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TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS"
by The Committee on International Human Rights

CORPORATE CRISIS MANAGERS AND DISINTERESTEDNESS UNDER THE BANKRUPTCY CODE
by The Committee on Bankruptcy and Corporate Reorganization

THE FEDERAL COMMON LAW OF JOURNALISTS' PRIVILEGE
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THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS
by The Committee on Federal Courts

PROPOSED NEW YORK COURT RULES REGARDING INTERROGATORIES
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FORMAL OPINION 2004-03: GOVERNMENT LAWYER CONFLICTS: REPRESENTING A GOVERNMENT AGENCY AND ITS CONSTITUENTS
by The Committee on Professional and Judicial Ethics
THE RECORD

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THE UNIVERSITY OF CALIFORNIA'S HASTINGS COLLEGE OF THE LAW won the final round of the 55th Annual National Moot Court Competition on Thursday, February 3, 2005, at the Association. Law students on the winning team included: Leah Bolstad, Mark D'Argenio and Eliza Hoard.

Drake University Law School, Des Moines, Iowa, took second-place honors. Team members included: Daniel J. Anderson, Matthew R. Eslick and Anna E. Wholey.

Best Brief honors went to Cleveland-Marshall College of Law, and Best Runner-Up Brief went to the University of Montana School of Law. Best Speaker went to Leah Bolstad, Hastings College, and runner-up honors went to Matthew R. Eslick, Drake University.

Judges for the final round of the competition included: The Honorable Joan M. Azrack, United States Magistrate Judge, Eastern District of New York; the Honorable Barry Cozier, Supreme Court Justice, Appellate Division, First Department; the Honorable Julio M. Fuentes, Judge, United States Court of Appeals for the Third Circuit; the Honorable Reena Raggi, Judge, United States Court of Appeals for the Second Circuit; the Honorable Sidney H. Stein, Judge, United States District Court, Southern District of New York; James W. Morris, III, President, American College of Trial Lawyers; Bettina B. Plevan, President, Association of the Bar of the City of New York.

Twenty-eight winning and runner-up teams from 14 regions across the United States competed in the final rounds of the National Moot Court Competition. The American College of Trial Lawyers, a national organization composed of approximately 2,000 of the leading advocates in the United States, is a co-sponsor of the competition with the Association's Young Lawyers Committee.

In the Regional Round held at the Association in November 2004, Fordham University School of Law took first place. Law students on the winning team included Paulo R. Lima, Lauren A. Moskowitz and Michael C. Stanitski.
Pace University School of Law took second place honors. Members of the Pace University team included Nikki D. Faldman, Scott D. Harper and Jeffrey A. Kerman. Both teams advanced to the final rounds.

Best Brief honors went to New York Law School, and Best Runner-Up Brief went to the Fordham University School of Law. The New York Law School team included Christopher L. Heer, Kerwin L. Ledesna and Noah P. Melnick.

Best Individual Oral Argument went to Lauren A. Moskowitz of Fordham University. Second Place Best Individual Oral Argument went to Michael C. Stanitski, also of Fordham University.

* * *

THE 1ST ANNUAL LAW PRACTICE MANAGEMENT SYMPOSIUM WAS HELD at the Association, November 16, 2004. The full-day symposium, titled “Business & Legal Techniques to Manage Your Firm,” was designed as a one-stop shopping forum for legal practitioners. The agenda included two CLE programs, five free workshops, and an exhibition to help attorneys figure out how to start and grow a successful practice for firms ranging in size from one to 50 lawyers. The five free workshops provided in-depth information on running a successful law practice—from establishing an appropriate billing system to learning how to protect valuable business assets against catastrophe. Dozens of vendors also showcased the office tools and management services every practitioner needs. Exhibitors were selected because they provide products and services specifically tailored to the legal industry.

The Symposium was sponsored by the Small Law Firm Center and the CityBar Center for CLE, in conjunction with the New York Law Journal.

* * *

THE ASSOCIATION HAS ANNOUNCED THE WINNERS OF THIS YEAR’S Kathryn A. McDonald Awards, presented annually for excellence in service to the Family Court. This year’s honorees have dedicated their abilities and leadership skills throughout their legal careers to the Family Court and the population it serves.

The award winners are Brad M. Nacht, a member of the Kings County Family Court Assigned Counsel Panel, and Karen J. Freedman, founder and executive director of Lawyers for Children.

The Kathryn A. McDonald Award is named in honor of the former
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Presiding Judge of the New York City Family Court. Chief Judge Judith S. Kaye of the New York Court of Appeals presented the awards on February 23 at the Association.

The Kathryn A. McDonald Award is sponsored by the Association's Committees on Children and the Law, Family Court and Family Law, and Juvenile Justice and its Council on Children.
Recent Committee Reports

Administrative Law/New York City Affairs
Letter to Mayor Bloomberg expressing support for the appointment of a Civil Legal Justice Coordinator, who would oversee the New York City administrative tribunals.

Alcoholism and Substance Abuse
Letter to the Appellate Division, Second Department, noting the Committee's disagreement with the recommendation found in the Krausman Report on Attorney Admission and Discipline, which calls for disapproving the adoption of the Bellacosa Rule. This rule authorizes the deferral of a disciplinary investigation to enable an attorney to enter a monitoring program if he/she claims a disability due to alcohol or substance abuse.

Bankruptcy and Corporate Reorganization
Proposed Revisions to 11 USC Section 365(c)(1). The proposed revisions would amend section 365(c)(1) to differentiate between limited, generally accepted instances where a trustee cannot assume or assign an executory contract or unexpired lease and the instances where assumption is permitted but assignment is prohibited without consent. This amendment would end confusion and the recording of disparate decisions on a debtor’s rights to assume or assume and assign a contract where assignment is prohibited by applicable law.

Crisis Managers and Disinterestedness Under the Bankruptcy Code. This report addresses the situation in which a company hires a crisis manager to help avoid filing for bankruptcy or to prepare for such a filing, but may be unable to retain the crisis manager after the bankruptcy filing because of the stringent “disinterestedness” requirement of Bankruptcy Code section 327(a). The report analyzes the current state of the case law, discusses the attempts of some courts to permit crisis managers to be retained after the filing, and proposes legislative changes to the statutory definition of disinterestedness which would permit crisis managers to be retained as professional persons despite previous service as officers or directors.

Bankruptcy and Corporate Reorganization/Uniform State Laws
Letter to the New York State Legislature recommending that the Legisla-
ture repeal New York’s existing fraudulent transfer statute and replace it with a statute based on the Uniform Fraudulent Transfer Act (UFTA). The letter goes on to reason that the existing statute is based on the Uniform Fraudulent Conveyance Act (UFCA), which was promulgated in 1918, and only four states including New York still base their fraudulent transfer statute on the UFCA. By enacting a fraudulent transfer statute based on the UFTA New York would have a statute that is more modern and practical and promote uniformity among the states.

**Capital Punishment**
Statement of the Association regarding New York’s death penalty urging that the New York State Legislature not rush into reinstating the death penalty but rather proceed cautiously and first study the practical consequences and costs of capital punishment.

**Civil Rights/International Human Rights/International Law/Military Affairs and Justice**
Letter from the Association President to the Honorable Alberto Gonzales expressing the Association’s concern with regard to several legal positions taken by the United States government in connection with the September 11 attacks. The policies causing concern include legal justifications for extreme interrogation techniques, unduly limited application of the Geneva Conventions to the “war on terrorism,” the use of military commissions to try enemy combatants, the transfer of prisoners to countries that practice torture and the assertion of presidential authority to ignore statutes and treaties in pursuing the “war on terrorism.”

**Civil Rights/Federal Courts/International Human Rights/International Law/Military Affairs and Justice**
Amicus Brief: *Hamdan v. Rumsfeld*. The brief, filed with the United States Court of Appeals, District of Columbia Circuit, argues that the Geneva Convention applies to the conflict in Afghanistan. The brief makes the case that Hamdan, a foreign national captured in the Afghan conflict, is entitled to the protections afforded a prisoner of war, until his status is determined in a proceeding, and in any event is entitled to the protections of Common Article 3 of the Geneva Conventions. Common Article 3 protections include basic judicial safeguards such as the right to be present at trial, the right to cross examine adverse witnesses, the right to prompt judicial proceedings and the right to be tried by an independent and impartial tribunal.
Communications and Media Law
Letter to the Office of Court Administration responding to questions about jury privacy and the right of access posed by the Chief Judge’s Commission on the Jury and urging that OCA not decrease the scope of the public’s access to information.

The Federal Common Law of Journalists’ Privilege: A Position Paper. This report urges the recognition of a federal common law journalists’ privilege, particularly given the increased trend toward secrecy in the federal government.

Domestic Violence
Recommendations to the New York City criminal and family courts on how to choose between the various batterers education program models available to them in domestic violence cases and urging that all defendants be required to participate in the Education Model, which most closely reflects the goals of the criminal justice system and the priorities of the domestic violence movement.

Election Law
Letter to the New York City Campaign Finance Board commenting on proposed amendments to the Board’s Rules. The letter supports the proposed reduction in the threshold for reporting employment information, and the proposed presumption that contributions made by any LLP or LLC be deemed to have been made by the general partner or general manager. The letter questions the legal basis for the Board’s decision to create a legal presumption of common control for certain unions and political committees without regard to whether there is a factual basis for such a conclusion. The letter urges the Board to set clear standards and provides suggested language for the Board’s consideration.

Federal Courts
Report discussing the surge of immigration appeals filed in the Circuit Court of Appeals from decisions of the Board of Immigration Appeals and the impact of this surge on the Second Circuit.

Federal Legislation
Letter to Congress urging opposition to the proposed changes to Rule 11 of the Federal Rules of Civil Procedure. If enacted, the letter notes, the proposed changes would significantly affect how attorneys practice law.
in federal and certain state court cases by making now permissible sanctions against attorneys mandatory and by removing the safe harbor which permits lawyers to withdraw or correct a filing within 21 days after a Rule 11 motion is served.

Futures Regulation
Letter to the SEC commenting on the proposed rule change regarding the treatment of commodity pool trail commissions stating that the change in the treatment of trail commissions in public commodity pools may result in unnecessarily different treatment of investors in the commodity futures markets.

Housing and Urban Development
Letter to Sheldon Silver, Speaker of the New York State Assembly, urging the restoration in the 2005 New York State budget of $57 million for the development of affordable housing. These funds would make possible the creation of thousands of new and rehabilitated low, moderate and middle income housing units throughout New York State, reducing the serious statewide shortage of habitable affordable housing.

International Commercial Dispute Resolution
Proposed amendment of the New York Civil Practice Law and Rules Section 7502(c) to permit attachments and preliminary injunctions in connection with national and international arbitrations. The report argues that New York law regarding the authority of the courts to issue the provisional remedies of orders of attachment and preliminary injunction in cases involving arbitration is inconsistent, contrary to the prevailing rule in effect in other jurisdictions and seriously out of date. New York is one of the world’s major centers for national and international arbitration yet New York law fails to give its courts authority in this area, prejudicing the rights of New York citizens and companies. The proposed amendment would extend the court’s current authority to issue provisional remedies in domestic arbitrations to include all arbitrations, including international arbitrations.

International Environmental Law
Letter to Congress urging ratification of the 1997 Protocol (Annex VI) relating to the treaty known as the International Convention on the Prevention of Pollution from Ships which would establish certain limits on air emissions from large ocean-going vessels. The letter expresses sup-
port for Annex VI as it represents a useful step in the international effort to address international mobile source air pollution that affects U.S. air quality, notably in port cities such as New York.

**International Human Rights**
Letter to Prime Minister Tony Blair urging his government to initiate a public inquiry in the case of the death of Patrick Finucane, a Northern Ireland defense attorney.

Letter to Sir Joseph Pilling, Permanent Under Secretary of State, Northern Ireland Office, urging that the government establish an inquiry in an expeditious and transparent manner in the Patrick Finucane case.

Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions.” This report analyzes the legal standards applicable to the U.S. practice of Extraordinary Rendition (the transfer of an individual to a foreign state in circumstances under which he/she is likely to be tortured or suffer cruel, inhuman or degrading treatment). The report finds that Extraordinary Rendition is an illegal practice under both domestic and international law.

Letter to the International Commission on Inquiry on Darfur expressing concerns about serious violations of international human rights and humanitarian law that have been committed in Darfur, including war crimes and crimes against humanity. The letter urges that the U.N. Security Council refer the situation in Darfur to the International Criminal Court to ensure that justice is done.

**Judicial Administration, Council on**
Letter to Congress expressing concern about a number of bills currently pending in the Senate, all of which would restrict federal court jurisdiction over various types of cases and constitutional issues. The letter noted that such jurisdiction-stripping legislation sets a dangerous precedent and could wreck the constitution and the delicate balance of powers created by the Framers.

**Judicial Administration, Council on/Election Law/Government Ethics**
Comments to the Office of Court Administration with regard to proposed rules addressing judicial elections. The proposed rules would establish judicial qualifications commissions to evaluate judicial candidates.
and make other changes with regard to judicial elections and campaigns. The comments made a number of recommendations with regard to the proposals, and stressed the Association’s concern that the shortcomings of the judicial election process run too deep to be significantly improved by the establishment of these qualifications commissions. The comments noted the Association’s long-time support for selection of judges by a merit appointment process and, until that is achieved, its support of a process by which political parties would establish independent committees that would recommend only three persons per vacancy, from which the parties would pledge to choose their candidate.

**Labor and Employment Law**

Comments to the National Labor Relations Board objecting to its recent decision that employees who are not represented for purposes of collective bargaining by a labor organization do not have a right to have a co-worker present during an interview that may lead to discipline of the employee.

**Matrimonial Law**

The Case for Amending the New York State Domestic Relations Law to Permit No Fault Divorces. This report urges the New York State Legislature to amend the current Domestic Relations Law to permit no fault divorces, as is the case in every other state in the United States. The report argues that the current statute, which requires blame be placed on one spouse or for both spouses to live apart for one year under a separation agreement before a divorce can be granted, often creates significant financial and emotional costs and can jeopardize the safety and well-being of the spouses.

Amicus Brief: *Chen v. Fischer*. The brief, filed with the New York Court of Appeals, urges the court to hear an appeal of this Appellate Division, Second Department decision, the practical effect of which is to make joinder of all interspousal torts in divorce proceedings mandatory. Mandatory joinder will cause divorce cases to be more protracted and more adversarial. The brief states that if *Chen* is left to stand it will increase the number and complexity of contested divorces in New York; lead to discovery abuses in matrimonial cases; result in increased cost to divorce litigants; prolong divorce litigation; and have a harmful effect on domestic violence victims, as they are the group most likely to have a personal injury cause of action against their spouse.
Mental Health Law
Letter to Congress urging Washington to allocate $10 million in funding pursuant to America’s Law Enforcement and Mental Health Project to oversee court-based programs involving continued judicial supervision for non-violent offenders with mental illness.

President
Statement with Respect to Release or Transfer of Detainees at Guantanamo. The statement referred to press reports suggesting the U.S. intends to release hundreds of detainees from Guantanamo and noted that to the extent prisoners are to be released or transferred to other governments, such action is subject to the limitations of applicable U.S. law, including treaties, with regard to turning over the detainees to nations with a reputation for torture.

State Courts of Superior Jurisdiction
Proposed New York Court Rule regarding interrogatories and accompanying report which urges the Commercial Division of the Supreme Court of New York County to adopt the proposed rule on a pilot basis.

Letter to the Administrative Justice, Supreme Court of the First Judicial District, Civil Term commenting on the current draft of proposed rules for the Commercial Division. The letter expresses concern that several of the proposed rules would require judges to rule that a party has waived rights even in situations where such waiver would be too harsh, leaving the penalty of waiver too extreme and falling unduly on the party rather than the attorney.

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at aakhtar@abcny.org.
Torture by Proxy:
International and Domestic Law Applicable to “Extraordinary Renditions”

The Committee on International Human Rights

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<td>Military Extraterritorial Jurisdiction Act</td>
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<td>NLRA</td>
<td>National Labor Relations Act</td>
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<td>OAS</td>
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<td>Refugee Convention</td>
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<td>TPA</td>
<td>Torture Victims Protection Act of 1991</td>
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<td>UCMJ</td>
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Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”

The Committee on International Human Rights*

I. INTRODUCTION

Since September 11, 2001, and especially in the aftermath of the wars in Afghanistan and Iraq, the United States has detained a large number of persons in various parts of the world for investigative purposes. Techniques used by U.S. authorities to interrogate these detainees have long been the subject of extensive criticism by human rights groups1 and hu-

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However, it was not until the military began receiving reports of mistreatment of detainees in Iraq, particularly at Abu Ghraib prison, that the Department of Defense began internal investigations into the conduct of army personnel. These investigations and their results

2. The International Committee of the Red Cross, which has a special status under international law as the guardian of international humanitarian law, issued a number of reports concerning ill-treatment of prisoners held by the United States, one of which was made public in the wake of the Abu Ghraib revelations. See International Committee of the Red Cross, Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), available at http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf (last visited Oct. 25, 2004).

3. A number of investigations have been conducted by the Department of Defense into the abuses at Abu Ghraib, with many of the reports now publicly available. See, e.g., Maj. Gen. Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade (February 2004) (Taguba Report), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (last visited Oct. 25, 2004); Department of the Army Inspector General, Detainee Operations Inspection (July 2004), available at http://www.globalsecurity.org/military/library/report/2004/daiig_detainee-ops_21jul2004.pdf (last visited Oct. 25, 2004); Lt. Gen. Anthony R. Jones & Maj. Gen. George Fay, Investigation of Intelligence Activities at Abu Ghraib (August 2004), available at http://www.informationclearinghouse.info/article6784.htm (last visited Oct. 25, 2004); and Independent Panel to Review Department of Defense Detention Operations, Final Report (August 2004), available at http://www.defenselink.mil/news/Aug2004/d20040824_finalreport.pdf (last visited Oct. 25, 2004). It is now undisputed that U.S. military personnel committed acts that amounted to torture, and to cruel, inhuman or degrading (CID) treatment or punishment. General Taguba’s report on the abuses at Abu Ghraib prison concludes that “between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force . . . .” Taguba Report, at 16. Acts of abuse included “(a) Punching, slapping, and kicking detainees; jumping on their naked feet; (b) videotaping and photographing naked male and female detainees; (c) forcibly arranging detainees in various sexually explicit positions for photographing; (d) forcing detainees to remove their clothing and keeping them naked for several days at a time; (e) forcing naked male detainees to wear women’s underwear; (f) forcing groups of male detainees to masturbate themselves while being photographed and videotaped; (g) arranging naked male detainees in a pile and then jumping on them; (h) positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; (i) writing “I am a Rapest” (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; (j) placing a dog chain or strap around a naked detainee’s neck and having a female soldier pose for a picture; (k) a male MP guard having sex with a female detainee; (l) using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; (m) taking photographs of dead Iraqi detainees.” Taguba Report, at 16-18. Other acts reported by the detainees who were found to be credible by General Taguba include (a) breaking chemical
lights and pouring the phosphoric liquid on detainees; (b) threatening detainees with a charged 9mm pistol; (c) pouring cold water on naked detainees; (d) beating detainees with a broom handle and a chair; (e) threatening male detainees with rape; (f) allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; (g) sodomizing a detainee with a chemical light and perhaps a broom stick; (h) using military working dogs to frighten and intimidate detainees with threats of attack, and (i) in one instance actually biting a detainee.”


5. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51, at 197, UN Doc. A/RES/39/708 (1984), entered into force June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535, available at http://www.ohchr.org/english/law/cat.htm (last visited Oct. 24, 2004) (CAT). The United States ratified CAT in October 1994, and CAT entered into force with respect to the United States on November 20, 1994. The instrument of ratification contained certain declarations, reservations, and understandings relevant to U.S. obligations addressed in this Report, including a declaration that CAT Articles 1 through 16 were not self-executing (i.e., that these provisions must be implemented by domestic legislation). See United Nations Treaty Collection: Declarations and Reservations, available at http://www.unhchr.ch/html/menu3/b/treaty12.asp (last visited Oct.9, 2004). Other declarations, reservations and understandings are discussed below in the relevant Sections of this Report detailing U.S. CAT obligations. A reservation generally is a unilateral statement, made by a state when signing, ratifying, accepting, approving or acceding to a treaty that purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331, 333, entered into force Jan. 27, 1980 (Vienna Convention), art. 2 para. 1(d). Section 2 of the Vienna Convention contains a regime on reservations which, together with the definitional article (Article 2(1)(d)), determines what constitutes a reservation, the criteria it must meet to be permissible, and the effect it will have, both in the event that it is accepted by other contracting states and in the event that it is not. Under international law, reservations are invalid if they “are incompatible with the object and purpose” of the treaty. Vienna Convention, art. 19 para. (c). A number of
prominence, with arguments about the interpretation of the standards debated in print, during Congressional hearings, and on television.

Similarly, new attention has been focused on the variety of settings in which such abuses have occurred. “War on Terror” detainees have been held in military installations both inside and outside the United States (such as the Naval Consolidated Brig in Charleston, North Carolina, the U.S. naval base at Guantánamo Bay, Cuba, and the U.S. air force base in Bagram, Afghanistan), as well as reportedly being held in secret detention centers run by the Central Intelligence Agency (CIA) and other government agencies (including suspected secret sites on U.S. naval ships and at certain foreign bases or prisons). The media, human rights organizations, and congressional bodies are currently investigating the abuses that have allegedly taken place in these detention centers. Internal probes have also been announced or acknowledged; at the time of this writing, investigations into detention practices and/or interrogation procedures had been concluded or were being

states have objected to the United States’ reservations concerning specific provisions of CAT as contrary to the object and purpose of the Convention. See Declarations and Reservations of Finland (objecting to the United States’ reservation to article 16), Netherlands (considering the United States’ reservation to articles 1 and 16 to be contrary to the object and purpose of the Convention), Sweden (explaining that it does not consider the United States’ reservation to article 16 to be valid or effective), available at http://www.ohchr.org/english/law/cat-reserve.htm (last visited Oct. 25, 2004). The Committee Against Torture, authorized under CAT to monitor compliance with the Convention, has called on the United States to “withdraw its reservations, interpretations and understandings relating to the Convention.” Summary record of the first part of the 431st meeting: Slovenia, United States of America, Committee Against Torture, UN Doc. CAT/C/SR.431 (2000). Also relevant to these discussions but less frequently invoked is the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 Dec. 16, 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 available at http://www.ohchr.org/english/law/ccpr.htm (last visited Oct. 24, 2004) (ICCPR). As with CAT, the U.S. instrument of ratification of the ICCPR contained certain declarations, reservations, and understandings, including a declaration that ICCPR Articles 1 through 27 were not self-executing. See International Covenant on Civil and Political Rights, Declarations, Reservations and Understandings made by the United States, available at http://www.unhchr.ch/tbs/doc.nsf/887f7374eb89574c1256a2a0027ba1f/80256404004f315c12563bb005f309e?OpenDocument (last visited Oct. 24, 2004). See discussion in Section V.B for more on the relevant substantive norms binding the United States under the ICCPR.

conducted by personnel within the following agencies: the CIA, the Department of Homeland Security, and the Department of Defense.

Despite this flurry of attention, one U.S. “anti-terror” tactic has largely escaped sustained scrutiny by Congress and other oversight bodies, and has not yet become the focus of public debate: the practice of “extraordinary rendition.” For the purpose of this Report, Extraordinary Rendition is the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment. As the term suggests, this “extraordinary”

7. This practice, however, is beginning to draw the attention of at least some members of Congress. See, e.g., the questioning of Dr. Stephen A. Cambone, Under Secretary of Defense for Intelligence, by Senator Kennedy during the Senate Armed Services Committee hearing regarding the mistreatment of Iraqi prisoners. Hearing on Allegations of mistreatment of Iraqi prisoners Before the Senate Armed Services Committee, 108th Cong. (May 2004) (statement by Dr. S.A. Cambone, Under Secretary of Defense for Intelligence) (Cambone Statement). On June 23, 2004, Congressman Markey (Mass.) introduced legislation to stop the extra-judicial practice of sending terrorism suspects to foreign governments known to engage in torture. For the full text of the Markey bill, see http://www.house.gov/markey/iraq.htm#LOC (last visited October 25, 2004).

8. Although this Report focuses mainly on cases in which U.S. actors are actually involved in the transfer of an individual, Extraordinary Rendition may be also considered to have occurred where an individual is placed in the custody of a foreign government at the direction of the U.S. government without U.S. officials ever being physically involved in the seizure or transfer. See, e.g., Omar Abu Ali ex. rel. Ahmed Abu Ali v. Ashcroft, Case No. 1:04-CV-01258 JDB (D.D.C. filed July 28, 2004) (lawsuit alleging that Abu Ali was arrested and detained by Saudi Arabian officials at the request of the United States and that the respondents, acting under color of law violated U.S. law by engaging in the practice of “rendition to torture, namely placing an individual in the custody of a foreign government for purposes of interrogation in connection with suspected terrorist activities where harsh forms of interrogation are employed.”), complaint available at http://www.humanrightsusa.org/modules.php?op=modload&name=News&file=article&sid=13 (last visited Oct. 25, 2004).

9. This Report uses the “more likely than not” standard for assessing an individual’s risk upon transfer because it is the test that the United States employs when assessing that risk. By using this standard, the Report intends to examine the set of transfers that would be illegal under U.S. law, while acknowledging that this approach excludes cases of Extraordinary Rendition that could be technically legal under federal law, but would violate international human rights law that is binding on the United States. The relevant human rights treaties contain significantly more protective standards concerning the level of risk of torture or CID treatment that an individual faces upon transfer. The standard under CAT requires the presence of “substantial grounds for believing [the individual] would be in danger of being subjected to torture” upon transfer. CAT, supra note 5, art. 4(1). The ICCPR has been authoritatively interpreted to prohibit transfer in cases where there are “substantial grounds for believing that there is a real risk of irreparable harm” from torture or CID treatment. Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the

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practice appears to be one form of what is an acknowledged practice—the covert rendition by U.S. officials of individuals suspected of involvement in terrorism to “justice”—i.e., for trial or criminal investigation either to the United States or to foreign states. What is “extraordinary” about this more recent form of rendition is the role of torture and cruel, inhuman or degrading (CID) treatment reportedly involved in such transfers: U.S. officials reportedly are seeking opportunities to transfer terrorist suspects to locations where it is known that they may be tortured, hoping to gain useful information with the use of abusive interrogation tactics. At best, they appear to be turning a blind eye to abuses.

According to press reports, “regular” renditions—i.e., transfers made without recourse to the regular legal procedures of extradition, removal, or exclusion, but not involving allegations of involvement in torture—have been occurring for more than a dozen years, and have included numerous transfers in the years leading up to September 11, 2001. According to reports, however, the frequency of renditions increased significantly and their scope widened as the United States engaged in the “War on Terror.” Moreover, reports suggest that the pattern of renditions shifted during this time, focusing less on rendition to “justice” in the form of criminal investigation and trial in the United States or abroad, and more on interrogation—often in circumstances that indicate torture was at least a foreseeable possibility. As the former Director of the CIA’s Counterterrorist Center J. Cofer Black stated during testimony before the House of Representatives and U.S. Senate Intelligence Committees, “there was a before 9/11 and there was an after 9/11. After 9/11 the gloves come off.”

Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (HRC General Comment 31). The United States has codified a standard that is more stringent, requiring that it be “more likely than not” that an individual will face torture upon transfer. For a discussion of U.S. law implementing CAT, see Section V.A.5. For a discussion of CAT standards, see Section V.A. For a discussion of ICCPR standards, see Section V.B.

10. On September 13, 2001, the Sunday Tribune (Ireland) reported that upon learning that 15 of the 19 hijackers involved in the September 11, 2001 attacks were from Saudi Arabia, President Bush met with the Saudi Ambassador to the United States, Prince Bandar bin Sultan. During the meeting, President Bush reportedly told Ambassador Bandar that if any Al Qaeda operatives were captured “if we can’t get them to co-operate, we’ll hand them over to you.” See Diarmuid Doyle, Which Ones Are the Bad Guys, Then? The US’s Contempt for the Rights of Its Prisoners Puts Saddam to Shame, The Sunday Tribune (Ireland), Mar. 30, 2003.

This Report will assess the legality of the practice of Extraordinary Rendition under both U.S. and international law. The purpose of the Report is not to establish or verify facts concerning such transfers; that is a task better left to human rights organizations, international bodies, congressional oversight committees, and the U.S. government itself. Rather, using publicly available factual scenarios, this Report will describe the laws relevant to Extraordinary Renditions and the sanctions that may be applicable to individuals involved in such transfers. It will demonstrate that Extraordinary Rendition is prohibited by U.S. law, and is illegal under international human rights and humanitarian law. It will also explain that the U.S. government has an obligation to prevent Extraordinary Renditions, and to fully investigate, prosecute, and punish those responsible for such acts when they do occur. In addition to these duties to prevent and punish Extraordinary Rendition, the U.S. government may be liable under the international law of state responsibility for such transfers at the hands of its agents, and in some circumstances for the ill-treatment that occurs in states to which individuals are transferred, giving rise to the international legal obligation to immediately cease the practice and to remedy such abuses through restitution, compensation, and satisfaction.

II. EXECUTIVE SUMMARY

This joint Report of the International Human Rights Committee of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at New York University School of Law analyzes the legal standards applicable to the practice of Extraordinary Rendition. The Report defines Extraordinary Rendition as the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment. The Report’s main findings are that Extraordinary Rendition is an illegal practice under both domestic and international law, and that, consistent with U.S. policy against torture, the U.S. government is duty bound to cease all acts of Extraordinary Rendition, to investigate Extraordinary Renditions that have already taken place, and to prosecute and punish those found to have engaged in acts that amount to crimes in connection with Extraordinary Rendition.

The Report begins with an overview of the practice of Extraordinary Renditions as reported in the press; since Extraordinary Rendition appears to be a covert activity, the factual scenarios included in the Report have
not been verified. Examples are given of cases in which the United States
has allegedly been involved in transfers of individuals from inside the
United States, from foreign states, and from U.S. military outposts to
states well known to practice systematic or uncontrolled torture. The level
of involvement of U.S. officials varies from case to case, but the facts in
each example suggest that the United States is using this form of transfer
as an interrogation technique in the “War on Terror.” Indeed, while the
use of Extraordinary Rendition has been denied in all official settings,
officials speaking off the record have acknowledged the practice.

The Report next examines U.S. law to determine whether Extraordi-
nary Renditions are, or could be, authorized by existing law or covert
directives. After systematically considering the bases of authority for transfers
of individuals by U.S. officials and the limits to that authority, the Re-
port concludes that no publicly available statute, regulation, executive
finding, directive or other action exists to authorize Extraordinary Rendi-
tion. Given the clear intent of Congress, expressed through legislation
aimed at upholding U.S. obligations against torture and complicity in
such abuse, and White House policy condemning torture, any purported
authority to carry out Extraordinary Renditions would be an unauthor-
rized derogation from U.S. law.

The Report then discusses the international law applicable to Extraor-
dinary Rendition, including the Convention against Torture and Other
Cruel, Inhuman or Degrading Treatment or Punishment; the International
Covenant on Civil and Political Rights; the Geneva Conventions of 1949;
and the Refugee Convention of 1951. The Report demonstrates that all of
these treaties contain provisions preventing some aspects, or the entire
practice, of Extraordinary Rendition. This Section concludes with a con-
sideration of some guiding principles from international law on criminal
liability that may be relevant in efforts to prosecute individuals who have
been involved in Extraordinary Renditions. Standards explored include
those governing complicity and conspiracy, the doctrine of command
responsibility, and certain justifications and defenses available under in-
ternational law. The Report then turns to the use of “diplomatic assure-
ances—promises made by governments not to torture or mistreat indi-
viduals who are being transferred into their custody. Because these prom-
ises are made only when the circumstances indicate that an individual is
at risk of torture, and because there are no procedural safeguards allowing
for their transparent implementation, the Report concludes that diplo-
matic assurances as currently used are ineffective.

The Report next demonstrates ways in which Extraordinary Rendi-
tion could leave the United States vulnerable to international liability under the doctrine of state responsibility. This Section explains that the U.S. government is required by international treaty law to prevent, investigate, prosecute, and punish acts amounting to Extraordinary Rendition. The Report concludes with a comprehensive examination of the U.S. criminal and civil statutes that are applicable to individuals involved in Extraordinary Rendition, demonstrating that such individuals may be open to criminal charges and/or civil liability for conspiracy and complicity in torture.

III. RECOMMENDATIONS

End the use of Extraordinary Rendition and take actions to remedy and compensate those harmed in Extraordinary Renditions.

- The president, the attorney general, the secretary of defense, and the secretary of homeland security should reject the practice of Extraordinary Rendition as contrary to U.S. and international law and policy.
- The United States should ensure that victims of Extraordinary Rendition are provided with adequate remedies.

Initiate formal investigations into the practice of Extraordinary Rendition.

- An independent commission, modeled on the National Commission on Terrorist Attacks Upon the United States (9-11 Commission) should be formed and charged with investigating Extraordinary Renditions.
- Congressional committees charged with oversight of the armed services, security and intelligence operations should fully investigate the practice of Extraordinary Rendition. Such investigations should include an examination of the alleged authority for Extraordinary Renditions, and an accounting of how such practices came to be approved, if they were.
- The inspectors general of all relevant agencies, including the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Defense, and the Department of Homeland Security should investigate the involvement of their personnel and institutions in Extraordinary Rendition.
- Agencies with custody of documents concerning Extraordinary Rendition, including the Central Intelligence Agency, should declassify and make public such documents, and must comply
with requests for documents pursuant to the Freedom of Information Act.

- The president should declassify Presidential Decision Directives and any other order or finding relevant to Extraordinary Renditions.
- The U.S. government should cooperate fully with the Canadian inquiry into the removal of Maher Arar.

Review and reform legislation and regulations relevant to Extraordinary Renditions.

- Congress should review and supplement the implementing legislation and accompanying regulations concerning the Convention against Torture to ensure that there are no gaps allowing for Extraordinary Rendition. Specifically, regulations should be promulgated by the relevant agencies to ensure that the obligation of non-refoulement set out in the Convention against Torture and the International Covenant on Civil and Political Rights, and implemented by the Foreign Affairs Reform and Restructuring Act of 1998, is enforced with respect to all detainees in the control or custody of U.S. actors, regardless of whether the person is physically present in the United States, as required by statute. The current failure to pass implementing legislation to this effect places relevant agencies at odds with their statutory duties.
- Congress should pass legislation modeled on H.R. 4674, drafted by Representative Markey, aimed at prohibiting Extraordinary Renditions.
- Congress should ensure that liability for complicity or conspiracy in torture is extended to civilian contractors working with U.S. armed forces, security personnel, or intelligence services.

Implement a moratorium on diplomatic assurances.

- The president, secretary of state, and attorney general should not rely upon diplomatic assurances as a means of negating the bar on transfers of those likely to face torture until and unless adequate safeguards have been implemented, including transparency, judicial review, and independent and effective monitoring.

Undertake criminal investigations into alleged acts of Extraordinary Rendition.

- Federal officials and military authorities should investigate individuals who may have been involved in acts that could
amount to aiding and abetting or conspiracy to torture. Such investigations should include examination of officials involved in activities that could amount to aiding and abetting or conspiracy to torture, and should not be focused on only those lower level officials carrying out Extraordinary Renditions.

- Following such investigations, federal prosecutors and military officials should prosecute individuals concerning whom sufficient evidence exists to indict for aiding and abetting or conspiracy to torture.
- The United States should ensure that civil or military personnel involved in the custody, interrogation and treatment of any detainees be adequately trained and supervised in implementing the prohibition against torture and *refoulement*.

IV. EXTRAORDINARY RENDITIONS: AN OVERVIEW

A. Extraordinary Renditions—(Not) A New Phenomenon

No one knows for certain how many renditions (ordinary or extraordinary) have occurred because Congress is not notified about individual cases. However, *Newsweek* reports that by 2004, the United States was running a covert charter airline moving CIA prisoners from one secret facility to another. Usual destinations for rendered subjects are reported to be states such as Egypt, Jordan, Morocco, Saudi Arabia, Yemen, and Syria, all of which have been implicated by the U.S. State Department in using torture in interrogation. The following examples of Extraordi-

12. According to intelligence officials, Congress, which oversees the CIA, knows of only the broad authority to carry out renditions, but is not informed about individual cases. Kareem Fahim, *The Invisible Men*, VILLAGE VOICE, Apr. 6, 2004, at 37.


TORTURE BY PROXY

Renditions have been reported by various news sources. We are not in a position to verify or disprove these accounts; instead, they are offered here as examples of the practices to which we will apply our legal analysis:15

- In September 1995, U.S. intelligence agents reportedly picked up from Croatia one of Egypt’s most wanted Islamic militants, placed him on a ship in the Adriatic Sea for interrogation, and subsequently turned him over to Egyptian authorities. His family believes he was executed in Egypt.16
- In 1998, U.S. agents reportedly transferred Tallat Fouad Qassem, a leader of the Islamic Group, an Egyptian extremist organization, to Egypt after he was picked up in Croatia. Egyptian lawyers said he was questioned aboard a U.S. ship off the Croatian coast before he was taken to Cairo, where a military tribunal had already sentenced him to death in absentia.17
- Also in 1998, CIA officers working with the Albanian police reportedly seized five members of Egyptian Islamic Jihad who were allegedly planning to bomb the U.S. embassy in Tirana. After three days of interrogation, the men were flown to Egypt, allegedly aboard a CIA-chartered plane; two of the men were put to death.18
- In October 2001, Jamil Qasim Aseed Mohammed, a Yemeni microbiology student, was allegedly flown from Pakistan to Jordan on a U.S.-registered Gulfstream jet after Pakistan’s intelligence agency reportedly surrendered him to U.S. authorities at the Karachi airport. U.S. officials alleged that Aseed Mohammed was an Al Qaeda operative who played a role in the bombing of the USS Cole. The handover of the shackled and blindfolded Aseed Mohammed reportedly took place in the middle of the

15. This list is not exhaustive. Factual information used in this Report is based solely on reports published by reputable mainstream media sources.


night in a remote corner of the airport, without the benefit of extradition or deportation procedures.19

• On December 18, 2001, Ahmed Agiza and Mohammed al-Zari were expelled from Sweden and transferred to Egypt. According to the reputable Swedish TV program Kalla Fakta, both men were flown on a Gulfstream V, a private jet alleged to be owned by a U.S. company and which reportedly is used mainly by the U.S. government.20 Both were asylum seekers and the Swedish government had acknowledged that each had a well-founded fear of being persecuted if returned to Egypt. However, the men were excluded from refugee status based on secret evidence that they were associated with Islamist groups responsible for acts of terrorism.21 To justify the expulsions, the Swedish government relied upon “diplomatic assurances” or formal guarantees from the Egyptian government that the two men would not be tortured and would have fair trials upon return. However, according to Human Rights Watch and a coalition of Swedish human rights groups, both men were tortured and ill-treated in Egyptian prisons upon transfer. Moreover, a trial monitor from Human Rights Watch provided a firsthand account of Agiza’s retrial by a military tribunal in April 2004 during which Agiza made serious allegations of torture and ill-treatment.22 The retrial was marred by numerous fair trial violations, proving a lack of compliance by the Egyptian authorities with their diplomatic assurances that Agiza would be granted a fair trial. Upon


re-trial, Agiza was convicted again and sentenced to 25 years’ imprisonment at hard labor. Kalla Fakta’s report that the U.S. government was involved in the transfers of Agiza and al-Zari from Sweden to Egypt has been subsequently confirmed by the Swedish Ministry of Justice.23

• In January 2002, apparently based on information provided by the CIA, Indonesian authorities reportedly detained Muhammad Saad Iqbal Madni who is suspected by the CIA of having worked with Richard Reid (the “shoe-bomber”).24 According to a senior Indonesian official, a few days later, the Egyptian government formally asked Indonesia to extradite Iqbal, who carried an Egyptian as well as a Pakistani passport.25 The Egyptian request did not specify the crime, noting broadly that Egypt sought Iqbal in connection with terrorism. On January 11, 2002, allegedly without a court hearing or a lawyer, Iqbal was put aboard an unmarked U.S.-registered Gulfstream V jet and flown to Egypt.26 A senior Indonesian official said that an extradition request from Egypt provided political cover to comply with the CIA’s request. “This was a U.S. deal all along,” the senior official said, “Egypt just provided the formalities.”27

• On January 17, 2002, just a few hours after Bosnia’s Supreme Court ordered the release from detention of several Algerian citizens for lack of evidence, Bosnian police handed them over to U.S. authorities, who reportedly flew them to Guantánamo Bay.28 The Human Rights Chamber of Bosnia-Herzegovina subsequently noted that there was no evidence to suggest that “the hand-over of the [individuals] can be interpreted to be an extradition. In particular, the diplomatic note of 17 January 2002 from the U.S. embassy cannot be understood to be a valid ex-


24. U.S. Bypasses Law in Fight Against Terrorism, supra note 17; Chandrasekaran & Finn, supra note 17.

25. U.S. Bypasses Law in Fight Against Terrorism, supra note 17; Chandrasekaran & Finn, supra note 17.


27. Chandrasekaran & Finn, supra note 17; U.S. Bypasses Law in Fight Against Terrorism, supra note 17.

tradition request of the United States of America. In this note, the U.S. embassy in Sarajevo advised the government of Bosnia and Herzegovina that it was prepared to assume custody of the six specified Algerian citizens and it offered to arrange to take physical custody of the individuals at a time and location mutually convenient.” The Chamber held that the transfer of the individuals to the custody of U.S. forces “without seeking and receiving any information as to the basis of the detention constitutes a breach of [Bosnia and Herzegovina’s and the Federation of Bosnia and Herzegovina’s] obligations to protect the [individuals] against arbitrary detention by foreign forces.”

