Egyptian minister.[186] He moved first to Germany and then to Italy, where he was granted political asylum on grounds that Egypt would persecute him due to his ties to *Al-Gama'a*.[187] Once in Italy, he started giving sermons encouraging attacks on U.S. facilities and helping recruit *jihadists* for operations in Kashmir, Chechnya, Afghanistan, and subsequently for the upcoming conflict in Iraq.[188] The CIA rep in Milan worked closely with the Italian antiterrorism police unit of the DIGOS (*Divisione Investigazioni Generali e Operazioni Speciali)* and his chief Bruno Megale, providing the DIGOS with information and advanced technical equipment to monitor Abu Omar.[189]

During the year following September 11, 2001, the CIA Chief in Rome secured the cooperation of the Italian government and the SISMI's new director, Gen. Pollari, with extraordinary rendition operations in Italy and, specifically, with a covert operation targeting Abu Omar.[190] The CIA Chief in Rome instructed the CIA rep in Milan to proceed with a plan to apprehend and transfer Abu Omar to Egypt.[191] The CIA's Special

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[184] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

[185] Ibid.

[186] Leo Sisti, "Anatomy of a Rendition: In Cleric's Abduction in Italy, the CIA All But Left a Calling Card," *The Center for Public Integrity*, May 24, 2007, http://projects.publicintegrity.org/militaryaid/report.aspx?aid=875, (accessed on March 25, 2009).

[187] Ibid.

[188] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

[189] Ibid.

[190] CNN, "Rome Denies CIA's Man Kidnap claim," *CNN World,* July 4, 2005, http://premium.edition.cnn.com/2005/WORLD/europe/07/04/security.italy.kidnap/index.html (accessed on March 25, 2009).

[191] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

Operations Group (SOG) operatives were dispatched to conduct pre-operational surveillance of Abu Omar.[192] In October 2002, the CIA rep advised the SISMI Milan chief, Col. Stefano D'Ambrosio, of the operation. Col. D'Ambrosio would later assert the following:

> *[The CIA rep in Milan] informed me confidentially of a plan worked out jointly by the CIA and SISMI on a 'rendition' of Abu Omar, where he would be transferred to a place unknown to me. [The CIA rep] wanted to see if I was aware of the plan. He went on to say that the plan had been worked out by [the CIA Chief], in charge of the CIA office in Rome as well as the rest of Italy, under precise orders coming from the United States, from Langley. (...) According to [the CIA rep], a unit of the CIA which was part of a structure called the Special Operation Groups (SOG) had already been in Italy, and specifically in Milan, where they had made a pre-action inspection.*[193]

Both the CIA rep in Milan and Col. D'Ambrosio were critical of the rendition plan as they thought that it would unnecessarily compromise the ongoing DIGOS investigation, which granted good visibility into Abu Omar's activities and that was promising to lead to several arrests.[194] Specifically, Col. D'Ambrosio stated that:

> *[The CIA rep] said that it was foolish to take a person being investigated by DIGOS agents who were doing a very good job. They [DIGOS] could keep on investigating and monitoring the situation in order to identify other associates of Omar's. He couldn't understand why that investigation had to be broken off, spoiling a profitable collaboration with DIGOS. [The CIA rep] felt sorry for having to betray DIGOS' trust since they were not aware of the plan.*[195]

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[192] Leo Sisti, "Anatomy of a Rendition: In Cleric's Abduction in Italy, the CIA All But Left a Calling Card," *The Center for Public Integrity*, May 24, 2007, http://projects.publicintegrity.org/militaryaid/report.aspx?aid=875, (accessed on March 25, 2009).

[193] Ibid.

[194] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

[195] Leo Sisti, "Anatomy of a Rendition: In Cleric's Abduction in Italy, the CIA All But Left a Calling Card," *The Center for Public Integrity*, May 24, 2007, http://projects.publicintegrity.org/militaryaid/report.aspx?aid=875, (accessed on March 25, 2009).

Col. D'Ambrosio reported this exchange, and his own opposition to the rendition, to his SISMI boss Marco Mancini. Shortly thereafter, Col. D'Ambrosio was reassigned outside the SISMI, while his boss Mancini assumed D'Ambrosio duties.[196]

With the SISMI solidly behind the operation, the CIA rep in Milan proceeded to enroll the help of a *Carabiniere* (an Italian military law enforcement officer), Luciano Pironi, assigned to the antiterrorism unit of the *ROS* (*Raggruppamento Operativo Speciale*) of the *Carabinieri* in Milan.[197] Pironi was a regular contact of the CIA rep, and had asked for the rep's help in joining the SISMI. The CIA rep said that he would help Pironi by talking to the SISMI chief in Milan, praising his assistance to the CIA. The rep, in turn, asked Pironi to assist in the CIA-SISMI rendition of Abu Omar. [198]

In February 2003, all was ready for the rendition of Abu Omar. The CIA team had arrived in Italy using different routes, checked-in different hotels, rented several cars, and used cell phones registered in names other than their own.[199] They had surveilled Abu Omar, studied his routine, scouted the routes, and decided the best place and time to apprehend him. They had decided that the street *Via Guerzoni*—on which Abu Omar walked on his way to the Mosque—would be the best place for the "snatch," as a ten-foot-high wall flanking one side of the street would limit onlookers.[200] They also decided that, when operating in the area, they would not use walkie-talkies which "made them

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[196] Tracy Wilkinson, "Italian Probe Broadens Beyond Abduction," *Los Angeles Times*, July 7, 2006, http://articles.latimes.com/2006/jul/07/world/fg-italyspy7, (accessed on March 25, 2009).

[197] Fabrizio Gatti and Peter Gomez, "Abu Omar, la Verità: Gli Italiani con la CIA," *L'Espresso*, http://espresso.repubblica.it/dettaglio-archivio/1522775&m2s=null (accessed on March 25, 2009).

[198] Ibid.

[199] Tribunale di Milano, "Arrest Warrant," Sezione Giudice per le Indagini Preliminari, September 27, 2005, http://www.statewatch.org/cia/documents/milan-tribunal-3-us-citizens-sought.pdf (accessed on March 25, 2009.

[200] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

look too much like spies," and opted to use cell phones instead.[201] After postponing the snatch on several occasions, often due to the presence of witnesses on *Via Guerzoni,* the operation was scheduled for February 17, 2003.

On February 17, 2003, Abu Omar exited his apartment to walk to the Mosque in *Via Jenner*. A few minutes before noon, he was walking on *Via Guerzoni* when he was approached by *Carabiniere* Luciano Pironi. Dressed in plainclothes, Pironi flashed his badge and asked Abu Omar for identification papers. Abu Omar gave Pironi his papers and, as Pironi got on his cell phone to make a call, a van suddenly appeared behind Abu Omar. Two men jumped out, sprayed Abu Omar with an incapacitating agent, and threw him in the back of the windowless van. Pironi jumped in a different car and disappeared from the scene. [202] The van, followed closely by a sedan and by a second van in the distance, drove approximately 5 hours to the NATO airbase of Aviano, home of the USAF 31st Fighter Wing.[203] Along the route, some members of the group that participated in the apprehension switched with members of a second group.[204] The van was given expedited access to Aviano airbase and at 1820 hours Abu Omar was on a "Spar 92" flight, plane LJ35, on the way to Ramstein, Germany. [205] Once in Germany, Abu Omar was transferred on a Gulfstream Executive Jet, tail number N85VM, bound for Cairo.[206]

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[201] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

[202] Ibid.

[203] Tribunale di Milano, "Arrest Warrant," *Sezione Giudice per le Indagini Preliminari*, September 27, 2005, http://www.statewatch.org/cia/documents/milan-tribunal-3-us-citizens-sought.pdf (accessed on March 25, 2009).

[203] Ibid.

[203] Ibid.

[204] Ibid.

[205] Ibid.

[206] Ibid.

Following the operation, members of the CIA team dispersed in different directions, with some of them driving their rental cars outside of Italy. Meanwhile, as Abu Omar was being "rendered," the CIA rep in Milan was having lunch with his DIGOS contact, Bruno Megale, who would not be made aware of the rendition operation.[207] This meeting allowed the CIA rep not only with a perfect "alibi," but also with an opportunity to monitor a possible DIGOS reaction during the operation. The CIA rep knew that the DIGOS would not be following Abu Omar that specific day, but he could not be sure that they would not accidentally "stumble" on the operation. They didn't. Furthermore, in order to point the DIGOS in the wrong direction, on March 3, 2003, the CIA in Rome passed a memo to the Italian police indicating that they had information suggesting that Abu Omar may have traveled to the Balkans.[208] The memo provided a plausible explanation, from an authoritative source, to any DIGOS officers wondering what had happened to Abu Omar.

According to press leaks attributed to a retired CIA officer, "after we grabbed Omar, senior [CIA] management went around the seventh floor of Langley bragging about this op…"[209] The "extraordinary rendition" of Abu Omar appeared to be an operational success. Within less than four years, however, it would be considered "one of the most embarrassing episodes in [the CIA's] post-Sept. 11 war on terror."[210]

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[207] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

[208] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 195.

[209] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

[210] John Crewdson and Alessandra Maggiorani, "CIA Chiefs Reportedly Split Over Cleric Plot," *Chicago Tribune,* January 8, 2007, http://www.chicagotribune.com/news/nationworld/chi-0701080198jan08,0,5630268.story?page=1 (accessed on March 25, 2009).

The Aftermath of Abu Omar's Extraordinary Rendition

Abu Omar's wife, Nabila, did not know what had happened to her husband. Three days after his disappearing, she went to the police station to ask whether the police had arrested him.[211] That same day, an Italian lawyer representing the Islamic Community, asked that same question to the DIGOS. The police soon identified an Egyptian woman, Merfat Rezk, who had witnessed the abduction of Abu Omar as she walked on the street with her two young children. She did not reveal all she had witnessed to the police and, fearful of being the only witness of a mysterious kidnapping, she fled to Egypt soon after being questioned by police.[212] With no real evidence of a kidnapping, no suspects, and the CIA memo suggesting that Abu Omar had left for the Balkans, investigators "almost disregarded the matter."[213]

On April 20, 2004, everything changed. A DIGOS wiretap intercepted a conversation between Abu Omar in Egypt and his wife Nabila in Milan. It was the first time they talked since his disappearance. He tried to reassure her that he was well, despite a long incarceration in Egypt, and then he added, "Take it easy, there are no problems for me, there won't be a second kidnapping…there won't, there won't, you understand?"[214] The DIGOS and experienced Italian investigative prosecutor Armando Spataro (in Italy, investigative prosecutors have broad authorities in leading criminal investigations) started looking into the case of the Abu Omar disappearance. They intercepted other calls from Abu Omar and re-interviewed key witnesses. Meanwhile, the Egyptians learned that Abu

[211] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 194.
[212] Ibid.
[213] Ibid.
[214] Ibid, 192.

Omar was having potentially damaging phone conversations and re-arrested him.[215] But it was too late to stop the kidnapping criminal investigation that would expose the entire operation.

Spataro and the DIGOS obtained cell phone records from all cell phones used in *Via Guerzoni* the day Abu Omar disappeared. The CIA's SOG decision to use cell phones instead of radios turned out to be a crucial mistake. The DIGOS identified a set of cell phone cards that were in contact with one another around the "crime scene," with a total of "62 calls of very short length, and reaching their highpoint at the moment of Abu Omar's disappearance." [216] They then expanded the search to other phone numbers contacted by those phones, and identified 59 different phones used, some of them traveling from Milan to Aviano airbase.[217] After that, they tracked the phone users back to their hotels and cross-checked cell phone locations with hotels, car rentals, and highway toll-records, revealing a paper trail of passports, driver's licenses, credit cards, and frequent flyers cards.[218] The CIA/SOG performance had been sloppy, not able to withstand the scrutiny of an investigation. Members of the team had kept their cell phones turned on during the entire time in Italy, making their movements easy to track. They had used their cells to call the CIA rep in Milan, a USAF security official at Aviano airbase, numbers in Virginia, airline companies, and each other, leaving an enormous footprint.[219] Moreover, they had registered several phone numbers under the same "front"

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[215] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 194-196.