• Also in 2002, U.S. immigration authorities, reportedly with the approval of then-Acting Attorney General Larry Thompson, authorized the “expedited removal” of a Syrian-born Canadian citizen, Maher Arar, to Syria. U.S. authorities alleged that Arar had links to Al Qaeda. While in transit at John F. Kennedy International Airport in New York in September 2002, Arar was taken into custody by officials from the FBI and Immigration and Naturalization Service (since reorganized into the Department of Homeland Security) and shackled. Arar’s requests for a lawyer were dismissed on the basis that he was not a U.S. citizen and therefore he did not have the right to counsel.

30. Id. para. 233. The Human Rights Chamber noted that “[c]onsidering the broad interpretation of the term jurisdiction, this obligation arises even if under the Dayton Peace Agreement [Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina] had no direct jurisdiction over U.S. forces stationed in Bosnia and Herzegovina.”
31. See Section V.A.5(c) of this Report for more detail on the procedure of “expedited removal,” also referred to as “summary removal.”
32. For additional information on the case of Maher Arar, see http://www.maherarar.ca/.
34. Id.
Officials repeatedly questioned Arar about his connection to certain members of Al Qaeda.\textsuperscript{35} Arar repeatedly denied that he had any connections whatsoever to the named individuals.\textsuperscript{36} Despite his denials, he remained in custody and was eventually put on a small jet that first landed in Washington, D.C., and then in Amman, Jordan.\textsuperscript{37} Once in Amman, Arar was allegedly blindfolded, shackled and put in a van.\textsuperscript{38} Arar was then transferred to Syria. Despite the fact that he is a Canadian citizen and has resided in Canada for seventeen years, Arar’s pleas to return to Canada were ignored.\textsuperscript{39} Upon reaching Syria, Arar was transferred to a prison where he was allegedly beaten for several hours and forced to falsely confess that he had attended a training camp in Afghanistan in order to fight against the United States.\textsuperscript{40} Arar remained in Syria for ten months during which he was repeatedly beaten, tortured, and kept in a shallow grave.\textsuperscript{41} Arar has subsequently been released and returned to Canada. No charges were ever filed against him in any of the countries involved in his transfer. Following intense public pressure, the Canadian government initiated a public inquiry into the circumstances surrounding Arar’s transfer. The U.S. government has refused the invitation to participate in the Canadian inquiry. U.S. officials, speaking on condition of anonymity, have said that the Arar case fits the profile of what they called covert CIA Extraordinary Rendition—the practice of turning over low-level, suspected terrorists to foreign intelligence services, some of which are known to torture prisoners.\textsuperscript{42}

- In October 2002, Australian citizen Mamdouh Habib was ar-

\textsuperscript{35} Id. paras. 31, 33.
\textsuperscript{36} Id. para. 38.
\textsuperscript{37} Id. para. 49.
\textsuperscript{38} Id.
\textsuperscript{39} Id. paras. 53, 62.
\textsuperscript{40} Id.
\textsuperscript{41} Id. para 61; see also Priest & Stephens, supra, note 26.
\textsuperscript{42} DeNeen L. Brown & Dana Priest, Deported Terror Suspect Details Torture in Syria; Canadian’s Case Called Typical of CIA, \textit{Washington Post}, Nov. 5, 2003, at A1. Gar Pardy, one of Canada’s most senior diplomats at the time, stated that, “The fact that you went looking for assurances, which is reflected here, tells you that even in the minds of people who made this decision… I mean, there were some second thoughts.” 60 Minutes II, \textit{His Year in Hell} (Jan. 21, 2004) available at http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml (last visited Oct. 25, 2004).
rested in Pakistan and, reportedly at the request of the U.S. authorities, flown to Egypt where, allegedly, he was severely tortured.\textsuperscript{43} Habib remained in Egypt for six months, after which he was transferred to Guantánamo where he has been detained since.\textsuperscript{44}

- In 2003, Human Rights Watch urged the United States to abandon reported plans to send Uighur Chinese detainees held at Guantánamo Bay to China, where they were likely to face mistreatment and possibly torture.\textsuperscript{45} China has a long and well-documented history of repression of Uighurs, a Muslim, Turkic-speaking community within China. The Chinese government has reportedly systematically tortured and otherwise mistreated suspected Uighur separatists. On August 12, 2004, speaking to Japanese journalists, Secretary of State Colin L. Powell stated that the U.S. government would not send Uighurs to China and indicated that the United States was looking for third-party states willing to accept the Uighurs upon their release from Guantánamo Bay.\textsuperscript{46}

\textbf{B. Extraordinary Renditions—Cloaked in Secrecy}

\textit{1. “Off the Record”: U.S. Involved in Extraordinary Renditions}

In statements made off the record, U.S. officials have admitted that


\textsuperscript{46} U.S. Dept. of State, Office of the Spokesman, Interview: Secretary of State Colin L. Powell Roundtable with Japanese Journalists (Aug. 12, 2004) (“The Uighurs are not going back to China, but finding places for them is not a simple matter, but we are trying to find places for
the government has engaged in Extraordinary Renditions. In many instances, however, the officials (and the press) refer to the practice of transferring an individual, with the involvement of the United States (or its agents) to a foreign country in circumstances that make it more likely than not the individual will be subjected to torture or CID treatment as rendition (as opposed to Extraordinary Rendition). As a technical matter, this Report makes a distinction between rendition and Extraordinary Rendition. Rendition is a covert procedure, also known as “rendition to justice,” which is apparently authorized by a number of presidential directives, despite being itself a deviation from legally codified procedures for transfers of individuals. Extraordinary Rendition appears to be an unauthorized version of rendition. While rendition has been publicly acknowledged by U.S. officials, the existence of Extraordinary Rendition, which involves the risk of torture or CID treatment, has been formally denied by government officials. The distinction between the two practices, however, is increasingly being blurred and media reports, as well as U.S. officials themselves, often do not differentiate between them when speaking off the record. Regardless of what classification is used, however, the practice described by the following U.S. officials off the record violates international and U.S. law and policy.

According to an unnamed senior U.S. intelligence official there have been “a lot of rendition activities” since September 11, 2001: “We are doing a number of them, and they have been very productive.” Similarly, in an interview with the Washington Post, an unnamed U.S. diplomat acknowledged that “[a]fter September 11, [renditions] have been occurring all the time….It allows us to get information from terrorists in a way we can’t do on U.S. soil.” According to another unnamed official, “[t]he temptation is to have these folks in other hands because they have different standards.” “Someone might be able to get information we...
can’t from detainees,” said another. 52 Another unnamed official who has been involved in rendering captives into foreign hands explained his understanding of the purpose of Extraordinary Renditions: “We don’t kick the \[expletive\] out of them. We send them to other countries so they can kick the \[expletive\] out of them.”53 *Newsweek* reported that at a classified briefing for senators not long after September 11, 2001, then CIA Director George Tenet was asked whether Washington was planning to seek the transfer of suspected Al Qaeda detainees from governments known for their brutality. “Congressional sources” told *Newsweek* “that Tenet suggested it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods.”54 Most recently, on October 13, 2004, the Israeli newspaper *HaAretz* reported that the CIA runs a top-secret interrogation facility in Jordan, where at least 11 detainees who are considered Al Qaeda’s most senior cadre are being held.55 *HaAretz* relied on “international intelligence sources” who, according to the newspaper, “are considered experts in surveillance and analysis of Al-Qaida and are involved in interrogating the detainees.”56 *HaAretz* reported that detention of Al Qaeda suspects outside the United States “enables CIA interrogators to apply interrogation methods that are banned by U.S. law, and to do so in a country where cooperation with the United States is particularly close, thereby reducing the danger of leaks.”57

Seymour M. Hersh, a well-respected journalist, asserts that Extraordinary Renditions form part of a special-access program (SAP) that was set

52. Id.
56. Id.
57. Id.
up reportedly at the instigation of U.S. Secretary of Defense Donald Rumsfeld and allegedly with the approval of President Bush and the National Security Advisor Condoleezza Rice.\(^\text{58}\) The SAP allegedly recruited highly-trained commandos and operatives from U.S. elite forces (e.g. Navy SEALs, Delta Force and CIA paramilitary experts), who would be able to cross borders “without visas and could interrogate terrorism suspects deemed too important for transfer to the military’s facilities at Guantánamo, Cuba. They carried out instant interrogations—using force if necessary—at secret detention centers scattered around the world.”\(^\text{59}\) Hersh alleges that the SAP was known in detail to few operatives and officials, although reportedly Secretary of Defense, Donald Rumsfeld, General Richard Myers, Chairman of the Joint Chiefs of Staff, and Dr. Stephen Cambone, the Under Secretary of Defense for Intelligence, were “completely read into the program.”\(^\text{60}\) According to a former intelligence official quoted by Hersh, the goal was to keep the operation protected: “We are not going to read more people than necessary into our heart of darkness. The rules are ‘Grab whom you must. Do what you want.’”\(^\text{61}\) The transfers of Ahmed Agiza and Mohammed Al-Zari from Sweden to Egypt, allegedly with the involvement of U.S. officials, were conducted as part of the SAP.\(^\text{62}\)

In response to Hersh’s reports, the Department of Defense issued a statement noting that “Mr. Seymour Hersh’s upcoming book apparently contains many of the numerous unsubstantiated allegations and inaccuracies which he has made in the past based upon unnamed sources.”\(^\text{63}\) The Department of Defense response notes that investigations into detainee operations in Afghanistan, Iraq, “and elsewhere” are being or have been examined; however, the statement does not refute, or even address, inter alia, the existence of the SAP, the existence of secret detention centers, or the participation of the military and the CIA in Extraordinary Renditions.

Given the secrecy that surrounds Extraordinary Renditions, informa-

\(^{58}\) Hersh, Chain of Command, supra note 20, at 16, 17, 47, 49-50; Seymour M. Hersh, The Gray Zone, The New Yorker, May 24, 2004.

\(^{59}\) Hersh, Chain of Command, supra note 20, at 50.

\(^{60}\) Hersh, Chain of Command, supra note 20, at 51.

\(^{61}\) Id.

\(^{62}\) Hersh, Chain of Command, supra note 20, at 53-54.

tion about the practice is scarce. Although the CIA and other intelligence agents appear to be the main actors, immigration officials, FBI agents, military personnel (including elite Army forces), and contractors may also be involved.64 According to news reports, transfers of individuals occur on U.S. chartered airlines,65 but there appears to be no standard formula for dealing with individuals once they are rendered.66 Sometimes, for instance in Saudi Arabia, U.S. officials allegedly “are able to observe through one-way mirrors the live investigations.”67 In other cases, according to a senior U.S. official, U.S. officials receive summaries of information obtained from interrogations after “feeding” the questions to foreign investigators.68

2. “On-the-Record”: U.S Involved in “Renditions to Justice”

On the record, U.S. government officials acknowledge only the existence of the practice of “rendition to justice” – a practice developed in the late 1980s when the technique was apparently created in order to allow U.S. law enforcement personnel to apprehend wanted individuals in “lawless” states like Lebanon during its civil war.69 In the early 1990s, renditions to justice were allegedly exclusively law enforcement operations in which suspects were apprehended by covert CIA or FBI teams and brought to the United States or other states (usually the states having an interest in bringing the person to justice) for trial or questioning.70 According to then FBI Director Louis J. Freeh, during the 1990s, the United States “successfully returned” thirteen suspected international terrorists to stand trial in the United States for completed or planned acts of terrorism against U.S. citizens.71 Then

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64. There is anecdotal evidence that the Army’s elite DELTA force as well as Navy SEALS may also be involved in Extraordinary Renditions. Hirsch, Chain of Command, supra, note 20, at 50.  
65. Barry, Hirsh & Isikoff, supra note 54; TV4 Kalla Fakta Broadcast, supra note 20.  
66. Coates, supra note 53.  
67. Id.; see also Priest & Gellman, supra note 53.  
68. Coates, supra note 53; Priest & Gellman, supra note 53.  
70. Brown & Priest, supra note 42. One U.S. official, speaking on condition of anonymity, characterized such renditions as follows: “These are not abductions, these are renditions. If [the detainees] are wanted by foreign governments and there is concern that they are involved in terrorist activities, the idea is to render them to justice.” Anthony Shadid, America Prepares the War on Terror, U.S., Egypt Raids Caught Militants, Boston Globe, Oct. 7, 2001, at A1.  
CIA Director George Tenet testified that the CIA took part in over eighty renditions before September 11, 2001.72

The National Commission on Terrorist Attacks Upon the United States (9-11 Commission) explained the practice of renditions as a counter-terrorism measure and described the role of the CIA in the practice:

Under the presidential directives in the Clinton administration, [Presidential Decision Directive]-39 and PDD-62, the CIA had two main operational responsibilities for combating terrorism, rendition and disruption. ...[I]f 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 the CIA, FBI and State Department may locate the terrorist suspect, perhaps using their own sources. If possible, they seek help from a foreign government. Though the FBI is often part of the process, the CIA is usually the main player, building and defining the relationships with the foreign government intelligence agencies and internal security services.73

George Tenet, in a written statement to the 9-11 Commission confirmed that:

CIA's policy and objectives statement for the FY 1998 budget submission prepared in early 1997 evidenced a strong determin...
nation to go on the offensive against terrorists. The submission outlined our Counterterrorist Center’s offensive operations and noted the goal to “render the masterminds, disrupt terrorist infrastructure, infiltrate terrorist groups, and work with foreign partners.”74

The interim staff report on diplomacy of the 9-11 Commission summed up the rendition process pre-September 11, 2001, as follows:

The role of diplomacy was to gain the cooperation of other governments in bringing terrorists to justice. PDD-39 stated: “When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution should be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them.” If extradition procedures were unavailable or put aside, the United States could seek the local country’s assistance in a rendition, secretly putting the fugitive in a plane back to America or some third country for trial.75

U.S. officials deny the existence of Extraordinary Renditions. According to a former covert field operations officer for the CIA, Mike Baker, torture was “not the point” of renditions; rather the “concept behind rendition is simply that moving the suspect to a third country, again, usually the origin of that suspect, will produce better cooperation, more information, as a result of normally such things as cultural affinity.”76

In response to questioning by Senator Kennedy at the Senate Armed Services Committee hearing regarding the mistreatment of Iraqi prisoners by some elements and certain personnel (May 11, 2004), Dr. Stephen Cambone, Under Secretary of Defense for Intelligence, stated that he was not aware of any suspects “in DOD custody” who had been transferred to Saudi Arabia, Jordan, Morocco, or Syria for the purpose of gathering information. When asked by Senator Kennedy whether any suspects had been

74. Tenet Statement to 9-11 Commission, supra note 72.


76. Is the U.S. Subcontracting for Torture? Interview by Jonathan Mann and Susan Candiotti, CNN, with Mike Baker, a former covert field operations officer for the CIA, and Barbara Olshansky, assistant legal director, Center for Constitutional Rights (Nov. 12, 2003).
rendered for other purposes, Dr. Cambone replied: “If there are, I will come back to you and tell you. As best I know, there are not any persons under our custody that have been transferred.” Dr. Cambone also stated that to his knowledge, the United States has not been involved in turning over individuals “for torture and misbehavior—mutilation.”

There is reason, however, to question such a statement from Dr. Cambone. As recently as August 7, 2004, *The Oregonian* reported that a team of Oregon Army National Guard soldiers on duty in Iraq came across a walled compound in which the soldiers found dozens of Iraqi detainees who complained that they had been beaten, starved and deprived of water for three days. According to the report, many of the Iraqis “including one identified as a 14-year-old boy, had fresh welts and bruises across their backs and legs.” The National Guard soldiers disarmed the Iraqi jailers and administered first aid to the prisoners. However, when the highest-ranking U.S. officer on the scene radioed his superiors for instructions, he was told to return the prisoners to their abusers and immediately withdraw. According to the news report, the U.S. embassy in Iraq confirmed the incident occurred and disclosed that the United States “raised questions about the... brutality with Iraq’s interior minister.” This case represents an instance of individuals in U.S. custody being transferred to a state (i.e., Iraq), pursuant to higher-command orders, under circumstances where it was clear that the individuals have been, and likely will continue to be, tortured. To our knowledge, Dr. Cambone has not publicly addressed the incident.

In a letter dated June 8, 2004 addressed to Senator Patrick Leahy, Defense Department General Counsel William Haynes stated: “Should an
individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored. Given that the process of obtaining diplomatic assurances is secret and not open to public scrutiny, it is impossible to verify Mr. Haynes’ claim. However, in the case of Maher Arar, despite U.S. officials’ insistence that they had received assurances in advance from Syria that Arar would not be mistreated, Arar’s captors allegedly “hung him upside-down, gave him electric shocks and put him in a grave-like cell.”

3. Summary: United States Involved in Extraordinary Renditions

Despite the formal denials of U.S. officials, off-the-record accounts as well as reports about rendered individuals suggest that Extraordinary Renditions do take place and, in fact, may be purposefully used as an interrogation technique. The practice appears to span a broad spectrum: from cases in which an individual is seized by U.S. officials and transferred by them to a third state known to use torture on detainees (e.g., the 1998 case involving alleged seizure by the CIA in Albania of members of Egyptian Islamic Jihad who were subsequently transferred to Egypt, and the Arar case) to cases in which U.S. officials indirectly assist another state in transferring individuals to a third state that practices torture (e.g., the case of Agiza and al-Zari who were transferred from Sweden to Egypt on a U.S.-chartered plane). Unfortunately, little additional information is available. According to news reports, the CIA’s Inspector General has initiated an internal investigation into the agency’s detention and interrogation practices in Iraq; however, it is not known whether renditions form part of that investigation. No further information about the CIA’s investigation is available.


87. Arar case puts Canada on rights group’s list, TORONTO STAR, Apr. 15, 2004, at A8. Diplomatic assurances were also obtained by Sweden from Egypt in connection with the expulsion of Ahmed Agiza and Mohammed al-Zari.

Nor is it known whether any other investigations with respect to individuals held at the so-called “secret detention facilities” are taking place. Other attempts to obtain additional information about renditions and Extraordinary Renditions have so far been without success. On January 9, 2004, the Office of the Inspector General of the Department of Homeland Security announced that he would review the reasons behind the removal of Maher Arar to Syria and look into general policies used by U.S. immigration officials to determine where to send non-immigrants who are removed. Unfortunately, the review’s scope has been subsequently limited to an examination of the role of immigration officials only.90 The United States has also refused to co-operate with the public inquiry being conducted by Canadian authorities into the case of Maher Arar.91

In October 2003 and May 2004, the American Civil Liberties Union (ACLU), jointly with other human rights organizations, filed Freedom of Information Act (FOIA) requests seeking records concerning the interrogation and treatment of detainees and the extrajudicial rendition of detainees to states known to use torture.92 The Defense Department and other federal agencies, however, failed to release records, prompting the ACLU and its co-litigants to file a lawsuit in federal court.93 Following a hearing on September 10, 2004 at which the government sought to delay release of documents until 2005, on September 15, federal Judge Alvin K. Hellerstein ordered the government to “produce or identify” the docu-

89. Dana Priest, Torture: The Legal Road to Abu Ghraib and Beyond, supra note 88.
93. Id.
ments listed in the FOIA requests by October 15, 2004.94 A list of the documents produced at the time of this writing is available on the website of the ACLU.95

94. Id. Documents that are not produced must be identified in a list that includes the author, addressee, date and subject matter. Documents that cannot be identified because of their classification status must be produced in a log to the court. The government must also supply the ACLU with a list called a “Vaughn index” stating its justification for withholding documents. Id.

95. ACLU, Records Released in Response to Torture FOIA Request, available at http://www.aclu.org/torturefoia/released/ (last visited Oct. 25, 2004). One of the released documents is a letter sent by William H. Taft, IV, legal advisor for the Department of State, to Christophe Girod, Head of Delegation, International Committee of the Red Cross (ICRC). The letter, dated May 11, 2004, was in response to the concern expressed by the ICRC about the transfer for prosecution of seven nationals of the Russian Federation from Guantanamo Bay to Russia. Taft reiterates the U.S. policy “not to expel, return ("refouler") or extradite individuals to other countries where it believes it is “more likely than not” that they will be tortured.” He proceeds to say, however, that “[b]efore transfer from Guantanamo to the control of another government, United States policy is to obtain specific assurances from the receiving country that it will provide human treatment and not torture the individual to be transferred. In determining whether it is “more likely than not” that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including inter alia the expressed commitments of officials from the receiving country.” Letter from William H. Taft, IV, legal adviser, Department of State, to Christophe Girod, Head of Delegation, International Committee of the Red Cross (May 11, 2004), available at http://www.aclu.org/torturefoia/released/State_Dept_ltr_051104.pdf (last visited Oct. 25, 2004). Taft concludes that the U.S. government obtained “assurances from senior Russian authorities that the detainees will be treated humanely in accordance with Russian law and obligations.” Id. It is surprising that the U.S. government would find such assurances from Russian authorities credible, given that the U.S. State Department Country Report for 2003 unequivocally finds that “There were credible reports that [Russian] law enforcement personnel frequently engaged in torture, violence, and other brutal or humiliating treatment and often did so with impunity.” U.S. DEP’T OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2003): Russia, available at http://www.state.gov/g/drl/rls/hrrpt/2003/27861.htm (last visited Oct. 25, 2004). The 2002 State Department report also noted that while the Russian Constitution prohibits torture, violence, and other brutal or humiliating treatment or punishment “there were credible reports that law enforcement personnel frequently engaged in these practices to coerce confessions from suspects and that the Government often did not hold officials accountable for such actions. Neither the law nor the Criminal Code defines torture; it is mentioned only in the Constitution. As a result, it was difficult to charge perpetrators. The only accusation prosecutors could bring against the police was that they exceeded their authority or committed a simple assault. Prisoners’ rights groups, as well as other human rights groups, documented numerous cases in which law enforcement and correctional officials tortured and beat detainees and suspects. Human rights groups described the practice of such abuse as widespread. Numerous press reports indicated that the police frequently beat persons with little or no provocation or used excessive force to subdue detainees.” Id.
C. Extraordinary Renditions Violate U.S. Law

Given the secrecy surrounding Extraordinary Renditions and the formal denials by U.S. officials of the existence of the practice, it is difficult to ascertain what source of authority, if any, would provide the basis for U.S. engagement in Extraordinary Renditions. In this Section, we examine the U.S. legal standards that potentially could be applicable to Extraordinary Rendition. After a close examination of these potential sources of authority, we conclude that no publicly available statute, regulation, or executive finding, directive or other action exists to authorize Extraordinary Rendition. Given the clear intent of Congress, expressed through legislation aimed at upholding U.S. obligations against torture and complicity in such abuse, and the White House policy condemning torture, any purported authority to carry out Extraordinary Renditions would be an unauthorized derogation from U.S. law and policy.

1. Extraordinary Rendition and Existing Statutory Law (FARRA)

One of the most important pieces of U.S. legislation dealing with transfers of individuals is the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).96 Regulations adopted pursuant to FARRA (FARRA Regulations) address transfers from the United States by virtue of extradition or removal, and include safeguards against removal and extradition of an individual to a country where he or she fears torture. The FARRA Regulations do not deal with transfers originating outside the United States and thus contain no authority for Extraordinary Renditions. However, given the fact that the FARRA Regulations prohibit the removal or extradition of an individual to a state where he or she is more likely than not to be subjected to torture, and given the FARRA policy statement that the “United States [shall] not ... 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,”97 it can be inferred that Congress intended to prohibit any transfers (whether originating in the U.S. or elsewhere), with the involvement of U.S. officials, to states where the individual is more likely than not to be tortured.

A more detailed look at the FARRA Regulations supports this conclu-


97. FARRA, supra note 96, §1242(a) (emphasis added).
sion. For example, in the context of extradition,\textsuperscript{98} according to the 2000 U.S. report to the Committee Against Torture regarding U.S. compliance with CAT, “in the United States, domestic law grants the Secretary of State discretion to decide whether to surrender a fugitive who has been found extraditable. This is a sufficient basis for the Secretary...to satisfy herself before she orders the surrender of the fugitive that he or she will not be tortured after extradition.”\textsuperscript{99}

Regulations concerning the removal of aliens from the United States, which are primarily found in the Code of Federal Regulations (C.F.R.) in Title 8, sections 208.16-208.18 and 1208.16-1208.18, prohibit the removal of aliens to states where they would more likely than not be subjected to torture.\textsuperscript{100} For the purposes of these regulations, “torture” is understood to have the meaning prescribed in CAT Article 1, subject to the reservations, understandings, and declarations contained in the Senate’s advice and consent to ratification of CAT.\textsuperscript{101} Specifically, the regulations provide that where an individual subject to a removal order is more likely than not to be subjected to torture in the transferee state, such individual is eligible for a withholding or deferral of the removal order.\textsuperscript{102} Aliens who are suspected of engaging in “terrorist activity,” including those are suspected of providing material support to terrorist organizations,\textsuperscript{103} are re-

\textsuperscript{98}. Generally, under the law of the United States, extradition to another state takes place pursuant to a duly ratified extradition treaty. The exceptions are (i) extradition to the international tribunals for the former Yugoslavia and Rwanda (Act Feb. 10, 1996, P.L. 104-106, Div A, Title XIII, Subtitle E, § 1342, 110 Stat. 486); (ii) extradition of non-U.S. nationals who have committed crimes of violence against a U.S. national in foreign countries in certain circumstances (18 U.S.C. §3181 with note, §3184); and extradition to Palau, the Marshall Islands and the Federated States of Micronesia pursuant to a legislative executive agreement (48 U.S.C.S. § 1901).


\textsuperscript{100}. The Department of Homeland Security has primary day-to-day authority to implement and enforce these regulations. The Department of Justice, through the Executive Office of Immigration Review (EOIR) has adjudicative authority over some detention and removal decisions.

\textsuperscript{101}. 8 C.F.R. §208.18(a). For a description of U.S. reservations and declarations, see Section V.A.5(a) of this Report. For a discussion of the legality under international law of the United States’ reservations and declarations, see note 5, supra.

\textsuperscript{102}. 8 C.F.R. §208.16(c)(4).

\textsuperscript{103}. Such individuals are considered a security threat covered under section 241(b)(3)(B) of the Immigration and Nationality Act (INA). Act June 27, 1952, ch. 477, 66 Stat. 163, as
movable and excludable from entry into the United States even if they face prospective persecution, including torture, abroad. They are not eligible for withholding of removal on CAT grounds, but are able nonetheless to apply for a deferral of removal pursuant to Title 8, section 208.17(a), which provides protection from transfer. 104

Certain individuals seeking to enter the United States, including those having engaged in terrorist activities, may be inadmissible to the United States, and therefore may be summarily removed.105 The decision regarding summary exclusion usually occurs at the border or airport when a Department of Homeland Security Bureau of Customs and Border Protection (CBP) officer suspects that an arriving alien is inadmissible on one of several grounds, including security or related grounds. However, even in those circumstances, the governing regulations provide that “[t]he Service shall not execute a removal order under this section [summary exclusion] under circumstances that violate...Article 3 of the Convention against Torture.”106

amended 8 U.S.C. §1101 et seq. Terrorist activity does not include material support if the secretary of state or attorney general, following consultation with the other, concludes in his sole discretion (which is not subject to a review) that the definition of “terrorist activity” does not apply. Id. § 212(a)(3)(B).

104. See INA supra note 103, §§237(a)(4)(B) (2004), 241(b)(3)(B) (2004), 8 U.S.C. §§1227(a)(4)(B) (2000), 1231(b)(3)(B) (2000). Aliens to be designated as engaging in “terrorist activity” include those who, acting as an individual or part of an organization, (1) commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepare or plan a terrorist activity; (3) gather information on potential targets for a terrorist activity; (4) solicit funds for a terrorist activity or organization, unless it can be demonstrated that the alien did not know and should not reasonably have known that solicitation would further terrorist activity; (5) solicit any individual for terrorist activity or membership, unless it can be demonstrated that the alien did not know and should not reasonably have known that solicitation would further terrorist activity; or (6) commit an act that the actor knows, or reasonably should know, affords material support to the terrorist organization, including providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives, or training. CRS Report for Congress, “The UN Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens,” available at http://fpc.state.gov/documents/organization/31351.pdf (last visited Oct. 25, 2004) (CRS Report); See INA §212(a)(3)(B) (2004), 8 U.S.C. §1182(a)(3)(B) (2000).

105. INA, supra note 103, §212(a)(3) (2004); § 235(c).

106. 8 C.F.R. §235.8(4). Those held for summary removal who are not suspected of terrorism and fear persecution or torture if returned can apply for a “credible fear” interview, which if positive, entitles the individual to a full hearing before an immigration judge. INA supra note 103, §208.30.
Thus, while FARRA Regulations do not directly address Extraordinary Renditions, given that the regulations, and FARRA itself, are clear in their intent to offer protections to individuals against transfers to states where they are more likely than not to be subject to torture,107 Congress must have intended to prohibit any practice that would foreseeably result in torture, including Extraordinary Renditions.

2. Extraordinary Rendition and the Courts

Although U.S. courts have not addressed Extraordinary Renditions, they have dealt with rendition108—that is, extrajudicial transfers of individuals from third countries to the United States—generally holding that such transfers (usually taking the form of abductions) do not preclude U.S. courts from exercising jurisdiction over the transferred individuals (the Ker-Frisbie doctrine).109 U.S. courts, however, have been more reluctant to accept jurisdiction where extrajudicial transfers were accompanied by torture by or with the acquiescence of the United States. Thus, in United States v. Toscanino,110 the Court of Appeals for the Second Circuit refused to exercise jurisdiction over an individual charged with conspiracy to import narcotics who was kidnapped by the U.S. government from Montevideo, bound, blindfolded, held incommunicado for eleven hours, deprived of food and water, and subsequently transferred to Brasilia where he was tortured for 17 days in the presence and with the participation of a member of the U.S. Bureau of Narcotics. Judge Mansfield, writing for the Second Circuit, stated:

107. As discussed in Section V.A.5(c) of the Report, protections that are offered under FARRA do not comply fully with the obligations of the United States under CAT.
108. See Sections IV.B.1. and IV.B.2. of this Report.
109. See, e.g., Ker v. Illinois, 119 U.S. 436 (1886) (extrajudicial kidnapping from Peru of an individual for purposes of bringing him to trial in the United States on charges of larceny and embezzlement did not deprive the U.S. court of jurisdiction to try the defendant in the United States); Frisbie v. Collins, 342 U.S. 519, 522-23 (1952) (reaffirming the Ker doctrine, the court stated that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (Supreme Court sustained the jurisdiction of a U.S. court to try a Mexican national who was brought to the United States through abduction rather than pursuant to the extradition treaty between the United States and Mexico).
110. 500 F.2d 267 (2d Cir. 1974), reh'g denied, 504 F.2d 1380 (2d Cir. 1974). On remand, the court found "[n]o credible evidence which would indicate any participation on the part of the United States officials prior to the time the defendant arrived in this country. Nor is there any evidence which shows that the abduction was carried out at the direction of United State officials." United States v. Toscanino, 398 F. Supp. 916, 917.
Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law. In light of these developments [in the protection of the rights of the accused] we are satisfied that the “Ker-Frisbie” rule cannot be reconciled with the Supreme Court’s expansion of the concept of due process, which protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. Although the issue in most of the cases forming part of this evolutionary process was whether evidence should have been excluded..., [w]here suppression of evidence will not suffice, ...we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, ...and when an accused is kidnapped and forcibly brought within the jurisdiction, the court’s acquisition of power over his person represents the fruits of the government’s exploitation of its own misconduct. ...Faced with a conflict between the two concepts of due process, the one being the restricted version found in Ker-Frisbie and the other expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the Ker-Frisbie version must yield.111

Although the courts have subsequently reaffirmed the Ker-Frisbie doctrine and confirmed that a court may exercise jurisdiction over an individual regardless of the method used to bring the individual before the court,112 those subsequent cases did not involve acts of torture of the abductee committed by or with the acquiescence of the U.S. officials.

3. Extraordinary Rendition and Congress

Congress has taken an even more assertive position than the courts against transfers in circumstances where the transferee was more likely

111. 500 F.2d at 274-75. Cf. United States v. Lira, 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1975). In Lira, the prisoner was charged with narcotics offenses and alleged that he had been arrested, taken to a local police station (and then to Chilean Naval Prison), tortured, forced to sign a decree expelling him from Chile, and subsequently sent to New York accompanied by of U.S. DEA agents and the Chilean police. Accepting jurisdiction, the Court distinguished Lira from Toscanino on the grounds that “the evidentiary hearing produced no proof that representatives of the United States participated or acquiesced in the alleged misconduct of the Chilean officials.” Id. at 70.

than not to be subjected to torture. In 1998, in compliance with the ratification by the United States of CAT, Congress enacted FARRA, discussed above, in which it explicitly stated that “[i]t 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.”\(^\text{113}\)

Thus, Congress explicitly extended the principle of non-refoulement to persons who may be located outside the United States, although presumably limiting the operation of this policy to those within its jurisdiction. The extension of the non-refoulement policy is in line with recent interpretations of human rights standards, as discussed in Sections V.A.4 and V.B. below. Congress has also implemented legislation criminalizing acts of torture and conspiracy to commit torture, once again evidencing its legislative intent against torture by proxy.\(^\text{114}\) Because Extraordinary Rendition entails the transfer of individuals to states where they are more likely than not to be tortured, the practice is a clear violation of Congressional intent and U.S. policy.\(^\text{115}\)

Congress has explicitly legislated on this issue; accordingly, any executive authorization for Extraordinary Rendition would be at “its lowest

\(^{113}\) FARRA, supra note 96, §1242(a) (emphasis added).

\(^{114}\) For a discussion of this legislation, see Section VIII.A.1. of this Report. For a more detailed description of U.S. ratification of CAT and the ICCPR, including descriptions of reservations and declarations, see Sections V.A.5. and V.B. of this Report.

\(^{115}\) In October 2004, Rep. Dennis Hastert introduced a bill (H.R. 10) a provision of which (section 3032) removes those suspected as terrorists from any protection against transfer to other countries known for their practice of torture. Indeed, under this provision, there would be no protection against such transfer even if it was for the specific purpose of interrogation under torture. This provision was denounced by human rights groups as well as by the White House. See Executive Office of the President, Statement of Administration Policy: H.R. 10-9/11 Recommendations Implementation Act Oct. 7, 2004). The bill has been subsequently amended by Rep. Hostettler. The Hostettler amendment provides that when dealing with suspected terrorists who “would threaten the national security or endanger the lives and safety of the American people” the secretary of homeland security may, in his or her “unreviewable discretion” determine that such individuals are specially dangerous aliens and should be detained until they are removed. Amendment to H.R. 10, offered by Rep. Hostettler (Oct. 4, 2004). The amendment further states that if such an alien has been granted any other protection under the immigration law restricting the alien’s removal, such alien shall be detained and diplomatic assurances will be sought prior to the removal. The amendment, although still inconsistent with the United States’ obligations under CAT, nonetheless evidences that members of Congress are resistant to authorizing blanket transfers to countries where an individual is more likely than not to be subject to torture.
ebb." The seminal case dealing with the legitimacy of executive actions vis-à-vis congressional will is Youngstown Sheet & Tube Co. v. Sawyer. In that case, the Supreme Court set out a tripartite division of executive actions and their respective legitimacy, holding that (i) as a general matter, a president’s power is at a maximum when exercised in a manner expressly authorized by Congress, (ii) a president’s power is in a “zone of twilight” if taken in the absence of congressional authorization, and (iii) a president’s power is at “its lowest ebb” when incompatible with congressional will. The Supreme Court reaffirmed Youngstown in Dames & Moore v. Regan. In light of Congress’ enactment of FARRA, any purported presidential authority for Extraordinary Renditions would be incompatible with expressed congressional intent; accordingly, any executive action purporting to authorize Extraordinary Rendition very likely would be considered outside the scope of executive authority. In any event, as will be demonstrated below, based on publicly available information, no executive authority for Extraordinary Renditions exists.

4. Extraordinary Rendition and the Executive Branch

Extraordinary Renditions potentially implicate the Executive Branch’s powers, including the president’s specific powers to order covert actions as a commander-in-chief, and powers to make agreements with other nations.

(a) The President’s general power as Commander-in-Chief

The Constitution of the United States vests the power over national security matters primarily in the political branches—the Legislative and the Executive Branches of government. The Constitution, however, separates congressional and presidential powers by vesting with Congress the power to declare war, and to “define and punish. . . . Offenses against the Law of Nations” and to “make Rules concerning Captures on Land and Water,” and by vesting in the president the power to wage war as “Commander in Chief of the Army and the Navy of the United States, and of

117. Id..
118. Id. at 635-38.
the Militia of the several States, when called into the actual Service of the United States." In addition, Article II, section 3 of the Constitution directs that the president “shall take Care that the Laws be faithfully executed,” thus confirming that the president cannot act outside the scope of laws enacted by Congress. The principle of separation of powers also serves as a check on the exercise of presidential authority.

In the context of a war, it is less clear “to what extent Congress can control decisions of the President as Commander in Chief in the conduct of wars authorized by Congress.” Likewise, the question of the role of the courts in regulating the Executive Branch’s power during war remains unsettled. Some commentators note that the Executive Branch has expanded by accretion its role in foreign affairs beyond its constitutionally enumerated powers. Supreme Court cases throughout U.S. history, including the recently decided cases relating to detainees in the “War on Terror,” make it clear that the power of the Executive Branch is not plenary. The Executive Branch’s wartime power is limited by the Constitution, by statutes, and by treaty obligations.

In April 2003, a Defense Department memo entitled “Detainee Interrogation in the Global War on Terrorism,” drafted by the department’s Working Group on Detainee Interrogation in the “War on Terror,” took

the position that the president, as Commander-in-Chief, is not bound by federal law and international treaties barring the use of torture. The memo asserted that

Congress lacks authority... to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war... Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe [the law] to avoid this constitutional difficulty and conclude that it does not apply to the President’s detention and interrogation of enemy combatants.  

It is not clear to what extent the Bush Administration adopted this legal reasoning. However, the memo failed to apply (or even mention) the Youngstown rule. Congress has not only given its advice and consent to CAT, but has enacted legislative provisions implementing the treaty. Under the Youngstown analysis, any presidential act that involves violations of U.S. treaty and statutory law very likely exceeds the scope of executive authority. Because Extraordinary Renditions violate U.S. statutory...  

129. Id. at 21.


131. See Section IV.C.3 of this Report.

132. Congress enacted FARRA, which regulates transfers from the United States, as well as 18 U.S.C. §§ 2340 and 2304A, which criminalize torture and conspiracy to commit torture.

law and binding treaty obligations, presidential authorization for such practices very likely would be outside the scope of presidential authority.

The fact that Congress, after the attacks of September 11, 2001, granted the president broad powers to wage the “War on Terror,” does not alter this calculus. The Authorization for Use of Military Force (AUMF), issued on September 18, 2001, authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001, and against those who “harbored such organizations or persons.” The U.S. government has contended that the AUMF and the Executive Branch’s Article II constitutional powers provide blanket and unreviewable authorization for carrying out the “War on Terror.” In Hamdi and Rasul, the Supreme Court rejected that stance. In Hamdi, the Court made clear that the AUMF did not give the government permission to indefinitely detain a suspect “for the purpose of interrogation.” The court did decide that the AUMF constitutes explicit congressional authorization for the detention of enemy combatants, but only because such detention was considered a “fundamental incident of war.” No such argument could apply to Extraordinary Renditions. No assertions have been made that this practice is a “fundamental incident of waging war;” instead, the U.S. government has formally denied that the practice takes place.

(b) Presidential power to authorize covert actions and to issue national security directives

Pursuant to the National Security Act of 1947, the president has the authority to authorize covert actions upon a determination that “such
an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding. . .” \(^{142}\) The same statute explicitly provides that “[a] finding may not authorize any action that would violate the Constitution or any statute of the United States.” \(^{144}\) The president may also issue classified executive orders or directives on national security matters. Whether these directives have the force of law depends upon such factors as the president’s authority to issue them, their conflict with constitutional or statutory provisions, and their promulgation in accordance with prescribed procedure. \(^{144}\) As one commentator has pointed out, “[i]nherent in [the division of power] is the notion that the president must respect statutory commands even when they require a result contrary to his own policy preferences.” \(^{145}\) Accordingly, where there is a conflict between a presidential directive and a law enacted by Congress, agency heads must comply with the law. \(^{146}\) Thus, for example, in *Chamber of Commerce v. Reich*, \(^{147}\) the District of Columbia Circuit Court of Appeals declared illegal an executive order issued by President Clinton that directed federal agencies not to do business with contractors who hire permanent replacements for striking employees. The court, noting that the National Labor Relations Act (NLRA) permits the hiring of permanent replacements for strikers, concluded that an executive order to the contrary would upset the balance struck by Congress on an issue that “surely goes to the heart of United States labor relations policy.” \(^{148}\)

\(^{142}\) 50 U.S.C. §413(b) (2004). The National Security Act of 1947 created the National Security Council, and directed the NSC, subject to the direction of the president, *inter alia*, to:

- a) assess and appraise the objectives, commitments and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purposes of making recommendations to the president in connection therewith; and


\(^{146}\) Id.

\(^{147}\) *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

\(^{148}\) Id. at 1337.
Similarly, in Building and Construction Trades Department v. Allbaugh, the court ruled illegal an executive order issued by President George W. Bush that prohibited federal contractors from using project labor agreements. The court held that the president lacked the authority under the Constitution and the Procurement Act to bar such agreements and that the executive order conflicted with the NLRA by prohibiting a practice that was considered legal under the Act.