[216] Tribunale di Milano, "Arrest Warrant," *Sezione Giudice per le Indagini Preliminari*, September 27, 2005, http://www.statewatch.org/cia/documents/milan-tribunal-3-us-citizens-sought.pdf (accessed on March 25, 2009.

[217] Ibid.

[218] Ibid.

[219] Ibid.

name, and activated virtually all phones a few months before the operation while disconnecting them within days after the abduction, allowing investigators to easily identify a pattern followed by "suspicious" cell phones.[220] Several team members had also used the same "home address" at hotel check-ins, and had credit cards numbers that, when compared, showed that cards had been issued in short sequential order.[221] Of possible concern to U.S. taxpayers, the team members had stayed at the most exclusive and expensive hotels, some costing in excess of $500 per night, and had spent $144,984 on accommodations.[222] Two individuals alone had spent $18,000 during their three weeks at the Milan Savoy Hotel. [223] Once all the information was analyzed, Spataro and the DIGOS identified the biographical data of 25 CIA operatives, including the CIA's rep in Milan and the Chief in Rome, who were connected to the operation. They were all indicted in Italy. So was the head of security at Aviano airbase, a USAF officer. Italian arrest warrants were issued for all 26 Americans.

Most of the CIA operatives had long departed Italy, but the CIA rep in Milan had since retired and resided with his wife in Penango, Italy. He was outside of Italy when the warrants were issued, and could no longer enter Italy—and Europe, for that matter—without being arrested. His house was searched by the DIGOS, headed by his old contact Bruno Megale. As soon as the search was over, his wife called him in Honduras using a phone line that the DIGOS was wiretapping:

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[220] Tribunale di Milano, "Arrest Warrant," *Sezione Giudice per le Indagini Preliminari*, September 27, 2005, http://www.statewatch.org/cia/documents/milan-tribunal-3-us-citizens-sought.pdf (accessed on March 25, 2009.

[221] Ibid

[222] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), 209.

[223] Ibid

> *"Hear me out and don't say anything," she began, according to a transcript of the call. "They came to the house today, the Milan police, and they seized stuff. They looked everywhere, outside, inside, and they took off with everything they found, your PC and the hard drives in your office."*
>
> *"They took all your documents and floppy disks. They showed me the judge's warrant. Megale was also there and others whom I'd never seen, but they knew you. It's bound to become public news tomorrow in the press."*
>
> *"And they found nothing?" [The CIA rep] asked.*
>
> *"What are they supposed to find if there's nothing to find?" his wife shot back.*[224]

What the DIGOS found, however, was damning: a surveillance photo of Abu Omar in the same spot where he would later be abducted, internet maps detailing the route between *Via Guerzoni* and Aviano airbase, an e-mail from a former colleague advising him to flee Italy, and travel reservations for a flight to Egypt, via Zurich, a few days after the abduction of Abu Omar.[225]

Figure 3.2: Surveillance photo of Abu Omar [226]

[224] Craig Whitlock, "CIA Ruse Is Said to Have Damaged Probe in Milan," *Washington Post*, December 6, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400885.html (accessed on March 25, 2009).

[225] Tribunale di Milano, "Arrest Warrant," *Sezione Giudice per le Indagini Preliminari*, September 27, 2005, http://www.statewatch.org/cia/documents/milan-tribunal-3-us-citizens-sought.pdf (accessed on March 25, 2009.

[226] Craig Whitlock, "CIA Ruse Is Said to Have Damaged Probe in Milan," *Washington Post*, December 6, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400885.html (accessed on March 25, 2009).

The Italian Government denied any involvement in the kidnapping of Abu Omar. In July 2005, the Italian Prime Minister summoned the U.S. Ambassador.[227] The U.S. Government released a press release pledging to respect Italian sovereignty.[228] The SISMI denied any knowledge or involvement in the "illegal" operation. However, a year later, the role of SISMI began to emerge. The *Carabiniere* Luciano Pironi, who had participated in the abduction, cooperated with investigators.[229] The DIGOS then intercepted a phone call between SISMI's Marco Mancini (who had been in charge of SISMI in Milan after getting rid of Stefano D'Ambrosio) and his former boss, Gustavo Pignero, that revealed their supporting role in the abduction of Abu Omar.[230] Both were arrested by the DIGOS and a total of seven SISMI officers, including the SISMI Director, were indicted.[231]

The Italian government never forwarded a request of extradition for the 26 indicted Americans. And, in February 2007, the U.S. Department of State's legal adviser stated that, "…if we got an extradition request, we would not extradite U.S. officials to Italy."[232] As of June 2009, the Italian trial was proceeding with the Americans tried *in absentia*, although on March 11, 2009, the Italian Constitutional Court had determined

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[227] CNN, "Rome Denies CIA's Man Kidnap claim," *CNN World,* July 4, 2005, http://premium.edition.cnn.com/2005/WORLD/europe/07/04/security.italy.kidnap/index.html (accessed on March 25, 2009).

[228] Ibid.

[229] Fabrizio Gatti and Peter Gomez, "Abu Omar, la Verità: Gli Italiani con la CIA," *L'Espresso*, http://espresso.repubblica.it/dettaglio-archivio/1522775&m2s=null (accessed on March 25, 2009).

[230] Stephen Grey and Elisabetta Povoledo, "Twist and Turns of 'Rendition' Scandal Rivet Italy," *International Herald Tribune*, July 11, 2006, http://www.iht.com/articles/2006/07/09/news/italy.php (accessed on March 25, 2009).

[231] Sebastian Rotella and Maria De Cristofaro, "Italy's High Court Rules Against Prosecutor's in CIA's 'Rendition' Case," *Los Angeles Times*, March 13, 2009, http://www.latimes.com/news/nationworld/world/la-fg-italy-cia13-2009mar13,0,5248749.story, (accessed on March 25, 2009).

[232] Leo Sisti, "Anatomy of a Rendition: In Cleric's Abduction in Italy, the CIA All But Left a Calling Card," *The Center for Public Integrity*, May 24, 2007, http://projects.publicintegrity.org/militaryaid/report.aspx?aid=875, (accessed on March 25, 2009).

that much of the evidence could not be used in the trial because it would represent a breach of the state secrecy laws.[233]

Abu Omar was released by the Egyptian Government in 2007. He provided a detailed version of his abduction to news media, along with allegations that he was severely tortured by Egyptian authorities.[234] The *Chicago Tribune* published Abu Omar's full account of events, under the title, "This is how they kidnapped me from Italy."[235] Indicted in Italy on terrorism-related charges, he remained in Egypt.[236] Meanwhile, U.S. Government lawyers advised the indicted U.S. officials not to travel outside of the U.S.[237] In 2007, the former CIA rep in Milan, who had since retired, told reporters of his frustrations over the personal aftermath of the operation, stating that, after being indicted in Italy, he lost his house and valuables in Italy, his wife of thirty-years divorced him, and at the CIA, "No one's called me for support. No one has helped."[238] In fact, the CIA reportedly offered no legal help against the Italian charges, preferring instead not to acknowledge its alleged role in the operation. In June 2009, another indicted U.S. official

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[233] Sebastian Rotella and Maria De Cristofaro, "Italy's High Court Rules Against Prosecutor's in CIA's 'Rendition' Case," *Los Angeles Times*, March 13, 2009, http://www.latimes.com/news/nationworld/world/la-fg-italy-cia13-2009mar13,0,5248749.story, (accessed on March 25, 2009).

[234] Abu Omar, "This is How They Kidnapped Me From Italy," *Chicago Tribune*, http://www.chicagotribune.com/news/nationworld/chi-cialetter-story,0,1548045.story?page=1, (accessed on March 25, 2009).

[235] Ibid.

[236] Phil Stewart, "Italy High Court to Rule on CIA Kidnap Case," *Reuters*, March 10, 2009, http://www.reuters.com/article/worldNews/idUSTRE5295HO20090310, (accessed on March 25, 2009).

[237] Jeff Stein, "Woman Charged in Italy Rendition Says U.S. 'Abandoned' Her," *CQ Politics*, May 15, 2009, http://blogs.cqpolitics.com/spytalk/2009/05/desousa.html, (accessed on June 19, 2009).

[238] Matthew Cole, "BlowBack," *GQ Magazine,* March 2007, http://www.matthewacole.com/pdfs/Blowback-GQ.pdf (accessed on March 25, 2009).

sued the U.S. Department of State, claiming that she was entitled to "diplomatic immunity, legal counsel in Italy, and the payment of bills associated with the trial."[239]

In December 2005, it was reported that then-CIA director Porter Goss, "horrified at the sloppiness of the Milan rendition, has ordered a top-down review of the agency's tradecraft."[240] Indeed, this covert operation highlighted some of CIA's shortcomings in conducting a rendition operation that involved the actual apprehension of a suspect in a foreign sovereign country. It also appears that the CIA severely miscalculated the political dynamics between the Italian Prime Minister's administration, the intelligence services, and the Italian investigative and judicial authorities, and the ability of the former two entities to control the latter two. Moreover, the CIA clearly overestimated its own ability to conduct an operation that could elude investigative authorities. As the operation crumbled under close scrutiny, the CIA appeared to have been sloppy, if not incompetent, in the execution of an unnecessary operation. Finally, it appears that the CIA neglected the ability of Abu Omar to communicate with his family, and the international news media, in a relatively short time after his apprehension. A dangerous terrorist was thus given a platform and an opportunity to win sympathy on the world stage, at the expense of the U.S. Government.

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[239] David Wallechinsky, Jacquelyn Lickness, "Accused CIA Agent Sues for Diplomatic Immunity," *AllGov*, June 2, 2009, http://www.allgov.com/ViewNews/Accused_CIA_Agent_Sues_for_Diplomatic_Immunity_90602, (accessed on June 19, 2009).

[240] John Crewdson, "CIA 'Rendition' Exposed by Cell Phone Use," *Chicago Tribune*, December 27, 2005, https://www.truthout.org/article/cia-rendition-exposed-cell-phone-use, (accessed on March 25, 2009).

Questioning Extraordinary Renditions

If the purpose was to apprehend and interrogate a suspect, why was it necessary for the U.S. to render suspects to the hands of foreign officials? In other words, why could the U.S. not directly hold and interrogate these suspects? On March 7, 2005, the White House press secretary Scott McClellan, was asked this same question:

> *QUESTIONER: Why has the President approved of and expanded the practice of rendition, of the transfer of individuals from CIA custody to third countries for the purposes of interrogation?*
>
> *MR. McCLELLAN: Well, Terry, we're talking about the war on terrorism. And this is a different kind of war. What took place on September 11th changed the world that we live in; it changed the equation, when it came to addressing the threats of the 21st century that we face. We have an obligation to the American people to gather intelligence that will help prevent attacks from happening in the first place.*
>
> *There are people that want to do harm to America. We're talking about enemy combatants who are terrorists that have been involved in plotting and planning to attack the American people. And if they have information that can help us prevent attacks from happening in the first place, we have an obligation to learn more about what they know. That will help us prevent attacks from happening in the first place.*
>
> *But the President has made it very clear that when it comes to the question of torture, that we do not torture, we do not condone torture, he would never authorize the use of torture. We have laws and treaty obligations that we abide by and adhere to. This is -- the United States is a nation of laws. We also have an obligation not to render people to countries if we believe they would be tortured.*
>
> *And so Judge Gonzales, during his testimony, provided information, talking about how we get assurances from countries to make sure that they abide by our values when it comes to the question of torture. But this is a different kind of war, and it requires us to gather intelligence in order to protect the American people.*
>
> *QUESTIONER: Well, one of the countries that receives a lot of these individuals is Uzbekistan. What is it that the Uzbekis can do in interrogations that the United States of America can't do?*

MR. McCLELLAN: Well, first of all, if you're asking me to talk about specific intelligence matters, you know that I'm not going to do that. But --

QUESTIONER: In general --

MR. McCLELLAN: Our understanding --

QUESTIONER: what is it that this country, the most advanced in national security matters of any country in the world, cannot accomplish in interrogations-

MR. McCLELLAN: Again --

QUESTIONER:-- that the nation of Uzbekistan can?