As detailed in Section IV.B.2 of this Report, a series of presidential decision directives (PDDs) apparently authorize transfers of suspected terrorists from foreign states to the United States. PDDs are National Security Council documents that announce presidential decisions and guide policy implementation. They range from the publicly available to the highly classified. According to the testimony of then-FBI Director Louis Freeh, “[t]he rendition process is governed by PDD-77, which sets explicit requirements for initiating this method for returning terrorists to stand trial in the United States.” This directive remains classified. Because many of the potentially relevant PDDs (including PDD-77) remain classified, the full scope of the relevant PDDs’ authority is unknown. U.S. officials and the 9-11 Commission have also referred to PDD-39, entitled “U.S. Policy on Counterterrorism,” signed on June 21, 1995 following the bombing of the federal building in Oklahoma City, in circumstances that indicate this PDD may also be implicated in rendition. Since this PDD is available only in highly redacted form, any specific provisions applicable to renditions are not publicly known. The Commission’s interim staff report on intelligence policy states that “under the presidential directives in the Clinton Administration, PDD-39 and PDD-62, the CIA had two main op-


150. Id.

151. Freeh Statement to 9-11 Commission, supra note 71.

erational responsibilities for combating terrorism, rendition and disruption.” Based on available information, it seems that this directive dealt with the transfers of suspected terrorists to the United States outside of formal extradition channels, rather than renditions from the United States or from a third state to another foreign state. A General Accounting Office report found that PDD-62, signed in May 1998, “reaffirmed PDD-39 and further articulated responsibilities for specific agencies.”

Although the scope of various presidential directives is unknown, because Extraordinary Renditions violate U.S. statutory law, and, as will be demonstrated in subsequent Report Sections, treaty law (which is considered to be supreme law of the land under the Constitution), it is unlikely that any PDD explicitly purports to authorize Extraordinary Rendition. Moreover, under U.S. law, Congress could have authorized departure from international obligations of the United States. However, not only did it not do so, but by enacting FARRA and sections 2340 and 2340A of the U.S. Code, Congress reaffirmed United States' commitment to CAT and to the *jus cogens* norm of the prohibition against torture. Without congressional authorization, it is unlikely that executive orders can be issued in violation of the international obligations of the United States. Accordingly, any PDD authorizing Extraordinary Rendition very likely would be outside the scope of presidential authority.

(c) Presidential power to make international agreements

The president has authority to make international agreements “dealing with any matter that falls within his independent powers under the Constitution.” However, as stated above, pursuant to Article III of the Constitution, the president has the duty to “take Care that the Laws be faithfully executed” (take care clause). Thus, under the “take care” clause, as well as in accordance with U.S. jurisprudence, the president likely would be prohibited from making international agreements that contravene the laws of the United States by permitting or aiding torture. In addition,
any order permitting the transfer of individuals to other states in circumstances that constitute complicity, participation, or assistance in CID treatment would also contravene stated administration policies that detainees in the “War on Terror” be “treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria.”

5. Extraordinary Rendition and the CIA

Because Extraordinary Renditions appear to be covert operations the existence of which is formally denied by the U.S. government, and because information about the operations of the CIA is similarly not available to the public, it is difficult to ascertain whether anything in the mandate of (or regulations governing) the CIA could be interpreted to authorize Extraordinary Renditions. This Section provides an overview of the scope of authorization of the CIA activities based on publicly available information and analyzes the practice of Extraordinary Renditions in light of that information.

The CIA was established and granted its general powers under the National Security Act of 1947. It was first given authority to conduct covert operations by National Security Council (NSC) Directive 10/2, issued on June 18, 1948. This authority has been reaffirmed and elaborated upon in several NSC directives and executive orders.

Provisions governing the CIA specify, among other things, how the CIA could use secret funds (a specific budget item to be allocated by the...
Director of Central Intelligence (DCI) as needed without normal accounting review), granted the CIA the right to borrow personnel from other government agencies, allowed the agency to ignore immigration laws, and gave the DCI the right to determine which of the agency’s activities and documents should be kept secret.\(^{161}\) It is noteworthy that the CIA’s powers to override immigration laws are restricted to those affecting the admission of aliens. Specifically, section 403h provides that:

Whenever the Director, the Attorney General, and the Commissioner of Immigration and Naturalization shall determine that the admission of a particular alien into the United States for permanent residence is in the interest of national security or essential to the furtherance of the national intelligence mission, such alien and his immediate family shall be admitted to the United States for permanent residence without regard to their inadmissibility under the immigration or any other laws and regulations, or to the failure to comply with such laws and regulations pertaining to admissibility....\(^{162}\)

No similar authority, however, is given to the CIA in respect of a removal of individuals from the United States. Thus, because the Act explicitly includes the admission but not the removal of aliens, one can infer that congressional intent was not to grant the CIA powers to override laws governing removal of aliens.

Generally, CIA operations are subject to oversight by congressional intelligence committees. However, alternative oversight is provided for highly classified actions: if the president determines that it is essential to limit access to a finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairpersons and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the president.\(^{163}\)

There are apparently CIA regulations in place that explicitly prohibit the use of or participation in torture by CIA officers. According to a Washington Post article, “the CIA’s authoritative Directorate of Operations in-

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\(^{161}\) See, e.g., 50 U.S.C. §403(f), (g), (h).

\(^{162}\) 50 U.S.C. §403h.

\(^{163}\) 50 U.S.C. §413(b).
structions, drafted in cooperation with the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries.164 However, the same article reports that “the CIA, in practice, is using a narrow definition of what counts as ‘knowing’ that a suspect has been tortured: ‘If we’re not there in the room, who is to say?’ said one official conversant with recent reports of renditions.”165 Since these regulations are not publicly available, it is not possible to analyze their consistency with U.S. and international law, or to determine whether they would appear to authorize Extraordinary Renditions. However, based on publicly available information, no authority for Extraordinary Renditions can be found in the CIA governing documents. This is not surprising given that the practice of Extraordinary Rendition is inherently contrary to both U.S. and international law.

V. EXTRAORDINARY RENDITIONS VIOLATE INTERNATIONAL LAW

In this Section of the Report, we consider in detail the international legal standards applicable to Extraordinary Renditions.166 The United States is party to international human rights and humanitarian law treaties that prohibit both torture and the transfer of individuals to states where they are in danger or at risk of torture. Specifically, the United States is a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,167 the International Covenant on Civil and Political Rights,168 the Geneva Conventions of 1949,169 and

164. Priest & Gellman, supra note 53.
165. Id.
166. As we noted in the Introduction and Overview Sections, this Report, including this international law discussion, addresses the different instances of Extraordinary Rendition and not renditions per se, which are beyond the scope of this Report.
167. CAT, supra note 5.
168. ICCPR, supra note 5.
the Refugee Convention of 1951. Each treaty prohibits torture, a prohibition that has become a non-derogable norm under international law. To varying degrees, the treaties also prohibit cruel, inhuman, or degrading (CID) treatment; the differences among the treaties reflect the open-textured nature of the definition of CID treatment. Either directly or indirectly (i.e., through the jurisprudence or commentary of courts or treaty or regional bodies charged with interpreting a particular treaty), each of these treaties includes another norm: the prohibition against the refoulement, or transfer, of an individual to another state where that individual faces the danger or risk of torture. Although these treaties may differ in their particulars, together with customary international law, they prohibit (and, in some instances, require the United States to criminalize) each of the different examples of Extraordinary Renditions described in Section IV.A. of this Report.

CAT prohibits both torture and CID treatment. It also explicitly prohibits the refoulement of individuals to states where there is a “substantial

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TORTURE BY PROXY

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...
The refoulement of individuals to states where they are in danger of CID treatment is not explicitly prohibited. A likely explanation for the higher ICCPR threshold is that the ICCPR has been interpreted to extend the non-refoulement protection over a broader range of abuse—including both torture and CID treatment or punishment—than CAT, which on its face protects only against refoulement to torture.

Although the assessment whether a particular allegation of refoulement to torture meets the subjective component of both the CAT and the ICCPR tests must be made on a case-by-case basis, each alleged instance of Extraordinary Rendition described earlier in Section IV.A. meets the objective component. According to the U.S. Department of State’s own annual human rights reports, each of the states to which individuals have alleg-

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171. The refoulement of individuals to states where they are in danger of CID treatment is not explicitly prohibited.

172. A likely explanation for the higher ICCPR threshold is that the ICCPR has been interpreted to extend the non-refoulement protection over a broader range of abuse—including both torture and CID treatment or punishment—than CAT, which on its face protects only against refoulement to torture.
edly been transferred is known to the United States as having a history of torture of detainees. Many of these states have also been identified by the United States as states that commonly use torture against individuals detained for alleged security reasons or because they are suspected of terrorism.

CAT, the ICCPR and the Geneva Conventions have each been interpreted to require that states investigate and criminalize torture by their own officials and those acting at the officials’ direction. Under CAT, the requirement to criminalize acts of torture or complicity or participation in torture is directly imposed by the treaty itself, and, in the context of Extraordinary Renditions, applies to acts by U.S. state actors (or non-state actors acting with the consent or acquiescence of a state actor) that take place in territory under U.S. jurisdiction (interpreted to include territory over which the United States has factual control), acts on board of U.S.-registered ships or aircraft, or acts by U.S. state actors (or non-state actors acting with the consent or acquiescence of a state actor) anywhere in the world.173

The ICCPR has been interpreted to require a state party to prevent, punish, investigate and redress harm caused by acts of both torture and CID treatment, and complicity to torture and CID treatment, by state actors and by private parties. Failure to investigate and prosecute may result in liability on the part of the state itself. The scope of applicability of ICCPR protections is similar to CAT, but has been interpreted more broadly to include state responsibility for violations of an individual’s ICCPR protections (i) in the physical territory of the state or (ii) that may be imputed to the state if the individual was in the power or effective control of the state (even if outside its territory) or if the violations were committed by state actors, regardless of where they took place.174 The protections of the Geneva Conventions apply in situations of armed conflict, and to individuals who qualify as “protected persons” under the Conventions.

The breadth of these criminalization provisions and interpretations is a reflection of the importance placed by the community of nations on the anti-torture prohibition. Each of the cases of alleged Extraordinary Rendition described above must therefore be investigated and, if there are reasonable grounds for belief that torture was committed, or that U.S. agents or nationals were complicit in transferring an individual to a state where the person was tortured, the United States must prosecute. As de-

173. CAT, supra note 5, art. 5(1). For a detailed discussion of the scope of CAT’s application, see Section V.A.4.

174. For a detailed discussion of the scope of the ICCPR’s application, see Section V.B.2.
scribed in greater detail below, the failure by a state party to investigate and prosecute allegations of torture and complicity in torture may itself give rise to a breach by the United States of its obligations under CAT and the ICCPR.

This Report focuses on the United States’ obligations pursuant to the international treaties to which it is a party, primarily CAT and the ICCPR, as well as the Geneva Conventions and the Refugee Convention. Given the importance of international standards in interpreting U.S. domestic law as reflected in part by recent U.S. Supreme Court decisions in which the court has explicitly looked to international law for guidance in interpreting those obligations, we consider the commentary and decisions by the Committee against Torture (CAT Committee) and the Human Rights Committee, the bodies charged respectively by CAT and the ICCPR.


176. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003); Hamdi v. Rumsfeld, 124 S.Ct. at 2641 (citing to international treaties for “clearly established” principles of the laws of war).

177. The Committee against Torture is the monitoring body created by the states party to CAT, supra note 5, arts. 17-24. It is charged with: (i) considering and commenting on country reports submitted under CAT (art. 19); (ii) the ability to inquire into an individual state’s practices with regard to torture if it receives “reliable information” of “well-founded indications” that torture is being practiced in the territory of the state (art. 20); (iii) resolving inter-State disputes (art. 21); and (iii) determining individual complaints (art. 22). The Committee Against Torture “is not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only.” Committee Against Torture, General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003) (CAT Article 3 Comment), para. 9. The United States is bound by the Article 20 inquiry procedure, and has entered a declaration accepting the Article 21 interstate complaint procedure. See United Nations Treaty Collection: Declarations and Reservations, available at http://www.unhchr.ch/html/menu3/b/treaty12.asp.htm (last visited Oct. 9, 2004). The United States has not accepted the competence of the CAT Committee under Article 22 to receive and consider complaints on behalf of individuals subject to U.S. jurisdiction who claim to be victims of a CAT violation. Id.

178. The Human Rights Committee is the most authoritative source, at the international level, of interpretations of a state’s obligations under the ICCPR. Pursuant to the ICCPR, supra note 5, the Human Rights Committee is empowered to: (i) receive state party reports and comment on those reports (art. 40(4)); (ii) rule on complaints filed by a state party that another state
with interpreting each treaty, monitoring compliance by states with the treaty, and, if applicable, considering individual petitions. The primary treatise on CAT, which was written by two of the principal drafters of the convention and which includes analysis of the CAT travaux préparatoires, also provides assistance in interpreting CAT.\textsuperscript{179}

An additional international legal instrument that applies to the United States through its membership in the Organization of American States (OAS) is the American Declaration on the Rights and Duties of Man.\textsuperscript{180} We also look briefly to the American Convention on Human Rights (American Convention), which the United States signed on June 1, 1997, but has not yet ratified.\textsuperscript{181}

In addition to the U.S. treaty obligations, we look to \textit{jus cogens}\textsuperscript{182} party is not fulfilling its obligations under the Covenant (art. 41); and (iii) rule on complaints filed by individuals “who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies” Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976, available at http://www.ohchr.org/english/law/ccpr-one.htm (last visited Oct. 24, 2004). In ratifying the ICCPR, the U.S. Senate declared that “The United States . . . accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.” See 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).


182. A \textit{jus cogens} norm is defined in the Vienna Convention as “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention, \textit{supra} note 179, art. 53.
norms by which the United States is bound. The prohibition against torture has been universally recognized as a customary international law norm\(^{183}\) and as a *jus cogens* norm applicable in times of war and peace, from which no derogation is permitted.\(^{184}\) In *The Paquete Habana*, the U.S. Supreme Court recognized that customary international law applies to the U.S. domestic sphere.\(^{185}\) As discussed in greater detail below, the prohibitions against torture and *refoulement* are specifically articulated in international law in numerous treaties (including treaties to which the United States is a party), in state practice (including that of the United States) and in the works of scholars.

The United States is not alone in facing the threat of terrorism both within its borders and against its citizens and interests abroad. The experience of other states and regions that have, and still are, facing the threat of terrorism offers useful guidance. Other sources we therefore look to

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\(^{183}\) “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” *Restatement, supra* note 123, at §102 (2). The Restatement specifies that “[t]he conclusion that there are binding norms of international law is necessarily based on the practice of states, and may lead to the creation of customary international law [for states which are not parties] when such agreements are intended for adherence by states generally and are in fact widely accepted.” *Id.* §102(3). The Restatement includes “torture or other cruel, inhuman or degrading treatment or punishment” as a violation of customary international law. *Id.* §702(d).

Customary international law is part of the common law of the United States and is considered to control if there is no contrary treaty, statute or executive act. U.S. CONST., art. III, § 8; *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

\(^{184}\) *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714, 717 (9th Cir. 1992), cert. denied 507 U.S. 1017, 113 S. Ct. 1812 (1993) (quoting Vienna Convention definition of *jus cogens* and noting that the prohibition against torture by state actors has “the force of a *jus cogens* norm”). *See also Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996) (holding that torture is a violation of customary international law and upholding a civil suit against the leader of the Bosnian Serbs under the Torture Victim Protection Act of 1991); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499 (9th Cir. 1992) (finding that official torture violates customary international law); *Filartiga v. Pena-Irala*, 630 F.2d at 881, 883-84, 887 (2d Cir. 1980) (holding that torture is a violation of “the law of nations”); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (following Filartiga and finding a universal proscription against official torture); Inter-Am. Comm’n H. R., *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, para.154 (prohibition against torture is a *jus cogens* norm); *Prosecutor v. Furundzija*, Case No. No. IT-95-17/1-T, Judgment (ICTY Trial Chamber December 10, 1998) (recognizing prohibition against torture as *jus cogens* norm); R. v. *Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 W.L.R. 827 (H.L.) (same); Restatement, *supra* note 123, at cmt. n, (the prohibitions against torture and CID treatment and punishment have the status of *jus cogens* norms).

\(^{185}\) *The Paquete Habana*, 175 U.S. 677, 700 (1900).
include the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{186} (as interpreted by the European Court of Human Rights). Finally, this Report briefly examines the international criminal law standards that have been applied to prosecutions of individuals for violations of the anti-torture prohibition.

A. The United States is Obligated to Prevent Extraordinary Renditions under the UN Convention Against Torture

CAT defines and prohibits torture and conduct that is considered cruel, inhuman or degrading,\textsuperscript{187} prohibits the transfer or refoulement of a person to a state that would subject the person to torture,\textsuperscript{188} and requires the United States to prevent, investigate and criminalize direct, complicitous or other participation in torture by state actors and also non-state actors acting with the consent or acquiescence of a state actor.\textsuperscript{189}

1. CAT Prohibits Torture and Cruel, Inhuman or Degrading Treatment

As the Convention’s preamble notes, at the time of CAT’s formulation, torture and CID treatment were already prohibited by Article 5 of the Universal Declaration of Human Rights,\textsuperscript{190} Article 7 of the ICCPR,\textsuperscript{191} and also by the UN General Assembly’s Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment.\textsuperscript{192} Unlike any of these instruments, though, CAT specifically defines torture as


\textsuperscript{187} CAT, supra note 5, art. 1.

\textsuperscript{188} Id. art. 3.1.

\textsuperscript{189} Id. art. 4.1.

\textsuperscript{190} Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3d Sess., UN Doc. A/810 (1948) art. 5, available at http://www.unhchr.ch/udhr/lang/eng.htm (last visited Oct. 24, 2004) (providing that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

\textsuperscript{191} ICCPR, supra note 5, art. 7 ("no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\textsuperscript{193}

CAT makes it clear, therefore, that the torture prohibition includes conduct undertaken for the purposes of obtaining information by state actors, or by other persons acting with the consent or acquiescence of a state actor.\textsuperscript{194} CAT does not define CID, but the jurisprudence of the CAT Committee makes clear that CID punishment or treatment is on a continuum with torture, through Article 16, which requires ratifying states to prevent “other actors of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”\textsuperscript{195} Article 16 further imposes on ratify-


\textsuperscript{194} See also \textsc{Burgers \& Danelius, supra note 179}, at 119 (“It is important to note . . . that the primary purpose of [CAT] is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions. Precisely because the public interest is sometimes seen in such cases as a justification, the authorities may be reluctant to suppress these practices.”). For a discussion of liability of state actors, see Section VIII. of this Report.

\textsuperscript{195} In its ratification of CAT, the U.S. reservation to Article 16 of CAT provides that the United States considers itself bound by Article 16 only insofar as CID treatment is understood to mean “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments.” See United Nations Treaty Collection: Declarations and Reservations, available at http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm (last visited Oct. 25, 2004). For further discussion of the interpretation of this reservation, see HR Standards Report, \textit{supra} note 193, at 27-30. Acts that the CAT Committee has found to constitute CID treatment or punishment are discussed in greater detail in the HR Standards Report, \textit{supra} note 193, at 18-19.

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ing parties the same obligations with respect to investigation of allegations of CID treatment as the parties have with respect to investigation of torture allegations.\textsuperscript{196}

1. CAT Prohibits the Transfer of Individuals to States Where They May Be in Danger of Torture

CAT’s prohibition against the transfer of individuals to states where they are in danger of torture is absolute and unqualified. CAT Article 3(1) states: “No State Party shall expel, return ("\textit{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.”\textsuperscript{197} The scope of the CAT prohibition against \textit{refoulement} was broadly drafted in order to apply to (i) transfers to any other state where an individual is in danger of torture; (ii) all persons in danger of torture upon transfer; and (iii) all types of transfers (including, for example, deportations or transfers pursuant to extradition treaties).

\textsuperscript{196} CAT, supra note 5, article 16(1) provides:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

See Section V.A.3. of this Report, discussing CAT articles 10, 11, 12 and 13.

\textsuperscript{197} The CAT non-\textit{refoulement} obligation prohibits transfers to states where an individual is in danger of torture, and not transfers to states where the individual faces the danger of CID treatment or punishment. This was a deliberate choice on the part of the drafters who were concerned that although “torture” could be defined with specificity, a definition of CID treatment or punishment was less easily specified. BURGERS & DANIELIUS, supra note 179, at 70, 74, 122-23. As discussed below, however, the Human Rights Committee has interpreted the ICCPR (to which the United States is also a party), to impose the prohibition against \textit{refoulement} to states where an individual faces the danger of CID treatment as well as the danger of torture. The United States should also be guided by the jurisprudence of the European Court of Human Rights and its Commission, interpreting Article 3 of the European Convention, supra note 186. Article 3 of the European Convention prohibits torture and CID treatment or punishment but does not include a prohibition against \textit{refoulement}. Nevertheless, the European Court and the European Commission have interpreted European Convention Article 3 to prohibit transfers to states in which an individual may be subjected to torture or to CID treatment or punishment. See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).
(a) Prohibition against transfers to subsequent states

According to the CAT Committee, “the phrase ‘another State’ in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.”198 Burgers and Danelius state that Article 3 “makes it clear that a State is not only responsible for what happens in its own territory, but it must also refrain from exposing an individual to serious risks outside its territory by handing him or her over to another State from which treatment contrary to [CAT] might be expected.”199

(b) Standards for determining application of non-refoulement obligation to persons in danger of torture

The CAT non-refoulement obligation applies to all individuals who “would be in danger of being subjected to torture” (emphasis added) and not just to individuals who would be tortured upon transfer.200 The focus is on future danger that could occur. CAT further provides that to determine whether “substantial grounds for believing that [an individual] would be in danger of being subjected to torture” exist, “the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”201 In commentary and decisions, the CAT Committee has provided guidance on interpretation of the non-refoulement standard, and the considerations that should be taken into account in assessing the danger of torture.

First, the CAT Committee has interpreted “substantial grounds” to mean that “the risk of torture must be assessed [by the State Party and the Committee] on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.”202 The CAT Committee therefore interprets the “substantial grounds” threshold at a lesser level than that used by the United States: the United States ratified CAT subject to an understanding that it would interpret the CAT

198. CAT Article 3 Comment, supra note 177, para.2.
199. BURGERS & DANELIUS, supra note 179, at 125.
200. This standard has a lower threshold than the Refugee Convention’s refoulement prohibition, which requires a showing of a “well-founded fear of persecution.” See Section V.D. below.
201. CAT, supra note 5, art. 3(2).
202. CAT Article 3 Comment, supra note 177, para. 6.
Article 3 phrase, “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” as used in article 3 of the Convention, to mean “if it is more likely than not that he would be tortured.”

Second, the CAT Committee has determined that the “substantial grounds for belief” requirement incorporates both (i) an objective assessment of the conditions in the state to which an individual is to be transferred, and (ii) a subjective assessment of the danger of torture to the individual facing a transfer. Thus, the CAT Committee has determined that applicants should not be returned to states where reports of conditions indicated the danger of torture and where the state of return was not a party to CAT. For example, in Khan v. Canada, the Committee found that because Pakistan was not a party to CAT, the petitioner’s return would not only put him in danger of torture, but would strip him of any possibility of applying for protection under CAT. On the other hand, the fact that the state of return is a party to CAT does not preclude a finding that a particular person may be at risk of torture in that state.

According to press reports, the United States has transferred individuals for interrogation to states including Egypt, Jordan, Syria, Saudi Arabia, Morocco, Yemen, and Egypt. These are all nations that the U.S.


204. Among the sources of information the CAT Committee will consider is whether the state to which an individual may be returned is “one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights.” CAT Article 3 Comment, supra note 177, para 8.

205. According to the CAT Committee, “The grounds for belief are subjective to the individual in danger of being tortured.” Id. para. 7. To assess a particular individual’s risk, the CAT Committee will look to whether the individual has engaged in activity “within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question.” Id. para 8. See also Mutombo v. Switzerland, Communication No. 13/1993, Committee Against Torture, U.N. Doc. A/49/44 at 45 (1994) (applicant for CAT relief must show that the risk of torture is specific to that individual).


Department of State itself has identified as practitioners of torture on detainees, including as an interrogation method, in State Department human rights reports for each of 2001, 2002, and 2003. The United States thus has knowledge that the objective prong of the “substantial grounds for belief” test is likely satisfied in alleged cases of Extraordinary Rendition to each of these states:

- **Egypt.** In its 2003 report, the State Department found “there were numerous, credible reports that security forces tortured and mistreated detainees” and that “torture and abuse of detainees by police, security personnel, and prison guards remained frequent.” The “[p]rincipal methods of torture reportedly employed by the police and [security services] included victims being: stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water. Victims frequently reported being subjected to threats and forced to sign blank papers for use against the victim or the victim’s family in the future should the victim complain of abuse. Some victims, including male and female detainees and children reported that they were sexually assaulted or threatened with rape themselves or family members.”

- **Jordan.** In its 2003 report, the State Department stated that “police and security forces sometimes abuse detainees physically and verbally during detention and interrogation, and allegedly also use torture. Allegations of torture are difficult to verify because the police and security officials frequently deny detainees timely access to lawyers, despite legal provisions requiring such access. The most frequently alleged methods of torture include sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions, and extended solitary confinement.”

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• **Morocco.** In its 2003 report, the State Department stated that “the law prohibits torture, and the Government denied the use of torture; however, some members of the security forces tortured or otherwise abused detainees.”

• **Syria.** In its 2003 report, the State Department stated that former prisoners and human rights groups report “that torture methods include administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyper-extending the spine; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine…. Although torture occurs in prisons, torture is most likely to occur while detainees are being held at one of the many detention centers run by the various security services throughout the country, and particularly while the authorities are attempting to extract a confession or information regarding an alleged crime or alleged accomplices.”

• **Saudi Arabia.** In its 2003 report, the State Department stated that “there were credible reports that the authorities abused detainees, both citizens and foreigners. Ministry of Interior officials were responsible for most incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation. In addition, there were allegations of torture, including allegations of beatings with sticks and suspension from bars by handcuffs. There were reports that torture and abuse were used to obtain confessions from prisoners. Canadian and British prisoners that...
were released during the year reported that they had been tortured during their detention.... The Government continued to refuse to recognize the mandate of the UN Committee against Torture to investigate alleged abuses. A government committee established in 2000 to investigate allegations of torture still had not begun functioning at year's end.”

- **Yemen.** In its 2003 report, the Department of State stated that “Security forces continued to arbitrarily arrest, detain, and torture persons. The Government sometimes failed to hold members of the security forces accountable for abuses.... The Constitution is ambiguous regarding the prohibition of cruel or inhuman punishment, and members of the security forces tortured and otherwise abused persons in detention. Arresting authorities were known to use force during interrogations, especially against those arrested for violent crimes. Detainees in some instances were confined in leg-irons and shackles, despite a 1998 law outlawing this practice.”

**(c) Types of transfers to which non-refoulement obligation applies**

CAT Article 3’s scope is broad and intended to encompass all transfers. The original draft of Article 3(1) referred to expulsion and *refoulement* only; the reference to extradition was added so that Article 3 would “cover all measures by which a person is physically transferred to another state.” Because of the breadth of this scope, concerns were raised during the drafting of CAT that the *non-refoulement* obligation could conflict with states’ obligations under existing extradition treaties. According to a report of the Working Group on CAT, set up by the UN Commission on Human Rights:

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215. BURGERS & DANIELUS, supra note 179, at 126. The reference to *refoulement* originates in, but differs from, Article 33 of the Refugee Convention, which states that “No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, supra note 170. But, whereas the Refugee Convention protects only persons who meet one of five specified categories that form a basis for persecution under the Refugee Convention, CAT was intended to apply to “any person who, for whatever reason, is in danger of being subjected to torture if handed over to another country.” BURGERS & DANIELUS, supra note 179, at 125.

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Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by Article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not Party to the Convention under extradition treaties concluded before the date of the signature of the Convention.216

Thus, states were aware of and on notice that a reservation or declaration regarding the primacy of extradition treaties over the CAT prohibition against refoulement could be made at the time of CAT ratification. Indeed, the initial version of CAT sent by President Reagan to the Senate for ratification included the reservation (intended to be included in the ratification instrument) that “[t]he U.S. does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not a party to the Convention under bilateral extradition treaties with such states.”217 This proposed reservation was not included in the final U.S. ratification and no such declaration was made by any state. The scope of the non-refoulement obligation therefore covers transfers of individuals to states with which the United States has extradition treaties and which may subject the individual to the danger of torture. These include states to which Extraordinary Renditions are reported to have been made, such as Pakistan,218 Egypt, and Jordan.219

217. S. Treaty Doc. No. 100-20, at iii, 9-14 (1988) (adding that “This reservation would eliminate the possibility of conflicting treaty obligations. This is not to say, however, that the United States would ever surrender a fugitive to a State where he would actually be in danger of being subjected to torture. Pursuant to his discretion under domestic law, and existing treaty bases for denying extradition, the Secretary of State would be able to satisfy himself on this issue before surrender.”).
218. U.S. DEP’T. OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003: PAKISTAN, available at http://www.state.gov/g/drl/rls/hrrpt/2003/27950.htm (“The Constitution and the Penal Code prohibit torture and other cruel, inhuman, or degrading treatment; however, security forces regularly tortured, and otherwise abused persons. Police routinely used force to elicit confessions. Human rights observers suggested that, because of widespread torture by the police, suspects usually confessed to crimes regardless of their actual culpability; the courts subsequently at times dismissed such confessions . . . Over the years, there have been allegations that common torture methods included: beating; burning with cigarettes; whipping the soles of the feet; sexual assault; prolonged isolation; electric shock; denial of food or sleep; hanging upside down; forced spreading of the legs with bar fetters; and public humiliation.”) (last visited Oct. 9, 2004); the State Department Reports for Egypt and Jordan are described above in notes 209 and 210 respectively, and the text accompanying those footnotes.
(d) Development of international law on non-refoulement

CAT Article 3’s prohibition of *refoulement* is based in part on the jurisprudence of the European Commission of Human Rights,\(^{220}\) interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).\(^{221}\) The jurisprudence of the European Commission, and subsequently that of the European Court of Human Rights, therefore is instructive and is evidence that the prohibition against *refoulement* to a state where an individual is in danger of torture is a broadly accepted international norm.

The European Convention does not contain an explicit prohibition against *refoulement*. However, Article 3 of the Convention provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Court has interpreted Article 3 to encompass a prohibition against *refoulement*, based on what it expressly identifies as a set of shared norms: the “common heritage of political traditions, ideals, freedom and the rule of law” of the states party to the European Convention.\(^{222}\)

In the seminal case of *Soering v. United Kingdom*, the European Court of Human Rights held that the extradition to the United States of a German citizen accused of murder in the United States and arrested in the United Kingdom would be a violation of Article 3 of the European Convention. The court emphasized the absolute, non-derogable prohibition on torture and of other inhuman or degrading treatment and held that:

> Article 3 makes no provision for exceptions and no derogation from it is permissible in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the

\(^{220}\) According to Burgers and Danelius (who participated in the drafting of CAT and whose authoritative text on the treaty includes discussion of the CAT *travaux préparatoires*), CAT Article 3 was “inspired by the case law of the European Commission of Human Rights with regard to Article 3 of the European Convention . . . . The Commission has considered that the prohibition of torture and inhuman or degrading treatment in article 3 of the European Convention does not only oblige a State to prevent torture within its own territory, but also to refrain from handing a person over to another State where he might, with some degree of probability, be subjected to torture.” BURGERS & DANIELIUS, *supra* note 179, at 125; see also id. at 125-128 (describing European Commission case law and the negotiations and discussions among states that lead to the final version of CAT Article 3, incorporating the European Commission’s interpretation of Article 3 of the European Convention).

\(^{221}\) European Convention, *supra* note 186.

Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.223

The court then examined whether the European Convention’s Article 3 prohibition against torture and CID treatment also applied to the extradition of an individual to a state where the individual was at substantial risk for torture or CID treatment. The court concluded that it did:

The fact that [CAT] should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed . . . . [I]n the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.224

The European Court subsequently confirmed its decision and extended its holdings to any kind of forced removal or transfer of an individual where there were substantial grounds to believe the person would face torture or ill-treatment.225

That the prohibition against refoulement to states where an individual faces the danger of torture is a broadly accepted norm is also shown in

223. Id.
224. Id.
part by the large number of treaties that incorporate the prohibition, and the number and variety of states that have ratified them. CAT has been ratified by an overwhelming majority of states. The states that have not signed or ratified CAT are states that have yet to recognize fully the prohibition against torture in their own domestic law or practice. The practice of the states that have ratified or signed CAT also supports the conclusion that the non-refoulement principle embodied in CAT is widely accepted and enforced.

A number of multinational or regional treaties ratified or enacted before CAT also support the status of non-refoulement as a principle of international law, and show that the protection afforded by the principle has expanded over time. As discussed in greater detail below, the Refugee Convention includes a prohibition against refoulement that specifically protects refugee who meet certain qualifications. The United

226. To determine whether a principle included in international treaties is a part of customary international law, U.S. courts will look to, inter alia, the "relative influence of [non-ratifying or signatory states] in international affairs. Flores, 343 F.3d at 163. States that are not party to CAT include: Angola, the Bahamas, Barbados, Bhutan, Brunei Darussalam, the Central African Republic, Democratic People’s Republic of Korea, the Dominican Republic, Gambia, Guinea-Bissau, India, Madagascar, Nauru, Nicaragua, Pakistan, San Marino, Sao Tome and Principe, Thailand and Sudan. For a full list of states that are not party to CAT, see http://www.unhchr.ch/lbs/doc.nsf/newhvstatbytreaty?OpenView&Start=1&Count=250&Expand=1.1#1.1 (last visited Oct. 24, 2004). Many of these states have a relatively low profile in international affairs. Significantly, many of these states have committed themselves to the non-refoulement principle by ratifying other treaties that include the principle, including, for example, the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, concluded on Sept. 10, 1969, entered into force June 20, 1974, 1001 U.N.T.S. 45 (ratified by 44 states to date). For ratification status of these treaties, see Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.unhchr.ch/pdi/report.pdf (Status of Ratifications) (last visited Oct. 25, 2004).

227. As of June 9, 2004, CAT had been ratified by 136 states and signed by 12 additional states. Only two states, the United States and Germany, entered reservations to Article 3. See Status of Ratifications, supra note 226, and http://www.unhchr.ch/lbs/doc.nsf/Statusfrset?OpenFrameSet (last visited Oct. 9, 2004). Neither reservation indicates an intent to derogate from CAT’s non-refoulement requirement. The U.S. ratification of CAT states its understanding that Article 3’s requirement of “substantial grounds” to mean “if it is likely than not that he would be tortured.” Id. Germany declared its opinion that Article 3 expressed an obligation on the part of a state, which was met by existing German domestic law. Id.

228. Fifty-four states have recognized the competence of the Committee against Torture to receive and process individual communications concerning those states’ practices under CAT Article 22. See Status of Ratifications, supra note 226.

229. See Section V.D.
States is obligated to comply with the Refugee Convention through its accession to the 1967 Protocol, including the prohibition against refoulement. In the Americas, both the 1978 American Convention on Human Rights and the 1987 Inter-American Convention to Prevent and Punish Torture include prohibitions of refoulement. Article 13 of the Inter-American Torture Convention provides that:

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting States.


230. Article 22(8) of the American Convention states that “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinion.” However, Article 27 of the American Convention allows a state to derogate from Article 22 (and other provisions) during “times of war or other public emergency that threaten the independence and security of the State party.” See American Convention, supra note 181.


232. Unlike CAT and the European Court of Human Rights’ case law on refoulement, the Inter-American Convention threshold for knowledge of likelihood of torture is not “substantial” grounds, but rather, any ground for belief that a person will be subject to torture or CID treatment.

233. The Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 1974, entered into force June 20, 1974, 1001 U.N.T.S. 45, available through http://www.africa-union.org/home/Welcome.htm (last visited Oct. 24, 2004), art. 2(3) (“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened... ”).

234. Adopted 26 June 1981, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3, Rev. 5, reprinted in 21 I.L.M. 58 (1982), available through http://www.africa-union.org/home/Welcome.htm (last visited Oct. 24, 2004), art. 2(3) (“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2”).
Finally, the prohibition against refoulement is often recognized by scholars as a norm of customary international law.235

3. CAT Requires States Parties to Prevent, Prosecute and Punish Torture and Complicity to Torture

CAT Article 4 requires that acts of torture must be treated as offenses under the criminal laws of the states party to the convention and “[t]he same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”236 Article 1’s definition of acts of torture includes the phrase “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”237 Burgers and Danelius note that the breadth of the phrase was intended to encompass an offender who was “not directly connected with any public authority but that the authorities have hired him to help gather information or have at least accepted or tolerated his act.”238 Read together, these provisions require the United States to criminalize (i) direct acts of torture; (ii) complicity in torture; (iii) attempted torture; and (iv) aiding and abetting torture when committed by officials or non-state actors under the direction or with the consent or acquiescence of a state actor.239 Depending on their degree of involvement in Extraordinary Renditions, U.S. officials and (U.S. or foreign) non-state actors acting with the consent or acquiescence of a U.S.


236. CAT, supra note 5, art. 4 (emphasis added).

237. Id., art. 1 (“For the purposes of this Convention, the term ‘torture’ means any act . . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

238. BURGERS & DANELIUS, supra note 179, at 120.

239. BURGERS & DANELIUS, supra note 179, at 120, 129, 130.
official could therefore be liable directly for torture or complicity to torture, and could also incur liability for complicity, attempt, or aiding and abetting torture through the facilitation of the transfer or refoulement of an individual to a state where that individual is in danger of torture.\footnote{240}

Acts of torture by state actors or those acting with their consent or acquiescence may also render a state directly liable. According to Burgers and Danelius, “[i]f torture is performed by a public agency, such as the security police, the government of the country has no defence under [CAT] in saying that it was unaware of the act or even disapproved of it once it was informed.”\footnote{241} Failure to investigate and prosecute could also constitute violations of CAT on the part of the state. CAT Article 6 obligates a state to investigate (if circumstances warrant), assert jurisdiction over, and take into custody an individual who is alleged to have committed torture or is complicit in or has participated in torture, and investigate the circumstances surrounding the allegations.\footnote{242} CAT Article 7 incorporates into CAT the obligation to prosecute or extradite in cases of violations of the prohibition against torture.\footnote{243}

\footnote{240. For a discussion of individual criminal liability under U.S. law, see Section VIII.A.}

\footnote{241. \textsc{Burgers} & \textsc{Danelius}, supra note 179, at 120.}

\footnote{242. Article 6 of CAT, supra note 5, provides:

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offense referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

243. CAT Article 7(1) provides: “1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offense referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.” CAT, supra note 5.}
In addition, CAT requires the United States to train fully persons “who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment,” including civil or military law enforcement and medical personnel, in the prohibition against torture. CAT also requires the United States to review systematically and on an on-going basis, the rules and practices regarding the custody and interrogation of detainees in order to prevent any cases of torture. If there are reasonable grounds to believe that torture has occurred in any territory subject to U.S. jurisdiction, the United States must ensure a prompt and impartial investigation, and also ensure that any alleged victim has timely recourse to an impartial authority that will examine allegations of torture. Victims of torture by U.S. actors must have access to redress and compensation through the U.S. legal system.

244. Id., art. 10:

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Unlike other CAT provisions (e.g. those imposing obligations on states party to review interrogation methods and techniques (art. 11), investigate allegations of torture and CID (art. 12), adjudicate allegations of torture or CID by an individual (art. 13)), Article 10’s obligations are not based on the state party’s jurisdiction over the territory in which its agents may be conducting interrogations. See also art. 16(1).

245. Id., art. 11 (“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”).

246. Id., art. 12 (“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”) and art. 13 (“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”).

247. Id., art. 14:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of
In the context of alleged Extraordinary Renditions, therefore, the United States must ensure that civil or military personnel involved in the custody, interrogation, and treatment of any detainees be trained in the prohibition against torture. The United States must also promptly investigate allegations of Extraordinary Rendition by U.S. actors, or those acting with their consent or acquiescence, and provide recourse and compensation to any individual who is found to have been Extraordinarily Rendered.

4. Scope of Application of CAT Standards Under International Law

Together, CAT’s prohibitions against torture and refoulement, and its criminal enforcement provisions, require the United States (i) to prohibit torture and complicity in torture and to punish acts of state actors (or non-state actors acting with their consent or acquiescence) that violate these prohibitions; (ii) to exercise criminal jurisdiction over such acts of torture and complicity in torture; and (iii) to prohibit the refoulement of individuals to states where they are in danger of torture. If, after fulfilling its obligation to investigate allegations of Extraordinary Rendition, the United States finds there is a reasonable basis to believe alleged Extraordinary Renditions occurred, the United States must exercise criminal jurisdiction over, and prosecute, U.S. officials, or individuals acting with their consent or acquiescence, who may have been involved in such Extraordinary Renditions that could amount to complicity in torture.

(a) Scope of obligations regarding torture

To implement CAT Article 4’s requirement that each state party criminalize torture, attempted torture, and an act by “any person which constitutes complicity or participation in torture,” CAT mandates that each state party “shall” establish jurisdiction over torture and complicity to torture:

(i) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(ii) When the alleged offender is a national of that State;

the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.
(iii) When the victim is a national of that State if that State considers it appropriate.248

In addition, CAT Article 5(2) requires each state party to establish jurisdiction over these offenses when the alleged offender is “present in any territory under its jurisdiction” and the state party choses not to extradite the alleged offender to another state party with jurisdiction.249 Finally, CAT permits the exercise of “any criminal jurisdiction exercised in accordance with” the domestic laws of the state party.250 Together, these CAT provisions constitute a mandatory system of universal jurisdiction over criminal acts of torture and complicity in torture.251

The Vienna Convention on the Law of Treaties requires that a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”252 Read in conjunction with each other, the plain language of the CAT torture prohibition, the requirement of criminalization of complicity or participation in torture, and the jurisdictional provisions, result in a positive obligation for the United States to assert jurisdiction over the following:

(i) any act that violates CAT’s torture prohibitions “in any territory over which [the United States] has jurisdiction”;

(ii) any act of torture or complicity to torture that occurs on a U.S.-registered ship or aircraft;253

248. Id., art. 5(1). The broadest basis of jurisdiction in the context of Extraordinary Renditions is that of Article 5(1)(b), requiring that the United States exercise criminal jurisdiction over a U.S. national who directly participates in, or is complicit or otherwise participates in torture. According to the U.S. CAT ratification legislative history, implementing jurisdictional legislation was required only for this provision and for the Article 5(2) requirement that the United States extend its criminal jurisdiction over foreign offenders who commit torture abroad and are later found in a territory under U.S. jurisdiction. Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990). This domestic legislation was enacted as 18 U.S.C. §2340A(a).

249. Article 5(2) can be seen as a basis for the assertion of universal jurisdiction, but this article does not obligate a state to establish jurisdiction over an alleged offender who is not within its territory. CAT, supra note 5.

250. Id., art. 5(3) (“This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”).

251. BURGERS & DANELIUS, supra note 179, at 3.

252. Vienna Convention, supra note 179, art. 31(1).

253. In addition, if the requisite mens rea element is met for any participating U.S. official or non-state actor, (see Section VIII.A. of this Report), an argument could be made that the
United States is required to assert jurisdiction if U.S.-registered ships or aircraft are used to transfer an individual to any state where the individual faces the danger of torture.

254. BURGERS & DANIELIUS, supra note 179, at 131.

255. Id., at 133. These provisions include CAT Articles 6 (requiring a state party in whose territory an individual is alleged to have committed a violation of CAT Article 4 to take that individual into custody, after ascertaining that the circumstances so warrant, in order to investigate the allegations) and 7 (requiring a state party either to extradite or prosecute an individual alleged to have committed a violation of CAT Article 4, who is in a territory under the jurisdiction of the state party).


There is a dearth of case law and CAT Committee guidance on the content of the phrase “territory under its jurisdiction” as used in CAT. According to Burgers and Danielius, this phrase was intended to extend to “territories under military occupation, to colonial territories and to any other territories over which a State has factual control.”254 This interpretation of “territory under its jurisdiction” also applies to the other CAT provisions that incorporate the territorial jurisdictional requirement.255 The legislative history of the CAT ratification into U.S. domestic law indicates that the Senate had a narrower interpretation of the scope of “territory under its jurisdiction,” stating that it referred to “all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State.”256 In its formal instrument of CAT ratification, however, the United States did not make a reservation or other declaration reflecting this narrower understanding. For a discussion of the interpretation of precisely the same phrase used in the ICCPR’s jurisdictional provisions, see Section V.B.2. below.

(b) Scope of obligations regarding non-refoulement

Given the object and purpose of CAT, the non-refoulement obligation...
should be applied not only to prohibit transfers by the United States of an individual from its own territory to another state where the individual is in danger of torture, but also to (i) the transfer of an individual located outside the United States but under the control of the United States or its agents, and (ii) the transfer of an individual from a second state to any subsequent state in which the individual faces the danger of torture. CAT Article 4’s criminalization requirement does not apply directly to violations of the refoulement prohibition. However, actions taken by a U.S. state actor or a non-state actor acting with the consent or acquiescence of a state actor to transfer or refoule an individual to another state where the individual is in danger of torture may constitute enough state involvement to result in liability for torture or complicity in torture.

5. The United States’ Implementation of CAT

(a) Ratification

The United States ratified CAT in October 1994, with certain reservations, understandings and declarations, and enacted a new federal law to implement the requirements of the CAT relating to acts of torture committed outside the United States. The United States is thus bound by CAT, subject to its reservations, understandings and declarations, as well as the international law norms that CAT codifies.

Under U.S. implementing legislation and regulations, “acquiescence” that amounts to conspiracy or complicity to torture may result in liability for a U.S. state actor. Thus, persons operating under the color of law do not necessarily need to engage directly in acts of torture to be culpable for them. For a public official to acquiesce to an act of torture, that official must, “prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”

257. 18 U.S.C. §2340 et seq. Domestic legislation was required because the Senate’s advice and consent to CAT ratification was subject to the declaration that CAT was not self-executing. Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990) (Ratification Resolution). One of the reservations was with respect to CAT Article 16, which requires states to prevent lesser forms of cruel and unusual punishment that do not constitute torture. According to the reservation, the United States considered itself bound to Article 16 to the extent that such cruel, unusual, and inhuman treatment or punishment was prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution. Id.; see also CRS Report, supra note 104.

258. See note 5 of this Report.

259. Ratification Resolution, supra note 257, at II.(1)(b); see also Section VIII.A. of this Report.

260. Ratification Resolution, supra note 257, at II.(1)(b).
torture. 261 In addition, mere non-compliance with applicable legal procedural standards does not per se constitute torture. 263 With respect to the provisions of CAT Article 3, which prohibits refoulement of persons to states where substantial grounds exist for believing the person would be subjected to torture, the United States declared its understanding that this requirement refers to instances in which it would be “more likely than not” that the alien would be tortured. 264

The U.S. Initial CAT Report 265 states that the United States “has long been a vigorous supporter of the international fight against torture” and that “[torture] is categorically denounced as a matter of policy and as a tool of state authority.” 266 The report further provides that prior to the

261. See, e.g., Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (declaring that the correct inquiry in deciding whether a Chinese immigrant was entitled to relief from removal from the United States under CAT was not whether Chinese officials would commit torture against him, but whether public officials would turn a blind eye to the immigrant’s torture by specified individuals); Ontunez-Turios v. Ashcroft, 303 F.3d 341 (5th Cir. 2002) (upholding Board of Immigration Appeals’ deportation order, but noting that “willful blindness” constitutes acquiescence under CAT); Bullies v. Nye, 239 F.Supp. 2d 518 (M.D. Pa. 2003) (under CAT implementing regulations, acquiescence by government to torture by non-governmental agents requires either willful acceptance by government officials or at least turning a blind eye); see also Pascual-Garcia v. Ashcroft, 73 Fed.Appx. 232 (9th Cir. 2003) (holding that relief under CAT does not require that torture will occur while victim is in the custody or physical control of a public official).

262. See, e.g., Moshud v. Blackman, 68 Fed. Appx. 328 (3rd Cir. 2003) (denying alien’s claim to reopen removal proceedings to assert a CAT claim based on her fear of female genital mutilation in Ghana, because although the practice was widespread, the Ghanian government had not acquiesced to the practice because it had been made illegal and public officials had condemned the practice); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) (holding that protection under CAT does not extend to persons fearing entities that a government is unable to control).

263. Ratification Resolution, supra note 257, at II.(1)(e). See also CRS Report, supra note 104, at 5.

264. Ratification Resolution, supra note 257, at II.(2). This is the standard commonly used by the United States in determining whether to withhold removal for fear of persecution. See INS v. Stovic, 467 U.S. 407, 429-30 (1984); See also CRS Report, supra note 104, at 6.


enactment of the legislation implementing CAT, “the Department of State relied on the law and practice of the United States to provide authority for declining to extradite a fugitive to another State party where there are substantial grounds to believe he would be in danger of being subjected to torture.”

(b) Criminalization of torture

The U.S. obligation under CAT Articles 4 and 5 to criminalize and assert jurisdiction over acts of torture and complicity to torture is described in detail in Section V.A.3. above. Subsequent to its ratification of CAT, the United States enacted section 2340A of the U.S. criminal code to criminalize acts of torture occurring outside its territorial jurisdiction. Pursuant to section 2340A, any person who commits or attempts to commit an act of torture outside the United States is subject to a fine and/or imprisonment for up to twenty years, except in circumstances where death results from the prohibited conduct, in which case the offender may be subject to imprisonment or death. Persons who conspire to commit an act of torture outside the United States are generally subject to the same penalties faced by those convicted of committing torture, except that in the case of conspiracy, the death penalty does not apply. The United States asserts jurisdiction over these actions when (i) the offender is a national of the United States or (ii) the offender is present in the United States, irrespective of the nationality of the victim or offender. Sections 2340 and 2340A are discussed in more detail in Section VIII.A.1. below.

(c) FARRA Regulations

As part of its commitment to implement CAT, the United States, through the enactment of FARRA, required relevant agencies to promulgate regulations effectuating FARRA provisions. The FARRA Regulations broadly address three categories of people: (i) individuals subject to “summary exclusion” (also known as “expedited removal”), (ii) individuals subject to removal orders, and (iii) individuals subject to extradition orders. The scope of CAT protection varies both among and within these categories.

268. 18 U.S.C., §2340A(a).
269. Id.
270. Id.
272. FARRA, supra note 96, §2242(b).
(i) Summary Removal

Broadly speaking, an individual arriving to the United States may be summarily removed if the individual is found inadmissible pursuant to sections 212(a)(6)(C) or 7 of the INA (i.e., lack of required documents or misrepresentation) or if the individual is viewed as a threat to national security.274 In the latter case, if an immigration officer suspects that an arriving individual appears to be inadmissible under section 212(a)(3)(A) (other than clause (ii)), (B), or (C) of the INA (i.e., based on terrorism-related grounds),275 the immigration officer is required to order the re-

273. 8 C.F.R. §235.3. Section 212(a)(6)(C) of the INA provides: Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible;

(ii) (I) Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

(II) In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (I).

Section 212(a)(7) of the INA enumerates required documentation for entry to the United States.

274. 8 C.F.R. §235.8.

275. Section 212(a)(3)(A) of the INA provides, in relevant part: "Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in: (i) any activity (II) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information, ...or (iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is inadmissible." INA Section 212(a)(3)(B) provides, in relevant part and with certain exceptions that the following people are ineligible for entry to the United States: "Any alien who (I) has engaged in a terrorist activity, (II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv)), (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity, (IV) is a representative (as defined in clause (v))
removal of the individual and report the action promptly to the district director. The district director then forwards the report to the regional director for further action. The regional director may deny any further inquiry or hearing by an immigration judge. The decision of the regional director is final and there is no administrative appeal. FARRA Regulations section 235.8(b)(4) provides that the “Service shall not execute a removal order under this section under circumstances that violate section 241(b)(3) of the Act [i.e., restrictions on removal to a country where the individual’s life or freedom would be threatened] or Article 3 of

276. 8 C.F.R. §235.8(a). For a detailed description of summary exclusion procedures, see CRS Report, supra note 104. If possible, the relevant officer or judge must take a brief statement from the alien, and the alien must be notified of the actions being taken against him and of his right to submit a written statement and additional information for consideration by the attorney general, who has authority to assess whether grounds exist to exclude the alien. INA §235(c)(2)(B). If the attorney general concludes, on the basis of confidential information, that the alien is inadmissible on security or terror-related grounds and the release of such information would be prejudicial on security or safety grounds, the CBP regional director is authorized to deny any further inquiry as to the alien’s status and either order removal or order disposal of the case as the director deems appropriate. See 8 C.F.R. § 235.8(b)(1). If the alien’s designation as inadmissible is based on non-confidential information, however, the regional director has discretion to either conduct a further examination of the alien concerning his admissibility or to refer the alien’s case to an immigration judge for a hearing prior to ordering removal. 8 C.F.R. § 235.8(b)(2). The regional director’s written, signed decision must be served to the alien unless it contains confidential information prejudicial to U.S. security, in which case the alien shall be served a separate written order indicating disposition of the case, but with confidential information deleted. 8 C.F.R. § 235.8(b)(3).

277. 8 C.F.R. §235.8(a).
278. 8 C.F.R. §235.8(b).
279. 8 C.F.R. §235.8(c).
the Convention Against Torture.” However, no guidance is provided regarding when, how and by whom the determination of a CAT claim would take place. In fact, the same section explicitly states that provisions of part 208 "relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply." Thus, the scope of CAT protection in the case of individuals arriving to the United States and suspected of being a threat to national security is unclear. Moreover, to the extent that some protocol for determination of CAT claims exists, lack of any review makes it impossible to evaluate the compliance of such a protocol with the protections afforded by CAT.

(ii) Removal

CAT-based procedures for individuals who are not subject to summary exclusion proceedings at the U.S. border are better-defined. In such cases, the determination of a CAT claim is made by an immigration judge. Generally, an applicant for non-removal under CAT Article 3 has the burden of proving that it is “more likely than not” that he or she would be tortured if removed to the proposed state. If credible, the applicant’s testimony may be sufficient to sustain this burden without additional corroboration. In assessing whether it is “more likely than not” that an applicant would be tortured if removed to the proposed state, all evidence relevant to the possibility of future torture is required to be considered, including, inter alia, (i) evidence of past torture inflicted upon the applicant; (ii) a pattern or practice of gross human rights violations within the proposed state of removal; and (iii) other relevant information regarding conditions in the state of removal. For purposes of ascertaining a pattern of gross violations, substantial weight is generally given to the Country Reports on Human Rights Practices issued annually by the U.S. Department of State.

280. FARRA Regulations section 208.30 provides that “the Service has exclusive jurisdiction to make credible fear determinations [for individuals inadmissible on terrorist-related grounds], and the Executive Office for Immigration Review has exclusive jurisdiction to review such determinations.” 8 C.F.R. §208.30. It also specifies procedures for making a determination of credible fear claims.

281. 8 C.F.R. §235.8(b)(4).

282. 8 C.F.R. §208.16(4).

283. 8 C.F.R. § 208.16(c)(2).

284. Id.

285. 8 C.F.R. § 208.16(c)(3).

The Board of Immigration Appeals (BIA), the appellate administrative body within the Executive Office for Immigration Review, has recognized that evidence concerning the likelihood of torture must be particularized; evidence of torture of similarly situated individuals is insufficient alone to demonstrate that it is more likely than not that an applicant would be tortured if removed to a proposed state.\(^{287}\)

If the immigration judge considering a CAT application determines that an individual is more likely than not to be tortured in the state of proposed removal, the individual is entitled to protection under CAT.\(^{288}\) Generally, protection will be granted through the withholding of removal, unless the person falls within one of the categories of aliens described in section 241(b)(3)(B) of the INA, in which case the person will be denied the withholding of removal (although the person could seek to have his or her removal deferred).

(iii) Extradition

In the context of extradition, pursuant to Criminal Code sections 3184 and 3186, the secretary of state is the U.S. official responsible for the final determination of whether to surrender an alleged fugitive to a foreign state by means of extradition.\(^{289}\) The regulations pertaining to extradition quote Article 3 of CAT,\(^{290}\) and specify that “in order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the State Department considers the question of whether a person facing extradition from the United States ‘is more likely than not’ to be tortured in the State requesting extradition when appropriate in making this determination.”\(^{291}\) Using the language of CAT Article 3, the regulations stipulate that in making this determination, the authorities must take into account “all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”\(^{292}\)

Generally, a decision to certify a detainee as extraditable is made ini-

\(^{288}\) 8 C.F.R. §208.16(c)(4).
\(^{289}\) 22 C.F.R. §95.2(b).
\(^{290}\) 22 C.F.R. § 95.2(a)(1).
\(^{291}\) 22 C.F.R. § 95.2(b).
\(^{292}\) 22 C.F.R. § 95.2(a)(2).
tially by a judicial officer, and then the decision is presented to the secretary of state. If the individual subject to an extradition order asserts that he or she will be subject to torture in the state of extradition, “appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.”

Even if the individual does not make a claim pursuant to CAT, the State Department will give consideration “to the requesting country’s human rights record, as set forth in the annual Country Reports on Human Rights Practices, from the perspective of Article 3 [of CAT].”

Decisions of the secretary of state concerning surrender of alleged fugitives for extradition “are matters of executive discretion not subject to judicial review.”

pursuant to FARRA Section 2242(d), notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in Section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the convention or Section 2242, or any other determination made with respect to the application of the policy set forth in Section 2242(a), except as part of the review of a final order of removal pursuant to Section 242 of the INA.

The regulations note that section 242 is not applicable to extradition.

Although the enactment of FARRA was a laudable step towards implementing CAT, the regulatory framework for implementation of the non-refoulement obligation of CAT and of FARRA suffers from certain deficiencies, including a lack of clear procedural guidelines for determination of CAT claims (in the context of summary removal proceeding for individuals deemed by an immigration officer to be inadmissible on possible terrorism-related grounds) and lack of administrative or judicial review in cases of

294. Id.
295. 22 C.F.R. § 95.4.
296. Id.
297. Id. In Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), the Ninth Circuit’s stated that individuals who fear torture upon return to a state of extradition may present a habeas claim under the general habeas statute, 22 U.S.C. §2241, alleging violation of CAT, following the secretary of state’s decision to return the alien. Subsequently, the Ninth Circuit held that its statement in Cornejo was advisory and nonbinding. Cornejo-Barreto v. Seifert, 379 F.3d 1075 (9th Cir. 2004). However, more recently the Court agreed to a rehearing en banc. 2004 WL (9th Cir. Oct. 19, 2004).
summary removals and extraditions. In those cases, therefore, there appears
to be nothing to prevent arbitrary decisions and no procedural safeguards
to ensure compliance with U.S. obligations under CAT and FARRA.

In addition, there appears to be a gap in the implementation of FARRA’s
policy directive to apply the principle of non-refoulement regardless of whether
the person is physically present in the United States. The United States
has enunciated a clear policy “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.” Congress evinced its intent to extend U.S CAT obliga-
tions to certain acts outside the United States through the enactment
into the U.S. Code of sections 2340 and 2340A, which criminalize the act
of and complicity in torture if the act occurs outside the U.S. territory.

However, neither the regulations governing extradition nor those govern-
ing removal proceedings under FARRA are designed to apply to persons
being transferred by, or with the complicity of, U.S. actors outside the United
States to third states. This failure to regulate against refoulement abroad
not only represents a failure of regulatory agencies to comply with the direc-
tives of FARRA, but also constitutes a breach of the U.S. international obliga-
tion to implement and comply fully with the provisions of CAT.

B. The United States is Obligated to Prevent Extraordinary
Renditions under the ICCPR

1. The ICCPR Prohibits Torture, CID Treatment, and Refoulement

The International Covenant on Civil and Political Rights, to which
the United States is a party, explicitly prohibits both torture and CID

298. Generally, judicial appeal or review is available for any action, decision, or claim raised
under CAT only insofar as it is part of a review of a final order of alien removal pursuant to
INA section 242. 8 U.S.C. §1231.

299. FARRA, supra note 96, §2242 (emphasis added)

(rejecting argument that the non-refoulement protections of Article 33 of the Refugee Convention
had extraterritorial applicability to prevent refoulement of Haitians intercepted by U.S.
officials on the high seas and holding that “a treaty cannot impose uncontemplated extraterritorial
obligations on those who ratify it through no more than its general humanitarian intent.”). The case was then brought before the Inter-American Commission on Human
Rights, which stated that Article 33 of the Refugee Convention is not subject to geographical
limitations. Haitian Centre for Human Rights v. United States, Case No. 10.675, Inter-Am.

301. The ICCPR, supra note 5, was ratified by the United States in 1992, subject to a number
torture by proxy

Although the ICCPR does not contain a direct prohibition against Extraordinary Rendition, the Human Rights Committee has interpreted Article 7 to require that states party to the ICCPR “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.” The Human Rights Committee also interprets ICCPR Article 2’s obligation on a state party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” by the Covenant as including a non-refoulement obligation:

[ICCPR Article 2’s] obligation requiring that States Parties respect and ensure the Covenant rights of all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article[] . . . 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

302. ICCPR, supra note 5, art. 7.
304. ICCPR, supra note 5, art. 2(1) states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized within the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
305. HRC General Comment 31, supra note 9, para. 12; see also HRC General Comment 20, supra note 303, para. 9.
Consistent with this interpretation, the Human Rights Committee has previously held that “[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.” According to the Human Rights Committee, the state party “would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.”

The Human Rights Committee has provided only limited guidance on the factors that would constitute a “real risk” of a violation of the ICCPR prohibition against torture, CID treatment or refoulement. Legal commentators have noted, however, that the Committee’s terminology tracks that of the European Court of Human Rights, and that ICCPR Article 7 should be interpreted in light of the court’s jurisprudence interpreting Article 3 of the European Convention. That jurisprudence shows that the “real risk” standard requires a higher showing than CAT’s “in danger of” standard.

308. See, e.g., Mrs. G.T. v. Australia, Communication No. 706/1996, UN Doc. CCPR/C/61/D/706/1996 (1997), para. 8.4 (“A real risk is to be deduced from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases.”).
309. Weissbrodt & Hörtreitere, supra note 235, at 44-45 (citing Ralf Alleweldt, Schutz Vor Abschiebung Bei Drohender Folter Oder Unmenschlicher Oder Erniedrigender Behandlung Oder Strafe: Refoulement-Verbote Im Völkerrecht Und Im Deutschen Recht Unter Besonderer Berücksichtigung Von Artikel 3 Der Europäischen Menschenrechtskonvention Und Artikel 1 Des Grundgesetzes [Protection Against Expulsion In The Case of Threat of Torture or Inhuman or Degrading Treatment Or Punishment], and MANFRED NOWAK, THE UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 131 et seq. (1993)).
310. See Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (ser. A) (1996), para. 79-82, 87-107 (in case where the United Kingdom sought to expel asylum seeker based on assertion that he was a threat to national security, the Court insisted on absolute nature of Article 3 protections even in the face of an alleged threat to national security, including in the context of expulsion cases, and found that despite an improvement in human rights conditions in India, abuses by security forces continued and the asylum seeker faced a “real risk” of ill-treatment by those
forces if returned to India); Soering v. United Kingdom, 11 EHRR 439, 161 Eur. Ct. H.R. (ser. A) (1989) paras. 91, 96, 99 (assessment of "real risk" includes assessment of conditions in the state to which the individual is to be extradited, including the likelihood that the particular individual will be subject to ill-treatment in the receiving state that would violate Article 3); Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991) paras. 70, 77 to 86 (even though individual asserted he had been tortured upon his previous forced transfer to Chile by Sweden, where political conditions in Chile had changed at the time of potential subsequent expulsion, and where the individual’s assertion of torture were not substantiated and deemed to lack credibility by the Court, there were no substantial grounds for belief that he faced a real risk of treatment prohibited by European Convention Article 3); Vilvarajah and Others v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) (1991) at paras. 140-44 (requiring that the "real risk" be current and subjectively be faced by the individual; evidence of mass violations of human rights, "random" acts of torture against the population by security forces, or evidence of prior torture suffered by applicants did not suffice to show such a real risk).

311. Weissbrodt & Hörtreitere, supra note 235, at 1, 50, 55-56.

312. Human Rights Committee, General Comment No. 15, The Position of Aliens under the Covenant, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1\Rev.1 at 18 (1994), (HRC General Comment 15), para. 1 ("Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."). See also Human Rights Committee, General Comment No. 18, Non-Discrimination, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1\Rev.1 at 26 (1994) (HRC General Comment 18), para. 1 ("Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

TORTURE BY PROXY

of Human Rights (and thus the ICCPR) standard is more stringent than that of CAT because the European Convention and ICCPR provide for non-refoulement protection over a broader range of abuse—including both torture and CID treatment or punishment—than CAT, which protects only against refoulement to torture.311

An additional basis for the ICCPR non-refoulement obligation may be found in the principle that, with the exception of a tiny subset of citizenship rights, states parties to the ICCPR may not distinguish between rights afforded to their own citizens and those extended to aliens. The Human Rights Committee has clarified that states may not discriminate between their own citizens and aliens in relation to the state’s “territory and subject to its jurisdiction.”312 According to the Committee, “the general rule...
is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. 313 Included among the rights of aliens under ICCPR is that “[t]hey must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment…. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.” 314

2. Scope of Application of ICCPR Standards under International Law

The Human Rights Committee has interpreted both Article 7’s prohibition against transfer of an individual to a state where he or she faces a real risk of torture or CID treatment or punishment, 315 and Article 2’s “respect and ensure” obligation as requiring state parties to prevent, investigate, and punish or remedy violations both by state agents and non-state actors, under that state’s domestic laws. 316 Failure to protect individuals

313. HRC General Comment 15, supra note 312, para. 2.
314. Id., para. 7.
315. HRC General Comment 20, supra note 303, para. 8 (“The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.”).
316. Id. para. 2 (“It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”); HRC General Comment 31, supra note 9, para. 8 (“The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities . . . . States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities . . . . It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”); see also HRC General Comment 20, supra note 303, at para. 13 (“States parties should indicate when presenting
against such violations may engage the international responsibility of the state party.\textsuperscript{317}

Examples of instances in which the Human Rights Committee has found a state party to be responsible for violations of the ICCPR generally encompass: (i) violations that occur within the physical territory of the state,\textsuperscript{318} and (ii) violations that otherwise are imputable to the state. Under the jurisprudence of the Human Rights Committee, acts that may be imputed to the state include the following: (a) violations of an individual’s ICCPR protections when that individual is in the “power or effective control” of a state, even if outside the territory of that state,\textsuperscript{319} (b) acts within

\textit{Torture by Proxy}

their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.).

317. HRC General Comment 31, \textit{supra} note 9, para. 8 (“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”).

318. ICCPR, \textit{supra} note 5, art. 2(1); see also Concluding Observations of the Human Rights Committee, Cyprus, UN Doc. CCPR/C/79/Add.88, para 3 (1998) (Cyprus not obligated to apply ICCPR protections to territory over which it did not exercise control because of occupation by another state). \textit{But see} Concluding Observations of the Human Rights Committee, Bosnia and Herzegovina, UN Doc. CCPR/C/79/Add.14, para 4 (1992) (Republic of Bosnia-Herzegovina legally responsible for acts in territory over which it had factual and effective control, and also other parts of its territory). Professor Dominic McGoldrick sees this decision as “best understood in the context of Bosnia’s newly attained statehood.” Dominic McGoldrick, \textit{Extraterritorial Application of the International Covenant on Civil and Political Rights, in Extraterritorial Application of Human Rights Treaties (Fons Coomans and Menno T. Kaminga, eds., 2004), 50.}

319. HRC General Comment 31, \textit{supra} note 9, para. 10 (“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ... [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping
a state’s territory that have the effect of violating the individual’s ICCPR protections, even if these effects occur outside the territory of that state;\(^{320}\) (c) acts by state officials or agents of the state (including civilian contractors) that violate an individual’s ICCPR protections, no matter where those acts occur;\(^{321}\) and (d) violations of the state’s obligation to “take appro-

\(^{320}\) Ng v. Canada, Communication No. 469/1991, Human Rights Committee, UN Doc. CCPR/C/49/D/469/1991 (1994), para. 6.1 (extradition of applicant from Canada to the United States where the applicant could face the death penalty could violate Article 7 and render Canada liable for ICCPR violation because “if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person’s rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”); see also Kindler v. Canada, Communication No. 470/1991, Human Rights Committee, UN Doc. CCPR/C/48/D/470/1991 (1993) (same); Lopez Burgos v. Uruguay, Communication No. R.12/52, Human Rights Committee, UN Doc. Supp. No. 40 (A/36/40) at 176 (1981), paras. 12.1-12.3 (in case involving the kidnapping of Uruguayan from Argentina by Uruguayan “security and intelligence forces,” Human Rights Committee held that Article 2(1) “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of the State or in opposition to it. . . . [I]t would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”); Celiberti v. Uruguay, Communication No. R.13/56, Human Rights Committee, UN Doc. Supp. No. 40 (A/36/40) at 185 (1981). Based on the reasoning applied by the Human Rights Committee in these cases, Professor McGoldrick thinks it makes no difference if the applicant had not been a Uruguayan national – it is the acts of arrest and abduction that violate ICCPR protections and bring the individual into the jurisdiction of the state committing those acts. McGoldrick, supra note 318, at 62.

appropriate measures or to exercise due diligence to prevent, punish, investigate and redress the harm caused by” ICCPR violations by state actors or private persons or entities. The Human Rights Committee explicitly found that Article 7 requires states party to take measures against ICCPR violations by private persons to “ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading punishment on others within their power.” In addition to these specific instances, other acts imputable to the State under general international law rule of attribution may come to light which amount to violations of the ICCPR.

Although further factual development of the allegations of U.S. involvement in Extraordinary Renditions is necessary, based on the Human Rights Committee’s jurisprudence, the United States could be liable for acts of torture or CID treatment or complicity to torture or CID treatment by state actors or private persons in each of the instances of alleged Extraordinary Rendition described above in Section IV.A. above. In addition, the United States could be liable for the refoulement of an individual under the control of the United States, or from territory under U.S. control (e.g. a secret detention facility) to any other state where the person faces “a real risk” of torture or CID treatment, regardless of whether the person is actually subjected to ill treatment.

The requirement that the United States investigate and prosecute allegations of Extraordinary Renditions is mandated by the terms of the

322. HRC General Comment 31, supra note 9, para. 8 (“[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities... States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.”).

323. Id. (“It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”).

324. For a detailed discussion of the scope of extraterritorial application of the ICCPR, See McGoldrick, supra note 318.

325. HRC General Comment 31, supra note 318, para. 12 (“article 2’s obligation requiring that States Parties respect and ensure the Covenant rights of all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm”).
Covenant, as interpreted by the Human Rights Committee. In order to ensure the effective application of ICCPR Article 7’s protection against torture, CID treatment, and *refoulement*, the Human Rights Committee requires that state parties investigate allegations of breaches of the protections in the treaty, including those against torture, CID treatment, and *refoulement*, to bring offenders to justice in the case of criminal violations, and to provide appropriate remedies.**326** States are obligated not only to investigate and prosecute, but also to submit periodic reports that include information about training and instruction of state agents and medical personnel on ICCPR protections.**327** A failure by the state party to take any of these actions could itself give rise to a separate breach of the ICCPR by the state.**328** Finally, the Human Rights Committee has interpreted the Article 7 protections in conjunction with the Article 2(3) obligation to provide appropriate remedies as requiring state parties to provide effective complaint procedures and remedies under domestic law for breaches of Article 7.**329**

3. The United States’ Implementation of the ICCPR

The U.S. Senate ratified the ICCPR on April 2, 1992, and the ICCPR came into force for the United States on September 8, 1992.**330** The instrument of ratification contained certain declarations, reservations, and understandings, including a declaration that ICCPR Articles 1 through 27 were not self-executing (*i.e.*, that these provisions must be implemented by domestic legislation).**331** Even though the United States has ratified the

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**326. Id., at paras. 15, and 18 (“Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7).”).**

**327. HRC General Comment 20, supra note 303, para. 10.**

**328. Id. para. 18.**

**329. Id., para. 14; see also HRC General Comment 31, supra note 9, at para. 7 (“Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.”).**


ICCPR with the express declaration that it is not self-executing and has not implemented the ICCPR into domestic legislation, the United States is nonetheless under an obligation to enact legislation to give effect to any international agreement to which it is a party. That obligation is included explicitly in Article 2 of the ICCPR, which requires states party to implement and enforce the protections of the ICCPR. Finally, the United States will be liable for violations of the ICCPR regardless of its failure to pass implementing legislation.

C. The Geneva Conventions' Prohibitions of Extraordinary Renditions

The four Geneva Conventions of 1949 codify a vast array of international humanitarian law standards on the treatment of prisoners of war and civilians during armed conflict and in occupied territories. The protections afforded by the Geneva Conventions apply to (i) the actions of a High Contracting Party in territory under its control during an armed conflict, (ii) the actions of a High Contracting Party outside territory under its control, but which are taken in connection with an armed conflict, and (iii) to individuals falling within specified categories and classified as “protected persons.” The Conventions also apply “to all cases of partial
or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance." 336 A High Contracting Party to the Conventions is bound by their terms with respect to other states accepting and applying the Geneva Conventions. 337 The Geneva Conventions’ protections have been interpreted to extend to individuals detained during the war in Afghanistan (though not without controversy), and also the U.S. war in, and occupation of, Iraq. 338 As discussed below, the Geneva Conventions’ applicability to individuals captured by the United States in situations other than these two conflicts and held, for example, in so-called secret detention facilities is open to question. Of course, all detainees held by the United States—regardless of where or when they were captured or of their status—are entitled to humane treatment and the protection of human rights law, including CAT and the ICCPR.

1. Geneva III Protections

Under Geneva III, “combatants” are entitled to POW status if they are members of the armed forces (other than medical personnel, chaplains, spies or saboteurs). The specific requirements for combatant/POW status are set forth in Article 4 of Geneva III. 340 If there is any doubt as to whether captured persons meet Article 4’s criteria for POW status, such per-

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336. See Geneva Conventions, supra note 169, art. 2.
337. Id.
339. Both medical personnel and chaplains may, however, still be entitled to POW protections under Geneva III even though they are not entitled to POW status. See Geneva III, supra note 169, art. 33.
340. Article 4 of Geneva III, supra note 169, provides, in part:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) That of being commanded by a person responsible for his subordinates;
(b) That of having a fixed distinctive sign recognizable at a distance;
(c) That of carrying arms openly;
(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Articles 43 and 44 of Additional Protocol I set out the circumstances in which an individual may be considered a prisoner of war in conflicts governed by that protocol.

341. See Geneva III, supra note 169, art. 5; see also, U.S. Dept. of Army, Field Manual 27-10, Law of Land Warfare, art. 71 (1956); U.S. Dept. of Army, Regulation 190-8 Military Police, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §1-5 (a)(2) (1997). Under U.S. military regulations, a “competent tribunal” pursuant to Article 5 of Geneva III consists of three commissioned officers. The regulations also require that persons whose status is to be determined: be advised of their rights; be permitted to attend all open sessions, call witnesses, question witnesses called by the tribunal; and, be permitted (but not compelled) to testify or otherwise address the tribunal and be provided with an interpreter. The regulations provide for the tribunal’s determination of a detainee’s status in closed session by a majority vote and require a preponderance of the evidence to support the tribunal’s finding. See Erin Chlopak, Dealing with the Detainees at Guantánamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions 9 Hum Rts. Br. 6, 8 (2002).

342. This Report notes, however, that pursuant to Geneva III, supra note 169, art. 118, POWs are required to be “released and repatriated without delay after the cessation of active hostilities.” If detainees captured during the Afghan conflict and the war in, and occupation of, Iraq are POWs (but have not been adjudicated as such), continued detention, without charge, constitutes a breach of Article 118, unless such persons are detained in compliance with Geneva IV relating to detention of civilians (e.g. pursuant to Article 5 with respect to security detainees and Article 42 permitting internment “if the security of the Detaining Power makes it absolutely necessary.”).
Briefly, Geneva III mandates that POWs be treated humanely at all times. This includes freedom from physical and mental torture, acts of violence, intimidation and insult, and exposure to public humiliation.343 Pursuant to Article 14, POWs also “are entitled in all circumstances to respect for their persons and their honour . . . . [and] shall retain the full civil capacity which they enjoyed at the time of their capture.” With respect to interrogation in particular, Article 17 of Geneva III provides: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” As discussed in greater detail below, in Section V.C.1., the torture or inhumane treatment of POWs is classified as a “grave breach” of Geneva III, obligating the United States to investigate and prosecute any such torture as a war crime.344

Geneva III also mandates that POWs may not be transferred to other states unless those states are also parties to Geneva III, and will fully protect the rights of such POWs (including the protections against torture or inhuman treatment). Although the unlawful transfer of POWs to a third state is not classified as a “grave breach,” Geneva III provides that if POW protections are not to be afforded by the third state, the Detaining Power is obligated to take back custody of the POW and intern the POW in a place where his or her rights will be respected.345

343. Specifically, Article 13 of Geneva III, supra note 169, provides:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

344. Id., arts. 130 and 131.

345. Article 12 of Geneva III, id., provides:

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners
of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

346. Geneva IV, supra note 169, art. 4.
347. Id.
348. Specifically, Article 5 of Geneva IV, id., provides:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

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lawfully participated in a conflict does not deprive that person of Geneva IV’s protections against torture, inhumane treatment and unlawful transfer. These Geneva IV protections would thus extend to individuals (who are not POWs covered by Geneva III) detained during the wars in Afghanistan and Iraq, and would protect them against torture, inhumane treatment and against transfer to other states where they may be subject to torture.

Like POWs under Geneva III, “protected persons” under Geneva IV cannot be subjected to coercive interrogation tactics. Specifically, Article 31 of Geneva IV provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” Article 32 further provides that “any measure of such a character as to cause physical suffering or extermination of protected persons” is prohibited and that “[t]his prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality, whether applied by civilian or military agents.”

Geneva IV contains detailed rules regarding the internment, transfer and deportation of civilians. Article 45 specifically provides that:

Protected persons shall not be transferred to a Power which is

349. A debate exists as to whether persons who have directly participated in the war in Afghanistan hostilities and who do not qualify as POWs under Geneva III (i.e., detainees considered to be “unlawful combatants” by the United States) should automatically be considered “protected persons” under Geneva IV, unless other exceptions apply. Recent decisions of the International Criminal Tribunal for the Former Yugoslavia have held that, “if an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of [Geneva IV].” See Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, (ICTY Trial Chamber November 16, 1998), para. 271; see also Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, (ICTY Appeals Chamber, July 15, 1999). For a further discussion of the standards applicable to the determination of a “protected person” under Geneva IV, and the Bush Administration’s designation of certain detainees as “enemy combatants,” see HR Standards Supplement, supra note 338, at 3-5 and 9-10.

350. Geneva IV, supra note 169, arts. 41 and 42 (civilians may be interned only where “absolutely necessary”), art. 43 (internment order must be reconsidered upon the civilian’s request, “as soon as possible by an appropriate court or administrative board” and periodically “at least twice yearly”), art. 45 (civilians may be transferred only to a Detaining Power that is a party to the Convention), art. 78 (civilian internment authorized only for “imperative reasons of safety”), arts. 79-126 (rules on treatment of civilian internees), arts. 127-28 (rules on transfers of internees), arts. 132-35 (rules on repatriation of civilian internees).
not a party to the Convention. . . Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

As discussed in greater detail below, in Section V.C.2., both the torture or inhuman treatment and the “unlawful deportation or transfer or unlawful confinement of a protected person” are classified as “grave breaches” of Geneva IV, obligating the United States to investigate and prosecute any such transfer as a war crime.\(^{351}\)

\(^{351}\) Id., arts. 147 and 148. Article 49 of Geneva IV, id., prohibits “[i]ndividual or mass forcible transfer, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, . . . regardless of their motive.” Geneva IV, supra note 169, art. 49. It has recently been reported that the CIA has secretly transferred detainees from Iraq for interrogations under authority of a draft legal opinion dated March 19, 2004 and authored by Jack Goldsmith, then Assistant Attorney General of the Department of Justice’s Office of Legal Counsel. See Dana Priest, Memo Lets CIA Take Detainees Out of Iraq; Practice is Called Serious Breach of Geneva Conventions, WASHINGTON POST, Oct, 24, 2004, at A1; see also Jack Goldsmith, Office of Legal Counsel of the Department of Justice, Re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq, (draft dated March 19, 2004), available at http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf (last visited Oct. 26, 2004) (Goldsmith Memo). According to Bush Administration officials, the Goldsmith Memo “establishes an important exception to public assertions by the Bush administration since March 2003 that the Geneva Conventions applied comprehensively to prisoners taken in the conflict in Iraq.” Douglas Jehl, U.S. Action Bars Right of Some Captured in Iraq, N.Y. Times, Oct. 26, 2004, at A1. The memo reasons that Article 49’s protection against forcible transfer and deportation is not available to “illegal aliens” in Iraq. Goldsmith Memo at 2-8. The memo also reasons that Article 49’s protections do not apply to transfers of either “protected persons” or of what the memo calls “illegal aliens” for the purposes of interroga-
It is unclear whether Geneva IV would apply to individuals detained outside the United States (and not Iraqi or Afghan nationals captured during the wars in Iraq or Afghanistan, respectively) as part of the “War on Terror,” including individuals detained at the U.S. secret detention facilities. First, in the context of the so-called war against terrorism, the United States is not engaged in international armed conflict with another state during the course of which these individuals were detained. Second, without a status hearing (which have now begun in the case of detainees at Guantánamo only, and whose procedural adequacy has been called into question by military lawyers and human rights groups) it is not possible to determine whether a particular individual is an interned civilian to whom Geneva IV would apply. As noted above, however, regardless of whether Geneva IV protections apply, transfer of any of these individuals to states where they are in danger of torture would still clearly be prohibited under human rights treaties.

By its terms, Geneva IV ceases to apply “on the general close of military operations” in the case of an international conflict or, in the case of “occupied territory,” “one year after the general close of military operations,” or as long thereafter as the occupying power exercises the “functions of government.”352 But the questions of when military operations have ended or when a territory is no longer occupied are often not easily answered. For example, whether military operations have reached a “general close” and whether the United States constituted an Occupying Power after the establishment of the Karzai government in June 2002, and its recognition by the UN Security Council, are questions open to controversy. Similarly, U.S. military operations in Iraq are on-going, and, even though governing authority was in many respects transferred to the interim Iraqi Government on June 28, 2004, with the approval of the UN Security Council and the subsequent recognition of the new government by numerous nations, the United States continues to hold some of the
powers of government, including legal and physical control over prisoners. Thus, the ability of some civilians captured in Afghanistan or Iraq to claim “protected person” status under Geneva IV today is subject to additional debate. However, regardless of the characterization of the current conflicts in Afghanistan and Iraq, torture and CID treatment of civilian detainees from the war or ongoing conflict in Afghanistan and Iraq is not permitted, whether or not they qualify as “protected persons” under Geneva IV. All such persons are still entitled to the protections of international human rights law and to humane treatment under Common Article 3 and Article 75 of Additional Protocol I.

3. Additional Geneva Convention Protections

Detained civilians captured in situations of international or non-international armed conflict who do not fall within the definition of “protected persons” in Geneva IV are nevertheless covered by Article 3 common to all four Geneva Conventions.” Common Article 3, which applies to armed conflict of any kind—international and non-international—is recognized as part of customary international law. Pursuant
to Common Article 3, detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating or degrading treatment.” Common Article 3 also provides that the “wounded and sick shall be collected and cared for.”

4. The Geneva Conventions Require High Contracting Parties To Investigate and Prosecute Torture and Complicity to Torture as War Crimes

Common Articles 50, 51, 130, and 147 of the Geneva Conventions define specific “grave breaches” of the Geneva Conventions as war crimes. Included in the grave breaches provisions is “willful killing, torture or inhuman treatment” of POWs and civilians qualified as “protected per-

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356. Geneva Conventions, supra note 169, art. 3. Additional Protocol I, supra note 354, article 75 also provides protection against ill-treatment in conflicts that are governed by that instrument:

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilians or by military agents:

(a) Violence to the life, health or physical or mental well-being of persons, in particular:

(i) Murder;

(ii) Torture of all kinds, whether physical or mental;

(iii) Corporal punishments; and

(iv) Mutilations

(b) Outrages on personal dignity, in particular, humiliating or degrading treatment, enforced prostitution, and any form of indecent assault.