MR. McCLELLAN: Again, you're asking me to get into specific matters, and I'm not going to do that --

QUESTIONER: Generally, in general --

MR. McCLELLAN: -- because of the classified nature of our intelligence. But it is important that we gather intelligence to protect the American people. We are working closely in partnership with many countries to win the war on terrorism and to prevent attacks from happening in the first place. The President will talk about some of those efforts that are being undertaken by countries around the world to win the war on terrorism tomorrow. And he looks forward to doing that.

But in terms of the whole question of renditions, I think our views are very clear in terms of --

QUESTIONER: But I'm wondering about the rationale for rendition. Why does the President approve of it? Why has he expanded it? And what is it that countries like Uzbekistan, in general, offer the U.S.?

MR. McCLELLAN: Well, first of all, in terms of the whole issue of renditions, that's relating to classified intelligence matters, which I'm not going to --

QUESTIONER: You can't even tell me in general why this practice occurs?

MR. McCLELLAN: Which I'm not going to get into. No, I just told you in general that we have an obligation to the American people to gather intelligence that will help prevent attacks from happening in the first place. The war on terrorism is a different kind of war. And we have sworn enemies of the United States who continue to seek to do us harm. And we are talking about enemy combatants, known terrorists, who have been involved in plotting and planning to attack the

> *American people in the past, and who might have information that can help us prevent attacks from happening in the future.*
>
> *Now, as we go about gathering intelligence, we have values and laws that we believe are important, that we believe need to be adhered to. And that is our commitment. The President has made it very clear to our government that we must abide by our laws and treaty obligations. And he's made it very clear that we do not torture.*[241]

The allegations of torture, combined with the perceived absence of a clear rationale explaining why, in order to obtain intelligence, the U.S. administration believed it was necessary to transfer certain suspects to foreign interrogators (instead of holding them in U.S. custody), fomented increasing criticism—in both domestic and international media—questioning the strategic value, and morality, of the rendition program. These questions are addressed in the next chapter.

[241] Scott McClellan, "Press Briefing by Scott McClellan," The White House, March 7, 2005, http://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050307-2.html (accessed on June 19, 2009).

CHAPTER 4

STRATEGY AND ETHICS

Evaluating the Strategic Effectiveness of Renditions

In order to evaluate the overall strategic effectiveness of U.S. counterterrorism renditions, it is necessary to analyze both the program's intelligence value and its impact on U.S. global relationships. However, since the U.S. has carried out significantly different types of counterterrorism renditions throughout the years, as covered in the previous chapter, it is important to evaluate renditions not as a uniformed program. Indeed, it is useful first to dissect the different elements of a rendition operation and then to assess the individual value of separate components. This approach, in addition to producing a more precise analysis, allows for the identification of which elements of the rendition program have been effective, and which ones could otherwise be modified for greater strategic effectiveness.

The Intelligence Value of the Four Elements of Renditions

With regard to a counterterrorism operation, the four basic elements of a rendition are (1) capture, (2) international transfer, (3) detention, and (4) interrogation. The potential intelligence value of each element is briefly described below.

1. **Capture:** Once a dangerous terrorist is identified and located, the U.S. might have the option, depending on circumstances, to either monitor, capture, or kill him. The immediate value of a capture is the neutralization of a suspect—taking him "off the streets"—while maintaining the option of obtaining information from the captured suspect. Additionally, the suspect's possessions, often seized during a capture, can be of considerable intelligence value.
2. **International Transfer:** The intelligence value of transferring a captured terrorist—transporting him to a country (including the U.S.) other than the one in which he was apprehended—is to allow for the continued detention and/or interrogation of the suspect when this would not be possible or desirable, for either legal or diplomatic reasons, in the country where he was captured. The U.S. might opt for the international transfer of a suspect due to either necessity (the foreign country has no will or legal system to hold the suspect) or choice (the U.S. wants to ensure interrogation by either U.S. officials or by certain foreign partners that the U.S. deems effective interrogators).
3. **Detention:** Taking terrorists "off the streets" implies a mechanism to keep them "off the streets." While a brief detention may have some immediate tactical benefits of disruption, the ability to keep a terrorist detained "for life," or until he

no longer poses a threat, is of the highest value to counterterrorism efforts. Thus, the long-term detention of a suspect is generally the preferred outcome of a counterterrorism rendition.

4. **Interrogation:** The intelligence value of an interrogation rests on the quantity and quality of information obtained from an interrogated suspect. Among other things, a terrorist might reveal actionable information of a specific threat, group, individual, or activity of interest to the U.S.

Alternatives within the Four Elements of Renditions

There are several alternative options that further characterize the above-referenced four basic elements of a rendition. A few fundamental alternatives, along with a short description of the practical (as opposed to legal and ethical concerns, addressed separately in this thesis) pros and cons for each alternative, are listed below.

(1) Capture

An extraterritorial capture of a suspect may be done either in cooperation with foreign partners or unilaterally.

Cooperative Capture: At the request of the U.S., foreign partners may cooperate to execute a capture within their own countries. The benefits of having foreign partners involved is that they generally have the legal authority, expertise, and knowledge necessary to conduct capture operations within their countries' environments. Moreover, their resources act as a force multiplier to U.S. resources. Even in cases when foreign partners may not have a solid legal grounding to detain a suspect within their own countries, they might be willing to use their authority to

"bend the rules" to cooperate with the U.S. In fact, a foreign partner may cooperate with the U.S. by either performing the capture itself—possibly with U.S. assistance and guidance—or by permitting U.S. forces to perform the capture on its territory. The main drawback to a cooperative capture is that the outcome of an American counterterrorism operation is dependent, at least in part, on the will and performance of a foreign entity.

Unilateral Capture: A unilateral rendition occurs when the U.S. captures a suspect in a sovereign foreign country without the cooperation of the foreign authorities, although these foreign authorities have jurisdiction according to the country's law. This might be done overtly (with a significant deployment of forces, similar to the 1989 U.S. invasion of Panama, which led to the "capture" of Manuel Noriega and his rendition to U.S. Justice) or covertly (such as a "kidnapping" that eludes foreign authorities). [242] A unilateral operation may be the only option when the country hosting a terrorist does not cooperate with the U.S., and its main advantage is that that the entire operation is controlled by the U.S. A unilateral capture, however, may be extremely difficult to carry out, and it requires significant resources and expertise. Moreover, a unilateral capture may result, if exposed, in serious diplomatic complications. It should be noted that, despite the fact that renditions are often portrayed as unilateral kidnappings, it is extremely rare for the U.S. to execute a truly unilateral counterterrorist capture outside of war theaters such

[242] Rich Phillips, "Courts Try to Decide What to Do with Manuel Noriega," *CNN*, January 14, 2009, http://www.cnn.com/2009/CRIME/01/14/noriega.prison/index.html, (accessed on June 23, 2009).

as Iraq and Afghanistan. Indeed, on April 17, 2007, the author of the CIA Rendition Program, Michael Scheuer, made the following statements before Congress:

> *To the best of my knowledge, not a single target of rendition has ever been kidnapped by CIA officers. The claims to the contrary by the Swedish Government regarding Mr. Aghiza and his associate and those by the Italian Government regarding Abu Omar are either misstatements or lies by those governments.*[243]

Scheuer then added the following:

> *And I have to say again, no rendered al-Qaeda leader has ever been kidnapped by the United States. They have always first been either arrested or seized by a local security or intelligence service.*[244]

During questioning, Scheuer reemphasized this point by stating, "And again, we never seized anyone," then adding, "most of the al-Qaeda people who have been captured were captured by the action of the Pakistani…"[245] In fact, the U.S. appears to have limited capability to carry out a successful covert kidnapping in a functioning sovereign foreign country. As shown by the Abu Omar case study (covered in the previous chapter), even the CIA seizure of Abu Omar in Italy—conducted with the full support of the Italian intelligence services, the assistance of at least one Italian *Carabiniere* law enforcement officer, and apparently approved at the highest levels of the Italian government—was unable to elude local investigative authorities once it came under scrutiny. And this was in Italy, which is a particularly permissive environment for Americans to operate in without attracting undue attention. Therefore, the capability of the CIA to carry out a truly-unilateral covert

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[243] Michael F. Scheuer, *Statement before the House Committee on Foreign Affairs: Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* House Committee on Foreign Affairs, April 17, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf, (accessed on June 16, 2009).

[244] Ibid.

[245] Ibid.

"kidnapping" in a relatively less-permissive sovereign country, for example, in the Middle East, remains questionable. Indeed, in the 1996 example of Khalid Sheikh Mohammed (covered in Chapter 2), the CIA reportedly declared to have no capability to carry out a covert "snatch" in Qatar, without Qatari assistance.[246] But in cases when a terrorist, wanted by the U.S., resides in a sovereign foreign country, with functioning institutions, which does not wish to cooperate with the U.S., the U.S. would be well-served by having a robust capability to carry out unilateral covert snatches. As an alternative to a unilateral snatch, in cases where foreign cooperation is not an option, the U.S. might also opt to conduct a unilateral "lure," as in the case of Fawaz Younis (covered in the previous chapter), which, while still a complex operation, is significantly easier to carry out when compared to a covert "kidnapping" in a foreign country.

(2) International Transfer

In a rendition, the U.S. transfers a captured suspect outside of the country where he was apprehended. Such a transfer might be conducted either overtly or covertly.

Overt Transfer: An overt transfer occurs when the U.S. does not attempt to conceal its role in the transfer of a captured terrorist, such as when a suspect is rendered back to the U.S. The principal advantage of an overt transfer is that it is easy to carry out, as it requires no complex cover for the planes, purpose of the flight, and flight itinerary. Moreover, an overt transfer, when it comes to the

[246] Richard A. Clarke, *Against All Enemies: Inside America's War on Terror*, (New York: Free Press, 2004), 152-153.

public's attention, appears to be more "legitimate," just as any other operation carried out in the open. As such, it can be more easily sustainable over time. The principal disadvantage of an overt transfer is that it does not allow for the undetected transfer of a suspect to an "undisclosed country."

Covert Transfer: The main advantage for a covert transfer is that it permits to transfer a suspect, in secret, to an "undisclosed location." This is particularly useful if the final destination is a foreign-based, secret, CIA detention center or a detention center located in a foreign country that does not wish to acknowledge its cooperation with the U.S. Cover for planes, flight purposes, and itineraries, however, can be difficult to develop and maintain. It was indeed the "spotting," and subsequent tracking, of reported CIA planes "under cover" that first exposed the CIA's rendition and foreign detention program.[247] Moreover, since most extraordinary renditions involved the cooperation of at least two foreign countries, the "covert transfers" were known to several foreign officials, making the exposure of the program all the more probable. Finally, a covert "transfer" program, once exposed, is likely to generate an enormous amount of public attention.

(3) Detention

Once a suspect has been apprehended and rendered outside of a country, the U.S. must decide how to best ensure for the continued detention of the suspect. There are two basic options with regard to the detention of a rendered suspect: (a) whether the

[247] Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights*, (Hoboken: Melville House Publishing, 2006), 11-17.

suspect will be placed in a U.S. or a foreign detention facility and (b) whether the decision to detain will be reviewed by a judicial body.