357. Geneva Conventions, supra note 169, art. 3.

358. Article 85(2) of Additional Protocol I, supra note 354, also includes a “grave breaches” provision, and extends “grave breaches” protections beyond those in the Geneva Conventions to include, among others, “(1) Persons who have taken part in hostilities and have fallen into the power of an adverse Party (defined by Additional Protocol I as including combatants and prisoners of war); (2) Refugees and stateless persons in the power of an adverse Party; (3) The wounded, sick, and shipwrecked of the adverse Party; and (4) Medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and protected under the Protocol (see Article 8 for definitions)."
Geneva IV, applicable to civilians, also includes as a “grave breach” the “unlawful deportation or transfer or unlawful confinement of a protected person.” States are required to investigate allegations of “grave breach” violations and to prosecute, or extradite to another state that will prosecute, perpetrators of “grave breaches.” The Geneva Conventions require criminal sanctions to be imposed on people who either directly commit “grave breaches,” or order “grave breaches” to be committed. The obligation to prosecute or extradite is absolute and non-derogable. It applies regardless of the nationality of the perpetrator or of the victim and also regardless of the place where the “grave breach” was committed. “Grave breaches” of the Geneva Conventions are a part of customary international law. Geneva Conventions Common Article 3 is also part of the customary international law, and violations

359. Geneva I, art. 50; Geneva II, art. 51; Geneva III, art. 130; Geneva IV, art. 147, supra note 169. Geneva III Article 130 states: “Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”

360. Geneva IV, supra note 169, art. 147. Geneva IV’s grave breaches provision refers to “persons . . . protected by the present Convention,” as opposed to “protected persons.” The full text of the Article states: “Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”


363. Geneva III, art. 129; Geneva IV, art. 146, supra note 169.

of Common Article 3 have also been interpreted as requiring criminal sanctions.\(^ {365} \)

Recently, the statute for the ICTY incorporated the language of the Geneva Convention grave breaches provisions and authorized the tribunals to prosecute individuals “committing or ordering to be committed” crimes including torture or inhuman treatment as set out under the Geneva Conventions.\(^ {366} \) The statute for the ICTR reflects the fact that, unlike the war in the former Yugoslavia, the conflict in Rwanda was at all times a non-international armed conflict and criminalizes violations of Geneva Convention Common Article 3, including, specifically “violence to life, health or physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.”\(^ {367} \)

365. \textit{Prosecutor v. Tadic}, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, (ICTY Appeals Chamber, Oct. 2, 1995) para. 128-129 (individuals who violate the laws of war, including Common Article 3, may incur individual criminal responsibility under international law); \textit{Prosecutor v. Mucic et al.}, Case No. IT-96-21, Judgment, (Appeals Chamber, Feb. 20, 2001) para. 162, 171 (“[T]he fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The [International Military Tribunal at Nuremberg] indeed followed a similar approach, as recalled in the \textit{Tadic} Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations. . . . The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level.”); \textit{Prosecutor v. Blaškic}, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 176 (“[C]ustomary international law imposes criminal responsibility for serious violations of Common Article 3.”); \textit{see also} U.S. Dept. of Army, Field Manual 27-10, “Law of Land Warfare”, art. 499 (“The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”) and 506 (1956); United Kingdom \textit{Manual of Military Law, Part 111} (1958), para. 626 (“all other violations of the [Geneva Conventions, not amounting to “grave breaches”, are also war crimes)."


5. The United States’ Implementation of the Geneva Conventions

The United States signed the Geneva Conventions on December 8, 1949 and ratified them on February 8, 1955. The United States has applied the prohibitions and protections of the Geneva Conventions (and those of its predecessor treaties) since at least the Nuremberg Tribunals following the Second World War, including during the Vietnam War, and the Persian Gulf War of 1990. The provisions of the Geneva Conventions are also reflected in U.S. domestic statutes, including the Uniform Code of Military Justice, applicable to all military personnel. However, it was not until 1996 that the Geneva Conventions were formally implemented into domestic legislation through the War Crimes Act of 1996. The War Crimes Act provides, in pertinent part:

(a) Offense—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition—As used in this section the term “war crime” means any conduct:

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 Au-


gust 1949, or any protocol to such convention to which the United States is a party and which deals with non-
international armed conflict.370

D. The Refugee Convention’s Prohibitions of Extraordinary Renditions

Extraordinary Rendition may also, in the case of transfer of individuals who seek asylum in the United States, violate the provisions of the Refugee Convention.371 Article 33(1) of the Refugee Convention prohibits the expulsion or refoulement of any person to a state “where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.”372 The Refugee Convention does not refer to torture or to CID treatment or punishment, but rather applies to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself to the protection of that country.”373 Thus the Refugee Convention’s protections are both narrower and broader than those


372. The non-refoulement obligation in the Refugee Convention is thus not limited to persons in danger of torture, as it is under CAT Article 3, but is concerned with the larger category of ill-treatment that constitutes “persecution” under the Refugee Convention.

373. Refugee Convention, supra note 170, art. 1(A)(2); see also 1967 Protocol, supra note 170, art. 1(2). In I.N.S. v. Cardoza-Fonseca, the Supreme Court held that the principal focus of the test of “well-founded fear” was on the applicant’s subjective beliefs: as long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution; it is enough that persecution is a reasonable possibility. 480 U.S. 421, 107 S. Ct. 1207 (1987).
of CAT. CAT prohibits refoulement of any individual to any state where that individual faces the danger of torture, regardless of the reason for the danger or the purpose of the torture.\footnote{374} The Refugee Convention’s protections extend only to individuals who face persecution in their home state (or state of habitual residence) on one of the five enumerated grounds. On the other hand, CAT applies to prohibit torture by state actors or individuals acting with the consent or acquiescence of state actors, while the Refugee Convention has been interpreted to include persecution by civilians, if the persecution is tolerated by state authorities or if state authorities are unable to prevent it.\footnote{375}

Also unlike CAT’s non-refoulement prohibition, which is absolute and permits no exceptions, the Refugee Convention contains certain exceptions that prohibit a person from obtaining refugee status, or protection against refoulement, even if the person has a well-founded fear of persecution on one of the five enumerated grounds. Article 33(2) limits the non-refoulement protection by providing that a person who has been recognized as a refugee may not be protected against refoulement if “there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is, or who, having been convicted . . . of a particularly serious crime, constitutes a danger to the community of that country.”\footnote{376} Article 1F of the Refugee Convention also states that the Convention shall not be applicable to a person if:

(a) He has committed a crime against peace, a war crime, or a crime against humanity . . .;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes of the United Nations.\footnote{377}

\footnote{374. CAT Article 1, \textit{supra} note 5, lists certain reasons that torture may be perpetrated, but this list is not exhaustive.}
\footnote{376. Refugee Convention, \textit{supra} note 170, art. 33(2).}
\footnote{377. \textit{Id.}, art. 1F. The UNHCR has cautioned that application of this exclusion clause to a person who otherwise meets the definition of a “refugee” would only be justified if the crime was particularly severe, and that the authorities must balance the degree of persecution feared by the applicant against the severity of the crime. UNHCR Handbook, \textit{supra} note 375, paras.}
The United States could seek to justify the *refoulement* of an asylum seeker to his or her home country based on these exceptions to applicability of the Refugee Convention. Still, to the extent that an individual seeking asylum to the United States is returned by the United States to his or her home state (or any another state) where that person is in danger of torture, U.S. obligations under CAT and the ICCPR would be violated.

**E. Guidance Provided by International Law on Criminal Liability**

Torture is universally proscribed. The community of states has recognized the egregiously transgressive nature of torture, and international human rights and humanitarian law treaties include provisions that either directly criminalize torture (for example, through the “grave breaches” provisions of the Geneva Conventions), or require that states party criminalize torture in their domestic legal regimes (for example CAT, or the ICCPR, as interpreted by the Human Rights Committee). Individuals acting either as agents of a state, or as private actors, can be held accountable for torture as an international crime.378 Reflecting the seriousness of the offense of torture, an evolving body of international law also requires criminalization and prosecution of ancillary acts, such as complicity to, and aiding and abetting, torture. This body of law is reflected in multilateral treaties that set out legal standards and a basis for criminal sanctions, and also in the norms of customary international law.379 Although not all of this body of law is directly binding on the United States, it offers useful guidance to the United States in interpreting its own obligations under the treaties to which it is party, and a set of principles, applied by international courts

38 and 156. For a detailed discussion of these provisions, see Kathleen M. Keller, A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement, 2 YALE HUM. RTS. & DEV. L.J. 183, 190 (1999); Joan Fitzpatrick, Rendition and the War Against Terrorism: Guantanamo and Beyond, 25 LOY. L.A. INT’L & COMP. L. REV. 457, 473 (2003).


379. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (“In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights. . . .”)

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*THE RECORD*
and tribunals, that the United States should follow in its domestic prosecutions of alleged acts of torture or conspiracy in torture.

In this Section, we look therefore to the International Criminal Court statute and the statutes and decisions of the criminal tribunals for Yugoslavia and Rwanda for guidance and comparison to the bases for prosecution (and defenses) under international criminal law. The United States is not a party to the Rome Statute, but was actively involved in the negotiations of the provisions of that statute. The provisions of the Rome Statute relating to the responsibility of civilian and military state actors for violations of international law reflect the most recent understanding by the community of states of the norms allowing for prosecutions of crimes under international law. In the future, the decisions of the ICC (with or without U.S. participation) will form and further the development of international criminal law and provide guidance as to its interpretation and application. The United States was actively involved in the negotiation and drafting of the statutes of the ICTY and the ICTR.

Although by their terms applicable only to the “armed conflict” in the former Yugoslavia and the “widespread or systematic attack” in Rwanda, both the statutes and the body of the tribunals’ jurisprudence on prosecutions of numerous individual defendants reflect the most recent international jurisprudence on individual liability for “grave breaches” of the Geneva Conventions, war crimes, including torture, and crimes against


381. ICTY Statute, supra note 366.

382. ICTR Statute, supra note 367.


385. ICTY Statute, supra note 366, art. 5.

386. ICTR Statute, supra note 367, art. 3 (the statute specifies that crimes for which individuals may be prosecuted must be “against any civilian population on national, political, ethnic, racial, or religious grounds”).

387. ICTY Statute, supra note 366 art. 2 (including torture and inhumane treatment among the enumerated “grave breaches”).
humanity, including systematic torture. A general discussion of certain key developments in international criminal law follows.

1. Complicity, Conspiracy, and Aiding and Abetting

The requirement of criminalization of complicity under CAT is not unusual in international law. Accomplice liability has been recognized in international criminal law since at least the post-World War II Nuremberg Trials. More recently, the ICTY and ICTR statutes have criminalized acts by individuals who plan, instigate, order, commit or otherwise aid or abet in the planning, preparation or execution of a crime.

In a case involving complicity to torture, the ICTR undertook a comparative review of criminal civil and common law systems and held that an accomplice may be tried (i) for complicity in a crime even if the principal perpetrator is unidentified or if the principal perpetrator’s guilt cannot be proven, and (ii) even if the accomplice has not “wished” that the principal offense be committed. According to the Chamber, “anyone who knowing of another’s criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.”

Accomplice liability does require the predicate


391. Id. para. 539.
showing that the accused’s actions had a “direct and substantial effect” on the commission of the offense. According to the ICTY, a substantial effect is shown “if the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.”

Liability for planning or conspiring to commit acts that violate international criminal law as set out in treaties or customary international law has also long been a basis for prosecution beginning during the Nuremberg tribunals and culminating in the recent case law of the ICTY and the ICTR. More recently, however, the Rome Statute provisions governing co-perpetrator liability do not expressly include conspiracy as a basis for prosecution. A basis for prosecution on grounds similar to conspiracy may be Rome Statute Article 25(3)(d) which establishes criminal liability for an individual who “contributes to the commission or attempted commission of ... a crime by a group of persons acting with a common purpose.” The contribution must be intentional and must either: (a) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court; or (b) be made in the knowledge of the intention of the group to commit the crime.

Aiding and abetting liability has also been recognized under customary international law. In the Tadic case, the ICTY laid out the basis for accomplice liability for aiding and abetting an international crime:

The most relevant sources for such a determination are the


393. Nuremberg Charter, supra note 388, art. 6; Nuremberg Principles, supra note 388, Principle VI (liability for conspiracy to commit an offense); see also Genocide Convention, supra note 389, Art. III (liability for planning); ICTRY Statute, supra note 366, art. 7 (1) (liability for planning); ICTR Statute, supra note 367, art. 6 (1) (same); ILC Draft Code of Crimes, supra note 389, art. 2(3)(e) (liability for direct participation in planning or conspiracy to commit a crime that actually occurs).

394. Article 25 of the Rome Statute does not specifically include conspiracy, although it creates liability for committing a crime individually or jointly; ordering, soliciting, or inducing “the commission of such a crime which in fact occurs or is attempted”; and, aiding, abetting, or otherwise assisting in the commission of a crime “or its attempted commission, including providing the means for its commission.” Rome Statute, supra note 380, art. 25(3)(a)-(c).

395. Id. art. 25(3)(d).

396. Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, (ICTY Chamber, May 7, 1997) paras. 662 and 669 (aiding and abetting liability is “beyond any doubt customary law”).
Nuremberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined, a clear pattern does emerge upon an examination of the relevant cases. First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.397

*Tadic* recognized three types of joint activity that could subject a perpetrator to liability for the acts of others: (i) co-defendants, acting pursuant to a common design, who possess the same criminal intention;398 (ii) members of military or administrative units acting pursuant to a joint plan399 and with “knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment;”400 (iii) where the accused possesses “the intention to take part in a joint criminal enterprise and to further ... the criminal purposes of that enterprise” and the offenses committed by members of the group are foreseeable.401 According to the ICTY, intent in instances of action pursuant to a joint plan may be shown “either directly or as a matter of inference from the nature of the accused’s authority within the camp or organizational hierarchy.”402

In the *Furundzija* judgment, the ICTY considered torture as a crime

397. *Id.* para. 674.
400. *Id.* para. 220.
401. Id. See also *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, (ICTY Trial Chamber Aug. 2, 2001) paras. 601-613 (summarizing jurisprudence of ICTY and ICTR on individual criminal liability and co-perpetrator crimes as follows: “Planning” means that one or more persons design the commission of a crime at both the preparatory and execution phases; “Instigating” means prompting another to commit an offense; “Aiding and abetting” means rendering a substantial contribution to the commission of a crime; and “Joint criminal enterprise” liability is a form of criminal responsibility ... implicitly included Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.).
against humanity even in the absence of an armed conflict and suggested that the mere presence of a superior may be enough to constitute participation by that superior for complicity and also aiding and abetting liability:

[P]resence, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. . . . In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.403

Prosecution for accomplice and co-conspirator liability for international crimes such as torture is clearly established in international law.

2. Status of Certain Defenses to Criminal Liability under International Law

Just as the evolving body of international criminal law provides guidance on criminalization and prosecution of acts of torture and complicity to torture, so too does it provide guidance on the status of certain defenses to criminal liability under international law. It is clear that the Bush Administration is cognizant of and concerned about the availability of defenses to prosecutions for violations of CAT and U.S. laws that either implement CAT or otherwise include prohibitions against torture and complicity to torture. The Bush Administration’s memos concerning the possible use of torture in interrogations include a focus on the possible defenses that may be asserted, including the superior orders defense, and the defenses of duress and necessity.404 Although U.S. domestic criminal and military law will govern any prosecution of, and defenses available


404. See, e.g., Bybee Memorandum, supra note 130, at 39-44.
to, individual involvement in Extraordinary Renditions,\textsuperscript{405} it is important to note that certain of the defenses that the Bush Administration memos argue may be asserted are unavailable under international law. To provide comparison and guidance for future prosecutions of alleged Extraordinary Renditions, therefore, it useful to describe briefly the status of certain defenses to the crime of torture and complicity to torture, under international law.

\textbf{(a) The Doctrine of Command Responsibility}

Criminal liability under international law has been interpreted to expand beyond those individuals who directly take part in the action and includes individuals throughout the chain of command. The doctrine of command responsibility has been recognized since the International Military Tribunal at Nuremberg, which held that persons in \textit{de facto} or \textit{de jure} control are responsible for the acts of those under their power.\textsuperscript{406} Codified in Articles 86 and 87 of Protocol 1 of the Geneva Conventions (1977), the doctrine has since been cemented in the decisions of the ICTY and ICTR. Under the doctrine, military superiors who ordered or planned international crimes, and those who knew or should have known that they were occurring may be held criminally liable for the crimes. As discussed below, a civilian superior may also be held criminally responsible for international crimes, depending on the individual’s position in the chain of command and the individual’s ability to prevent and punish the offense.

\textbf{(i) Individual criminal responsibility of commanders}

As a preliminary matter, any superior who was involved in the commission of a criminal act may be individually liable. Thus any official who planned, ordered,\textsuperscript{407} instigated, committed or otherwise aided and

\textsuperscript{405} See Section VIII.A. of this Report.

\textsuperscript{406} In an early case applying the doctrine of command responsibility, the U.S. Supreme Court held that a military commander could be liable for crimes by his troops even if he possessed only \textit{de jure} control and had ceded or delegated \textit{de facto} control. \textit{Yamashita v. U.S.}, 327 U.S. 1, 16, 35 (1946). \textit{See also United States v. Von Leeb}, 11 \textit{Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Law No. 10}, 1, 462 (1950); \textit{United States v. List}, 11 \textit{Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Law No. 10}, 759, 1230 (1951); \textit{United States v. von Weizsaecker}, 11 \textit{Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Law No. 10}, 308 (1952).

\textsuperscript{407} “Ordering” entails a person in a position of authority using that position to convince or instruct another to commit the offense. \textit{See Prosecutor v. Krišto}, Case No. IT-98-33, Judgment, (ICTY Trial Chamber, Aug. 2, 2001) para. 601; \textit{Prosecutor v. Akayesu}, Case No. ICTR-96-4-T, Judgment, (ICTY Trial Chamber, Sept. 2, 1998) para. 483. An order may be explicit or implicit and need not be given directly to the person who performs the offense. \textit{Prosecutor v. Blaškic},
abetted in the planning, preparation or execution of a crime is individually responsible for that crime. This principle is recognized in the Geneva Conventions, and the attribution of liability is codified in Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute, and Article 25(3)(b) of the Rome Statute. Both the Rome Statute, in Article 27(1), and the ICTR Statute, in Article 6(2), further state that individual criminal responsibility shall apply to all persons regardless of any official capacity. The position of an individual as Head of State or as a responsible government official is irrelevant in prosecutions before international courts or tribunals.

(ii) Command responsibility

Both civilian and military superiors may be held responsible for the criminal acts of subordinates even if they did not actually order the subordinate to commit the acts. Article 28 of the Rome Statute, Article 6(3) of the ICTR Statute, and Article 7(3) of the ICTY statute make clear that

Case No. IT-95-14, Judgment, (ICTY Trial Chamber, Mar. 3, 2000) para. 281-82. No formal or legal superior-subordinate relationship need exist so long as the accused possessed the authority to order. Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2, Judgment, (ICTY Trial Chamber, Feb. 26, 2001).

408. Geneva I, art 49, Geneva II, art. 50; Geneva III, art. 129; Geneva IV, art. 146, supra note 169.

409. ICTY Statute, supra note 366; ICTR Statute, supra note 367; Rome Statute, supra note 380.

410. See also ILC Report, art. 2(3)(b) and art. 6 (“The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or suppress the crime.”).

411. Nuremberg Principles, supra note 388, Principle III (“The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”). See also Prosecutor v. Milosovic, Case No. IT-99-37, Indictment of May 22, 1999 paras. 55-89 (responsibility for crimes as head of state based on allegations of de jure and de facto position of command); Prosecutor v. Milosovic, Case No. IT-99-37-I, Amended Indictment of June 29, 2001, paras. 27-34 (same); Prosecutor v. Taylor, Case No. SCSL-03-1, Indictment of March 3, 2003; R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 W.L.R. 827 (H.L. 1999) (holding that General Augusto Pinochet could not claim official immunity for torture after Chile had signed the UN Convention Against Torture); see also Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) 441 I.L.M. 536 (2002) (holding that, under customary international law, heads of state and other senior ministers may be immune from prosecution in domestic courts, but may be prosecuted at an international criminal tribunal with jurisdiction).
superiors may be held criminally liable under the doctrine of command responsibility. The doctrine extends to civilian leaders to the extent they have a degree of effective control similar to military commanders such that the exercise of de facto authority has the trappings of de jure authority. Under the decisions of the ICTY and the ICTR, the main factors in determining a civilian superior’s liability are (a) whether there is a de jure or de facto chain of command; and (b) whether the superior has the material ability to prevent and punish the offenses.

The three elements international criminal tribunals have held are necessary for a military superior to be held responsible for crimes committed by subordinates are: (1) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime, (2) the knowledge, or constructive knowledge, of the accused that the crime was about to be committed or had been committed, and (3) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime or to punish the perpetrator.

412. ICTY Statute, supra note 366; ICTR Statute, supra note 367; Rome Statute, supra note 380. The Human Rights Committee has also interpreted the nature of the legal obligation of ICCPR Article 2 to include a prohibition against the recognition of official immunity: “no official status justifies persons who may be accused of responsibility for [ICCPR] violations being held immune from legal responsibility.” HRC General Comment 31, supra note 9, para. 15.


An accused may argue that a superior-subordinate relationship did not exist since such a relationship is an essential element if an individual is to be held responsible under command responsibility.\footnote[418]{Prosecutor v. Kunarac et al., Case Nos. IT-96-23 and IT-96-23/11, Judgment, (ICTY Trial Chamber, Feb. 22, 2001), para. 369.} However, the concept of a superior-subordinate relationship is not limited to a formal military command structure in international criminal prosecutions, and international tribunals look at both \textit{de jure} and \textit{de facto} power to control.\footnote[419]{Prosecutor v. Mucic et al., Case No. IT-96-21, Judgment, (ICTY Appeals Chamber, Feb. 20, 2001), paras. 192-94, 256; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, (ICTR Trial Chamber, May 21, 1999), paras. 217-231; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, (ICTR Trial Chamber, June 7, 2001), para. 39.} What is determinative is effective control to prevent or punish the criminal acts.

The second element for showing command responsibility requires that the superior either knew or had reason to know that subordinates were about to commit or had committed a crime.\footnote[420]{Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (ICTR Trial Chamber, Sept. 2, 1998), para. 476; Prosecutor v. Blaškiač, Case No. IT-95-14-T, Judgment, (ICTY Trial Chamber, Mar. 3, 2000), para. 307.} Actual knowledge may be proven through direct or circumstantial evidence, and the evidence required may differ based on the position of authority and distance from the crimes. While responsibility is not based on strict liability, an individual’s command position \textit{per se} is a significant indication that the individual knew about the crimes.\footnote[421]{Prosecutor v. Blaškiač, Case No. IT-95-14-T, Judgment, (ICTY Trial Chamber, Mar. 3, 2000), para. 308; Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2, Judgment (ICTY Trial Chamber, Feb. 26, 2001), para. 428; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, (ICTR Trial Chamber, June 7, 2001), paras. 44-46.} It is not necessary to prove actual knowledge if the superior “had some general information in his possession which would put him on notice.”\footnote[422]{Prosecutor v. Mucic et al., Case No. IT-96-21, Judgment, (ICTY Appeals Chamber, Feb. 20, 2001), para. 222.} Further, it is not required that the superior acquainted himself with the information, but just that it was provided or available to him.\footnote[423]{Id., paras. 222-241.} Ignorance arising from the negligent failure to carry out a duty to inform oneself of the actions of subordinates will not constitute a defense.\footnote[424]{Prosecutor v. Blaškiač, Case No. IT-95-14-T, Judgment, (ICTY Trial Chamber, Mar. 3, 2000), para. 332; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, (ICTR Trial Chamber, May 21, 1999), paras. 217-231; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, (ICTR Trial Chamber, June 7, 2001), para. 39.} Superior who know or should have known about a crime have a duty to prevent or punish that crime using all necessary and reasonable
measures that are feasible and use every means in their power. The degree of effective control over subordinates will determine what is required.425

(iii) Superior orders defense

Under the superior orders defense, a subordinate who is legally obligated to follow the orders of his or her superiors is not liable for carrying out those orders. This defense is unavailable in customary international law and given the absolute prohibition against torture, would not likely excuse conspiracy to commit torture.

Article 8 of the London Charter establishing the Nuremberg International Military Tribunal explicitly prohibited the superior orders defense, and this prohibition has generally become accepted in international law.426 The defense was clearly rejected in the trial of Adolf Eichmann, where the court noted that such an approach had “become general in all civilized nations.”427 More recently, international instruments have explicitly required that states exclude the defense from their criminal law. Article 2(3) of CAT states that, “An order from a superior officer or a public authority may not be invoked as a justification of torture.”428 The Human Rights Committee has also recommended that states party to the ICCPR revoke the superior orders defense for violations of the ICCPR.429 Similarly, Ar-


426. Nuremberg Judgment, at 42 (“The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality.”); see also Nuremberg Principles, supra note 388, Principle IV (“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him”).


428. CAT, supra note 5.

429. HRC General Comment 31, supra note 9, para. 15. (“impediments to the establishment of legal responsibility should also be removed, such as the defense of obedience to superior orders”).
article 6(4) of the ICTR Statute and Article 7(4) of the ICTY Statute state that, “the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility.”430 While superior orders may be taken into account as a mitigating factor when considering punishment, these instruments make clear that they do not absolve an individual of criminal responsibility.431

Unlike other instruments, the Rome Statute does leave open the possibility of a defense of superior orders, but not one that would apply in cases of torture or complicity to torture. Article 33 of the Rome Statute provides that the defense is not available for offenses that are commonly known to be unlawful.432 Thus the superior orders defense is available only when the individual was legally bound to obey the orders and the person did not know that the orders were unlawful. Further, the orders must not have been manifestly unlawful. Torture is manifestly unlawful and, like murder and genocide, it is a crime that every individual must be presumed to know is illegal and thus cannot be excused by superior orders.

(b) Duress and Necessity

Duress and necessity are related defenses where the accused argues that criminal acts are justified because the accused faced an imminent threat to his or her life. Under common law, necessity is seen as a defense when the accused is required to choose between two evils and must choose the lesser evil. Duress under common law is seen as an excuse.

The defenses should not be available for violations of CAT. 433 CAT

430. ICTR Statute, supra note 366; ICTY Statute, supra note 367.
432. Article 33 states:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

   (b) The person did not know that the order was unlawful; and

   (c) The order was not manifestly unlawful.

433. See also Rome Statute, supra note 380, art. 31(1)(d):

The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the
Article 2(2) makes clear that, “no exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.” This provision makes clear that there can be no threat compared to which torture is a lesser harm. Moreover, the harm that is caused by torture is definite whereas the benefits gained by torture are difficult to measure and often negligible. Torture is carried out to collect information, but often fails to produce actionable intelligence. The criminal laws of most nations prohibit the use of information obtained from torture or abusive interrogation.

Moreover, torture is rarely, if ever, carried out in an attempt to avoid a truly imminent threat. Under international law, an imminent harm must be known and specific and an assertion that an individual may have information about a possible future attack is unlikely to fulfill this requirement. Legal interrogation, surveillance and intelligence techniques may be employed to gather the same information that officials hope to gather through torture.

Finally, duress and necessity are clearly inapplicable in cases where an individual is rendered to face torture as a form of punishment for past actions or to gather information related to previously committed attacks. The defenses require that the crime be committed with the intent of avoiding future harm. Any torture where the focus is on past events is clearly missing the required mental element.

(c) Self-Defense

While self-defense is recognized in international law, it applies narrowly, to excuse illegal conduct carried out to protect oneself or another person against an imminent unlawful use of force. International law excuses reasonable acts to protect oneself as long as they are proportion-

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434. CAT, supra note 5.
435. See discussion supra at Section V.F.2.
437. Rome Statute, supra note 380, art. 31(1)(d).
438. WAYNE R. LAFAYE, CRIMINAL LAW (3d ed. 2000), §5.7. (LaFave).
ate to the degree of danger, but an individual’s involvement in a defensive operation does not constitute a ground for the excuse. The doctrine is most clearly laid out in Article 31(1)(c) of the Rome Statute, which states:

A person shall not be criminally responsible if, at the time of that person's conduct ... The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.439

The ICTY has also emphasized that “involvement of a person in a defensive operation does not, in itself, constitute a ground for excluding criminal responsibility.”440 These sources make clear that it is not a defense to argue, for example, that in conspiring to commit torture, an individual is protecting his or her state from terrorist attack.

F. Extraordinary Renditions in the Context of the “War on Terror” Violate International Law

There is an inherent tension between the need to obtain potentially life-saving information through interrogation of terrorist suspects and the legal requirement of upholding the anti-torture standards in the treaties to which the United States is a party. Still, “condoning torture under any circumstances erodes one of the most basic principles of international law and human rights and contradicts our values as a democratic state.”441 Torture harms not only the detainees, but also interrogators and our society. The universal condemnation of the abuses that have come to light at Abu Ghraib prison and other U.S. detention facilities in Iraq and Afghanistan have damaged this nation’s standing in the community of nations, and have served to fuel the enmity of those who seek to harm U.S. cit-

440. Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2 (Trial Chamber, February 26, 2001), paras. 448-452.
441. HR Standards Report, supra note 193, at 10.
zens and U.S. interests domestically and abroad. Extraordinary Renditions may be one step removed from the direct torture of detainees by U.S. agents, but to condone any level of U.S. involvement in the interrogation by torture of detainees remains wrong and immoral. This position is reflected in international law, which, as discussed above, prohibits both torture and complicity to torture, including, as discussed below, in the context of terrorism and national security emergencies.

1. The Prohibition Against Torture is Absolute and Non-Derogable

Article 2(2) of CAT provides that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” The absolute nature of this prohibition was specifically included in CAT to distinguish freedom from torture as one of “the few fundamental rights of the individual” from which no derogation is permitted under international law, even in times of war or other emergency.

After the terror attacks of September 11, 2001, as the United States geared up its “War on Terror,” the CAT Committee issued a statement in which it condemned the terror attacks, expressed “profound condolences to the victims, who were nationals of some 80 countries, including many States parties to [CAT],” but reminded states of the non-derogable nature of CAT obligations. The CAT Committee highlighted the obligations contained in article 2 (prohibition of torture under all circumstances), article 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and article 16 (prohibiting CID treatment or punishment). The Committee added that these provisions must be observed in all circumstances, and expressed confidence that “whatever responses to the threat of international terrorism are adopted by States parties, such responses will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture.”

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442. CAT, supra note 5.
443. BURGERS & DANIELUS, supra note 179, at 124.
445. Committee against Torture, UN Doc. No. CAT/C/XXVI/Misc.7, Nov. 22, 2001. Similarly, although not binding under international law, a resolution specifically focusing on the
Unlike CAT, each of the ICCPR, the European Convention and the American Convention contains provisions permitting certain derogations from human rights obligations in specific circumstances. Each of these conventions is clear, however, that certain rights are always non-derogable. Paradigmatic among these is the prohibition against torture. Even derogation from other rights is only permitted in the special circumstances and according to the specified limits defined in each of the three treaties. Under the ICCPR, any such measures must be of exceptional character.

need to protect human rights and fundamental freedoms while countering terrorism was adopted for the first time by the General Assembly on 18 December 2002 (UN Doc. No. A/RES/57/219). It affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

446. ICCPR, supra note 5, art. 4(1); European Convention, supra note 186, art. 15; American Convention, supra note 181, art. 27(1). The most common exception is for conditions of “public emergency,” such as in Article 4 of the ICCPR, supra note 5, which states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations . . . to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. . . .

447. European Convention, supra note 186, art. 15(2); American Convention, supra note 181, art. 27(2); ICCPR, supra note 5, art. 4 (limits on derogation); HRC Comment 20, supra note 303, para. 3, (“The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force.”); Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (HRC General Comment 29) para. 7 (“Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: . . . article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent) . . . ”); see also Aksay v. Turkey, ECHR, 18 December 1996 (para. 62) (“Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention..., Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.”).

448. CCPR/C/79/Add.76, para. 25 (1997) (“The Committee ... expresses its concern that the resort to declarations of states of emergency is still frequent and seldom in conformity with article 4, paragraph 1, of the Covenant, which provides that such declaration may be made only when the life and existence of the nation is threatened”).
strictly limited in time\textsuperscript{449} and to the extent required by the exigencies of the situation,\textsuperscript{450} subject to regular review,\textsuperscript{451} consistent with other obligations under international law, and must not involve discrimination.\textsuperscript{452} Each of the three treaties further requires that formal notice be given to the secretary-general of the United Nations or the relevant regional organization, detailing which provisions a state has derogated from and the reasons for such derogation.\textsuperscript{453} Thus, in 2001, when its anti-terrorism legislation was adopted, the United Kingdom filed notices of derogation under the ICCPR\textsuperscript{454} and the European Convention.\textsuperscript{455} The United States has filed no such notice of derogation under the ICCPR.

\textsuperscript{449} CCPR/CO/76/EGY, para. 6 (2002); CCPR/CO/71/SYR, para. 6 (2001); CCPR/C/79/Add.93, para. 11 (1998) ("The Committee is disturbed by the fact that the state of emergency proclaimed ... in 1981 is still in effect, meaning that the State party has been in a semi-permanent state of emergency ever since. The State party should consider reviewing the need to maintain the state of emergency.");

\textsuperscript{450} CCPR/C/79/Add.42, para. 9 (1995) ("The Committee deplores the lack of clarity of the legal provisions governing the introduction and administration of the state of emergency ... which would permit derogations contravening the State party’s obligations under article 4, paragraph 2, of the Covenant.");

\textsuperscript{451} CCPR/C/79/Add.76, para. 38 (1997) ("Constitutional and legal provisions should ensure that compliance with article 4 of the Covenant can be monitored by the courts"); CCPR/C/79/Add.56, para. 13 (1995) ("[The Human Rights Committee] is ... concerned that courts do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the state of emergency").

\textsuperscript{452} The European Court of Human Rights has interpreted Article 15 of the European Convention (which contains language almost identical to ICCPR Article 4(1)’s national emergency exception) to hold that, to qualify as a public emergency, the danger must be actual or imminent, the effects must involve the whole nation, the danger must threaten the continuity of the organized life of the community, and that the danger must be so exceptional that normal measures under the Convention that permit maintenance of public safety, health and order, are inadequate. The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 511, P153 (Eur. Comm’n on Hum. Rts.) (resolution).

\textsuperscript{453} CCPR/CO/72/GTM, para. 11 (2001) ("The state party should ensure that its constitutional provisions for emergency situations are compatible with article 4 of the Covenant. It should also comply with the obligation to notify the other states parties through the intermediary of the secretary-general of the United Nations in all cases when an emergency situation is declared and to inform them of the provisions from which it has derogated and of the reasons for the derogation"); ICCPR, supra note 5, art. 4(3); European Convention, supra note 186, art. 15(3); American Convention, supra note 181, art. 27(3).


or any other human rights or humanitarian law treaty to which it is a party.

Like CAT's non-derogability provision, the Geneva Conventions' obligation to investigate and prosecute individuals who are alleged to have committed “grave breaches” of the Geneva Conventions is not derogable. Thus Geneva III's prohibition against torture and inhumane treatment of POWs and Geneva IV's prohibition against torture, inhumane treatment and unlawful transfers of civilians to states where they may be subject to Geneva Convention violations apply during war—surely the greatest of national security emergencies.456 Moreover, even though Geneva IV contains a national security exception to the applicability of “protected person” status,457 in no circumstance does this exception permit a High Contracting Party to commit “grave breaches” as defined in Art. 147, which includes torture or inhuman treatment and willfully causing great suffering or serious injury to body or health.458 To the extent that any physical or moral coercion (otherwise prohibited by Article 31 of Geneva IV) might fall below the level of “grave breach,” the ICRC commentary to the derogations contained in Article 5 of Geneva IV, involving persons engaged in activities hostile to the security of the state, notes that:

[W]idespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check. It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will fol-


457. Article 5 of Geneva IV provides: “Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.” Geneva IV, supra note 169, art. 5.

As drafted (i.e., the use of the words “the latter”), it would appear that the national security derogation is available only to the State on whose territory the conflict is occurring (i.e., in the War in Afghanistan, only Afghanistan would be able to take a national security derogation under Article 5). The ICRC has not made a definitive statement on whether this provision would be interpreted to apply to any party to the conflict.

458. See Geneva IV, supra note 169, art. 146.
low. This Article should never be applied as a result of mere suspicion.\footnote{459}

2. Application of the Prohibition Against Torture and Refoulement in the Context of Terrorism or National Security Risk

The CAT Committee has specifically addressed the non-refoulement of asylum seekers and other foreigners in the context of a state party's concerns that a claimant may present a security risk:

[T]he test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.\footnote{460}

The CAT Committee's holding is echoed by the Human Rights Committee's comment on the link between removal, expulsion or refoulement of non-nationals and torture, in its General Comment No. 20 on article 7 of the ICCPR:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.\footnote{461}

The Human Rights Committee has acknowledged “the difficulties that the State Party faces in its prolonged fight against terrorism, but recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture, and expresses concern at the possible restrictions of human rights which may result from measures taken for that purpose.”\footnote{462}

The European Court of Human Rights has also addressed the prin-
ciple of non-refoulement to the danger of torture in the context of terrorism and national security, and determined that the prohibition against refoulement is based on “one of the most fundamental values of democratic society,” and may not be violated even on national security grounds. In Chahal v. United Kingdom, The government of the United Kingdom claimed that the petitioner was a threat to the United Kingdom’s national security, refused his claim for asylum and issued a deportation order. The Court found that Chahal would be in danger of ill-treatment if sent to India, and stated that the absolute nature of Article 3 applied to expulsion cases. With respect to the United Kingdom’s claim that the petitioner posed a threat to its national security, the Court stated that:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. . . . The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion . . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.

The Inter-American Court of Human Rights has similarly held that the prohibition against torture is a jus cogens norm, which prohibits an

464. Tomasi v. France, 15 Eur. Ct. H.R. 1 (Ser. A) (1992), para. 115 (“The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”).
466. Id. paras. 79-80. See also Ahmed v. Austria, 24 Eur. H.R. Rep. 278, 287 and 291 (1997) (even individuals that a transferring state classifies as “undesirable or dangerous” may not be extradited or transferred to a state “where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture.”).
individual from return to a country where that person is likely to be tortured, even if the individual is suspected of terrorist activities.\footnote{467. Inter-Am. Court H.R., OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000 (para. 154). ("[T]he prohibition of torture as a norm of \textit{jus cogens}—as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion—applies beyond the terms of the 1951 [Refugee] Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to \textit{refrain} from return where substantial grounds of a real risk of inhuman treatment are at issue.").}

These cases provide guidance to the United States in its necessary task of striking a balance between the need to address the threat of terrorism and the “fundamental values of democratic society.” International law uniformly provides that regardless of whether the transfer of a person occurs as part of an extradition request and regardless of any exceptional circumstances such as efforts to combat terrorism or another threat against national security, the anti-torture and non-refoulement principles would be violated if, as a result of such transfer, the person could be subjected to torture or other ill-treatment.

\section*{VI. DIPLOMATIC ASSURANCES}

Despite the prohibitions against torture and refoulement to torture under CAT and the ICCPR, so-called “diplomatic assurances” have been used by the United States as well as certain European states and Canada as a basis for the transfer of alien detainees or asylum seekers to states where the individual faces the risk or danger of torture.\footnote{468. Diplomatic assurances are used in other contexts as guarantees against ill-treatment, such as an agreement made by a receiving state to a transferring state that an individual extradited or otherwise removed will not be subject to the death penalty. See HRW Diplomatic Assurances Report, supra note 21, at 3, fn.2. A discussion of the broader uses of diplomatic assurances is beyond the scope of this Report, which focuses on what Human Rights Watch has described as the “novel practice” of using diplomatic assurances in the context of torture. \textit{Id}.} Specifically in the United States, regulations implementing CAT provide that if assurances are obtained by the secretary of state from the government of a specific state “that an alien would not be tortured there if the alien were removed to that country” and such assurances are forwarded to the attorney general or the secretary of the Department of Homeland Security, the official to whom this information is forwarded shall determine, in consultation with the secretary of state, whether such assurances are “sufficiently reliable” to permit the alien’s removal to that state without violat-
Diplomatic assurances were apparently obtained by the United States in at least one case of alleged Extraordinary Rendition (the Maher Arar case, discussed below). It is not clear whether they have been obtained in other cases because the U.S. State and Justice Departments and the Department of Homeland Security are not required to make public their use of diplomatic assurances.

In this Section, we examine the legality of diplomatic assurances under international and U.S. law and conclude that although diplomatic assurances arguably fall under a “grey area”—neither envisioned nor prohibited by the international treaties to which the United States is a party—as currently implemented, they violate the strict letter and the object and purpose of these treaties. We also briefly consider examples of the use of diplomatic assurances to determine their effectiveness. We conclude that diplomatic assurances, as implemented, are inadequate safeguards against torture for two fundamental reasons: (i) diplomatic assurances are unilaterally employed by the Executive Branch without judicial or administrative review or any opportunity for the transferred detainee to challenge their basis, and (ii) they are tools of diplomacy without means of effective monitoring and enforcement.

A. Legality of Diplomatic Assurances under International and Domestic Law

1. International Law Applicable to Diplomatic Assurances

Use of diplomatic assurances as a permissible basis for the transfer of an individual to another state falls into a grey area under international law. CAT (and other treaties containing the torture prohibition) neither envisions nor prohibits the use of diplomatic assurances. Arguably, a receiving state’s diplomatic assurance could be one of the “relevant conditions” to be taken into account under CAT Article 3 in the determination of whether there are substantial grounds to believe that an individual is “in danger of” torture upon transfer to a receiving state. On the other hand, the prohibition against torture under the strict letter of CAT, the ICCPR, the Geneva Conventions and under customary international law is absolute and non-derogable. CAT, the ICCPR and, as applicable in specific contexts, the Geneva Conventions and the Refugee Convention also prohibit the refoulement of an individual to a state where the person faces the risk or danger of torture.

Diplomatic assurances are most likely used where conditions in the

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469. 8 C.F.R. §235.8(c)(1), (2).
proposed receiving state present a risk of torture to the individual to be transferred: otherwise, diplomatic assurances would be unnecessary. The United States, along with other states party to CAT, the ICCPR, the Geneva Conventions and the Refugee Convention, must interpret and implement its obligations under these treaties “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”\textsuperscript{470} If a risk or danger of \textit{refoulement} to torture exists, then the use of diplomatic assurances is a circumvention of the absolute prohibition against torture and \textit{refoulement} to torture—the creation of “an island of legality, in a sea of illegality.”\textsuperscript{471}

Diplomatic assurances were addressed by the UN Special Rapporteur on Torture in a July 2002 interim report to the UN General Assembly. Specifically focusing on the prohibition of torture in the context of counter-terrorism measures, the Special Rapporteur called on states not to extradite any individual “unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.”\textsuperscript{472} The Special Rapporteur recommended a two-pronged test to assess the reliability of diplomatic assurances. First, according to the Special Rapporteur, diplomatic assurances must be “unequivocal” before the transfer of an individual took place—the diplomatic assurances must leave no doubt that torture or ill-treatment will not occur. Second, the Special Rapporteur required a “monitoring” system, agreed upon in advance between the transferring state and the state offering assurances, to ensure that, upon return, the individual continued to be protected from torture or CID treatment. As described below, however, the monitoring mechanism has, in practice, proved to be an inadequate safeguard.

\textsuperscript{470} Vienna Convention, \textit{supra} note 178, art. 31(1);
\textsuperscript{471} Interview of Julia Hall, Counsel and Senior Researcher, Europe and Central Asia Division, Human Rights Watch, June 14, 2004, Notes on file with the ABCNY International Human Rights Committee.
2. U.S. Law Applicable to Diplomatic Assurances

Under U.S. law, if diplomatic assurances satisfactory to the attorney general are provided, an alien detainee’s claims for protection under CAT Article 3 “shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer” and the alien may be removed. The detainee has no opportunity to challenge the attorney general’s determination, and the attorney general’s decision is not subject to any judicial or administrative review.

Deferral of removal may also be terminated on the basis of diplomatic assurances following the same procedure. The regulations specifically provide that “[a]t any time while deferral of removal is in effect the Attorney General may determine whether it should be terminated based on diplomatic assurances forwarded by the secretary of state pursuant to the procedures in 8 C.F.R. §208.18(c).”

There is no mention of diplomatic assurances in the section of the regulations dealing with CAT claims made in the context of summary exclusion. The process and standards for determining a CAT claim in summary exclusion proceedings are unclear, and the only restriction articulated is the prohibition of removal where it would violate CAT Article 3. Given the broad discretion granted to the Executive Branch, and the extent to which removal in this context is shielded from review or any form of judicial scrutiny, it is unclear and probably unlikely that the U.S. government even seeks to obtain diplomatic assurances in summary exclusion cases. Even assuming there are procedures for considering the CAT claim of a summarily removable individual suspected of terrorist activities, there is a danger that an immigration officer may simply determine that it is unlikely that the individual would be tortured upon his or her return.

Although there is also no mention of diplomatic assurances in the regulations dealing with the application of CAT in the context of extradition, C.F.R. section 95.3(b) provides that once the secretary of state has received “review and analysis” from relevant policy and legal offices in relation to a CAT claim, he or she may decide “to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions” (emphasis added). Such conditions would

473. 8 C.F.R. §208.18(c)(3).
474. 8 C.F.R. §208.17(f).
475. 8 C.F.R. §235.8; see also Section IV.A.5.c.i. of this Report.
476. 22 C.F.R. §95.
appear to include diplomatic assurances and other executive agreements between states.

B. Examples of Uses of Diplomatic Assurances

In the United States, the use of diplomatic assurances is not made public and it is not possible to determine how many people have been transferred to other states from the United States, or from territories or detention facilities under its jurisdiction, on the basis of diplomatic assurances. As the case of Maher Arar demonstrates, however, diplomatic assurances have recently been used in the context of at least one reported Extraordinary Rendition from the United States.477

Arar, a Syrian-born Canadian citizen, was allegedly detained by U.S. officials while in transit at John F. Kennedy Airport to Canada.478 He was not seeking to enter the United States.479 Without any apparent authority, Arar was held in U.S. detention for two weeks and interrogated during this time about his alleged affiliation with terrorist groups, including Al Qaeda.480 During his detention, Arar was informed that he had been designated by the secretary of state as a member of a foreign terrorist organization.481 Arar was given no meaningful opportunity to challenge this designation.482 Apparently without notification to his lawyer, Arar was then flown to Jordan, where he was interrogated and beaten by Jordanian authorities.483 The Jordanian authorities then turned him over to Syria, where he was held in prison for ten months.484 The United States reportedly received diplomatic assurances from Syria that he would not...

482. Id.
483. Arar v. Ashcroft, supra note 33, para. 49.
484. Arar v. Ashcroft, supra note 33, para. 50.
be tortured.\textsuperscript{485} During the time he spent in Syria, Arar alleges that he was tortured: “Syrian authorities regularly beat him on the palms, hips, and lower back, using a two-inch thick electric cable.”\textsuperscript{486} Arar alleges that, as a result of torture, he made and signed false confessions about his participation in terrorist training in Afghanistan; Arar states that, in fact, he has never been to Afghanistan.\textsuperscript{487}

Although Arar was visited by Canadian consular officials during his detention in the Syrian prison, Syrian security officers reportedly threatened him with additional torture if he complained about his treatment.\textsuperscript{488} Arar reportedly kept silent from October 23, 2002 to August 14, 2003, when apparently “unable to bear the mistreatment any longer, Mr. Arar yelled out to a Canadian Consular official that he had been tortured and was being kept in a grave.”\textsuperscript{489} Arar was released to Canadian authorities in October 2003, without charges brought against him.\textsuperscript{490}

According to a Syrian diplomat in Washington, after extensive investigation, Syrian authorities found no link between Arar and Al Qaeda.\textsuperscript{491} Arar was released, according to this official, as a gesture of goodwill to Canada, and because Syrian officials could not substantiate any allegations against him.\textsuperscript{492} Of note, Canada has begun a public inquiry to determine what role, if any, Canadian officials played in his transfer to Syria.

The Arar case and media reports raise concern that even if the United States is obtaining diplomatic assurances, it may not be doing so in good faith. Arar alleges that U.S. authorities provided Syrian authorities with suggested topics to be covered during interrogation, and that Syrian authorities provided the United States with information coerced from him.\textsuperscript{493} Similarly, at least one media report indicates that U.S. intelligence and law enforcement officials have seized and rendered purported terror subjects from one foreign state to another state that the United States knows to employ torture as an interrogation technique. The United States has

\begin{itemize}
\item\textsuperscript{486} \textit{Arar v. Ashcroft}, supra note 33, para. 51.
\item\textsuperscript{487} \textit{Arar v. Ashcroft}, supra note 33, paras. 53 and 62.
\item\textsuperscript{488} \textit{Arar v. Ashcroft}, supra note 33, para. 61.
\item\textsuperscript{489} \textit{Id.}
\item\textsuperscript{490} \textit{Arar v. Ashcroft}, supra note 33, para. 64.
\item\textsuperscript{491} \textit{Arar v. Ashcroft}, supra note 33, para. 65.
\item\textsuperscript{492} \textit{Id.}
\item\textsuperscript{493} \textit{Arar v. Ashcroft}, supra note 33, paras. 55-56.
\end{itemize}
reportedly provided to these intelligence forces lists of questions that it wants answered.\textsuperscript{494} In the context of such alleged practices, diplomatic assurances from countries that the United States knows to practice torture do not appear to be a good faith compliance by the Executive Branch with U.S. obligations under international and domestic law.

In a detailed report on diplomatic assurances, Human Rights Watch provides a number of examples of the use of diplomatic assurances in Europe.\textsuperscript{495} The report shows, among other things, the inadequacy of the post-assurance monitoring mechanism used by European states as a safeguard against torture. For example, in the case that was the subject of \textit{Shamayev and 12 Others v. Georgia and Russia},\textsuperscript{496} the Russian government offered diplomatic assurances to the European Court of Human Rights itself, after thirteen Chechens were extradited to Russia by Germany. These diplomatic assurances included the right to access to the detainees by the European Court.\textsuperscript{497} In violation of these assurances, the Russian government subsequently denied access to the detainees to a fact-finding mission from the European Court.\textsuperscript{498}

Another instructive example in the Human Rights Watch report is the case of Ahmed Agiza and Mohammed al-Zari. Agiza and al-Zari were Egyptians seeking asylum in Sweden. Both were expelled from Sweden to Egypt in December 2001, despite the Swedish authorities’ reported acknowledgement that they had a well-founded fear of persecution in Egypt.\textsuperscript{499} Before expulsion, Swedish authorities reportedly obtained diplomatic assurances from Egypt that the men would not be subjected to torture or ill-treatment, would receive a fair trial, and would not be sentenced to death.\textsuperscript{500} After return, Swedish representatives did not visit the men for five weeks, and they were reportedly held “in incommunicado detention” during that time.\textsuperscript{501} Although visits subsequently occurred, Swedish authorities were always accompanied by Egyptian authorities.\textsuperscript{502} Based on subsequent investigation, Human Rights Watch and Swedish journalists report there is

\textsuperscript{494} Priest & Gellman, supra note 53.
\textsuperscript{495} HRW Diplomatic Assurances Report, supra note 21, at 21-36.
\textsuperscript{496} Application No. 36378/02, Oct. 4, 2002.
\textsuperscript{497} HRW Diplomatic Assurances Report, supra note 21, at 24.
\textsuperscript{498} Id. at 25.
\textsuperscript{499} Id. at 34.
\textsuperscript{500} Id.
\textsuperscript{501} Id. at 35.
\textsuperscript{502} Id.
credible evidence that the men were tortured in Egypt. Significantly, Swedish journalists found that the men had been transported to Egypt on a U.S.-registered plane, with the involvement of U.S. agents. After Swedish journalists reported the allegations of torture by Egyptian authorities, the Swedish vice foreign minister stated “[t]his is so ominous that we have prepared a visit to Cairo, on a high political level from the Swedish side, to take up this question with representatives of the Egyptian security service. And of the Egyptian government.” The vice foreign minister acknowledged that Egypt had not acted in accordance with its diplomatic assurances.

Finally, in the one known case in which the United States reportedly obtained diplomatic assurances, involving Maher Arar’s transfer to Syria, there is no indication that the United States sought to monitor Syria’s compliance with its assurances. To the contrary, Arar alleges that the United States suggested to Syrian security agents topics to be covered during interrogation, and that Syrian security agents provided to U.S. agents information obtained from Arar as a result of torture.

C. In Practice, Diplomatic Assurances are Inadequate Safeguards Against Torture

Even if diplomatic assurances are permissible under international law, their implementation in practice raises significant doubts about their reliability as a means of safeguarding against the danger or risk of torture to an individual.

First, the use of diplomatic tools as a means of compliance with the prohibition against torture is limited. Although U.S. foreign service officers often perform valuable work monitoring and advocating against human rights violations in the states to which they are posted, their role is of necessity restricted by the need to maintain diplomatic, trade, and commercial relations of significance to the United States. In turn, the danger exists that the Executive Branch will seek diplomatic assurances in return for other concessions, such as military or economic assistance. Diplomats, including the secretary of state, are subject to political pressure and are able in turn to exert it.

503. Id.; TV4 Kalla Fakta Broadcast, supra note 20.
504. TV4 Kalla Fakta Broadcast, supra note 20.
505. Id.
506. Id.
Second, monitoring mechanisms have been shown to be inadequate. In large part, this is because torture is conducted in secret and regimes that use torture have become adept at hiding it. As the Human Rights Watch report on diplomatic assurances notes, in countries where torture is widespread and systematic, it is practiced within the walls of prisons and detention facilities rarely open to scrutiny by independent, well-trained monitors.\textsuperscript{508} Prison guards and other prison personnel are trained in torture methods that leave few external marks and are also trained to intimidate prisoners into silence.\textsuperscript{509} In addition, prison medical personnel are often complicit in covering up torture.\textsuperscript{510} Moreover, the HRW Diplomatic Assurances report notes, in such countries governments routinely deny access to independent monitors or experts in detecting signs of torture, and in many instances state authorities may not have effective control over the forces perpetrating acts of torture.\textsuperscript{511} Indeed, governmental authorities in countries where torture is systematic routinely deny the existence of torture at all.\textsuperscript{512} In those circumstances, the dangers of relying on diplomatic assurances as a safeguard against torture are apparent. As the Human Rights Watch report notes, “[w]here governments routinely deny that torture is practiced, despite the fact that it is systematic or widespread, official assurances cannot be considered reliable.”\textsuperscript{513}

The inadequacies inherent in current monitoring mechanisms are apparent from the United States’ own internal investigations. As the investigation into the Abu Ghraib torture scandal by U.S. Army Major General Antonio Taguba revealed, military guards at the prison moved a group of detainees around the prison to hide them from a visiting ICRC delegation.\textsuperscript{514} Recent investigatory reports by General Paul A. Kern and former Secretary of Defense James R. Schlesinger, have raised congressional concern about so-called ghost detainees held by the CIA.\textsuperscript{515} Unlike some of the states to which it has allegedly Extraordinarily Rendered individuals,

\textsuperscript{508} HRW Diplomatic Assurances Report, supra note 21, at 4.
\textsuperscript{509} Id.
\textsuperscript{510} Id.
\textsuperscript{511} Id.
\textsuperscript{512} Id.
\textsuperscript{513} Id.
\textsuperscript{514} Taguba Report, supra note 3.
\textsuperscript{515} Graham & White, supra note 90; see also HRW Report, supra note 6; Dana Priest, Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions, WASHINGTON POST, Oct. 24, 2004, at A1.
the United States does not have a history and practice of systemic torture. Still, these examples reveal the relative ease by which the monitoring mechanism may be circumvented.

Third, even if diplomatic assurances themselves are permissible under international law, the unfettered discretion the Executive Branch exercises in seeking diplomatic assurances and making the unilateral decision to transfer an individual pursuant to those assurances leaves the individual with no due process protection or the safeguard of judicial oversight. This procedural shortcoming likely violates international law. The United States has an obligation to provide detainees in its custody an effective opportunity to challenge the reliability and adequacy of diplomatic assurances. This obligation is grounded in CAT Article 3 (prohibiting torture and CID) and Article 2 (requiring state parties to implement judicial and administrative measures to prevent torture); and ICCPR Article 7 (prohibiting torture and CID) and Article 2(1) (interpreted by the Human Rights Committee as requiring state parties “to respect and to ensure” ICCPR protections through prevention and provision of judicial or administrative review).

CAT requires each state party to enact legislative and administrative measures to prevent torture. Interpreting these obligations, the CAT Committee has expressed particular concern about instances in which individuals are transferred to third states without the right of appeal. In Arana v. France, an individual was convicted in France for links to the Basque separatist group ETA and sought by Spanish police on suspicion that he was an ETA leader. Spain sought deportation from France through an administrative procedure, whereby the detainees would be exchanged between the two nations’ police forces, without judicial oversight or intervention. The CAT Committee found violations of CAT Article 3, as well as violations of due-process rights because the handover of the detainee by the French police to the Spanish police was not subject to judicial oversight:

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516. See CAT, supra note 5, art. 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”) and Article 2(2) (“No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.”).

517. Committee Against Torture, Concluding Observations, Sweden, U.N. Doc. CAT/C/XXVIII/CONCL.1, para. 6 (2002) (“The Committee [against Torture] ... records its concern at the following: ... (b) The Special Control of Foreigners Act, known as the anti-terrorism law, allows foreigners suspected of terrorism to be expelled under a procedure which might not be in keeping with the Convention, because there is no provision for appeal.”).
The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police. At the time of the consideration of the [previous] report, the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

Although U.S. regulations governing diplomatic assurances include a determination by the Executive Branch, there is no similar oversight or intervention by a neutral judicial authority.

In a 2002 case, the Canadian Supreme Court examined the adequacy of procedural safeguards in the use of diplomatic assurances in light of CAT Article 3(1)'s, and held that, “[g]iven Canada’s commitment to the CAT, we find that ... the phrase ‘substantial grounds’ raises a duty to afford an opportunity to demonstrate and defend those grounds.” The court further added that “[w]here the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.” While this case is of course not legally binding on the United States, it offers useful guidance on the interpretation of U.S. CAT obligations.

Article 2 of the ICCPR defines the scope of the legal obligations undertaken by the United States as a party to the ICCPR.
TORTURE BY PROXY

Rights Committee has interpreted Article 2’s “respect and ensure” language as incorporating the obligation on a state to provide judicial or administrative review.\(^{523}\) Moreover, paragraph 1 of Article 2(3) of the ICCPR requires that an individual claiming a remedy for violation of his rights under the ICCPR shall have an accessible and effective remedy determined by competent judicial, administrative or legislative authorities.\(^{524}\) At no stage in the U.S. diplomatic assurance process is there any opportunity for an individual to present evidence to a judicial or administrative authority that diplomatic assurances may be inadequate, or to seek a remedy for rendition. Moreover, it does not appear that there is any mechanism for the United States to seek the return of an individual who, in violation of diplomatic assurances, is tortured by the receiving state.

VII. STATE RESPONSIBILITY

As discussed in detail in this Report, Extraordinary Renditions violate numerous provisions of CAT, the ICCPR, and the Geneva Conventions.\(^{525}\) The United States is a party to all of these treaties and, as such, is bound

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\(^{2(1)}\): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

\(^{2(2)}\): Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

\(^{2(3)}\): Each State Party to the present Covenant undertakes:

1. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereby determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy[.]

\(^{523}\). HRC General Comment 31, supra note 9, para. 12.

\(^{524}\). The Human Rights Committee has interpreted ICCPR Article 2(1) as applicable both to persons within a state’s territory and also within the state’s “power or effective control.” HRC General Comment 31, supra note 9, para. 10; see also id. para. 15.

\(^{525}\). See Sections V.A, B, and C of this Report.
by them as a matter of international law. In the Extraordinary Rendition context, the United States has three major obligations: the duty to refrain from engaging in or facilitating torture, the duty to refrain from transferring an individual when there is a risk that the individual may face torture (the non-refoulement obligation), and the duty to prevent such violations and remedy them once they have occurred.

The Articles on State Responsibility for Internationally Wrongful Acts (ILC Articles) establish the “basic rules of international law concerning the responsibility of states for their internationally wrongful acts.” The ILC Articles are secondary rules of international law—that is, they do not speak to or interpret the content of states’ primary obligations, which are contained in treaties and customary law; rather, they “provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences.” For a wrongful act to result in some form of international liability on the part of a state, two elements must be established: (i) the conduct must constitute a breach of an international legal obligation in force for that state at that time, and (ii) the conduct in question must be attributable to the state. In this Section of the Report, we first consider the actions that would amount to breaches of U.S. obligations with respect to Extraordinary Renditions under the treaties to which it is a party. We then discuss the standards under which conduct is attributable to the United States.

A. U.S. Conduct Constitutes a Breach of International Law in Relation to Extraordinary Renditions

This subsection of the Report outlines the types of U.S. conduct that

526. See Sosa v. Alvarez-Machain 124 S. Ct. 2739, 2767 (2004) (“the [ICCPR] does bind the U.S. as matter of international law...”). Article 26 of the Vienna Convention, which codifies the fundamental international law principle of pacta sunt servanda, that is, that agreements must be observed, states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention, supra note 179, art. 26 (emphasis added).


528. ILC Articles and Commentaries, supra note 527, at 74.

529. Id., at 75.

530. ILC Articles and Commentaries, supra note 527, art. 2, at 81.
could amount to a breach of international law in relation to Extraordinary Renditions under CAT, the ICCPR, and the Geneva Conventions. These obligations are binding even though the United States has ratified both CAT and ICCPR with the express understanding that they are not self-executing. The United States is in fact under a binding international obligation to give effect to any international agreement to which it is a party.531 Failure to enact or enforce such legislation or other procedures will itself amount to a violation of the treaties to which the United States is a party, and provides no excuse for the additional violations flowing from that failure.532

1. Refoulement Constitutes a Breach of International Law

The United States’ involvement in the process of Extraordinary Rendition directly violates its non-refoulement obligations as set out in CAT and the ICCPR.533 CAT explicitly prohibits the transfer or refoulement of a person to a country where the individual may be in danger of torture.534 The ICCPR includes a similar prohibition: the Human Rights Committee has interpreted ICCPR Article 7 to include a prohibition against refoulement to states where the individual may be at risk of torture or CID treatment.535 The wrongful act of refoulement is the transfer itself in the face of risk:536 state responsibility attaches even if the individual is never tortured or subject to CID treatment.

531. Vienna Convention, supra note 179, at arts. 26 and 27.
532. Id.
533. See Sections V.A. and B. of this Report. Of course, the United States would also face liability for any torture directly committed by its military or intelligence personnel.
534. CAT, supra note 5, at art. 3(1).
535. HRC General Comment 20, supra note 303. As demonstrated in Section V. above, the different treaties contain slightly different standards concerning the level of risk that must be present to trigger the obligation not to transfer an individual who fears torture or CID.
536. The CAT standard requires the presence of “substantial grounds for believing [the individual] would be in danger of being subjected to torture” upon transfer. CAT, supra note 5, at art. 4(1). The Human Rights Committee has interpreted the ICCPR to prohibit transfer in cases where there are “substantial grounds for believing that there is a real risk of irreparable harm.” HRC General Comment No. 31, supra note 9, para. 12. The United States has codified a standard that is more stringent, requiring that it be “more likely than not” that an individual will face torture upon transfer. See Section V.A.5. of this Report. Under international law, the United States is responsible for violations of the treaty standards, regardless of federal law. See Vienna Convention, supra note 179, at arts. 26 and 27.
2. Complicity in Torture Constitutes a Breach of International Law

Participation in Extraordinary Rendition may amount to a breach of the United States’ international obligations to refrain from engaging in acts that amount to complicity or participation in torture. The prohibition against torture is absolute and enshrined in both CAT and the ICCPR. CAT requires states to criminalize complicity or participation in torture. Under CAT Article 4, states must ensure that both “an attempt to commit torture” and “an act by any person which constitutes complicity or participation in torture” is a criminal offense. State actors who are complicit in torture engage the responsibility of the state.

3. The Failure to Prevent or Remedy Torture or CID Treatment Constitutes a Breach of International Law

The failure of the United States to prevent torture or refoulement and to remedy these abuses once they have occurred amounts to a violation of international law. Under CAT, the United States is required to train civil or military personnel involved in the custody, interrogation and treatment of any detainees in the prohibition against torture. The United States must ensure that any allegation of torture or CID treatment by U.S. officials is fully and impartially investigated by a competent authority. The United States must also criminalize and assert mandatory jurisdiction over direct, complicitous, or other participation in torture by state actors. Victims of torture by U.S. actors must have access to redress and compensation through the U.S. legal system. Failure to train, investigate, prosecute, and provide redress and compensation could, by the terms of CAT, constitute a violation by the United States.

Article 2 of the ICCPR requires states party “to respect and to ensure” to all individuals the rights set out in the ICCPR, “to give effect to” those rights through legislation, and to provide “an effective remedy” for those rights. The Human Rights Committee’s authoritative General Comments

537. CAT, supra note 5, arts. 1, 2(2); ICCPR, supra note 5, arts. 7, 4(2).
538. CAT, supra note 5, art. 4(1).
539. CAT, supra note 5.
540. Id. arts. 10, 11 and 12.
541. Id. arts. 10, 11, 12 and 16.
542. Id. arts. 4.1, 6 and 7.
543. Id. art. 14.
544. Article 2 of the ICCPR, supra note 5, provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all
on the ICCPR have interpreted the “respect and ensure” language, the “give effect to” language, and the “effective remedy” language of ICCPR Article 2 to require the criminalization of violations of Article 7’s prohibitions against torture, by (i) state actors acting in their official capacity, or outside their official capacity or in a private capacity, and (ii) private parties, which could include contractors determined to be non-state actors or agents. In addition, according to the Human Rights Committee,
both the failure to investigate allegations of violations of the ICCPR and the failure to bring perpetrators to justice could amount to a breach of the ICCPR by a state party. 547

The Human Rights Committee has applied these interpretations in cases arising under the ICCPR’s individual complaints mechanism, the First Optional Protocol. In the seminal case of Irene Bleier Lewenhoff & Rosa Valino de Bleier v. Uruguay concerning arbitrary arrests, torture, and disappearances in Uruguay in the late 1970s, the Human Rights Committee found that Uruguay had a duty to investigate allegations including violations of ICCPR Article 7 (prohibiting torture), Article 9 (arbitrary detention), and Article 10(1) (humane treatment of prisoners), to prosecute those responsible for ICCPR violations, and to pay reparation. 548 Similarly, the Human Rights Committee has found that in response to allegations of torture, Zaire was “under a duty to ... conduct an inquiry into the circumstances of [the victim’s] torture, to punish those found...
guilty of torture and to take steps to ensure that similar violations do not occur in the future.\footnote{549}{Tshitenge Muteba v. Zaire, Communication No. 124/1982 (25 March 1983), Human Rights Committee, U.N. Doc. Supp. No. 40 (A/39/40) at 182 (1984); \textit{see also} John Khemraadi Baboeram at al. v. Suriname, Communication No. 146/1983 and 148 to 154/1983, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/40/40) at 187, para. 13.2 (1985) (same with respect to extra-judicial executions); \textit{Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida v. Uruguay}, Communication No. 107/1981, U.N. Doc. Supp. No. 40 (A/38/40) at 216 (1983) (same with respect to forced abductions by state agents). Regional courts have also interpreted similar “ensure and respect” and “right to remedy” language in regional conventions and treaties to incorporate a state’s obligation to investigate and prosecute conventional violations. For example, the Inter-American Commission on Human Rights has interpreted the American Convention’s Article 1(1) duty to “ensure and respect” and Article 25 “right to a remedy” duty to include the obligation to investigate and prosecute responsible individuals in cases of torture or disappearance. Case No. 6586 Inter-Am. C.H.R. 91, OEA/ser.L/VII/61, doc. 22 rev. 1 (1983), at 93; \textit{see also} Gary Hermosilla et. al., Case No. 10.843, Inter-Am C.H.R. (1988). The European Court of Human Rights has also interpreted the “right to a remedy” language of Article 13 of the European Convention to include the obligation to investigate and prosecute. \textit{See McCann and others v. United Kingdom}, 324 Eur. Ct. H.R. 31 (ser. A) (1995). See European Convention, supra note 186, art. 13, which provides that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”}

\footnote{550}{Geneva I, art. 51, Geneva II, art. 52, Geneva III art. 131, Geneva IV, art. 148, \textit{supra} note 169.}

\footnote{551}{Geneva I, art. 50, Geneva II, art. 51, Geneva III, art. 130, Geneva IV, art. 147, \textit{supra} note 169.}

\footnote{552}{Geneva IV, \textit{supra} note 169, art. 147,}

\footnote{553}{Geneva III, art. 129, Geneva IV, art. 146, \textit{supra} note 169.}
would be in breach of the Geneva Conventions if it fails to investigate and prosecute (i) the torture or complicity to torture of POWs and civilian detainees by U.S. actors or those acting at their direction, and (ii) the unlawful transfer of civilian detainees to third states where those detainees will be subject to torture.

B. Acts Attributable to the United States in the Context of Extraordinary Rendition

The second part of the state responsibility analysis asks whether or not a particular act is attributable to the state; in other words, what constitutes an “act of state’ for the purposes of state responsibility.” While the United States might intend to shield itself from liability by “outsourcing” torture, under international law, the U.S. may be held responsible for acts of torture committed by private actors and even by a third state subsequent to rendering.

1. The United States is Liable for the Authorized and Unauthorized Actions of its Officials, including the Armed Forces, CIA, and FBI

Under the general rules of attribution, a state faces responsibility for an alleged wrongful act if that act was carried out by the state through its many organs and officials. Article 4 explains that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

Thus, involvement of the U.S. military, the CIA, and the FBI in violations of international law would render the United States itself liable for such violations. The ILC Articles specify that a state cannot elude responsibility by demonstrating that the act in question was not authorized. The state can still be held responsible for the conduct of “an organ of a State or of a person or entity empowered to exercise elements of the governmental authority” even if the entity “exceed[ed] its authority or contravene[d] instructions.” Arguments that “rogue” CIA officers are behind Extraor-

554. See ILC Articles and Commentaries, supra note 527, at 82 (art. 2, cmt. 5). Chapter II of the ILC Articles sets out the general rules by which a wrongful act might be attributed to a state.

555. ILC Articles and Commentaries, supra note 527, at 106 (art. 7.)
ordinary Renditions, for example, would not shield the United States from responsibility under international law.

2. The United States is Liable for the Actions of Individuals or Groups Acting under its Instructions, Direction, or Control, including Private Actors

ILC Article 8 provides that:

The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.\(^556\)

The commentary to this article indicates that there are two main circumstances in which the conduct of private entities may be attributable to the state: (a) "where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State," or (b) "where private persons act under the State's direction or control."\(^557\)

In discussing the applicable test regarding the degree of control necessary to attribute the acts of private entities to a state, the commentaries to the ILC Articles examine the standard articulated in the International Court of Justice's (ICJ) judgment in *Military and Paramilitary Activities in and against Nicaragua v. United States.*\(^558\) That case concerned the covert and overt involvement of the United States in supporting the contra rebel forces in Nicaragua in the 1980s. The ICJ held that by training, arming, financing, and supplying the *contras,*\(^559\) the United States had breached a number of its customary international law obligations, including its obligation not to use force against another state and its obligation not to intervene in the affairs of another state.\(^560\) However, the ICJ rejected Nicaragua's claim that, for legal purposes, the *contras* should be considered an organ or agent of the U.S. government such that the United States should be held responsible for violations, including the murder of non-combatants, committed by the *contras.*\(^561\) The ICJ stated:

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\(^{556}\) ILC Articles and Commentaries, supra note 527, at 110 (art. 8).

\(^{557}\) ILC Articles and Commentaries, supra note 527, at 110 (art. 8, cmts. 1 & 2).

\(^{558}\) Nicaragua case, supra note 355; ILC Articles and Commentaries, supra note 527, at 110-111 (art.8, cmt 4).

\(^{559}\) Id. para. 108.

\(^{560}\) Id. para. 211, 238.

\(^{561}\) Id. para 115.

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The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras.562

The ICJ refused to attribute the actions of the contras to the United States absent a finding of effective control (as opposed to “general control,” which was held by the court to be present) by the United States of the contra forces at the specific times that the violations were committed.563

In Prosecutor v. Tadic, the ICTY carved out an exception to the standard enunciated by the ICJ in the Nicaragua case. Distinguishing two kinds of cases encompassed by the Nicaragua test, the Tadic court concluded that the Nicaragua test was applicable to inquiries about individuals or groups of individuals, but inappropriate when examining the actions of an organized armed faction. When examining organized paramilitary groups, the Court set out the following test:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.564

562. Id. para 116.
563. Id. para 115. Some commentators have suggested that by not holding the United States responsible for the acts of the contras, the ICJ set the legal standard for attribution too high. See, e.g., Mark Gibney, Katarina Tomasevski and Jens Vedsted-Hansen, Transnational State Responsibility for Violations of Human Rights, 12 HARV. HUM. RTS. J. 267, 285-87 (Spring 1999). The article argues that the “ICJ’s notion of ‘control’ is premised on very transitional notions of state-sovereignty and power relations between nation-states, where one country attempts to rule or dominate another. This approach, however, will miss most of what presently governs relations between and among states.” Id. at 286.
564. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, (ICTY Trial Chamber, July 15, 1999), paras. 131, 137.
The ICTY thus limited the use of the ICJ’s standard of effective control during a particular act to situations where the “issue is whether a single private individual or a group that is not militarily organized has acted as a de facto State organ when performing a specific act.”

Under either the ICJ’s Nicaragua test for effective control or the ICTY’s subsequent formulation of that test in Tadic, the United States could be held liable for Extraordinary Renditions carried out by private individuals (or groups) acting under its direction and control. Private contractors who have been hired by various organs of the United States to perform functions on behalf of those organs (e.g., investigation or interrogation of detainees, transfer or transport of detainees) may incur the responsibility of the United States to the extent that they act under the direction and control of the agencies by which they are employed. While the United States would also be responsible for the acts of armed groups acting under its overall control, this scenario is less applicable in the context of Extraordinary Renditions.

3. The United States May Be Liable for the Actions of Organs of a Foreign State Acting under its Direction and Control

ILC Article 6 states that:

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

565. Id. (emphasis added).
566. Possible liability of civilian contractors is discussion in Sections V.E. and VIII.A. of this Report.
567. Some commentators have suggested that the threshold for attribution of the acts of private parties to a state appears to have been lowered significantly post-September 11, 2001. Subsequent to the attacks in New York, Washington, and Pennsylvania, the United States asserted the right to act in self-defense against Afghanistan because the Taliban regime had supported and harbored leaders of the Al Qaeda terrorist network. D. Jinks, State Responsibility for Sponsorship of Terrorists and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups, 4 CHI. J. INT’L L. 83. The Bush Administration did not allege that Al Qaeda acted on behalf of the Taliban, or that the Taliban played any direct role in, or had any direct knowledge of, the planning or execution of the attacks; instead it attributed the acts of Al Qaeda to Taliban simply because the Taliban had harbored and supported the group. Id. The attribution was without regard to whether Afghanistan in fact exercised “effective control” (or “overall control”) over the group. The UN Security Council, North Atlantic Treaty Organization, and the OAS expressly or tacitly endorsed the U.S. position. Id.
According to the commentaries to the ILC Articles, the condition that the organs of the third state be “placed at the disposal” of a state is a strictly construed requirement. The organs of the third state must be acting under the “exclusive direction and control” of the former state, not just acting “on instructions.”\(^\text{568}\) The commentaries further state that “mere aid or assistance offered by organs of one State to another” would not give rise to liability under this article.\(^\text{569}\) Accordingly, the United States may be liable for acts of torture or mistreatment committed by foreign officials in the country to which an individual is rendered if such officials are acting under the exclusive direction and control of U.S. actors. The level of control the United States may have over foreign officials in the context of Extraordinary Renditions is a factual inquiry that may only be conclusively determined after the United States conducts investigations of alleged renditions in accordance with its international law obligations. Given reports of the existence of U.S. secret detention facilities abroad, and the possible use of foreign officials as agents in U.S.-directed interrogations, there is reason to believe that the requisite direct control may exist in the context of Extraordinary Renditions.

4. The United States May Be Liable for Knowingly Assisting in the Unlawful Acts of a Foreign State

ILC Articles 16 and 17 establish ways in which a state might be derivatively responsible for the acts of another state. As the commentaries to the ILC Articles note, “the essential principle is that a State should not be able to do through another what it could not do itself.”\(^\text{570}\)

Article 16 establishes responsibility for aiding or assisting in the commission of an internationally wrongful act:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.\(^\text{571}\)

Under this article, a state is responsible to the extent of the aid or assist-

\(^{568}\) ILC Articles and Commentaries, supra note 527, at 103 (art. 6, cmt. 2).
\(^{569}\) ILC Articles and Commentaries, supra note 527, at 103 (art. 6, cmt. 3).
\(^{570}\) ILC Articles and Commentaries, supra note 527, at 154 (art. 17, cmt. 8).
\(^{571}\) ILC Articles and Commentaries, supra note 527, at 148 (art. 16).
tance given.\textsuperscript{572} While the text of the article itself provides two conditions for attribution, namely awareness of the act and that the act constitute a violation of an international obligation of the aiding state, the commentaries appear to add an intent requirement.\textsuperscript{573} The aid or assistance need not have been essential to the performance of the wrongful act, but the assistance must have “contributed significantly” to that act.\textsuperscript{574}

The commentary for Article 16 lists “facilitating the abduction of persons on foreign soil” as an example of a situation where state responsibility for the acts of another state would attach.\textsuperscript{575} More generally, the commentaries are clear that liability could arise from the provision of material aid to a state for the purpose of facilitating a human rights violation. In such a situation, the commentaries advise that a fact-intensive inquiry is needed to determine whether the aiding state was “aware of and intended to facilitate the commission of the internationally wrongful act.”\textsuperscript{576} Thus, for example, liability may attach to the United States for Extraordinary Rendition (to the extent of its assistance) in situations where the United States provided intelligence, personnel, or, as in the Swedish case,\textsuperscript{577} the aircraft that facilitated the illegal abduction of detainees with the intent to aid in violation either of the principle of non-refoulement (e.g., in the Swedish case) or any other provision of CAT, the ICCPR, Geneva Conventions, or customary international law.

Finally, the United States may be found internationally responsible under ILC Article 17, which provides:

\begin{quote}
A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be wrongful if committed by that State.\textsuperscript{578}
\end{quote}

\textsuperscript{572} ILC Articles and Commentaries, supra note 527, at 148 (art. 16).
\textsuperscript{573} See, e.g., ILC Articles and Commentaries, supra note 527, at 149 (art. 16, cmt. 3) (“the aid or assistance must be given with a view to facilitating the commission of that act”), cmt. 5 (“A State is not responsible for aid or assistance under article 16 unless the relevant State organ \textit{intended}, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct....”) (emphasis added).
\textsuperscript{574} ILC Articles and Commentaries, supra note 527, at 149 (art. 16, cmt. 5).
\textsuperscript{575} ILC Articles and Commentaries, supra note 527, at 148 (art. 16, cmt. 1).
\textsuperscript{576} ILC Articles and Commentaries, supra note 527, at 150 (art. 16, cmt. 9).
\textsuperscript{577} See Sections IV.A. and VI. of this Report.
\textsuperscript{578} ILC Articles and Commentaries, supra note 527, at 152 (art. 17).
While under ILC Article 16 a state is liable only to the extent of the assistance offered, under ILC Article 17, a state that directs and controls another state in the commission of a wrongful act is responsible for the act itself. State responsibility under Article 17 is historically associated with international dependency relationships between imperial and colonial states. In modern times, Article 17 may apply in a situation where a state controls the activities of another state as a result of occupation, or through a treaty or other, less formal, international agreement. In the context of Extraordinary Renditions, this provision could apply to the extent that the United States has directed or controlled interrogations in, for example, Afghanistan or Iraq (both nations that the United States has occupied, and that have historically practiced torture as a means of interrogation by security forces) or other states that resort to torture or CID treatment. In such situations, the United States may derive responsibility for acts of torture or mistreatment committed during those interrogations.

C. A Note on Adjudicating State Responsibility

A full discussion of the process by which a state may be found liable by a court for internationally wrongful acts attributable to it is beyond the scope of this Report. Even though the venues for bringing suit against the United States may be limited, the United States, as a matter of international law, remains bound by its treaty obligations and may be considered responsible for violating the prohibition of non-refoulement and the rule against torture when it extraordinarily renders a suspected terrorist. A breach of an international obligation, regardless of whether it results in litigation, has serious consequences for the victims of that violation, for the standing of the United States in the international community, and for the development of international human rights generally.

In brief, a state may be found liable though a suit brought either by another state, or by an individual. For actions by states suing other
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states, suits may be brought at the International Court of Justice or through a relevant system of arbitration, provided that jurisdictional requirements are met. The ICJ may only adjudicate a dispute when the states concerned have consented to its jurisdiction.583 The United States revoked its general consent to ICJ jurisdiction in the 1980s, and the ICJ only has jurisdiction to adjudicate a claim involving the United States if the United States grants it permission in that case, or if the case involves a dispute over a treaty to which the United States is a party and which contains a clause granting the ICJ jurisdiction over disputes arising from that treaty.584 Of the treaties discussed in this Report—CAT, the ICCPR, the Refugee Convention and the Geneva Conventions—only CAT contains such a clause;585 however, the United States, in its reservations to CAT, declared that it does not consider itself bound by that clause.586 The United States did reserve the right to permit ICJ jurisdiction or some other dispute resolution mechanism in a given case. Thus, for any nation to bring a claim at the ICJ under one of these treaties against the United States, the United States would have to consent to the jurisdiction of the ICJ to adjudicate that particular dispute. Considering that the United States has historically been reluctant to submit to the jurisdiction of the ICJ, such permission would be unlikely.587 In the absence of jurisdiction, the ICJ may issue a non-binding advisory opinion “on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”588

For an individual who has suffered torture as a result of Extraordinary

583. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993 (ICJ Statute), art. 36. States may manifest their consent in three ways: through special agreement relating to the single case at issue; through a clause in a treaty (known as a “jurisdictional clause”) giving the ICJ authority to adjudicate a dispute relating to the interpretation or application of a given treaty; or through a unilateral declaration recognizing the jurisdiction of the Court as compulsory, in relation to any other State accepting the same obligation (known as an “optional clause.”) See also the website of the ICJ, at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasic_whobringcases.html (last visited Oct. 25, 2004).
585. CAT, supra note 5, art. 30(1).
587. For an overview of the efforts of the U.S. government to insulate itself from liability in international fora, see, e.g., John Quigley, American Style in International Human Rights Adjudication, 19 Ohio St. J. ON DISP. RESOL. 249 (2003).
588. ICJ Statute, supra note 571, art. 65.
Rendition seeking to sue the United States for international law claims, the only possible international forum would be the Inter-American Commission and Court on Human Rights because the United States has not accepted the jurisdiction of the international treaty-monitoring bodies established under the ICCPR or CAT to hear individual claims under those treaties. The Inter-American Commission on Human Rights is the principal organ created under the OAS Charter to promote the observance and protection of human rights in the Americas.589 The United States has signed but not ratified the American Convention on Human Rights. Nevertheless, the United States is a member of the OAS, and Article 44 of the American Convention allows the Inter-American Commission on Human Rights to hear complaints by individuals against states if those states are members of the OAS.590 If a state (such as the United States) has not ratified the American Convention, the Commission will examine any such claims under the American Declaration of the Rights and Duties of Man.591

The possibility of bringing a suit against a U.S. official in a U.S. court for torture that occurred overseas seems to have been foreclosed by the recent Supreme Court ruling in the case of United States v. Alvarez-Machain.592 In that case, a Mexican doctor alleged that the United States was liable for false arrest after the Drug Enforcement Administration (DEA) arranged for other Mexican nationals to abduct him and bring him to the United States to face charges for the murder of a DEA agent.593 After the doctor was acquitted, he brought suit against the United States under the Federal Tort Claims Act (FTCA), which authorizes suit “for . . . per-
sonal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” The Supreme Court held that the case fell under an exception to the FTCA which precludes a claim “arising in a foreign country.” More broadly, the court ruled that the “FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country.” In the Extraordinary Rendition context, the alleged torture occurs in a foreign state, and so suit under the FTCA may be barred.