U.S. vs. Foreign Detention: The main advantage of having a suspect in a U.S. detention facility, located either inside or outside of the U.S., is that the U.S. maintains complete control over the length of detention and the treatment of the subject. Disadvantages include the costs of maintaining a suspect in detention, and the possibility that the U.S. detention facility, or associated U.S. entities, will be targeted by terrorists in an effort to free captives (possibly endangering the community around the detention facility). Indeed, in one of Al Qaeda's training manuals, called the *Military Studies in the Jihad Against the Tyrants*, one of the declared missions consists of "freeing the brothers who are captured by the enemy."[248] On the other hand, the principal advantage of placing a suspect in a detention center operated by a foreign government is that such a detention is not subject to review under the American legal system. Thus, if the U.S. has insufficient evidence to hold a suspect, a foreign government can provide a viable alternative to detain a suspect of interest to the U.S. The main drawback of a foreign detention is that the U.S. has no control on the treatment that a subject, rendered by the U.S., receives in a foreign jail. Moreover, the actual length of detention is also outside of U.S. control.

Judicial Review: Aside from legal requirements, there are practical benefits to having a judicial body review and approve, often through a trial, the detention of a suspect. The main advantage is that it provides the whole process, and by extension the incarcerating authorities, with the legitimacy needed to justify the continued

[248] Ben Venzke and Aimee Ibrahim, *The Al-Qaeda Threat: An Analytical Guide to Al-Qaeda's Tactics and Targets*, (Alexandria: Tempest Publishing, 2003), 124.

detention of the terrorist. Indeed, while a thirty-year sentence of a convicted terrorist appears justified, even a relatively brief detention of an individual who has been neither charged nor convicted may appear arbitrary and repressive. And as terrorist groups generally attempt to challenge governmental legitimacy, any activity that might help delegitimize U.S. counterterrorism efforts may seriously undermine the overall U.S. counterterrorism strategy.[249] Moreover, judicial review of counterterrorism detentions might help to quickly identify, and overall minimize, cases of mistaken identity and governmental errors, such as in the rendition of Khaled El-Masri, a German citizen whom, in early 2004, the U.S. "rendered" from Macedonia to Afghanistan and detained for several months, before realizing that it was a case of mistaken identity. [250]-[251] The main disadvantage of judicial review is that it might impose constraints on renditions, although this depends on the legal framework used, and that it might reveal intelligence sources and methods to the public, although efforts could be taken to minimize such disclosures. Moreover, while the Executive Branch would need to expend additional time and resources in order to routinely present cases before a judicial body, this might save some of the time and resources spent later to counter lawsuits and appeals for *habeas corpus* that inevitably follow extrajudicial detentions.

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[249] Presidential Task Force, *Rewriting the Narrative: An Integrated Strategy for Counterradicalization*, The Washington Institute for Near East Policy, March 2009, http://www.washingtoninstitute.org/pubPDFs/PTF2-Counterradicalization.pdf, (accessed on June 24, 2009).

[250] Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake," *Washington Post*, December 4, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html, (accessed on June 24, 2009).

[251] Glenn Kessler, "Rice to Admit German's Abduction Was an Error," *Washington Post*, December 7, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/06/AR2005120600083.html, (accessed on June 24, 2009).

(4) Interrogation

There are two key variables with regard to the interrogation of a captured terrorist: whether the interrogation will be conducted by U.S. officials or foreign partners and whether coercive "enhanced interrogation" methods will be used to interrogate the individuals.

U.S. vs. Foreign Interrogators: One of the primary benefits of having foreign interrogators is that they might possess the language skills and/or cultural expertise necessary to effectively question their countrymen. The main drawback of using foreign interrogators is that, unless the interrogation is actively monitored by U.S. officials, they might misreport a subject's statements, either deliberately or unwittingly.

The example of the CIA interrogation of Abu Zubaydah (a topic partially covered in the last chapter) might provide a concrete example of the possible drawbacks of unmonitored foreign interrogations. According to investigative-journalist and author Gerald Posner, Zubaydah did eventually provide the CIA with key information that he had not previously disclosed to FBI agents, but not because of "enhanced interrogation techniques."[252] Instead, the CIA had arranged for two ethnic-Arab U.S. officials to pose as Saudi intelligence officers, in an effort to lead Zubaydah into believing that he had been transferred to Saudi authorities.[253] The CIA believed that Zubaydah would be terrified at the prospect of being tortured by the Saudis and would thus be inclined to provide more information. Zubaydah, however,

[252] Gerald Posner, *Why America Slept: The Failure to Prevent 9/11*, (2003; repr., New York: Ballantine Books, 2009), 202-216.
[253] Ibid.

once informed that he was in Saudi custody, was surprisingly relieved. According to Posner, Zubaydah proceeded with providing the interrogators with the private home and cell phone numbers, from memory, of a senior member of the Saudi ruling royal family, Prince Ahmed bin Salman bin Abdul Aziz.[254] Zubaydah reportedly told his "Saudi" interrogators to call him and advised that "he will tell you what to do." [255] After the "Saudi" interrogators subsequently accused Zubaydah of lying, Zubaydah reportedly provided the phone numbers of two other prominent Saudi royal princes, Prince Sultan bin Faisal bin Turki al-Saud and Prince Fahd bin Turki bin Saud al-Kabir. Zubaydha implicated the three men, along with Pakistani senior military officer Mushaf Ali Mir, (and, to a lesser degree, Saudi Intelligence Chief Prince Turki al-Faisal), with supporting Al-Qaeda.[256] While Posner's account of events has not been officially confirmed, it highlights a plausible scenario: a suspect reveals information that implicates, or is considered embarrassing for, the foreign government conducting the interrogation. In such case, would foreign interrogators accurately report such information to U.S. authorities? In other words, to expand on the Zubaydah example, if Zubaydah had provided the above-referenced information to "real" Saudi interrogators, it would appear unlikely that the Saudis would have reported such allegations to U.S. authorities, thus denying the U.S. of critical intelligence. Of note, according to Saudi official reports, and possibly corroborating Posner's account of events, the three Saudi royals reportedly implicated by Zubaydah all suffered a similar fate, less than four months after the reported "Saudi"

[254] Gerald Posner, *Why America Slept: The Failure to Prevent 9/11*, (2003; repr., New York: Ballantine Books, 2009), 202-216.
[255] Ibid.
[256] Ibid.

interrogation: On July 22, 2002, Prince Ahmed, age 43, died of a heart attack; One day later, Prince Sultan bin Faisal bin Turki al-Saud was reportedly killed in a single-car high-speed accident; A week later, Prince Fahd bin Turki bin Saud al-Kabir, reportedly "died of thirst" while traveling in the desert; And seven months later, the Pakistani Mushaf Ali Mir also died in a suspicious plane crash.[257]

Conversely, one of the major benefits of having American officials conduct interrogations is that it provides the U.S. with the ability to gather information directly from the source, instead of from a third-party, and thus to minimize possible distortions. There are few, if any, disadvantages to using skilled American interrogators, other than there might be language and cultural barriers that might limit their effectiveness. Such barriers, however, could be minimized by recruiting and training U.S. interrogators with the relevant skills set.

"Informed Interrogation Approach" vs. "Enhanced Interrogation Techniques:" The previous chapter covered some aspects of the debate over the effectiveness of "enhanced interrogation techniques" when compared to non-coercive interrogation methods, also labeled as the "Informed Interrogation" approach. While evaluating the effectiveness of these two approaches is beyond the scope of this thesis, the advantages and disadvantages of each, from a purely practical viewpoint (as opposed to legal and ethical), revolve around their effectiveness in eliciting accurate information. But while using non-coercive interrogation techniques has been a time-tested approach used by U.S. authorities to elicit information from suspects in

[257] Editorial, "New Book Says Abu Zubaydah Has Made Startling Revelations About Secret Connections Linking Saudi Arabia, Pakistan, and Osama Bin Laden," *TIME*, August 31, 2003, http://www.time.com/time/nation/article/0,8599,480240,00.html, (accessed on June 24, 2009).

custodial interviews, the use of "enhanced interrogation techniques" appears to have been used based on a relatively untested assumption that such techniques would be most effective, to the notable disagreement of the FBI.[258] Indeed, the reported genesis of the CIA "enhanced interrogation" program suggests that the effectiveness of such techniques was not properly established on empirical data. Instead, the CIA contracted former military psychologists, with no previous experience in either counterterrorism or in conducting actual interrogations, to develop interrogation techniques for suspects.[259] The contracted psychologists, in turn, borrowed from their experience in overseeing the military *Survival, Evasion, Resistance, and Escape* (SERE) training program, a program developed to train U.S. military personnel to cope with coercive-interrogations in the event of being captured by an enemy.[260] In fact, the genesis of the techniques used in SERE training underscored the fact that the "enhanced interrogation techniques" compelled individuals to make statements, but not necessarily accurate statements. Indeed, the SERE program, which started during the Cold War, was an "effort to re-create, and therefore understand, the mistreatment that had led thirty-six captured U.S. airmen to give stunningly false confessions during the Korean War."[261] Nothing in the SERE program suggested that the coercive interrogation techniques utilized actually produced accurate information.[262] While the

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[258] U.S. Department of Justice, "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq," Office of Inspector General, May 2008, http://www.usdoj.gov/oig/special/s0805/final.pdf, (accessed on June 18, 2009), 354.

[259] Matthew Cole, "You're Fired! CIA Axes $1000-A-Day Waterboarding Experts," ABC News, June 16, 2009, http://www.abcnews.go.com/Blotter/Story?id=7847478&page=1, (accessed on June 24, 2009).

[260] Ibid.

[261] Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals,* (New York: Random House, 2008), 139-181.

[262] Ibid.

effectiveness of any "enhanced interrogation technique" in producing accurate information needs to be fully evaluated, it appears that the use of such techniques, absent any conclusive determination with regard to their effectiveness, remains unjustified. Underlying the lack of research on interrogation methods, the *Intelligence Science Board*, a panel reporting to the Director of National Intelligence and advising President Obama's *Special Task Force on Interrogation and Transfer Policies*, reported that, after the attacks of September 11, 2001:

> *Since there had been little or no development of sustained capacity for interrogation practices, training, or research, within intelligence or military communities in the post-Soviet period, many interrogators were forced to "make it up" on the fly. This shortfall in advanced, research-based interrogation methods at a time of intense pressure from operational commanders to produce actionable intelligence from high-value targets may have contributed significantly to the unfortunate cases of abuse that have recently come to light.*[263]

Moreover, former Deputy Attorney General Philip Heymann, a member of the *Intelligence Science Board*, declared that the Board's social science research ruled out all forms of physical and psychological torture as methods for soliciting information.[264] Heymann also added that the *Intelligence Science Board* recommended to the *Special Task Force on Interrogation and Transfer Policies* that the U.S. create an interagency group of expert government interrogators that "could produce what would very likely be the best non-coercive interrogation or interviewing capacity in the world."[265] Heymann then added:

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[263] Intelligence Science Board, *Educing Information – Interrogation: Science and Art*, (Washington: National Defense Intelligence College Press, 2006), xiii.

[264] Spencer Ackerman, "Obama Task Force on Torture Considers CIA-FBI Interrogation Teams," *Washington Independent,* June 24, 2009, http://washingtonindependent.com/48411/obama-task-force-on-torture-considers-cia-fbi-interrogations-teams,(accessed on June 24, 2009).

[265] Ibid.

> *What I mean by 'non-coercive' is in line with what our major allies do — Britain, France, other European nations — and not out of line with what's accepted by western nations. (...) We would not do anything to other people that we would complain about if done to Americans abroad in other circumstances, we wouldn't do something we wouldn't do to an American in the U.S., and we would be pretty well in line with the views of our major allies.*[266]

The Elements of Controversy

Counterterrorism Renditions might be comprised of several different combinations of the above-referenced alternatives. Taking as examples the two case studies covered in the previous chapter, the renditions of Fawaz Younis and Abu Omar, the first can be described, using the above-referenced nomenclature, as being comprised of the following elements: Unilateral Capture/Overt Transfer/U.S. Detention with Judicial Review/and U.S. Non-Coercive Interrogation. On the other hand, the extraordinary rendition of Abu Omar had the following elements: Cooperative Capture/Covert Transfer/Foreign Detention without Judicial Review/and Foreign Coercive Interrogation. All renditions and extraordinary renditions can be broken down in the above-referenced elements. Having already considered the intelligence value of each element, it is useful to focus on the elements of renditions that have caused the most controversy. Indeed, as U.S. rendition practices have been intensely criticized by Human Rights and Civil Liberties groups, as well as other U.S. and international entities, the criticism had focused primarily on the following two elements: (a) Coercive Interrogation Methods (used by either U.S. or foreign interrogators) and the related mistreatment of prisoners, and (b) Detentions with no Judicial Review (U.S. or foreign). While other

[266] Spencer Ackerman, "Obama Task Force on Torture Considers CIA-FBI Interrogation Teams," *Washington Independent,* June 24, 2009, http://washingtonindependent.com/48411/obama-task-force-on-torture-considers-cia-fbi-interrogations-teams,(accessed on June 24, 2009).

elements of renditions have also come under criticism—most notably, the methods of capture, covert transfers, and foreign detention—their criticism is generally tied to their relations to elements (a) and (b). For example, the *American Civil Liberties Union* (ACLU) characterizes renditions as follows:

> *Extraordinary rendition is an illegal practice that was used by the Bush administration as part of the so-called "war on terror." It involves the apprehension of foreign nationals suspected of involvement of terrorism and their subsequent clandestine transfer to detention in secret CIA-run "black site" prisons outside the United States or by foreign intelligence agencies in countries like Jordan, Syria, Egypt or Morocco, where they are held without charge or trial and interrogated without legal restraints. Once detained, these men experience unspeakable horrors – often kept in squalid conditions, many of them face interrogation under torture, including waterboarding, electrocutions, beatings, extreme isolation, and psychological torture.*[267]

The ACLU also adds the following:

> *…the "extraordinary rendition" program violates universal human rights guarantees including the right of everyone to be free from forced disappearance, arbitrary detention and torture.*[268]

Similarly, *Amnesty International* demands that the U.S.:

> *Stop "rendition" and other human rights violations connected to this practice, including enforced disappearance, torture and ill-treatment.*[269]

As suggested by these quotes, the criticism of these groups revolves around (a) the treatment of detainees in custody, including methods used to interrogate such detainees (with references to "torture and ill-treatment," to being "interrogated without legal restraints," and to "face interrogation under torture"), and (b) the absence of judicial

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[267] American Civil Liberties Union, "Safe and Free: Restore Our Constitutional Rights," *ACLU*, http://www.aclu.org/safefree/rendition/index.html, (accessed on June 25, 2009).

[268] American Civil Liberties Union, American Civil Liberties Union, "Safe and Free: Restore Our Constitutional Rights – Extraordinary Rendition – El-Masri v. Tenet," *ACLU,* http://www.aclu.org/safefree/torture/rendition.html, (accessed on June 25, 2009).

[269] Amnesty International, "'Rendition' and Secret Detention: A Global System of Human Rights Violations. Questions and Answers," *Amnesty International*, January 1, 2006, http://www.amnesty.org/en/library/info/POL30/003/2006, (accessed on June 25, 2009).

review (as referenced by "disappearance", "arbitrary detention," and detainees "held without charge or trial"). These same themes have been reproduced and amplified by both national and international media outlets, which in turn influenced the public's perception of the program and caused foreign partners to limit their cooperation with U.S. renditions. In fact, these themes became such an intrinsic part of the criticism and characterization of extraordinary renditions that even cases of deportations resulting in custodial mistreatment and lengthy extrajudicial detention were labeled as extraordinary renditions. For example, although the case of Maher Arar, a Canadian citizen whom the U.S. had transferred to Syria, became one of the most infamous cases of "extraordinary renditions," this was legally not a rendition but a deportation from the U.S. to Arar's birth-country of Syria, albeit in many ways indeed an extraordinary deportation (Arar was flown on a private jet to Jordan, driven to Syria, and then detained for almost a year in Syria). An official Canadian "Commission of Inquiry" would later report the following:

> *...U.S. authorities had relied on information from Canada in removing Mr. Arar to Syria using their questionable practice of extraordinary rendition."*[270]

While it was revealed that the Canadians had provided the U.S. with less-than-accurate information about Arar's ties to extremists, the Canadian Commission also emphasized the following two themes of this "extraordinary rendition" case:

> *While in Syria, Mr. Arar was interrogated, tortured and held in degrading and inhuman conditions.*[271]
>
> *Mr. Arar has never been charged with any offence in Canada, the United States, or Syria.*[272]

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[270] Government of Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, (Ottawa: Publishing and depository Services, Public Works and Government Services Canada, 2006), 42.

[271] Ibid, 9.

Similarly, the United Kingdom's *All Party Parliamentary Group on Extraordinary Renditions* concluded that "Extraordinary Rendition should not be permitted because:"

- *Subjecting people to torture, cruel, inhuman or degrading treatment is morally wrong and cannot be countenanced as an instrument of policy.*
- *Operationally, evidence obtained under such circumstances is likely to be unreliable. Such information cannot be used in court to obtain convictions, therefore the practice is not only undermines the rule of law, it also makes the application of law more difficult.*
- *Politically, the policy of extraordinary rendition is also likely to be counterproductive. The US, and the countries that assist it, are seen to be undermining the values that they are seeking to export. Furthermore, as the UK found when it used unacceptable methods in Northern Ireland in the 1970s, the policy acts as a recruiting sergeant, creating more extremists that it stops.*[273]

Consistently, the themes of harsh interrogations/custodial mistreatment and extrajudicial detention were by far the most controversial elements of extraordinary renditions. The central issue at-hand is not whether such criticism has merit (the criticism is based primarily on legal and moral arguments, covered in separate sections in this thesis), but only to recognize that such criticism (1) can be narrowed down to certain specific elements of the rendition program, and (2) has a negative effect (or is "counterproductive," as concluded by the above-cited UK report) on the overall strategic effectiveness of the program. This is important because it suggests that the U.S. could improve the overall strategic effectiveness of renditions if it replaced the elements that cause the most controversy with alternatives of equal or greater intelligence value.

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[272] Government of Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, (Ottawa: Publishing and depository Services, Public Works and Government Services Canada, 2006), 42.

[273] United Kingdom, House of Commons, "A Measure to Safeguard the Rights of Individuals Subject to Renditions," *All Party Parliamentary Group on Extraordinary Renditions,* September 25, 2007, http://www.extraordinaryrendition.org/index.php/document-library-mainmenu-27/all-other-documents?start=5, (accessed on June 28, 2009).

Specifically, if the U.S. reverted to renditions that included (1) non-coercive methods of interrogations, and (2) a judicial review to validate detentions, then it would achieve the same tactical goals while ensuring a more successful strategic outcome, namely the continued cooperation of foreign partners and the long-term survivability of the U.S. counterterrorism rendition program. This is not to say that groups such as the ACLU and Amnesty International would suddenly endorse renditions, but only that the main thrust behind their criticism of the program would be removed, and their overall criticism would, if not subside, at least reverberate less with domestic audiences and foreign partners.

The Worst-Kept Secret: Covert Transfers

In addition to the above, the element of "Covert Transfer" appears also to have been detrimental to the long-term survivability and overall strategic effectiveness of the rendition program. Indeed, while the concept of covert transfers is not, per se, particularly controversial, the manner in which these transfers were carried out attracted an inordinate amount of attention. In fact, post 9/11 extraordinary rendition operations were exposed to the public, because of high-visibility "covert" transfers, almost from the start.

The first incident reportedly occurred on October 23, 2001, after an unmarked white *Gulfstream V* landed in Karachi, Pakistan, to pick up a prisoner—Jamil Qasim Saeed Mohammed—who was going to be handed over by agents of the Pakistani Inter-Service Intelligence Agency (ISI).[274] While any prisoner transfer occurring in the middle

[274] Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights*, (Hoboken: Melville House Publishing, 2006), 59-64.

of the night, at approximately 0240 hours, is due to pique the curiosity of airport personnel, the fact that the *Gulfstream V* operators refused to pay the airport's requisite landing fee created an embarrassingly visible standoff with airport personnel, which was resolved only after ISI agents intervened and convinced the airport staff to allow the American jet to take off.[275] News of the suspicious middle-of-the-night transfer quickly reached a Pakistani journalist, Masood Anwar, who published an article with the story. The article opened by stating that "Pakistani authorities handed over a 'suspected foreigner' to the US authorities in a mysterious way in the early hours of Tuesday…"[276] The article went on to quote a "source at the Karachi airport" as stating that, "the entire operation was so mysterious that all persons involved in the operation, including US troops, were wearing masks."[277] Also published was the tail number of the American jet: N379P.[278] Although it appears as a trivial detail, having transfer personnel wear ski-masks, or balaclavas, while operating in a relatively secluded area in a civilian airport is due to attract the attention of casual observers. In fact, acting in a "mysterious way" is sure to attract attention almost anywhere. And how would people react in the West if they observed unidentified hooded individuals operating at a civilian airport? This question was answered on the evening of December 18, 2001, at approximately 2100 hours, when the same American-registered *Gulfstream V* jet, N379P, landed in Bromma, Sweden. The plane had been dispatched to transfer two suspects—Ahmed Agiza and Mohammed Zery—who had been arrested earlier that day by the Swedish Security

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[275] Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights*, (Hoboken: Melville House Publishing, 2006), 59-64.
[276] Masood Anwar, "Mystery Man Handed Over to US Troops in Karachi," *The News International, Pakistan*, October 26, 2001, http://209.157.64.200/focus/f-news/556778/posts, (accessed on June 26, 2009).
[277] Ibid.
[278] Ibid.

Police, the Sakerhetpolisen (SÄPO), and were to be expeditiously deported to Egypt.[279] To the surprise of the Bromma airport police officers, a group of individuals—approximately six Americans and two Egyptians—disembarked the jet wearing black gear from head to toe, including black masks covering their faces. A Swedish officer reportedly alerted the group that the black hoods were unnecessary at Bromma airport, but the men remained hooded as they took custody of the prisoners.[280] According to a Swedish Parliamentary Inquiry review of the incident, the following actions then occurred:

> *The security team, all of whom were disguised by hoods around their heads, then went up to the vehicles in which A. and E.Z. were sitting. One of the men was taken first to the police station by the team. Inside the station, in a small changing room, the American officials conducted what they had referred to as a security check. According to reports, a doctor was present in the changing room. When the check had been completed, the second man was sent for and the same procedure repeated.*
>
> *The inquiry has revealed that this security check comprised at least the following. A. and E.Z. were subjected to a body search, their clothes were cut to pieces and placed in bags, their hair was thoroughly examined, as were their oral cavities and ears. In addition they were handcuffed and their ankles fettered, each was then dressed in an overall and photographed.*
>
> *Finally loose hoods without holes for their eyes were placed over their heads. A. and E.Z. were then taken out of the police station in bare feet and led to the aircraft.*[281]

The Swedish Parliamentary Inquiry would later conclude that: "The way in which A. and E.Z. were treated is alien to Swedish police procedures and cannot be

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[279] Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights*, (Hoboken: Melville House Publishing, 2006), 59-64.
[280] Ibid.
[281] Government of Sweden, "A Review of the Enforcement by the Security Police of a Government Decision to Expel Two Egyptian Citizens," *The Parliamentary Ombudsmen*, March 22, 2005, http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX_SFS_Decision&Id=1662, (accessed on June 26, 2009).

tolerated."[282] The inquiry also determined that the Swedish police had allowed "American officials free hands to exercise public authority on Swedish territory" and that "relinquishing Swedish public authority in this way to foreign officials is not compatible with Swedish law."[283] As a result of the incident, the Swedes would put on hold any further cooperation with similar U.S. rendition operations.