VIII. INDIVIDUAL LIABILITY UNDER DOMESTIC LAW

The following Section discusses the parameters of individual liability for commission or participation in torture. This Section does not focus on the actions of individuals that amount to illegal refoulement, since the conduct amounting to refoulement has not in itself been made the subject of criminal penalties. Instead, the focus is on legal accountability for indirect participation in torture, including by way of refoulement.

A. Participation in Extraordinary Renditions May Result in Criminal Liability

Acts of Extraordinary Renditions may be sanctioned by the Torture Act of 2000 and the Uniform Code of Military Justice. Moreover, the Military Extraterritorial Jurisdiction Act of 2000 provides a jurisdictional

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595. Alvarez-Machain, 124 S. Ct. at 2748 referring to 28 U.S.C. § 2680(k). In its opinion, the Supreme Court rejected the so-called “headquarters doctrine” that the Ninth Circuit had applied when it ruled on the case. Under the headquarters doctrine, the U.S. may be liable for an act that took place in another country if the wrongdoing originated in the U.S. but had its “operative effect in another country.” Id., citing Sami v. U.S., 617 F.2d 755, 762 (CADC 1979) (refusing to apply § 2680(k) where a communique sent from the United States by a federal law enforcement officer resulted in plaintiff’s wrongful detention in Germany).
596. Alvarez-Machain, 124 S. Ct. at 2754.
598. 18 U.S.C. §§2340, 2340A, and 2340B.
basis for prosecution of military and certain civilian personnel for acts committed outside the United States that would be criminal if committed in the United States.

1. Acts of Extraordinary Rendition May Amount To Conspiracy to Commit Torture and/or Aiding and Abetting in the Commission of Torture pursuant to the Torture Act of 2000

(a) Jurisdiction

In order to comply with CAT’s provisions requiring each ratifying country to criminalize acts of torture (including attempts to commit torture and complicity in torture), the United States enacted into U.S. Code sections 2340 and 2340A.601 Section 2340A(a) makes it a criminal offense for any person “outside the United States [to] commit... or attempt...to commit torture.” In addition, section 2340A, as amended by the USA Patriot Act,602 codifies the offense of conspiracy to commit torture.

Section 2340A extends jurisdiction to military members, civilian employees of the United States, as well as contract employees, and generally applies to acts committed by U.S. nationals “outside of the United States,”603 The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amends section 2340(3) to define the “United States” as “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”604

(b) Offense

In addition to criminalizing direct acts of torture, section 2340A(c) provides that “a person who conspires to commit [torture] 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

603. U.S.C. §§2340A(a). Section 2340(3) defined the “United States” as including “all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.” The USA Patriot Act broadened the scope of section 7, extending jurisdiction under that section to foreign diplomatic, military and other facilities. By cross-reference, these places would have been excluded from the reach of section 2340A. But see note 604.
conspiracy.” (emphasis added) Torture is defined as 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.”\(^{605}\) “Severe mental pain or suffering” is defined as the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the sense or the personality;
(C) the threat of imminent death, or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the sense or personality.\(^{606}\)

This definition of torture was intended to track the definition set forth in CAT, taking into account the reservations, understandings and declarations made by the United States as part of its ratification.\(^{607}\)

No cases have been brought to date under section 2340. However, guidance as to the meaning of “torture” under U.S. law can be gleaned from cases interpreting the Alien Tort Claims Act of 1789 (ATCA),\(^{608}\) and the Torture Victim Protection Act of 1991 (TPA).\(^{609}\) Thus, for example, courts

\(^{605}\) 18 U.S.C. §2340.

\(^{606}\) 18 U.S.C. §2340.

\(^{607}\) See Sen. Rep. 103-107; for a discussion of the legality under international law of the United States’ reservation, understanding and declarations with respect to ratification of CAT, see supra note 5.

\(^{608}\) 28 U.S.C. §1350. ATCA states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

\(^{609}\) Torture Victim Protection Act of 1991, Mar. 12, 1992, P.L. 102-256, 106 Stat. 73, enacted as a note to 28 U.S.C. §1350. The TPA provides that: “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”
have found that the following acts constitute torture: subjecting detainees to interrogation sessions lasting 14 hours,\textsuperscript{610} beating with hands,\textsuperscript{611} threatening with death,\textsuperscript{612} and using techniques to exacerbate pain or injury.\textsuperscript{613}

Section 2340 requires that the act must be “specifically intended” to inflict severe physical or mental pain or suffering. Generally, if specific intent is required, the prosecution must show that the defendant intended the illegal consequences of his actions. In \textit{United States v. Newiswender},\textsuperscript{614} the Court noted that in order to establish that the defendant had “specific intent to obstruct justice” “the defendant need only have had knowledge or notice that success [in his act] would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one’s acts.”\textsuperscript{615} The Court further added that this rule “is grounded upon sound policy for ... a rule focusing on foreseeable, rather than intended consequences operates in sensible and fair fashion to deter the conduct sought to be avoided and to punish those whose actions are blameworthy, even though undertaken for purposes that may or may not be culpable.”\textsuperscript{616}
lawful goods or services may be inferred. Direct evidence of participation, such as advice from the supplier of legal goods or services to the user of those goods or services on their use for illegal .... But in cases where direct proof of complicity is lacking, intent to further the conspiracy must be derived from the sale itself and its surrounding circumstances in order to establish the supplier’s express or tacit agreement to join the conspiracy.”); See generally, LAFAVE, supra note 438; LAFAVE, §5.7.

617. Syria, Egypt, Saudi Arabia, and other states to which the United States is alleged to have Extraordinarily Rendered individuals are known to employ interrogation techniques that unequivocally amount to torture. See, e.g., U.S. DEPT. OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2001: SYRIA, available at http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8298.htm (last visited Oct. 25, 2004) (“there was credible evidence that security forces continued to use torture. During the year, ... numerous cases of torture in custody [were reported], including the case of two Kurdish leaders, Marwan Uthman and Hasan Saleh, who were arrested in December 2002 for organizing a demonstration .... Former prisoners and detainees, as well as the SHRC, reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim’s spine. Torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, particularly while the authorities were attempting to extract a confession or information “); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003: LEBANON, available at http://www.state.gov/g/drl/rls/hrrpt/2003/27932.htm (last visited Oct. 26, 2004) (“The Government acknowledged that violent abuse usually occurred during preliminary investigations conducted at police stations or military installations, in which suspects were interrogated without an attorney. Such abuse occurred despite laws that prevented judges from accepting any confession extracted under duress “); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003: EGYPT, available at http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm (last visited Oct. 26, 2004) (“there were numerous, credible reports that security forces tortured and mistreated detainees. Human rights groups believed that the SSIS, police, and other Government entities continued to employ torture. Torture was used to extract information, coerce the victims to end their oppositionist activities, and to deter others from similar activities. Reports of torture and mistreatment at police stations remained frequent “); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003: SAUDI ARABIA, available at http://www.state.gov/g/drl/rls/hrrpt/2003/27937.htm (last visited Oct. 26, 2004) (“there were credible reports that the authorities abused detainees, both citizens and foreigners. Ministry of Interior officials were responsible for most incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation. In addition, there were allegations of torture, including allegations of beatings with sticks and suspension from bars by handcuffs. There were reports that torture and abuse were used to obtain confessions from prisoners.... Canadian and British prisoners that were released during the year reported that they had been tortured during their detention”.

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TORTURE BY PROXY

As will be demonstrated below, in certain circumstances, acts of Extraordinary Rendition may amount to a crime of conspiracy to commit torture and/or to the crime of aiding and abetting in the commission of torture. 617
(i) Conspiracy

Section 2340A has not been litigated before the courts. As a result, there is no jurisprudence on the scope of the crime of conspiracy to commit torture. Guidance, however, can be gleaned from the general federal conspiracy statute (18 U.S.C. §371), the Model Penal Code, and state jurisprudence. The following analysis draws on each of these sources.

(A) Federal Conspiracy Statute. Under 18 U.S.C. §371 (the crime of defrauding the United States), the government must establish beyond a reasonable doubt: 1) that two or more people agreed to pursue an unlawful objective; 2) that the defendant voluntarily agreed to join the conspiracy; and 3) that one or more members of the conspiracy committed an overt act in furtherance of the conspiracy.\(^\text{618}\) With respect to the third requirement, however, courts have held that where a statute does not provide for a requirement of an overt act (as is the case in section 2340A), no proof of an overt act for the conspiratorial objective is required.\(^\text{619}\) In addition, an overt act may not be required if the contemplated crime is serious, likely of completion, or likely to encourage future criminal activity.\(^\text{620}\) Even where an overt act is required, it is generally viewed merely as evidence of the offense and not an element of proof.\(^\text{621}\)

(B) The Model Penal Code. The Model Penal Code\(^\text{622}\) provides that a person is guilty of conspiracy with another person to commit a crime if “with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of

\(^{618}\) United States v. Loe, 262 F.3d 427 (5th Cir. 2001).

\(^{619}\) United States v. Sassi, 966 F.2d 283 (7th Cir. 1992) (while general federal conspiracy statute specifically requires overt act, several specific conspiracy statutes, including 21 U.S.C.A. § 846, do not so specify, and as to them proof of overt act unnecessary); State v. D’Ingianni, 47 So. 2d 731 (1950); Martin v. State, 19 So. 2d 488 (Miss.1944); State v. Condrey, 562 S.E.2d 320 (S.C. 2002). Even those statutes that do contain an overt act requirement provide that an act need not be done by all conspirators and the act need not be criminal or unlawful in itself.

\(^{620}\) LAFAVE, supra note 438, §6.5(c); American Law Institute Model Penal Code Official Draft, 1962, §5.03(5) (Model Penal Code).

\(^{621}\) Yates v. United States, 354 U.S. 298 (1957); LAFAVE, supra note 438, §6.5(c).

\(^{622}\) The Model Penal Code is not binding law. However, it has been very influential and numerous court opinions cite to the Model Penal Code as persuasive authority for the interpretation of an existing statute or in the exercise of a court’s occasional power to formulate a criminal law doctrine. See, e.g., U.S. v. Crowley, 318 F.3d 401 (2nd Cir. 2003); United States v. Bussey, 507 F.2d 1096, 1098 (9th Cir. 1974).
them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime, or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. 623 An agreement is an essential element of conspiracy. However, the agreement does not need to be written, nor is it necessary that an oral agreement be made. 624 Mere tacit understanding suffices. 625 As the Supreme Court stated in Iannelli v. United States, 626 “[t]he agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.” 627

Under U.S. law, the crime of conspiracy usually requires intent to conspire as well as intent to achieve an unlawful or criminal result. 628 The latter intent need not be so particular that the conspirator has in mind a particular time, place, victim, etc., but at least must relate to a particular type of criminal activity. 629 Where the objective of conspiracy is itself a crime, it has been held that “at least the degree of criminal intent necessary for the substantive offense itself” is required to prove the conspiracy charge. 630 Intent may be inferred from circumstantial evidence. Thus, for example, a supplier who furnishes equipment which he knows will be used to commit a serious crime may be deemed from that knowledge alone to have intended to produce the result. 631 Although some courts have allowed for a defense of “good faith” to be a defense to conspiracy, 632 other courts have rejected this defense, usually by resort to the general rule that ignorance of the criminality of one’s conduct is no defense. 633

623. Model Penal Code, supra note 604, §5.03(1).
627. See also, LAFAVE, supra note 438, §6.4(d).
628. Id. at 275-276.
629. LAFAVE, supra note 438, §6.4(e).
630. U.S. v. Lichenstein, 610 F.2d 1272 (5th Cir. 1980); McDonald v. State, 454 So. 2d 488 (Miss. 1984).
633. See generally, LAFAVE, supra note 438, §6.4

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(ii) Accomplice Liability

Section 2 of Title 18, provides that

(a) Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.634

The Courts have generally accepted that section 2 applies to the entire U.S. criminal code.635 Accordingly, section 2 is applicable to the crime of torture codified in section 2340.

Generally, one may become an accomplice by acting to induce another through threats or promises,636 by words or gestures of encouragement,637 or by providing others with the plan for the crime.638 Thus, for example, furnishing of weapons,639 supplies,640 or instrumentalities641 to be used in committing the crime has been considered rendering of assistance. As the court in State ex rel. Martin v. Tally642 stated:

The assistance given...need not contribute to the criminal re-

635. Breeze v. United States, 398 F.2d 178 (10th Cir. 1968) (holding that 18 U.S.C. §2 is applicable to entire U.S. criminal code, so that 18 U.S.C. §1381, relating to harboring, concealment, protection or assistance of deserter from Armed Forces of United States should be read and construed in like manner as if 18 U.S.C. §2 were part of it); United States v. Muccianti, 21 F.3d 1228, 1234 (2nd Cir. 1994) (“an aiding and abetting charge is arguably implicit in every indictment....The Federal aiding and abetting statute, 18 U.S.C. 2, does not penalize conduct apart from the substantive crime with which it is coupled.”); see also United States v. Sabatino, 943 F.2d 94 (1st Cir. 1991) (same effect).
640. Malatkofski v. United States, 179 F.2d 905 (1st Cir. 1950) (supplying money for bribe).
641. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969) (provided own blood to be poured on selective service files).
642. 15 So. 722, 738 ( Ala. 1893).
result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely renders it easier for the principal actor to accomplish the end intended by him and the aider and abetter, though in all human probability the end would have been attained without it.

Although mere presence at the scene of the crime is not enough, it is sufficient assistance that the accomplice is standing by at the scene of the crime ready to give some aid if needed, provided that the principal is aware of the accomplice’s intentions.

The accomplice must intentionally encourage or assist the commission of the crime, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state. Thus, for example, an accomplice is not guilty of first degree murder unless he acted with premeditation and deliberation (because first degree murder requires a deliberate and premeditated killing). However, there is some authority to support the proposition that an individual may become an accomplice by giving encouragement or assistance with the knowledge that it will promote or facilitate a crime. As a practical matter, in a case of a completed act of torture, the same mental state that supports the crime of conspiracy (see Section VIII.A.1.b.i. above) will also support the offense of complicity.

According to media and off-the-record statements by officials, some Extraordinary Renditions to states like Syria, Egypt, Saudi Arabia, Yemen, and Morocco may have the purpose of subjecting the rendered person to interrogations with harsh methods that amount to torture or to CID treatment. According to some reports, U.S. officials may provide transportation, supply interrogation questions, and may even be present during the

643. The defendant was not an accomplice where he “stood by” while the mother killed the child but neither actually aided the mother in the acts of abuse nor “counsel[ed], command[ed] or encourage[d] her.” Pope v. State, 396 A.2d 1054 (Md. 1979).


645. LA FAVE, supra note 438, §6.7(a).

646. Id. §6.7(b).

647. Id. §6.7(c).

648. Id. §6.7(d); see also Backun v. United States, 112 F.2d 635 (4th Cir. 1940); United States v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990) (willful blindness suffices as a mental state for accomplice liability). Cf. United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).
interrogation. Information obtained during such interrogations is allegedly relayed back to the U.S. officials. Under such circumstances, it is possible to contend that U.S. officials implicated in the Extraordinary Rendition could be charged under section 2340A(a) and/or (c). Thus, for example, under the Newswender rule, a deliberate transfer of an individual to a state where it is reasonably foreseeable that the individual would be tortured, could result in criminal liability on the grounds of conspiracy in the commission of torture under section 2340A(c) and an accomplice liability to the commission of torture under sections 2 and 2340A(a).

In circumstances where diplomatic assurances that rendered individuals will not be tortured are used, it could be argued that U.S. officials lack the intent to conspire to commit, or to aid in the commission of, torture. However, the Department of State reports on human rights practices have consistently revealed systematic uses of torture in detentions and interrogations by states to which individuals have allegedly been Extraordinarily Rendered. The reliability of diplomatic assurances in the face of such systemic use of torture is suspect.649 Thus, Extraordinary Renditions to such states may demonstrate deliberate avoidance of knowledge, potentially allowing for prosecution under the theory of willful blindness.

2. The Uniform Code of Military Justice (UCMJ) May Be Used as a Sanction Against Extraordinary Renditions

(a) Jurisdiction

The UCMJ650 regulates the conduct of all persons serving in the U.S. Armed Forces and certain civilians accompanying such personnel.651 Its purpose is to “promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”652

As a jurisdictional matter, the UCMJ applies worldwide,653 and per-

649. For a more detailed discussion of unreliability of diplomatic assurances, see Section VI. of this Report.
652. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) (The Manual). The Manual is issued by the President as a regulation under authority granted by Congress under Article 3 of the UCMJ.
sons subject to the UCMJ include any U.S. service member as well as certain civilians “in time of war ... serving with or accompanying an armed force in the field” and POWs. The scope of the applicability of the UCMJ to civilians has been narrowed by the courts over the years. Although courts’ interpretations of the terms “serving,” “accompanying,” and “in the field” suggest a broad application, the “time of war” requirement is construed narrowly when applied to civilians. Thus, for example, the Supreme Court held that during peacetime the UCMJ does not apply to discharged personnel. The UCMJ also cannot be used to try dependents of military personnel in noncapital cases. Nor can the UCMJ be used to try civilian employees (either in capital or noncapital cases). As recently as 1998, the Court of Appeals for the Armed Forces analyzed the propriety of the application of the UCMJ to civilians and stated:

As a matter of constitutional law, the Supreme Court has held that Congress may not extend court-martial jurisdiction to cover civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents.

656. 10 U.S.C. §802(a)(9). The UCMJ does not define the term POW. Thus it is uncertain whether “POW” in the UCMJ has the same meaning as in Geneva III.
657. United States v. Averette, 19 U.S.C.M.A. 363, 365-66, 41 C.M.R. 363, 365-66 (1970) (the phrase “in time of war” is limited to “a war formally declared by Congress”; even though the Vietnam conflict “qualified as a war as that word is generally used and understood[,] ... such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction”). Cf. United States v. Anderson, 17 U.S.C.M.A. 588, 589, 38 C.M.R. 386, 387 (1968) (U.S. involvement in Vietnam conflict “constitutes a ‘time of war’ . . . within the meaning of” Article 43(a) of the UCMJ, which provides that there is no statute of limitations over certain offenses committed “in time of war”).
661. The Court of Appeals for the Armed Forces (formerly the Court of Military Appeals) is a civilian Article I court hearing appeals from the intermediate appellate courts for each of the Army, Navy (and Marines) and Air Force, subject to possible appeal to the U.S. Supreme Court.
Jurisprudence in this area generally focuses on the application of the UCMJ to civilian contractors and civilian dependents of service members.\textsuperscript{663} No cases directly address whether CIA operatives (other than military personnel detailed to the CIA) conducting para-military operations with the regular armed forces or interrogations within a military base are considered civilians for purposes of UCMJ application. However, in \textit{Reid v. Covert}, the Supreme Court stated, “[e]ven if it were possible, we need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces.’ We recognize that there might be circumstances where a person could be ‘in’ the armed services . . . even though he had not formally been inducted into the military or did not wear a uniform.”\textsuperscript{664}

(b) Offense

The UCMJ comprises a set of criminal laws, which include many crimes punished under civilian law (\textit{e.g.}, assault, manslaughter, murder, rape, etc.). It also provides procedures for courts martial and for matters relating to detention and questioning of persons subject to the UCMJ. Article 55 of the UCMJ provides that:

\begin{quote}
\text{Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.}\textsuperscript{665}
\end{quote}

Article 55 is unique in its specific definition of “cruel or unusual punishment” as a standard for treatment.\textsuperscript{666} While most military courts have

\begin{itemize}
\item \textsuperscript{663} See, \textit{e.g.}, \textit{Robb v. United States}, 456 F.2d 768 (Ct. Cl. 1972) (civilian engineer employed by U.S. Navy in Vietnam was not subject to the UCMJ); \textit{Reid v. Covert}, 354 U.S. 1 (1957) (no jurisdiction over civilian dependents of service members stationed overseas in peacetime for capital offenses).
\item \textsuperscript{664} \textit{Reid v. Covert}, 354 U.S. 1, 22 (1957). As described below, the Military Extraterritorial Jurisdiction Act of 2000 eliminated some of the gap in jurisdiction resulting from \textit{Reid v. Covert} by conferring jurisdiction on federal courts over certain civilians accompanying the armed forces abroad.
\item \textsuperscript{665} 10 U.S.C. §855. The protections of Article 55 apply to “any person subject to” the UCMJ. As stated previously, the UCMJ applies to “prisoners of war,” at least as defined in the Geneva Conventions, which probably includes persons whose status is in doubt pending resolution by a competent tribunal, and would apply to unlawful combatants charged with offenses under the UCMJ under 10 U.S.C. § 818.
\item \textsuperscript{666} The Articles of War preceding the UCMJ prohibited “cruel and unusual punishment,” but the phrase was changed to “cruel \textit{or} unusual punishment” in Article 55 (emphasis added).
\end{itemize}
followed the Supreme Court’s analytical framework of protections under the Eighth Amendment as they pertain to cruel and unusual punishment, several military courts have found that Article 55 provides greater protections than those given under the Eighth Amendment. It is notable that Article 55 applies at least the equivalent of the protection afforded by the Eighth Amendment even if the victim is not otherwise entitled to constitutional rights (e.g., a non-citizen apprehended and detained outside the United States and arguably not entitled to such rights).

Other potentially relevant provisions include the offenses of cruelty and maltreatment (10 U.S.C. §893) and offenses under punitive articles corresponding to the normal criminal definitions of murder (10 U.S.C. §918), manslaughter (10 U.S.C. §919) and assault. Also of particular interest are the offenses of dereliction of duty (10 U.S.C. §892), which applies to personnel who know of offenses by others and fail to report them, and failure to obey orders and dereliction of duty (separate offenses under 10 U.S.C. §892). Such offenses have been the basis of investigations and charges in connection with the conduct at Abu Ghraib and other recently alleged abuses of military detainees.

In addition, section 934 of Article 134 provides that

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134 makes punishable acts in three categories of offenses not spe-
specifically covered in any other article of the UCMJ: Clause 1 offenses involving disorders and neglect to the prejudice of good order and discipline; Clause 2 offenses involving conduct of a nature to bring discredit upon the armed forces; and Clause 3 offenses entailing non-capital crimes or offenses that violate Federal law. Thus, the UCMJ effectively provides a basis for the prosecution of military personnel in courts-martial for the offense of torture in violation of 18 U.S.C. § 2340.

In order to successfully charge an individual under Clauses 1 and 2 of this Article, the government must show: (i) that the accused did or failed to do certain acts; and (ii) that, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Under Clause 1, the acts must be directly prejudicial to good order and discipline, rather than remotely so. Under Clause 2, discredit is interpreted to mean “injure the reputation of,” and encompasses conduct that brings the service “into disrepute or which tends to lower it in public esteem.” With respect to Clause 3 offenses, as a general rule, any offense created by Federal statute may be prosecuted as an Article 134 offense. Thus, a service member whose conduct is alleged to violate 18 U.S.C. § 2340A could be prosecuted under Article 134 of the UCMJ, as a Clause 3 violation, although charges in courts martial are usually brought under the UCMJ’s punitive offenses rather than generally applicable criminal statutes. Moreover, multiple counts alleging Article 134 violations also could be brought in such a situation, because such conduct could be construed as prejudicial to good order and discipline and/or of a nature to bring discredit upon the armed forces.

The UCMJ also provides for an offense of conspiracy by any person

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670. The Manual, supra note 652, para. 60.b (1- 2).
671. Id. para. 60.c (3).
672. United States v. Perkins, 47 C.M.R. 259 (Ct. of Mil. Rev. 1973). According to the Manual, however, the doctrine of preemption "prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny type offense, either under Article 121 or, because of preemption, under Article 134." The Manual, para. 60.c (5)(a). In effect, Article 134 may not be employed to salvage a charge where the charge could not be sustained under the substantive offense provisions of the UCMJ or Federal statute. Accordingly, conduct which violated Article 55 discussed above or any other substantive provision of the UCMJ could not be charged under Article 134. These remain alternative, not cumulative provisions.
subject to the UCMJ “with any other person to commit an offense under [UCMJ]” “if one or more of the conspirators does an act to effect the object of the conspiracy.” Conspiracy is punishable by a court-martial. Accordingly, the UCMJ can be used to prosecute conspiracy to commit the prohibited acts, including both acts of torture and cruelty, making its scope potentially larger than the federal torture statute.

3. The Military Extraterritorial Jurisdiction Act (MEJA) May Provide Jurisdiction for Prosecution of Involvement in Extraordinary Renditions

To date there have been virtually no cases that rely on MEJA. In February 2004, proposed regulations under MEJA were issued for comment, but, to date, they have not become final. The first case filed under MEJA, in June 2004, involved an alleged murder by a spouse of an Air Force officer stationed abroad. The case resulted in a conviction.

(a) Jurisdiction
Section 3261(a) of MEJA provides that

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

> (1) while employed by or accompanying the Armed Forces outside the United States; or

> (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),

shall be punished as provided for that offense.

The provisions of MEJA do not apply if a foreign government, in
accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting the person for the offense; however, the United States may nonetheless prosecute such person under MEJA if approval for the prosecution is granted by the attorney general or the deputy attorney general.\(^{678}\)

The report analyzing MEJA prepared by the House of Representatives’ Judiciary Committee makes it clear that the reference to “the special maritime and territorial jurisdiction of the United States” includes those “acts that would be a Federal crime regardless of where they are committed in the United States, such as the drug crimes in title 21.”\(^{679}\) The term “employed by the Armed Forces outside the United States” means “(A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier); (B) present or residing outside the United States in connection with such employment; and (C) not a national of or ordinarily resident in the host nation.”\(^{680}\) The term “accompanying the Armed Forces outside the United States” means

(A) a dependent of (i) a member of the Armed Forces, (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), or (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier)

(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(C) not a national of or ordinarily resident in the host nation.\(^{681}\)


(i) a civilian employee of—

(I) the Department of Defense...; or

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\(^{678}\) 18 U.S.C.S. §3261(b).


\(^{681}\) 18 U.S.C.S., §3267.

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(II) any other Federal agency, or any provisional authority, to the extent that such employment relates to supporting the mission of the Department of Defense overseas;

(ii) a contractor (including a subcontractor at any tier) of—

(I) the Department of Defense...; or

(II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(iii) an employee of a contractor (or a subcontractor at any tier) of—

(I) the Department of Defense...; or

(II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.682

MEJA does not apply to members of the Armed Forces who are subject to the UCMJ, unless such individuals cease to be subject to UCMJ (for example, if they had been discharged from the Armed Forces after commission of the act in question but before charges were brought) or unless they have committed an offense with one or more other defendants, at least one of whom is not subject to the relevant chapter.683

Where conduct violates both section 3261 and another federal statute having extraterritorial application (other than the UCMJ), “the Government may proceed under either statute.”684 In cases where conduct violates both section 3261 and the UCMJ, the Department of Defense has the exclusive right to prosecute, provided that the offender is not part of a conspiracy or other illegal activity with civilians. If a military member is indicted with a civilian, MEJA allows the government to prosecute the military member in federal court.685 This remains the case even if a

683. 18 U.S.C.S. §3261(d). Retired personnel, as distinguished from discharged personnel, remain subject to the UCMJ and may be recalled to active duty for purposes of being tried by court martial.
685. Id., at 16. The House Report stated that the provision “is designed to allow the Government to try the military member together with a non-military co-defendant in a United States Court.” Id.
federal judge later orders that the military and civilian defendants be tried separately.686

(b) Offense

MEJA was intended to be broad in scope and to cover crimes found in Titles 18 and 21 of the U.S. Code (e.g., murder, rape, assault, etc.) as well as crimes under other federal statutes that provide for criminal liability.687 Even though many of these statutes refer to crimes that take place within the United States, the language used in the MEJA includes these crimes within its scope. Accordingly, MEJA can be used to prosecute individuals for conspiracy to commit torture under section 2340A as well as for common law crimes such as conspiracy to commit, or aiding and abetting in commission of, assault, sexual assault, manslaughter, and murder.

As explained above, with the requisite mens rea, instances of Extraordinary Renditions may amount to aiding and abetting in the commission of torture, assault, sexual assault, and, where death results, manslaughter or murder. Accordingly, those officials who fall within the jurisdiction of MEJA can be prosecuted for participation in these crimes under the appropriate MEJA provisions.

B. Defenses to Criminal Liability Generally Are Inapplicable to Most Cases of Extraordinary Renditions

Under certain circumstances, the defenses of necessity, self-defense, or superior orders may be available to those charged in connection with Extraordinary Renditions. However, as explained in more detail below, such defenses are inapplicable to most instances of Extraordinary Renditions.

Necessity and self-defense are related defenses that involve admission to the illegal act but which seek to justify the act because the individual prevented greater harm by committing the crime. As a preliminary matter, it should be noted that the arguments set out below that seek to justify Extraordinary Rendition under the defenses of necessity and self-defense run counter to the right of the individual who has been Extraordinarily

686. MEJA §3261, 114 Stat. 2488. Because section 3261(d)(2) only requires that the military member be indicted, or an information filed against him, together with another person, this element of the crime will be satisfied even if the judge approves a motion for separate trials. Of course, in such a situation, Justice could agree to dismiss the complaint against the military member so that the Department of Defense could proceed against him or her by court-martial, but nothing in the statute requires this.

Rendered to be presumed innocent until proven guilty, and rest on the assumption that the person in custody has actionable information of an imminent terrorist attack. In reality, this scenario is far from guaranteed and in many cases those sent to face torture provide no information to confirm that they know of terrorist activity.

Both defenses have been historically applied whenever an individual’s belief that his or her action will prevent future harm can be shown to have been reasonable. It could be argued that if the belief that the person in custody possessed information about a future attack was reasonable, then the fact that that person did not actually possess such information is not relevant. However, the change from a presumption of innocence standard to a reasonableness standard seems to disproportionately favor the state in this context given the extreme consequences of Extraordinary Rendition and the state action involved.

1. Necessity

Necessity is a traditional defense to criminal liability that was raised by now-Judge Jay S. Bybee, formerly Assistant Attorney General in the Justice Department, in a memo entitled Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A. Despite the memo’s assertion to the contrary, it remains an open question as to whether federal courts have the authority to recognize a necessity defense that is not statutorily provided.

The Supreme Court has discussed the availability of the defense of necessity in the federal context without rejecting or accepting it, and has stated that the applicability of the defense to federal crimes is questionable since such crimes are defined by statute and not by common law. In United States v. Bailey, the court rejected a claim of necessity on the grounds that a legal alternative existed. While the court noted that Congress legislates against the background of the common law and may have considered a necessity defense, it refused to balance harms as the defense would require, explaining that “we are construing an Act of Congress, not drafting it.” In United States v. Oakland Cannabis Buyers’ Cooperative, the court again refused to decide whether necessity could ever be a defense when a federal statute did not provide for it. While the court admitted that it had discussed the possibility of the defense in Bailey, it made clear that the earlier case had not settled the question. The Court reiterated its view

that, “whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.”

Since sections 2340 and 2340A are silent on the issue of necessity, it is unclear whether the defense would apply. It could be argued that, given the gravity of torture, had Congress intended any exception to the blanket prohibition, it would have included the parameters of such an exception. Absent express intent, it could be argued that courts should not insert such a defense into the federal criminal statute.

Whether the defense of necessity would be available to a member of the Armed Forces is even more questionable. Neither the UCMJ nor the Manual explicitly allow for the defense. The Manual only provides for a defense of “coercion or duress.” The U.S. Court of Appeals for the Armed Forces and its predecessor court have considered necessity but have yet to apply it or explicitly allow it. In United States v. Rockwood, the court stated that there may be an unusual situation in which consideration might be given to the defense. In both Rockwood and United States v. Washington, a more recent case in which the court also declined to recognize the defense, the court emphasized the importance of order, explaining that the essence of military duty is the subordination of individual interest and sacrifice. It implied that the defense of necessity would be less applicable in the military setting than in the civilian context.

The defense of necessity could be available to individuals charged under MEJA. However, in that context, the necessity defense would justify only illegal conduct that the actor believed was necessary to avoid harm to himself or to another. The defense of necessity has three general requirements, all of which must be satisfied: (i) the actor must have in-

690. Id. (quoting United States v. Rutherford, 442 U.S. 544, 559 (1979)).
691. Note that the Bybee Memorandum makes a similar argument but in reverse. Judge Bybee suggests that because Congress did not include provisions from CAT that explicitly prohibit the defense of necessity, Congress implicitly allowed the defense. Bybee Memorandum, supra note 130.
693. 52 M.J. 58 (C.M.A. 1999).
694. 57 M.J. 394 (C.M.A. 2002).
695. Note that in the context of military justice, the defense has traditionally been examined through the prism of a subordinate’s refusal to follow a superior order. In the Extraordinary Rendition context the situation may be reversed however, and the accused might raise the defense to justify following the order.
696. Because MEJA incorporates crimes under Title 18 and 21, presumably it incorporates the applicable defenses as well.
tended to avoid the greater harm, (ii) the harm avoided must be greater than the harm done, and (iii) there must have been no alternative which would have caused less harm than the harm actually caused. In principle, there is no limit to the type of harm that may be justified by the defense and, in general, it can apply even to intentional homicide.697 It is for the trier of fact, not the defendant, to determine whether the harm done by the defendant was less than the harm that was avoided.698

The first requirement of the defense could be satisfied only if an Extraordinary Rendition was carried out in an attempt to avoid a terrorist attack. The intent requirement holds that a person may not commit a crime for an impermissible reason and then justify it afterwards by pointing to the fact that a greater harm just happened to be avoided. The intent to avoid future harm must be the reason why the crime was committed. Thus, the defense would be inapplicable in cases were an individual was rendered to face torture as a form of punishment for past actions or to gather information related to previously committed attacks.699

Moreover, to justify Extraordinary Rendition, the court would have to determine that the harm avoided by such practice is greater than the harm resulting from it. In this objective inquiry, the court acts as a legislature, balancing the two harms and deciding whether the individual’s decision was consistent with societal values.700 Accordingly, the defense is unavailable when the legislature has made the determination of values and has made clear that violation of a statute cannot be outweighed by the harm avoided. The memos produced for the Bush Administration have suggested that the harm avoided by preventing a future terrorist attack would outweigh the harm caused by torturous interrogation.701 However, as demonstrated by the fact that the anti-torture norm is largely recognized to have achieved the status of \textit{jus cogens}, a court is likely to find that torture is so inherently harmful that nothing can outweigh it. Both CAT and section 2340A make clear that society considers the harm caused by

697. LA FAVE, supra note 438, §5.4(d).
698. See, e.g., \textit{United States v. Coupez}, 603 F.2d 1347 (9th Cir. 1979) and state statutes such as N.Y. Penal Law §35.05.
699. It may be assumed that the defense is likely to assert that individual’s intent was to avoid future harm. However, only in the ticking bomb scenario where the purpose of an Extraordinary Rendition is to gather information to prevent an imminent future terrorist attack is it likely that this requirement of the defense will be met.
701. See Bybee Memorandum, supra note 130.
torture to be great, and the White House has repeatedly reaffirmed that “United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under [CAT].”702 Moreover, the harm that is caused by torture is definite whereas the benefits gained by torture are difficult to measure and often negligible. U.S. officials themselves have acknowledged that torture is an ineffective means of producing reliable intelligence.703 Accordingly, the harm alleged as being prevented as a result of Extraordinary Renditions is unlikely to outweigh the harm caused to the “rendered” individual.

Even if the purpose of Extraordinary Renditions was to avoid greater harm, the defense requires that there be no alternative to the action taken. Courts have interpreted this requirement strictly, holding the defense inapplicable when any legal or less harmful option was available.704 Thus, this requirement will be satisfied only in the unlikely event that no alternative to Extraordinary Rendition is available.

Further, to rely on the necessity defense, the harm avoided must be known and specific. Some state statutes further require that the threatened harm be imminent and state that the defense only applies in emergency situations.705 In this regard, courts have held that “the possibility of harm at an indeterminate date in the future is insufficient.”706 An assertion that an individual may have information about a possible future attack is unlikely to fulfill this requirement. It could be argued, however, that the “threatened harm is imminent” in a situation where U.S. officials are aware of a specific threat but unaware of its operational details. It could be further argued that the ongoing “War on Terror” adds further urgency to uncovering such details. However, while the current environment may be described as an ongoing emergency, the necessity defense is only available if all legal options for halting a known, specific, and imminent threat are taken before Extraordinary Rendition. Although terrorist groups may be continually plotting attacks, this does not satisfy the im-


704. See e.g., Bailey, 442 U.S. at 635; United States v. Arellano-Rivera, 244 F.3d 1119 (9th Cir. 2001); Regina v. Dudley & Stephens, L.R. 14 Q.B.D. 273 (1884).

705. LAFAVE, supra note 438, §5.4(d); see, e.g., N.Y. Penal Law §35.05.

minence requirement. Thus, unless U.S. officials are truly dealing with a “ticking bomb” scenario, the necessity defense is unlikely to be applicable to most instances of Extraordinary Renditions. It is submitted that the purposes of the necessity defense are validly effected by appropriate use of prosecutorial discretion in those rare cases where it might apply.

2. Self-Defense and Defense of Others

The doctrine of self-defense justifies the use of force to prevent unlawful bodily harm to oneself, provided that the force is necessary to avoid the bodily harm. The doctrine of defense of others is a related defense that allows for the use of force to protect another person and has the same requirements as self-defense. Although self-defense and defense of others could be asserted against a charge of complicity to commit torture, it is doubtful whether these defenses can be used as defenses against a charge of conspiracy. In the context of military law, self-defense and the defense of others are allowable defenses only for charges of homicide or assaults. Even if such defenses were available, because, like necessity, self-defense and defense of others are common law defenses, they raise the same issue of applicability to federal law. Thus, self-defense and defense of others are unlikely to be available as defenses against conspiracy charges. In any event, self-defense in the context of Extraordinary Renditions can be understood as a personalized version of the social defense of necessity and should be subject to the same limitations. Accordingly, neither self-defense nor the defense of others is likely to be a successful means for negating charges of participation in Extraordinary Renditions.

3. Superior Orders

An individual charged with complicity (or conspiracy) to commit torture under sections 2340A(a) or (c), or for crimes under military law may argue that he or she should be immune from liability because a super-

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707. See e.g., Public Committee Against Torture in Israel et. al. v. The State of Israel, HCJ 5100/94 (1999) (restricting the application of the defense of necessity in cases of torture during interrogation).

708. LaFave, supra note 438, §5.8.

709. State of Connecticut v. Robert Dejesus, 797 A.2d 1101, 1108 (Conn. 2002) (“... defense counsel suggested that self-defense does apply to the mens rea element of the offense of conspiracy to commit murder. In any event, we are unaware of any authority that supports the defendant’s request at trial for an instruction on self-defense as to the charge of conspiracy to commit murder...”); Richmond v. Commonwealth, 75 S.W.2d 500, (Ky. Ct. App., 1934).

710. Manual, supra note 634, Rule 916(e).
rior ordered the Extraordinary Rendition. This defense is not available to civilians or CIA contractors facing federal charges. Similarly, a person may not plead the defense of superior orders to avoid liability in tort. In holding that an unconstitutional order or practice is actionable under 42 U.S.C. §1983, Chief Justice Marshall laid down the principle that “instructions cannot change the nature of the transaction, nor legalize an act.”

The defense of superior orders, however, is available to a member of the Armed Forces charged under military laws. The rationale for this defense lies in the importance of order and discipline in the military setting. Indeed, for a subordinate to question an order may amount to insubordination for which the individual could be criminally charged. Accordingly, following superior orders provides a defense except in instances of palpable illegality, i.e., where the order is so manifestly beyond the legal power of the commander as to give no doubt as to its illegality. The Manual for Courts-Martial formalizes the defense. It states “it is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”

The defense does not justify obviously illegal acts, such as a conduct that is obviously a war crime. Indeed, the Department of the Army Field Manual states:

> The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.

The central issue is whether a person of ordinary sense and understanding would know that the order was illegal. In *U.S. v. Calley*, the court upheld a finding that the order to kill non-combatant civilians in My Lai, Vietnam, was so clearly unlawful that it did not justify the murders. The court emphasized the “ordinary sense and understanding” standard.

713. See *United States of America v. Otto Ohlendorf, et al.*, Case No. 9, IV Trials of War Criminals before the Nuremberg Military Tribunals, at 1,470.
and stated that Calley must be presumed to know that he could not lawfully kill the people involved.\textsuperscript{716}

Because of their training, all U.S. soldiers have been informed of the Geneva Conventions, which make clear that the torture of individuals is illegal. In \textit{Calley} the court stated that, “[w]hether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here.”\textsuperscript{717} Like murder, torture is a crime that every soldier must be presumed to know is illegal and thus is a crime that cannot be excused by superior orders. However, not every soldier can be presumed to know whether a certain individual would be subjected to torture if transferred to a particularly country, or that a particular conduct constitutes torture. Accordingly, the defense may be available to those soldiers who have no reason to believe (and no knowledge suggesting otherwise) that the individual whom they were ordered to transfer to a third country is more likely than not to be tortured on there. On the other hand, defense of superior orders may be unavailable in circumstances of Extraordinary Rendition to a military official who knows that torture of the transferred individuals is foreseeable.