The events that occurred at Bromma airport are emblematic of an approach that failed to align tactical decisions with overall strategic goals. In fact, while the short-term tactical goal of safely and securely transporting two prisoners from Sweden to Egypt was easily accomplished, the longer-term strategic goal of minimizing the U.S. footprint in the operation and, more specifically, of ensuring that Sweden would be amenable to similar renditions in the future was apparently ignored. In fact, this "covert" transfer showed an incoherent approach: a plane, supposedly "under cover" to hide its connection with the U.S. Government, is met at the airport by two American officials who reportedly identified themselves to Swedish police as being with the U.S. Embassy. Then, masked man disembark the plane, apparently fearful of revealing their faces (in contrast to the unmasked SÄPO officers who actually captured the terrorists), and what was essentially a Swedish deportation to Egypt was thus unnecessarily made to appear as a Hollywood-type "black-op." And while a low-profile expedited Swedish deportation, albeit with U.S.-provided transportation, would not necessarily be considered newsworthy, a U.S. "covert operation" on Swedish territory is most likely to attract media and parliamentary

[282] Government of Sweden, "A Review of the Enforcement by the Security Police of a Government Decision to Expel Two Egyptian Citizens," *The Parliamentary Ombudsmen*, March 22, 2005, http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX_SFS_Decision&Id=1662, (accessed on June 26, 2009).
[283] Ibid.

inquiries. In fact, according to a report of the event, it almost appeared as if the Swedes had to convince the Americans that this was still a Swedish deportation:

> *Even before the plane had landed in Sweden, tensions had started to develop between CIA and the Swedish authorities. While waiting at the airport, the American Embassy officials had told the Swedes that there wasn't enough room on the plane for them to accompany the prisoners to Cairo. The Swedes protested and were ultimately given two seats.*[284].

In the end, this Swedish incident, coupled with other reports of "mysterious masked men" conducting "suspicious transfers," were followed-up by investigative journalists who were able to track the flight itineraries of the executive jets used for "covert" transfers, expose their cover, and report on the extraordinary renditions program.[285] "Covert" transfers intended to keep extraordinary renditions under-the-radar had thus the opposite effect, unintentionally raising the program's profile and providing the international media with a thinly-veiled mystery to uncover.

The Consequences of International Controversy on U.S. Global Relationships

International media coverage—with overwhelmingly negative overtones—of the rendition program, and the international controversy that ensued, seriously undermined U.S. counterterrorism strategic efforts. As Daniel Benjamin, who currently serves as the Coordinator for Counterterrorism at the Department of State with the rank of Ambassador-at-large, wrote in 2007:

> *[Rendition-related blunders] are raising the specter of a disruption of the network of intelligence and law enforcement agencies currently cooperating on*

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[284] Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights*, (Hoboken: Melville House Publishing, 2006), 59-64.

[285] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program*, (New York: St. Martin's Griffin, 2007), p. 115.

> *counterterrorism, as angry publics demand that their governments restrict cooperation with the United States.*[286]

While defending the value of renditions, Ambassador Benjamin specified that the controversy surrounded one specific aspect of modern renditions:

> *...rendition has become a dirty word because it is now a shorthand for what some have called "the outsourcing of torture."*[287]

Some of the closest allies of the U.S. reevaluated, and in most case severely limited, their cooperation with U.S. counterterrorism renditions. Certain foreign governments conducted official inquiries—such as the above-cited ones from Sweden, Canada, and the United Kingdom—to investigate and review their role in U.S. counterterrorism renditions. Moreover, the European Union established a *Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners,* which, in one of its findings:

> *Condemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism; condemns, further, the acceptance and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries.*[288]

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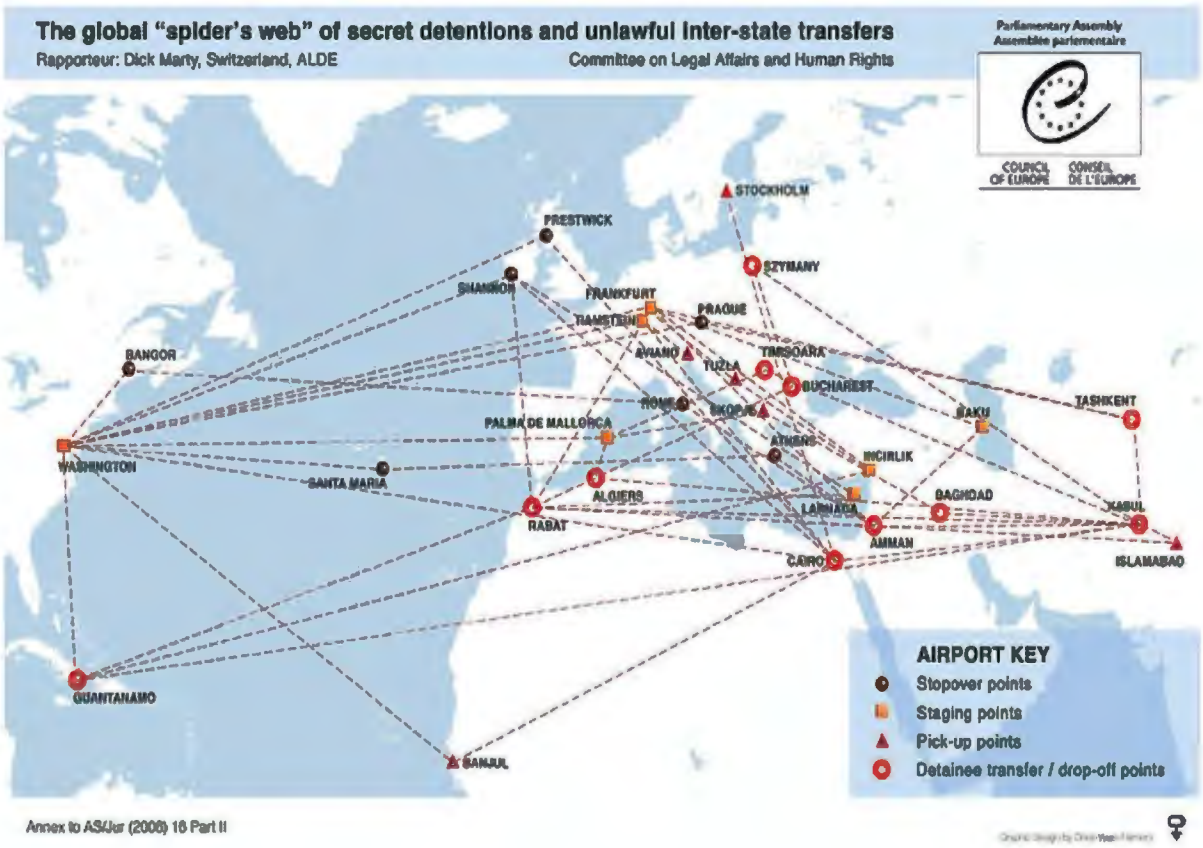
[286] Daniel Benjamin, "Rendition at Risk: The Bush Administration's Excesses Have Endangered a Valuable Tool," Slate, *February 2, 2007*, http://www.slate.com/id/2159017/pagenum/2, (accessed on June 26, 2009).

[287] Ibid.

[288] European Union Parliament, "Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners," *Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners,* January 26, 2007, http://jurist.law.pitt.edu/gazette/2007/01/cia-secret-prisons-final-report.php, (accessed on June 28, 2009).

Figure 4-1: "Renditions Map" Published by the European Council.[289]



In addition to the above, certain countries issued arrest warrants for US officials believed to be involved in extraordinary renditions. As covered in the previous chapter, Italy issued arrest warrants for twenty-six U.S. officials believed to be involved in the case of Abu Omar, while Germany issued arrest warrants for thirteen U.S. officials supposedly linked to the extraordinary rendition of Khaled El-Masri, a German citizen abducted in Macedonia (this case was cited in the above section covering judicial reviews of detentions).[290] While the criticism of European countries and other foreign parties might

[289] Council of Europe, Parliamentary Assembly, "The Global 'Spider's Web' of Secret Detentions and Unlawful Inter-State Transfers," *Committee on Legal Affairs and Human Rights*, June 7, 2006, http://www.statewatch.org/news/2006/jun/01COEmap.htm, (accessed on June 29, 2009).

[290] Matthias Gebauer, "Germany Issues Arrest Warrants for 13 CIA Agents in El_Masri Case," *Der Spiegel*, January 31, 2007, http://www.spiegel.de/international/0,1518,463385,00.html, accessed on June 28, 2009).

be dismissed as a hypocritical reaction driven by domestic political concerns, such criticism limits foreign cooperation with US counterterrorism efforts. On April 17, 2007, in a Joint Hearing on *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on transatlantic Relations*, the Chairman of the *Subcommittee on International Organizations, Human rights, and Oversight*, the Hon. Bill Delahunt, noted that:

> *These extraordinary renditions are utterly inconsistent with our broader foreign policy goals of promoting democracy and the rule of law, the very foundations of civil society. These practices have brought us universal condemnation and have frustrated our efforts to work in a concerted way with our allies in fighting terrorism.*[291]

On July 26, 2007, then-Senator and Chairman of the U.S. Senate's *Committee on Foreign Relations*, Vice President Joseph Biden, in his opening remarks in hearings on *Extraordinary Renditions, Extraordinary Detention, and the Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing,* stated that "the current rendition program has taken a toll on the relationships with some of our closest foreign partners."[292] He then added:

> *If we continue to pursue a rendition program ungoverned by law, without sufficient safeguards and oversight, we will take individual terrorists off the streets at the expense of foreign coalitions that are significantly more consequential long term and essential to our efforts to combat international terrorism at the expense of facilitating the recruitment of a new generation of terrorists who are just as dangerous—and what we know from the intelligence report—far more numerous.*[293]

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[291] U.S. House Committee on Foreign Affairs, *Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Transatlantic Relations.* 110th Cong., 1st sess, 2007, http://www.foreignaffairs.house.gov/110/34712.pdf (accessed on June 3, 2009).

[292] U.S. Senate Committee on Foreign Relations, *Extraordinary Renditions, Extraordinary Detention, and the Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing,* 110th Congress, 1st sess., July 26, 2007, http://www.fas.org/irp/congress/2007_hr/rendition2.pdf, (accessed on June 28, 2009).

[293] U.S. Senate Committee on Foreign Relations, *Extraordinary Renditions, Extraordinary Detention, and the Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing,* 110th Congress, 1st sess., July 26, 2007, http://www.fas.org/irp/congress/2007_hr/rendition2.pdf, (accessed on June 28, 2009).

If, as former CIA Director Gen. Michael Hayden stated, "America cannot win this war [on terrorism] without allies," then it would appear to be in the best strategic interest of the U.S. to maintain the effectiveness of rendition operations while minimizing international criticism. [294]

In terms of strategic effectiveness, as argued throughout the above sections in this chapter, it appears that if the U.S. conducted rendition operations that did not involve harsh interrogation/treatment of detainees and extrajudicial detentions (as opposed to mere extrajudicial transfers), rendition operations could maintain their intelligence and tactical value while minimizing international criticism. Moreover, whenever possible, the U.S. should conduct low-profile overt transfers instead of covert transfers. Covert transfers, if absolutely necessary (as in possible future cases of unilateral captures in hostile countries), should be conducted with the goal of minimizing the U.S. footprint and of withstanding possible future inquiries, possibly preferring "false-flag" planes and crews (belonging to companies registered in foreign countries and operated by U.S. agents, under cover, posing as foreign citizens). By eliminating the two most controversial elements of U.S. renditions, and by limiting covert transfers, the U.S. could improve the overall strategic effectiveness of the counterterrorism rendition program.

[294] Michael V. Hayden, "General Hayden's Remarks at the Council on Foreign Relatons" Central Intelligence Agency, September 7, 2007, https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html, (accessed on June 18, 2009).

The Ethics of Renditions

In 1513, political theorist Niccolò Machiavelli wrote:

> *"You must know that there are two kinds of combat: one with laws, the other with force. The first is proper to man, the second to beasts; but because the first is often not enough, one must have recourse to the second."*[295]

The central question, as aptly summarized by author Col. Kevin Cieply in his article *Rendition; the Beast and the Man* (in reference to the above-reported quote of Machiavelli), is as follows:

> *Is rendition simply recourse to the beast at a necessary time? Or is it a practice that is inevitably inconsistent with the notions of morality, rule of law, and human rights? In short, is rendition a practice reluctantly allowed by the philosophy of Machiavelli but inalterably opposed by idealism of Kennan* [political theorist George Kennan had noted that excessive secrecy, duplicity, and clandestine skullduggery were "simply not our dish"], *or a contemporary practice necessitated by circumstances that transcend traditional ethical theories?*[296]

Moral and ethical considerations related to the use of renditions can be explored using as references established ethical theories such as the utilitarian, deontological, social contract, and "Just War" theories. In applying these theories, it is useful to first evaluate the ethics of the two most-basic elements of renditions—capture and transfer of a suspect, or *snatch and grab*—as separate from any subsequent interrogation and detention. Borrowing some of the concepts from "Just War" theory, it is useful to first evaluate when it can be considered ethically justified to carry out a extraterritorial *snatch and grab* operations (similar to *jus ad bellum* considerations) and then how these operations should be ethically carried out (*jus in bello*). Although "Just War" theory is only partially applicable to a limited counterterrorism operation such as rendition, it can

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[295] Niccolò Machiavelli *The Prince* 18.

[296] Kevin M. Cieply, "Rendition: The Beast and the Man," *JFQ,* Issue 48, 1st Quarter 2008, http://www.ndu.edu/inss/Press/jfq_pages/editions/i48/9.pdf (accessed on April 26, 2009).

still provide some useful reference. Specifically, relevant *jus ad bellum* criteria demand that the "action must be a last resort" and that the damage inflicted is "proportionate to the injury it is designed to avert or to the injustice that occasioned it" (the other Just War criteria, such as the ones referring to proper authority, a just cause, reasonable probability of success, proportionality of means, and right intentions seem less problematic with regard to the practice of renditions).[297] According to these two relevant *jus ad bellum* criteria, the rendition of an individual suspected of plotting terrorist attacks while hiding in a country with no legal extradition to the U.S. would be ethically justified—as it is clearly both a serious offense and a "last option" (especially if a "ruse" is deemed impractical)—while the rendition of a suspected bicycle thief on vacation in Canada would clearly be considered outside these parameters.

With regard to *jus in bello,* the central issues are proportionality, respect for human rights, and target discrimination. Similar to law enforcement operations, *jus in bello* would thus demand that officials gather clear evidence of subjects' culpability before targeting them for renditions and that they "thwart the assailant's purpose using the minimum force necessary to do so."[298] For example, in conducting transfers, it would be considered unethical (absent special circumstances) to inject with incapacitating drugs an otherwise restrained suspect, a practice that was apparently used in several renditions but that remains extremely rare in law enforcement arrests and transfers. Similarly, prisoners' human rights should be respected at all times, as this ethical theory dictates that "a legitimate act of war is one that does not violate the rights of the people against whom it

[297] Jan Goldman, *Ethics of Spying,* (Maryland: Scarecrow Press, 2006), 250.
[298] James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. (New Jersey: Princeton University Press, 1981), 128.

is directed." [299] Thus, during transfers, while safety and security considerations remain of paramount importance, a suspect should still be treated as a human to the maximum extent possible. Specifically, the reported rendition practices of covering a suspect's face with a hood, subjecting a suspect to "forcibly administered sedatives by anal suppository," and to strap a suspect in diapers in order to keep him from moving during a long flight appears to be beyond the standard of "minimum force necessary", especially when considering a usual ratio of one suspect to four or more officers.[300] If law enforcement officers can routinely manage to safely transport convicted terrorists and serial-killers in more humane conditions, and with a fraction of the resources and manpower utilized in renditions, the use of humiliating techniques appears unnecessary and therefore unjustified. Conversely, if a suspect is apprehended and transported by U.S. authorities in a manner that is respectful of the suspect's humanity, using strictly necessary procedures (similar to the ones used by law enforcement officers in the U.S.), then the practice of capturing and transferring a suspect in a counterterrorism rendition, on its own, would raise no more ethical concerns that any arrest occurring on U.S. soil. This approach would also satisfy deontological theories that emphasize the respect for human dignity, as Immanuel Kant wrote in *Foundations of the Metaphysics of Morals* (1785): "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."[301] Of importance, it is relevant to note that

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[299] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th Edition. (New York: Basic Books, 2006), 135.

[300] Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals,* (New York: Random House, 2008), 109.

[301] James Rachels, *The Elements of Moral Philosophy*, 5th Edition, (New York: McGraw Hill Companies, 2007), 131.

Kant's view on human dignity did not preclude him from advocating for retributivism, and for proportional harsh punishments for the guilty.

Another ethical consideration is that the extraterritorial capture of a suspect by U.S. authorities might be a violation of the laws of the sovereign country where the suspect is located. However, as discussed in the previous sections, the reality is that, in most renditions, the U.S. acts with the explicit cooperation and approval of the host country authorities (with the exception of Iraq and Afghanistan where U.S. military direct action is considered legal by the host country), who normally are the ones actually "snatching" the suspect off the street and delivering him to U.S. authorities for rendition. In any event, even a truly "unilateral" rendition could be easily justified under the "social contract" theory, as the U.S. Government has a responsibility to act to defend its citizenry from threats to the state irrespective to foreign laws that might be broken in the process. Respect for foreign laws is, of course, primarily a question of reciprocity, and thus breaking foreign laws might cause some significant practical problems for the U.S. As regards to ethics, however, the social contract between the U.S. Government and the American people is of utmost importance, and primary to any agreements with foreign governments.

In addition to the above ethical considerations, since capture and transfers are essentially *means* to an *end*, it is important to carefully consider the *end* of a rendition to evaluate the overall morality of both the *means* and of the rendition operation as a whole. Indeed, the apprehension and transport of a suspect cannot be fully evaluated without the context of the final destination. As an analogy, even though a police officer may arrest a serious criminal only when there is no other way to stop him, and even if the detainee is

treated respectfully and humanely during capture and transfer, the ultimate destination of the transfer is relevant to the overall morality of the officer's actions. Is the officer bringing the suspect before a court or is he abandoning him before a public lynching? The *end*, in such cases, determines the morality of the *means*. Indeed, even though a just *end* might not always justify all *means*, if an *end* is unjust (public lynching) the *means* (capture and transport) will always be unjustified, regardless of how they are carried out.

With regard to renditions, the ultimate stated *end* can generally be described as neutralizing a threat by placing a suspect into custody and attempting to obtain any threat-related information in order to protect the American people (although sentiments of revenge have appeared at times intertwined with this *end*). But it is the more immediate *end* that needs to be evaluated with regard to ethical considerations. Indeed, the ultimate *end* of almost any Government activity could always be summarized as to some variation of "to serve and protect the Nation." But such a broad definition of an *end* is unhelpful in evaluating the ethics of specific practices. Therefore, with regard to the ethics of renditions, it is useful to focus on the immediate *ends* of detention and interrogations, and to divide them in four distinct categories:

1) **U.S. Detention/Non-Coercive Interrogation:** For example, a suspect is apprehended in a foreign country and transferred to the U.S., where U.S. officials conduct non-coercive interrogations.

2) **U.S. Detention/Coercive Interrogation**: An example of this would be when the U.S. apprehends a suspect in a foreign country and transfers him to foreign-based U.S. detention center (CIA's "black sites" or

military detention centers such as Guantanamo). U.S. officials conduct questioning using "enhanced interrogation techniques."

3) **Foreign Detention/Non-Coercive Interrogation:** An example of this is when a suspect is apprehended in a foreign country and transferred into a foreign criminal justice system where no torture is suspected. Foreign officials conduct non-coercive interrogations and U.S. officials have no reason to suspect that torture might be used.

4) **Foreign Detention/Coercive Interrogation:** For example, the U.S. apprehends a suspect in a foreign country and transfers him to a foreign country –not necessarily into the foreign criminal justice system— where the use of torture is suspected. Foreign officials conduct interrogations using coercive methods and U.S. officials have reason to suspect that torture might be used.

A deontological ethical framework could only justify the first category: suspects being returned to U.S. detention centers and being interrogated with non-coercive methods. Indeed, in addition to respect for human dignity, Kant states to "act only according to that maxim by which you can at the same time will what it should become a universal law."[302] The universality of the principle would seem to demand that the U.S. consistently applies the same legal and procedural safeguards that it deems appropriate for its own citizens, according to its domestic laws, to all persons under its custody. Under this theory, since the U.S. would not "render" a U.S. citizen to a foreign country,

[302] James Rachels, *The Elements of Moral Philosophy*, 5th Edition, (New York: McGraw Hill Companies, 2007), 131.

or use coercive interrogation means against a U.S. citizen within its borders, then the U.S. should not apply different principles to foreigners under U.S. custody, regardless of where they were apprehended.

A utilitarian approach, however, would emphasize the morality of doing what is best for the greatest amount of people, regardless of the universality and of the respect for an individual's humanity. But objectively determining what is best for most people can be a difficult task in the case of renditions, detentions, and interrogations. In the short term, taking some suspects off the streets has undoubtedly a beneficial effect for the "greater good," regardless of how these few individuals are then treated. In the long term though, the "greater good" might be more damaged by the loss of credibility suffered as a result of the U.S. being perceived as temporarily abandoning some of the democratic principles and values for which it always stood. This loss of credibility not only can be used to mobilize anti-American movements internationally, but also can result in a relative loss of international standing for the U.S., ultimately damaging counterterrorism cooperation with foreign countries. Thus, renditions that result in a public's perception that the U.S. tolerated (or worse, encouraged) "torture" can be considered ethically unjustified under utilitarian terms, as strategic interests are sacrificed to narrow tactical benefits. However, if it was determined that the *only* way to obtain *vital* threat information was via coercive techniques, then the utilitarian theory would consider ethically justified renditions for the purpose of subsequent "enhanced interrogations" of suspects. But to date, as discussed in the previous sections, other than highly disputed anecdotal accounts, there is no evidence that coercive "enhanced" techniques are more effective (and thus necessary) than traditional interrogation techniques that emphasize

rapport-building. Therefore, in evaluating renditions under a utilitarian framework, it is important to note that there is a relation, to some degree, between ethics and effectiveness: while an effective solution may still be unethical, an ineffective approach can seldom be ethically justified.

A "social contract" approach would demand that the U.S. Government does all it can in order to fulfill its obligation to protect the American people and advance their interests, both short-term and long-term, without compromising the values that form the basis for the "social contract" union. Thus, the U.S. government could render suspects back to the U.S., to U.S. detention centers in foreign countries, or to foreign jurisdictions, as long as under no circumstance U.S. authorities engage or promote conduct that would "shock the conscience" of the American public. Under this interpretation of social contract ethical theory, no entity, whether U.S. or US-backed, is justified in engaging in conduct that the American people condemned in treaties signed by the U.S. and laws passed by Congress. Legal circumventions and practical acts of self-deception (such as having foreign officials with a long history of human rights abuses sign a written "reassurance" that they will not torture, having U.S. officials physically absent during foreign interrogations, and ignoring subsequent accounts of mistreatment) would be considered violations of the spirit of this contract.

In conclusion, even though captures and transfers can be carried out according to ethical standards, the overall *end* of a rendition—and, specifically, a suspect's ultimate destination and treatment—determines the ethical justifiability of rendition operations. While the rendition of a suspect to a U.S. detention center where no mistreatment occurs appears to raise few, if any, ethical concerns, renditions to foreign jurisdictions where

suspects are routinely mistreated, contrary to what would be considered acceptable within the U.S., might not be considered ethically justifiable under deontological, utilitarian, and social contract theories, albeit for different reasons. Ultimately, the U.S. appears to be best served by an effective counterterrorism strategy consistent with fundamental principles of morality and ethics. As the 9/11 Commission reported, "The U.S. government must define … what it stands for. We should offer an example of moral leadership in the world, committed to treat people humanely, [and] abide by the rule of law."[303]

[303] Kevin M. Cieply, "Rendition: The Beast and the Man," *JFQ,* Issue 48, 1st Quarter 2008, http://www.ndu.edu/inss/Press/jfq_pages/editions/i48/9.pdf (accessed on April 26, 2009).

CHAPTER 5

IMPROVING U.S. COUNTERTERRORISM RENDITIONS

We are now conducting a review of the rendition policy, there could be situations, and I emphasize – could be – because we haven't made a determination yet, where let's say we have a well-known Al Qaeda operative, that doesn't surface very often, appears in a third country, with whom we don't have an extradition relationship, or would not be willing to prosecute him, but we think is a very dangerous person. I think we will have to think about how do we deal with that scenario in a way that comports with international law and abides by my very clear edict that we don't torture, and that we ultimately provide anybody that we're detaining an opportunity through habeas corpus to answer to charges. How all that sorts itself out is extremely complicated because it's not just domestic law it's also international law, our relationship with various other entities. And so, again, it will take this year to be able to get all of these procedures in place and on the right footing.

President Barack Obama, March 6, 2009.[304]

Hypothesis and Key Findings

As the globalized world continues to promote transnational entities and activities, the U.S. increasingly needs to develop effective means to counter threats that transcend national borders. U.S. counterterrorism renditions can be an effective tool to neutralize violent extremists who, although operating in sovereign foreign countries, pose a threat to the national security interests of the U.S. The tactical goals of renditions—taking a terrorist "off the streets," collecting intelligence by exploiting items seized during

[304] Barack Obama, "Transcript: Obama Interview Aboard Air Force One," *New York Times*, March 7, 2009, http://www.nytimes.com/2009/03/08/us/politics/08obama-text.html?pagewanted=all, (accessed on June 30, 2009).

capture, and obtaining intelligence via interrogations—can be achieved without compromising the long-term survivability of the rendition program and the overall U.S. counterterrorism strategy, which includes continued cooperation with foreign partners and de-radicalization of potential recruits. After reviewing and analyzing the strategic value of the rendition program, answering the proposed key questions, and covering legal, ethical, and operational consideration, the hypothesis was validated*: In order to conduct rendition operations effectively at the strategic level, the U.S. will need to redefine the parameters, legal framework, and procedures of renditions to minimize international and domestic controversy.* In fact, the research revealed the following key findings:

Controversy on Renditions negatively affected U.S. counterterrorism strategy: The intensity of both domestic and international controversy resulted in severe limitations in the cooperation of key foreign partners, a cooperation that the U.S. deems essential for continued success in counterterrorism efforts. Moreover, the controversy ultimately threatened the survivability of the rendition program, as foreign partners investigated and exposed U.S. renditions, while truncating their own participation in the program. Domestic criticism, and legal challenges, of the program also resulted in a temporary curtailment of U.S. extraordinary renditions, pending a review by a Presidential *Task Force*.

Renditions can be modified to minimize controversy while remaining effective: Controversy surrounding renditions primarily revolves around two elements: (a)

enhanced interrogation techniques (and related mistreatment of detainees), and (b) detentions not subjected to judicial review. The research uncovered no evidence suggesting that conducting renditions without these two elements would reduce the overall operational effectiveness and intelligence value of counterterrorism renditions. Similarly, renditions that do not involve covert transfers, or at least "covert" transfers as conducted in recent years, are likely to attract less attention and be more beneficial to the long-term survivability of the rendition program.

Renditions to the U.S. are legal, effective, and ethical: Renditions to the U.S. can achieve the desired counterterrorism tactical and strategic goals. U.S. interrogators can conduct effective non-coercive interrogations and obtain information first-hand from the source, minimizing reporting distortions or omissions. A suspect's detention is subjected to judicial review, minimizing controversy and providing legitimacy to prolonged detentions, while U.S. law poses no real limitations on methods of capture. Finally, counterterrorism renditions to the U.S. appear consistent with ethical standards inspired by the major ethical theories reviewed in this thesis.

Interagency rivalries and misinterpretations of legal requirements limited Renditions to the U.S.: Throughout the years, U.S. renditions evolved to include transfers to the U.S., to foreign detention centers, and to foreign-located U.S. detention centers. The research conducted for this thesis unexpectedly revealed that the evolution of renditions was shaped at least as much by interagency rivalries as by strategic considerations. Specifically, the FBI insisted, based in part on a self-serving misinterpretation of legal

requirements, on being part of an overseas capture, severely limiting the U.S. Government's flexibility in—and overall capability of—capturing a suspect in a foreign country.[305] The CIA, on the other hand, developed a program of extraordinary renditions to detention centers located in foreign countries, thus bypassing any FBI involvement, and transferred to foreign countries suspects that could have been otherwise rendered to the U.S. to stand trial.

The legality and effectiveness of renditions to foreign countries depend on several variables: The research for this thesis revealed that a rendition to a foreign detention center, operated by either the U.S. or a foreign country, is strategically effective only when: (a) a detainee is not subjected to torture or other mistreatment likely to cause international consternation, (b) a judicial body provides legitimacy by approving a suspect's detention, and either (c) foreign authorities conduct effective interrogations of a suspect and accurately report the information obtained to the U.S., or (d) U.S. officials directly conduct or monitor the interrogation. In addition to the above, renditions to a foreign country known to the U.S. to employ torture is illegal under U.S. law. Also, renditions to a foreign country known to use cruel, degrading, and inhuman treatment can be considered legal only with a restrictive interpretation of the relevant provisions of the Convention Against Torture (CAT), which the Executive Branch interprets as applying only domestically.

[305] Melissa Boyle Mahle, *Denial and Deception: An Insider's View of the CIA from Iran-Contra to 9/11*, (New York: Nation Books, 2004), 247-248.

Implications for Policies and Practices

The findings of this thesis suggest several policy implications with regards to the practice of counterterrorism renditions. Specifically, the key findings suggest that, in order to improve the strategic effectiveness of counterterrorism renditions, the U.S. should (1) expand renditions to the U.S., and (2) limit extraordinary renditions only to cases where the receiving foreign country has an acceptable human rights record and a legal case to prosecute and detain a rendered suspect. Renditions to foreign-based U.S. detention centers could be modified to comply with the above findings, but, with such modifications, the standards and procedures to detain and interrogate a suspect in a foreign-based U.S. detention centers would be almost identical to U.S. domestic requirements, making foreign-based detention centers an expensive and somewhat redundant alternative. In contrast, the U.S. prison system appears capable of easily absorbing rendered suspects. In fact, according to the total estimated numbers of renditions (as reported in Chapter 3), even if all suspects ever rendered by the U.S. (and ever held at Guantanamo Bay) were injected all at once into U.S. prisons, they would constitute only a drop, much less than one-in-a-thousand, of the 2.3 million people incarcerated in the U.S.[306]

[306] Adam Liptak, "U.S. Prison Population Dwarfs that of Other Nations," *New York Times,* April 23, 2008, http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html, (accessed on June 30, 2009).

Recommendations

As interagency rivalries impeded the development of a coordinated rendition strategy, the U.S. should establish the following institutions to promote unity of effort in counterterrorism rendition operations:

(1) Establish an interagency Counterterrorism Rendition Task Force (CRTF) to coordinate the execution of all U.S. government renditions. Instead of the CIA having its own extraordinary rendition program and the FBI dictating procedures for renditions to the U.S., the U.S. government needs to develop a coordinated and integrated counterterrorism rendition program. CRTF should be comprised of all agencies contributing to counterterrorism renditions, including the FBI, CIA, Diplomatic Security Service (DSS), U.S. Marshals Service (USMS), Defense Intelligence Agency (DIA), and the U.S. Special Operations Command (USSOCOM). The CRTF would be able to coordinate both covert and overt renditions, including renditions that might include a covert snatch or lure followed by an overt transfer to the U.S. The CRTF could be overseen by the Office of the Coordinator for Counterterrorism (S/CT) at the U.S. Department of State, since according to U.S. Public Law 105-277, "The principal duty of the coordinator shall be the overall supervision (including policy oversight of resources) of international counterterrorism activities."[307]

(2) Establish interagency Counterterrorism Rendition Working Groups (CRWG) at U.S. Embassies around the world, possibly as part of existing Counterterrorism

[307] U.S. Department of State, "About us," *Office of the Coordinator for Counterterrorism*, http://www.state.gov/s/ct/about/index.htm, (accessed on June 30, 2009).

Working Groups.[308] The CRWG would be an on-the-ground multi-agency effort to report to the CRTF on country-specific capabilities, special circumstances, and opportunities to capture wanted terrorists and transfer them to the U.S. The CRWG could be tasked with developing and periodically producing a "Rendition Action Plan" to outline the country-specific requirements and best practices to render suspects out of the country's borders. A CRWG would promote coordinated and integrated rendition field operations, while ensuring that rendition practices and procedures reflect the U.S. Government's in-country expertise and minimize unnecessary diplomatic incidents and misunderstandings.

Recommendations for Future Research

Future research, related to this thesis, could seek to answer the following tentative research questions: (1) How can the U.S. develop an effective capability to conduct truly unilateral captures in sovereign foreign countries? (2) How can the U.S. reform its criminal justice procedures and institutions to maximize successful prosecutions of terrorism-related cases, involving extraterritorial activities, while protecting classified intelligence?

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[308] U.S. General Accountability Office, "Combating Terrorism: Guidance for State Department's Antiterrorism Assistance Program Is Limited and State Does Not Systematically Assess Outcomes," *Testimony Before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives,* June 4, 2008, http://nationalsecurity.oversight.house.gov/documents/20080604115016.pdf, (accessed on June 30, 2009), 11.

Conclusion

For the foreseeable future, renditions--the practice of seizing and transferring a person from one country to another, including the United States, by means other than deportation and extradition—will remain an indispensable weapon in the counterterrorism arsenal of the U.S. In order to be effective, renditions need to be carried out in a manner that maximizes both tactical and strategic effectiveness. However, U.S. attempts to develop a strategically effective rendition program have been stifled by narrow bureaucratic infighting and by the application of tactics that favored short-term results, especially—and understandably—in the immediate aftermath of the 9/11 attacks, at the expense of long-term sustainability and effectiveness. At this juncture, the future of U.S. counterterrorism renditions appears to hinge, in part, on a report to be issued in July 2009 by President Obama's *Special Interagency Task Force on Interrogation and Transfer Policies*. While the *Task Force*'s recommendations are unknown at the time of this writing, the establishment of an independent *Task Force* appears a sensible first-step in maturing a strategically valuable rendition program. In 1996, a rendition of Khalid Sheikh Mohammed (KSM) in Qatar could have taken "off the streets" one of the principal architects of the 9/11 attacks, possibly preventing the attacks. The U.S. cannot afford to miss similar opportunities in the future. In order to ensure a robust capability to capture terrorists worldwide, the U.S. needs to further develop a strategically effective, and sustainable, counterterrorism rendition program with global reach.

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