\textbf{C. U.S. Officials Participating in Extraordinary Rendition May Face Civil Liability for their Involvement in the Practice}

In certain circumstances, U.S. officials participating in Extraordinary Renditions may be subject to civil liability. The ability to bring a lawsuit against a U.S. official, however, is subject to certain limitations. If the attorney general certifies that “the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose...the United States shall be substituted as the party defendant.”\textsuperscript{718} This provision effectively removes “the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and would instead provide that the exclusive remedy for such torts is through an action against the United States under the [FTCA].”\textsuperscript{719}


\textsuperscript{718} 28 U.S.C. S 2679(d)(1).

\textsuperscript{719} H.R. Rep. No. 100-700, 100th Cong., at 4 (1988). According to the legislative history, the term “common law tort” “embraces not only those state law causes of action predicated
Although generally, sovereign immunity precludes civil suits against the federal government, the Federal Tort Claims Act (FTCA) provides a limited waiver of the government’s sovereign immunity, stating that the government can only be sued “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” The federal government will not be liable for:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

An “investigative or law enforcement officer” is “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” In certain circumstances, military officials (particularly the military police) may be considered “investigative or law enforcement officers.”

1. Alien Tort Claims Act (ATCA)

ATCA extends the jurisdiction of U.S. district courts to “any civil action by an alien for a tort only, committed in violation of the law of

on the ‘common’ or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence.” Id. at 6.

720. 28 U.S.C. §1346(b).
721. 28 U.S.C. §2680(h). FTCA is limited by other exceptions pursuant to which the government is not subject to suit, such as the discretionary function exception, which bars a claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. S 2680(a).
723. See, e.g., Kennedy v. United States, 585 F. Suppl. 1119 (1984) (under 28 U.S.C.S. §2680(h), government is liable for tortuous conduct of the military police amounting to assault and battery and false arrest). Contrast Solomon v. United States, 559 F. 2d 309 (5th Cir. 1977) (security employees of a military exchange are not investigative or law enforcement officers within the meaning of section 2680(h)); DeLong v. United States, 600 F.Supp. 331 (D.
nations or a treaty of the United States.” The courts have consistently recognized that ATCA establishes a forum where plaintiffs can seek redress for violations of international law. Section 2680(k) precludes liability for any “claim arising in a foreign country.” However, an argument can be made that a claim for conspiracy and/or aiding and abetting in the commission of torture originates in the United States, even though “its operative effect” takes place in a foreign country. See, e.g. Richard v. United States, 369 U.S. 1 (1962). But see notes 592-597 and accompanying discussion.

The tort pled under ATCA must be “definable, obligatory (rather than hortatory) and universally condemned.” To satisfy this specificity requirement, the following is required: (i) no state condones the act in question, and there is a recognizable “universal” consensus of prohibition against it; (ii) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; and (iii) the prohibition against it is non-derogable and therefore binding at all times upon all actors.

Torture is actionable under ATCA (as well as under TPA, discussed
below)\textsuperscript{729} and courts have allowed ATCA suits to proceed based on theories of conspiracy and aiding and abetting of torture.\textsuperscript{730} Torture practices in countries of rendition, such as Egypt, Syria, Lebanon, Saudi Arabia, and Morocco, amount to egregious, universally condemnable acts, which are prohibited both by customary and statutory international law. Conspiracy to commit or aiding and abetting the commission of acts of torture in such countries through the rendition of individuals by U.S. officials could, therefore, give rise to civil liability under ATCA.

2. Torture Victims Protection Act (TPA)

The Torture Victims Protection Act of 1991 (TPA) was signed into law in 1992 and was appended to the U.S. Code as a note to section 1350. The TPA provides that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.” The Senate Judiciary Committee has stated that, consistent with international law, “responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts; anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them,” thus evidencing that TPA is intended to apply to those complicit in acts of torture.\textsuperscript{731} Moreover, U.S. courts have held that a private actor who conspires with a government official can be considered to act “under color of law.” \textsuperscript{732} By analogy, a U.S. official who


\textsuperscript{732} See, e.g., Dennis v. Sparks, 449 U.S. 24, 27-29 (1980) (nongovernmental witness could act “under color of law” by conspiring with the prosecutor or other state officials); Adickes v. S.H. Cress & Co., 398 U.S. 144, 152 (1970) (“The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner’s Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful); Monroe v. Pape, 365 U.S. 167 (1961); see also United States v. Classic, 313 U.S. 299, 326 (1941); Screws v. United States, 325 U.S. 91, 107-11 (1945); Williams v. United States, 341 U.S. 97, 99-100 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. ‘Private
conspires with or aids a foreign perpetrator who acts under apparent author-ity of a foreign government may be considered to act “under color of foreign law” and thus may be held liable under the TPA.\footnote{It should be noted that it is not clear whether TPA would apply to actions of U.S. armed forces. See President George H.W. Bush, Statement on Signing the Torture Victim Protection Act of 1991 (Mar. 12, 1992) (“I must note that I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions. ...I do not believe it is the Congress’ intent that H.R. 2092 should apply to United States Armed Forces or law enforce-ment operations, which are always carried out under the authority of United States law.”).}

**IX. CONCLUSION**

This Report concludes that both international and domestic law prohibit the practice of Extraordinary Rendition. Despite these clear standards, allegations of such transfers have surfaced repeatedly in the press and in the reports of human rights and humanitarian organizations. The United States should demonstrate its opposition to this practice by initiating formal inquiries into Extraordinary Renditions, investigating cases in which U.S. officials or their agents may have committed criminal acts, and implementing a moratorium on the use of diplomatic assurances in torture cases. Far from being an acceptable tool in the “War on Terror,” Extraordinary Renditions are illegal and constitute a perversion of justice that must be exposed and brought to an end.

*October 29, 2004*
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Acknowledgments
The Committee and the Center for Human Rights and Global Justice at NYU School of Law thank the following people for their work and/or assistance in the preparation of the Report:

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We are also grateful to Nicole Barrett and Sullivan & Cromwell LLP, Sam Scott Miller and Orrick, Herrington & Sutcliffe LLP, and Sidney Rosdeitcher and Paul, Weiss, Rifkind, Wharton & Garrison LLP for summer associate assistance on aspects of the Report.
Companies experiencing financial difficulty frequently hire crisis managers 1 or workout specialists to help them avoid filing for bankruptcy protection under chapter 11 or to assist them in preparing for bankruptcy cases and in operating their businesses thereafter. In an effort to increase the efficiency and effectiveness of crisis managers, companies commonly appoint crisis managers as officers or directors. However, the stringent disinterestedness requirements of section 327(a) of title 11 of the United States Code (the “Bankruptcy Code”) often inhibit the retention of a firm whose crisis manager held such a position prior to the company filing for bankruptcy protection. 2

1. The term “crisis manager” as used in this article encompasses individuals and entities who are regularly hired by enterprises in financial difficulty to oversee turnarounds or orderly liquidations of the enterprises.

2. Section 327(a) of the Bankruptcy Code states “[e]xcept as otherwise provided in this section, the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.” When the statute refers to a “trustee” it includes a debtor-in-possession pursuant to section 1107(a) of the Bankruptcy Code. 11 U.S.C. § 327(a) (2005).
Some courts—recognizing that serving in such prepetition dual capacities should not, logically, preclude postpetition employment—have struggled for ways to circumvent the literal prohibitions of section 327(a) of the Bankruptcy Code with a variety of theories. Such theories include that crisis managers (i) are not “professional persons” and therefore their retentions are not governed by the strictures of section 327(a) of the Bankruptcy Code, (ii) are employed in connection with the use, sale or lease of property of the estates and therefore are covered by section 363 of the Bankruptcy Code and not section 327(a), (iii) are salaried employees covered by sections 327(b) and 1107(b) of the Bankruptcy Code or (iv) are employable under the broad scope of authority given to bankruptcy courts pursuant to section 105(a) of the Bankruptcy Code. Courts should not be forced to engage in such machinations to achieve a result desired by the debtor and, for the most part, all other parties-in-interest. The existing statutory prohibitions as interpreted by most courts appear to be incompatible with the increasing importance and predominance of the use today of crisis managers by many financially troubled companies.

This article reviews the historical development of the requirement of “disinterestedness” for most professional persons since the Bankruptcy Act3 analyzes the current state of the case law governing crisis managers and disinterestedness, discusses the attempts of some courts to permit crisis managers to be retained as professionals under the Bankruptcy Code, notwithstanding an apparent lack of disinterestedness due to prepetition officer or director posts held by a principal of the crisis manager and, finally, suggests a legislative change to the statutory definition of disinterestedness to permit crisis managers to be retained as professional persons despite previous service as officers or directors.

HISTORICAL DEVELOPMENT OF DISINTERESTEDNESS UNDER THE BANKRUPTCY CODE

The Bankruptcy Code’s requirement of “disinterestedness” has its origins in the Depression-era Chandler Act Amendments4 to the Bankruptcy Act. Congress introduced a requirement of disinterestedness in the Bankruptcy Act in an effort to eliminate pervasive self-dealing and conflicted

3. “Bankruptcy Act” means the Bankruptcy Act of 1898 as amended, which was repealed by § 401(a) of Public Law 95-598.

interests that plagued practice under the Bankruptcy Act, as explained by
the Donovan Report of 1929\(^5\) and in *Weil v. Neary*.\(^6\)

The development of the concept of disinterestedness under the Bank-
ruptcy Act did not occur in a vacuum. The disinterestedness requirements
were adopted to try to eliminate a perceived systematic pattern of abuse
and conflict of interest that had developed in bankruptcy practice due to
the lack of sufficient oversight of professionals in the administration of
bankruptcy cases. These requirements were adopted to try to further the
best interests of creditors and the administration of justice.

The definition of a disinterested person in the Bankruptcy Act was
very similar to that now contained in section 101(14) of the Bankruptcy
Code.\(^7\) The focus of disinterestedness under the Bankruptcy Act and case
law primarily involved trustees and attorneys. Crisis managers were not
in common use in the restructurings of the day.

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5. See Donovan Report of 1929 (detailing an investigation of the administration of bankruptcy
law in the Southern District of New York in the 1920s which administration was marked by
widespread and systematic abuse and persistent conflicts of interest), *cited in Report of Commis-
sion on the Bankruptcy Laws of the U.S., H.R. Doc. No. 93-137, pts. I and II (1973).*

6. As explained by Chief Justice Taft in an early case under the Bankruptcy Act:

Many abuses have occurred in the bankruptcy practice, and none is more frequent
than that by which the attorney for petitioning creditors [in an involuntary case]
becomes counsel for the trustees subsequently appointed. This mingling of interests,
frequently conflicting, is generally regarded by courts as working to the detriment of
one of the parties and to the undue advantage of another. Experience has shown the
wisdom and necessity of separating the function and obligation of counsel by forbid-
ding the employment in different interests of the same person.


7. Section 158 of the Bankruptcy Act provided:

A person shall not be deemed disinterested, for the purposes of section 156 and
section 157 of this Act, if –

(1) he is a creditor or stockholder of the debtor; or

(2) he is or was an underwriter of any of the outstanding securities of the debtor
or within five years prior to the date of filing of the petition was the underwriter
of any securities of the debtor; or

(3) he is, or was within two years prior to the date of filing of the petition, a
director, officer, or employee of the debtor or any such underwriter, or an attor-
ney for the debtor or such underwriter; or

(4) it appears that he has, by reason or any other direct or indirect relationship to,
connection with, or interest in the debtor or such underwriter, or for any reason
an interest materially adverse to the interests of any class of creditors or stockholders.

The section of the Bankruptcy Act concerning disinterestedness makes reference to two other sections of the Act: sections 156 and 157. Section 156 applied only to corporate reorganization cases under chapter X of the Bankruptcy Act and required a disinterested trustee to be appointed in cases with $250,000 or more in indebtedness. Chapter X of the Bankruptcy Act required appointment of a trustee in an attempt to ensure that entrenched interests would not perpetuate or secure control of the reorganization process, as had become common in equity receiverships and in section 77B proceedings prior to the enactment of chapter X of the Bankruptcy Act.

Under the Bankruptcy Act, trustees were required to be “independent and disinterested so far as possible.” A trustee had to be “divested of any scintilla of personal interest which might be reflected in his decision concerning estate matters.” Similar requirements applied to attorneys who represented a trustee under the Bankruptcy Act.

8. The Supreme Court has explained the difference between chapters X and XI of the Bankruptcy Act as follows:

Chapter X [was] devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public through the intervention of the Securities and Exchange Commission, while chapter XI, which is peculiarly adapted to the speedy composition of debts of small individual and corporate businesses, omits the machinery for reorganization set up by chapter X.


12. In re Ocean City Auto. Bridge Co., 184 F.2d 726, 729 (3d Cir. 1950) (disqualifying the trustee because the trustee’s wife owned, among other things, stocks and bonds of the debtor). See also Meredith v. Thralls, 144 F.2d 473 (2d Cir. 1944) (disqualifying the trustee because the trustee was employed by the parent of the debtor and a corporation doing business with the debtor).

13. In re Realty Assocs. Sec. Corp., 56 F. Supp. 1007, 1007 (E.D.N.Y. 1944). See also HAROLD REMINGTON, REMINGTON ON BANKRUPTCY § 4487 (1961 revised ed.) ("Trustees must not have any conflicting interests, and should keep themselves free from entanglements.")
Section 157 of the Bankruptcy Act provided that an “attorney to represent a trustee under [Chapter X] shall also be disinterested.”\textsuperscript{14} However, section 157 provided further that, if the representation was not general representation of the trustee, the attorney did not have to be disinterested.\textsuperscript{15}

The Bankruptcy Act’s disinterestedness requirements were a logical solution to the history of abuses by interested attorneys and trustees. However, crisis managers have no such history of abuse. Arguably, because the present Bankruptcy Code favors leaving management in place as a debtor-in-possession in chapter 11, the postpetition retention of crisis managers who were prepetition officers and directors is consistent with the goals of the Bankruptcy Code. Nevertheless, recent case law shows that courts often reach the opposite conclusion.

**CURRENT CASE LAW ON CRISIS MANAGERS AND DISINTERESTEDNESS**

Most courts have evaluated motions to retain crisis managers under section 327(a).\textsuperscript{16} Thus, to be retained, the crisis manager must not hold an adverse interest to the debtor or its estate, and the crisis manager must be disinterested.\textsuperscript{17} Most courts hold that a crisis manager who was or is an

\textsuperscript{14} Bankruptcy Act § 157 (former 11 U.S.C. § 557).

\textsuperscript{15} See id. ("For any specified purpose other than to represent a trustee in conducting the proceeding under this chapter the trustee may, with the approval of the judge, employ an attorney who is not disinterested.")

\textsuperscript{16} See infra notes 23-27 and accompanying text.

\textsuperscript{17} A “disinterested person” means person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph or for any other reason.

officer or director of the debtor is *per se* not disinterested pursuant to section 101(14)(D). 18

With respect to the retention of crisis managers pursuant to section 327, the term “professional person” is not defined in the Bankruptcy Code. Therefore, a crisis manager may be outside of the definition of a professional person. In the bankruptcy context and under case law, “professional person” is a term of art that does not necessarily refer to people with a high degree of expertise in their fields but rather refers to individuals who take active roles in the bankruptcy case. 19 However, the courts are split as to the precise definition of “professional person.” The majority of courts have adopted a quantitative analysis, finding a professional person to be a person 20 playing a central role in the administration of the estate and the bankruptcy case. 21 Other courts have adopted a qualitative analysis and look to see whether the person has a large degree of autonomy or discretion with respect to the administration of the estate. 22 To add to the confusion, some courts have used hybrid tests incorporating both qualitative and quantitative analyses. 23 If under the appropriate test the individual is not deemed to be a professional person, then court approval is not required. The majority of the reported decisions suggest that crisis managers are deemed to be professional persons and therefore require that they be retained pursuant to section 327(a). 24

As stated above, to be retained pursuant to section 327(a), a profes-

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18. See infra notes 24-27 and accompanying text.
19. See Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 619 (Bankr. S.D.N.Y. 1986) (finding a professional lobbyist was not a “professional person” under section 327 because the lobbyist was retained in the ordinary course of business). See also In re Sieling Assoc. Ltd. P’ship, 128 B.R. 721, 723 (Bankr. E.D. Va. 1991) (finding an environmental consultant not to be a “professional person” since his position, while professional in nature, was not central to the bankruptcy proceeding).
A professional person must show that the following two requirements are satisfied: (i) that the person does not hold or represent an interest adverse to the estate and (ii) that the person is a disinterested person under section 101(14). Section 101(14) defines what it means to be disinterested, and creditors, directors, officers and employees are not disinterested. The majority of the courts strictly construe the term “disinterested person” with respect to professionals hired by debtors. In other words, the majority of courts consider the issue of disinterestedness without regard to the facts of the case, equitable considerations or judicial economy. For example, the Ninth Circuit held in In re Capitol Metals Co. that a consultant acting as the prepetition chief financial officer was not disinterested for purposes of section 327 and, therefore, could not be retained postpetition.

While professional persons who were prepetition officers or directors appear to be per se precluded from being retained postpetition, individuals who were officers and employees may still be retained as professional persons under section 327(b) or 1107(b). As a general rule, section 327(b) covers salaried employees who do not play a central role in the bankruptcy. Section 1107(b) covers employees whose sole violation of the disinterestedness requirement is their prior employment by the debtor.

25. The term “officer” is not defined in the Bankruptcy Code. Instead, the courts look to state corporate law to decide whether an individual is an officer.


27. See, e.g., Childress v. Middleton Arms, Ltd. P’ship (In re Middleton Arms, Ltd. P’ship), 934 F.2d 723, 725 (6th Cir. 1991) (“Section 327(a) clearly states, however, that the court cannot approve the employment of a person who is not disinterested. . . . By forbidding employment of all interested persons, section 327 prevents individual bankruptcy courts from having to make determinations as to the best interest of the debtors in these situations”).


29. Section 327(b) states that if “the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.” 11 U.S.C. § 327(b) (2003).

30. Section 1107(b) provides that notwithstanding “section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person’s employment by or representation of the debtor before the commencement of the case.” 11 U.S.C. § 1107(b) (2003).
The majority of the reported cases, nevertheless, do not find these exceptions applicable to the retention of crisis managers.\footnote{31}

Section 327(b) does not require court approval for a trustee to retain a professional person who is regularly employed or in a salaried position that is regularly offered by the debtor.\footnote{32} This section is narrowly construed and does not cover all employees who worked for the debtor prepetition. Presently, courts disagree over the type of employment that complies with this section and even over what test should be used to evaluate such employment. One court used an expansive reading of section 327(b) and held that workout specialists (that is, crisis managers) hired prepetition as officers could be retained postpetition under section 327(b).\footnote{33} Other courts have stated that a professional person, for purposes of section 327(b), may be retained if working on only minor transactions in the ordinary course of the debtor's business.\footnote{34} Other cases have linked authorization of employment with the manner of payment (for example, salaried rather than on commission) and the party paying the salary to the crisis manager.\footnote{35}

Section 1107(b) allows a debtor-in-possession (but not a trustee) to retain an employee even if that employee is deemed not disinterested, but only if the disqualification arises solely because of her employment with the debtor.\footnote{36} The majority of courts interpret section 1107(b) narrowly and allow debtors to retain professionals whose failure to be disinterested is caused solely by their prior employment.\footnote{37} In other words, if any other

\footnote{31. See Michel v. Federated Dep’t Stores, Inc. (In re Federated Dep’t Stores, Inc.), 44 F.3d 1310, 1318-19 (6th Cir. 1995) (“Where a professional is disqualified for other reasons expressly listed in the statutory definition of an interested person, § 1107(b) does not apply”) (citations omitted); Stahl v. Bartley Lindsay Co. (In re Bartley Lindsay Co.), 137 B.R. 305, 309 (Bankr. D. Minn. 1991) (finding that president and CEO of business also employed as financial consultant constituted both an officer of the debtor as well as a professional person and thus did not qualify under 327(b)).


34. See In re Bartley Lindsay Co., 137 B.R. at 309.

35. See, e.g., In re Carolina Sales Corp., 45 B.R. 750, 753 (Bankr. E.D.N.C. 1985). In these cases, the party paying the crisis manager’s salary was dispositive. That is, courts are more likely to allow the retention under 327(b) when the debtor pays the salary of the crisis manager rather than if the crisis management firm pays the salary.


facts exist that would make that professional person not disinterested (such as a prepetition fee outstanding that has not been waived), then the professional person may not be retained. A few courts have permitted the retention of a professional if, in addition to prepetition employment, the only other disinterestedness factor was that the professional person held a claim arising from prepetition employment where the size of the claim was de minimis compared to the size of the bankruptcy estate. One court stated that section 1107(b) allows a debtor-in-possession to retain a workout specialist, that is, a crisis manager, regardless of whether the person is disinterested.

One commentator has suggested that even though section 327(a) is the accurate provision to govern employment of crisis managers, section 363(c) might provide a more flexible option. Section 363(c)(1) provides that the debtor may employ certain entities without court approval in the ordinary course of business, so long as those entities were not employed pursuant to section 327(a). To determine whether a transaction is in the ordinary course of business, courts have developed a “horizontal dimension” test and a “vertical dimension” test, both of which must be satisfied. The horizontal dimension test focuses on an industry-wide perspective to determine if the transaction is common among companies in the industry. The vertical dimension test focuses on the creditor’s perspective to determine if the transaction is in line with the risks the creditor anticipated at the time the creditor extended credit to the debtor. The author of the article suggests that both tests could be fulfilled. He points to certain industries, including steel, retail shopping and telecommunications, that are prevalent in bankruptcy filings, and suggests that

42. See In re Roth Am., Inc., 975 F.2d 949, 952 (3d Cir. 1992).
43. See In re Roth Am., Inc., 975 F.2d at 953.
44. See id.
it may be common for them to engage crisis managers, thus satisfying the horizontal test. 46 The vertical test may be satisfied if the creditor is deemed to expect the debtor borrower to employ a crisis manager if its business operations begin to decline. 47 The terms of each retention agreement would have to be examined to ensure that the provisions are in line with both the industry standards and the creditor’s expectations. 48 The author, however, acknowledged that 327(a) is a much more specific provision than 363(c) and is better equipped to govern the retention of a crisis manager. 49

Bankruptcy courts have determined that crisis management firms must also be disinterested, as a firm is considered a professional person under section 327(a). 50 The question arises whether, if an individual is disqualified from being retained as a professional person because of his or her lack of disinterestedness, that individual’s disqualification would be imputed to the crisis management firm as a whole.

Few cases discuss imputing lack of disinterestedness to all of the individuals in a crisis management firm. Cases allowing debtors to hire a firm, despite the disqualification of a member, involve law firms, not crisis management firms. 51 In these cases, the courts reviewed the relevant attorney ethical rules for the appropriate jurisdiction along with the Bankruptcy Code and found that neither requires per se disqualification of the entire firm. 52 One case involving a consulting firm acknowledged that there is no per se disqualification of the firm. 53 In that case, however, the court did disqualify the firm in its entirety, since the only person working for that consulting firm was the one who was not disinterested. 54

46. See id.
47. See id. at 681.
48. See id.
49. See id.
52. See, e.g., In re Creative Rest. Mgmt., Inc., 139 B.R. at 909-14.
54. See id. at 727 (stating that by deciding otherwise, “the disinterestedness standard would be eradicated by corporate form over substance”).
While the reported case law suggests that crisis managers must satisfy the requirements of section 327(a) in order to obtain court approval of their retention, several recent unreported bankruptcy court orders have indicated that retention may be allowed under other sections of the Bankruptcy Code. The Bankruptcy Court for the District of Delaware, the Bankruptcy Court for the Central District of California, and the Bankruptcy Court for the Southern District of New York have all held that crisis managers need not be subjected to the obstacles of section 327 but, instead, may be retained under section 363. The focus of section 363 is on the debtor’s proposed use of its assets and, if the debtor’s determination to use such assets to retain a crisis manager represents a reasonable business judgment, the bankruptcy court should approve such use. Therefore, the authority to retain crisis managers under section 363 would be more flexible in the employment of such professionals, since the crisis manager would not be disqualified solely for having served prepetition as an officer or director. Section 363 does not contain a disinterestedness requirement. In In re Adelphia Communications Corp., however, the debtors filed affidavits disclosing adverse conflicts of the crisis managers, even though they recognized that section 363 did not require them to do so. No reported opinions uphold this authority under section 363, the orders approving such retentions by the Delaware, California and New York Bankruptcy Courts notwithstanding.
In addition, the Bankruptcy Court for the District of Delaware recently provided further support for the retention of crisis managers under section 363 by approving a settlement agreement between Alix Partners, LLC (f/k/a Jay Alix & Associates), a prominent crisis management firm, and the United States Trustee. The settlement agreement resolved the Trustee’s objections to Alix Partners, LLC’s employment and compensation in two bankruptcy cases: *In re Harnischfeger Industries, Inc.* and *In re Safety-Kleen Corp.* According to the settlement agreement, if Alix Partners, LLC seeks to be retained as a debtor’s crisis manager in future bankruptcy cases, it must do so under section 363. However, the settlement agreement appears to curtail the flexibility of section 363 retention because Alix Partners, LLC must disclose certain conflicts of interest or material adverse interests to the court in its application. Also, Alix Partners, LLC may serve in only one capacity in a bankruptcy case (for example, as financial advisor, claims agent/administrator or investor/acquirer) and, upon confirmation of a plan, continue to serve only in a like capacity. Additionally, Alix Partners, LLC must file an application for compensation, subject to objections and review by the Court.

The Bankruptcy Court for the Southern District of New York has also approved retention of crisis managers under section 105(a), which provides courts with the broad authority to issue any order that “is necessary or appropriate to carry out the provisions of this title.” The flexibility of

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61. Pursuant to the terms of the settlement agreement, Alix Partners, LLC agreed to disgorge approximately $3.25 million in fees and follow certain guidelines when seeking retention in chapter 11 cases pending in Region 3.

62. *See In re Harnischfeger Indus. Inc.*, No. 99-2171 (Bankr. D. Del. Oct. 4, 2001). Alix Partners, LLC was retained under section 327 as a financial advisor and the Trustee objected to such retention, in part, because several of Alix Partners, LLC’s principals held director or officer positions with the debtors.

63. *See In re Safety-Kleen Corp.*, No. 00-2303 (PJW) (Bankr. D. Del. Oct. 4, 2001). Alix Partners, LLC sought retention as a restructuring consultant under section 327. The Trustee’s objection to Alix Partners, LLC’s application was based on, among other things, the fact that a principal of Alix Partners, LLC served prepetition as the debtors’ CFO, and a principal of Alix Partners, LLC was to serve as an officer of the debtors during the bankruptcy cases.

64. Alix Partners, LLC’s disclosure must include (1) its connections with creditors, equity holders, and the debtor’s officers and directors, (2) its involvement as a creditor, (3) its prepetition role as an officer, director, employee or consultant, (4) its prepetition involvement in voting on the Board’s decision to engage Alix Partners, LLC, (5) information on the composition of the Board so the Trustee can determine if the Board is truly independent, (6) existence of unpaid prepetition balances, and (7) any prepetition claims the debtors may have against Alix Partners, LLC from its prepetition engagement.

employment under section 105(a) was reduced, however, in *In re Maidenform Worldwide*, where the debtors submitted affidavits, disclosing adverse conflict of the crisis managers, not required by section 105.66 Additionally, the bankruptcy court in *In re Maidenform Worldwide* required that the crisis managers’ compensation was subject to approval pursuant to section 330, which grants the bankruptcy court discretion to approve the compensation of professional persons employed under section 327,67 even though the court permitted the employment under section 105 and not section 327.68

**SUGGESTED LEGISLATIVE CHANGE**

Crisis managers are being increasingly employed by financially troubled companies as prepetition officers or directors of debtors. However, the confused state of the reported and unreported decisions governing crisis managers and disinterestedness suggests the need to modify the definition of disinterestedness in the Bankruptcy Code. The most straightforward legislative amendment would create an exception in the definition of “disinterested person” contained in § 101(14) of the Bankruptcy Code substantially as follows:

§ 101 Definitions
In this title–

* * *

(14) “disinterested person” means a person that –

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, (i) a director, officer or employee of the

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debtor except where such person is or was a director, officer or employee of the debtor solely in connection with and during the employment of such person (or an entity of which such person is an employee or principal) as a crisis manager or workout specialist employed by the debtor to oversee a turnaround or liquidation of the debtor or (ii) a director, officer, or employee of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in the subparagraph (B) or (C) of this paragraph, or for any other reason.


This statutory amendment should lessen the pressure on courts to shoehorn crisis manager retentions into other sections and permit the retention of crisis managers pursuant to section 327(a), provided that the section’s other requirements are satisfied. Furthermore, continuing to require crisis manager retention under section 327(a) should be sufficient (i) to disqualify persons from employment where other aspects of their relationships with parties-in-interest create true conflicts with their continued employment and (ii) to circumscribe postpetition conduct of crisis managers who seek to deal inappropriately with debtors-in-possession or their assets. Additionally, employment under 327(a) would assure the prerequisite of submitting an application for allowance of compensation and having that compensation approved by the court under sections 328, 330 and 331. A court may limit the compensation agreed upon by the parties for a crisis manager employed under section 327 if it finds, among other things, the amount to be unreasonable or that the professional person is not disinterested.⁶⁹

It should be noted that, even with the exception for crisis managers effected by the legislative change, a crisis manager may still not be disinterested for purposes of section 101(14)(A). Section 101(14)(A) provides that a person is not disinterested if that person is a “creditor” or “equity security holder.”⁷⁰ These terms are defined in sections 101(10) and 101(17) of the Bankruptcy Code, respectively.⁷¹ A “creditor” holds a “claim” against

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the estate that “arose at the time of or before the order for relief.” 72 An “equity security holder” holds a residual interest in the debtor. 73 If a crisis manager holds a prepetition claim against the estate or an equity interest in the debtor, the crisis manager is not disinterested. 74 This can be dealt with by the debtor and the crisis manager, in the retention agreement, by not giving an equity interest to the crisis manager prepetition or postpetition. 75 Additionally, the debtor should ensure that the crisis manager does not hold a claim against the estate, as of the petition date, by prepaying the crisis manager for its services or by having the crisis manager waive the claim. 76 The debtor should also ensure that the crisis manager does not hold a prepetition indemnification claim or a postpetition indemnification claim for prepetition acts. 77 Special care should be taken in drafting the retention agreement with a crisis manager who serves as an officer or director, since the corporation’s by-laws may provide for a contingent indemnification claim. 78

77. See Kurt F. Gwynne, Employment of Turnaround Management Companies, “Disinterestedness” Issues Under the Bankruptcy Code, and Issues under Delaware General Corporation Law, 10 AM. BANKR. INST. L. REV. at 684; In re Amtesco Indus., Inc., 81 B.R. 777, 781 (Bankr. E.D.N.Y. 1988); In re Consol. Oil & Gas, Inc., 110 B.R. 535, 538 (Bankr. D. Colo. 1990). The Committee recognizes that there exist strong corporate policies that would support the position that crisis managers should be permitted to serve as postpetition officers while retaining their prepetition indemnification claims, since it would be difficult, if not impossible, to retain a crisis manager prepetition with the intention that he or she continue to serve postpetition without such indemnification. The Committee also acknowledges that there is no rationale for permitting officers and directors to serve both prepetition and postpetition, retaining all of their prepetition and postpetition indemnification claims, while crisis managers who served prepetition would have to waive their prepetition indemnification claims as preconditions to serving in the same capacities postpetition. However, this issue is beyond the scope of this article and, unfortunately, not in accord with the positions taken to date by both the courts and the U.S. Trustee.
Special care should also be taken in drafting the retention agreement to provide that the crisis managers retain advisory positions, while the directors and officers make the final decisions regarding the business. Otherwise, the crisis managers may be said to be “insiders” of the debtor under sections 101(31)(B)(iii) and (F). Categorization as an insider would render the crisis manager an insider under section 101(14)(A), causing the crisis manager to be ineligible for retention under section 327(a). Ensuring that the crisis manager does not control the debtor’s corporate decisions or corporate policy would also prevent the crisis manager from being termed an insider who has a “sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm’s length with the debtor.”

This legislative change would permit crisis managers to be effective in workouts, to continue to function effectively after a bankruptcy filing and to be able to do so in a way that treats them as the professionals they are.

January 2005

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82. See Kurt F. Gwynne, Employment of Turnaround Management Companies, “Disinterestedness” Issues Under the Bankruptcy Code, and Issues under Delaware General Corporation Law, 10 Am. Bankr. Inst. L. Rev. at 695 (noting that the categories comprising “insider” under section 101(31) are not exhaustive), citing S. Rep. No. 95-989 § 25 (1978); H.R. Rep. No. 95-595 § 312 (1977); In re City of Columbia Falls, 143 B.R. 750, 766 (Bankr. D. Mont. 1992) (quoting legislative history). The Committee recognizes that this approach would not be appropriate where, e.g., a crisis manager is retained as a chief executive officer who functions in both a decision-making capacity and an advisory capacity. How this issue should be dealt with is beyond the scope of this article.
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I. INTRODUCTION

In Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court declined to quash a number of subpoenas that had been issued to journalists by grand juries. Whether in doing so the Branzburg Court rejected any First Amendment privilege for journalists, or actually recognized a general First Amendment protection for newsgathering that had been overcome by the specific circumstances before the Court, is an issue that has been debated in court opinions ever since. Compare, e.g., Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (finding First Amendment protection of newsgathering), with, e.g., In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan), 810 F.2d 580 (6th Cir. 1987) (rejecting any First Amendment privilege). Regardless of any uncertainty about its recognition of a constitutional privilege, however, Branzburg plainly poses no obstacle to judicial recognition of a federal common law privilege for journalists under Rule 501 of the Federal Rules of Evidence, and such a privilege should plainly be recognized.

* The Committee wishes to extend special thanks to Theodore Boutrous, Jr. for his seminal research and writing on this topic, including Retooling the Federal Common-Law Reporter’s Privilege, Vol. 17, No. 1, Communications Lawyer (Spring 1999).
In declining to quash the subpoenas then before the Court, the *Branzburg* majority contemplated other measures to protect the confidentiality of journalists’ sources:

At the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate.

_id._ at 706. Congress did exactly this in 1975. At that time it rejected nine enumerated privileges that had been proposed to become part of the Federal Rules of Evidence, and directed the courts instead to create a federal common law of privilege. See Federal Rule of Evidence 501. Congress rejected the draft rules defining certain specific privileges because they would limit the flexibility of the courts, drew privilege lines too rigidly and too narrowly, and, the legislative history shows, because certain privileges were left out, including the journalists’ privilege. (See Section IIIA, below.)

Notwithstanding the concern of both the Court and Congress to protect, in some situations, the confidential sources of journalists, a recent unprecedented rise in the number of subpoenas addressed to journalists has been met by some federal courts with disturbing new rulings rejecting altogether the notion of _any_ privilege—constitutional or common law—protecting journalists and their confidential sources. _E.g._, _In re Special Counsel Investigation_, Misc. No. 04-407 (TFH) (D.D.C. Sept. 9, 2004) (subpoena to Judith Miller of The New York Times); _In re Special Counsel Investigation_, 332 F. Supp. 2d 26 (D.D.C. 2004) (subpoenas to Matthew Cooper of Time Magazine and Tim Russert of NBC News); _Lee v. United States Department of Justice_, 287 F. Supp. 2d 15 (D.D.C. 2003) (subpoenas to five different journalists). These courts have turned away from decades of precedent finding a qualified First Amendment privilege for newsgathering necessarily contained within Justice Powell’s concurring opinion in *Branzburg*, and reinterpret *Branzburg* to preclude any First Amendment protection at all for a journalist called before a grand jury, absent a prosecutor’s abuse of the grand jury process. _E.g._, _In re Special Counsel Investigation_, 332 F. Supp. 2d 26. One court has gone further still, holding that *Branzburg* also precludes the recognition of a common law journalists’ privilege because the *Branzburg* Court weighed the competing societal values at issue when a reporter’s confidential source information is sought by a grand jury.
and found the need for protection lacking. *In re Special Counsel Investigation*, Misc. No. 04-407 (TFH).

The Committee believes these recent rulings misread *Branzburg* and misapply the relevant law. If followed by other courts, these rulings could cause serious, long-term damage to the ability of the press to report on important issues concerning our government and other powerful institutions in our society. Particularly given the federal government’s recent, more expansive use of press subpoenas as an investigatory tool, the federal courts should adopt a journalists’ privilege as a matter of federal common law.

II. BRANZBURG AND THE DEVELOPMENT OF FIRST AMENDMENT PRIVILEGE

A. The Supreme Court’s Decision in *Branzburg v. Hayes*

In *Branzburg v. Hayes*, the Supreme Court was faced with claims from three journalists who had been subpoenaed to reveal confidential information and, in some instances, sources before state and federal grand juries investigating possible criminal activity including synthesizing of hashish, conversations with drug users, and observations by a reporter of events at Black Panther headquarters incident to civil unrest in the surrounding neighborhood, and information held by another reporter concerning the aims, purposes, and activities of the Black Panthers. (Only the last involved a federal grand jury; the others were Massachusetts and Kentucky grand juries). 408 U.S. 665. In each instance, the journalist had claimed a privilege under the First Amendment to the United States Constitution not to appear or answer questions concerning confidential information or confidential sources. The majority opinion declined to quash the subpoenas on that ground, with a concurring opinion by Justice Powell (necessary to make up the five justice majority) setting out the limits of the Court’s ruling. *Id.*

One significant aspect of the Court’s opinion in *Branzburg* is the prudential reasons why the Court was reluctant to adopt a federal constitutional privilege. *Id.* at 703-09. In describing the various issues that the courts would have to resolve if the Court adopted a constitutional privi-

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1. E.g., Scott Shane, *Anthrax Figure Wins Round on News Sources*, New York Times, Oct. 22, 2004 (reports that as a precursor to subpoenas of the press, the Justice Department required dozens of investigators to sign waivers in the 2001 anthrax case); Adam Liptak, *Times Sues Prosecutor on Phone Records*, New York Times, Sept. 29, 2004, at 19 (reporters’ telephone records subpoenaed in a Muslim charity investigation).
lege, the Court observed that the courts would become involved in legislative judgments outside the tasks of judges—“not to make the law, but to uphold it in accordance with their oaths.” Id. at 706. The Court stated that Congress was free to determine whether a statutory newsman’s privilege is necessary and desirable and said, “There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.” Id.

Justice Powell, in his concurring opinion in Branzburg, very clearly limited the scope of the Court’s opinion: he stated that “[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.” Id. at 709. Justice Powell went on to say that journalists would have access to the courts “where legitimate First Amendment interests require protections.” Id. at 710.

B. Development of the First Amendment Privilege Post-Branzburg

Following the Supreme Court’s decision in Branzburg, courts in almost every circuit around the country interpreted Justice Powell’s concurrence, along with parts of the Court’s opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside of the grand jury context. E.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583 (1st Cir. 1980); United States v. Burke, 700 F.2d 70 (2d Cir. 1983); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); LaRouche v. NBC, 780 F.2d 1134 (4th Cir. 1982); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986 (6th Cir. 1972); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). In doing so, the courts relied on the strong societal interests reflected in the protection of a free press under the First Amendment.

The reasoning of the courts that have recognized such a privilege is instructive. In Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), the court relied upon the core societal values reflected by the First Amendment to find a journalists’ privilege under the First Amendment: “It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free.” Id. at 785. As the D.C. Circuit succinctly put it in Zerilli, “news gathering is essential to a free press” and

[t]he press was protected so that it could bare the secrets of gov-
ernment and inform the people. Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

656 F.2d at 710-11 (quoting New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

Other courts, however, have read Branzburg more restrictively especially in the grand jury context and declined to adopt such a privilege or allowed only a very limited balancing of interests. E.g., In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan), 810 F.2d 580 (6th Cir. 1987); McKevitt v. Pallasch, 339 F.3d 530 (7th Cir 2003). In both of these cases, the courts reasoned that special press protection was not necessary and that the general powers of the federal courts to limit abuse of compulsory process would be a sufficient safeguard.

III. ADOPTION OF RULE 501 AND RECOGNITION OF NEW PRIVILEGES UNDER JAFFEE v. REDMOND

A. Adoption of Rule 501

The original version of the Federal Rules of Evidence, proposed in 1972 by the Advisory Committee on Rules of Evidence and promulgated by the Supreme Court, recognized nine specific non-constitutional privileges. See Proposed Federal Rules of Evidence 501-510, 56 F.R.D. 183, 230-56 (1972); see generally Trammel v. United States, 445 U.S. 40, 47 (1980) (discussing history of Rule 501). Public response to the proposed privilege rules resulted in unfavorable scrutiny, and its history has been widely acknowledged to be “stormy.” See, e.g., In re Grand Jury Imp Panel January 21, 1975, 541 F.2d 373, 379 n.11 (3d Cir. 1976) (citing 2 J. Weinstein & M. Berger, EVIDENCE ¶ 501 (01)—(05) at 501-1 to 49 (1975)). In order to defuse criticism that threatened delay of implementation of the Federal Rules of Evidence or might possibly even have prevented the Rules’ passage, Congress rejected the proposed rules and instead adopted a more open-


Rule 501 has not been altered since its original enactment. It provides as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Rule 501 thus provides that “in federal criminal cases and in civil cases where federal law provides the rule of decision, privileges should continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.” (Graham, Handbook of Evidence § 501.1, at 642. Moreover, Rule 501’s legislative history indicates that the rule was intended, in federal question and criminal cases, to allow the law of privileges to be developed by the judiciary through resort to the “principles of the common law as . . . interpreted . . . in the light of reason and experience.” See In re Grand Jury Impaneled January 21, 1975, 541 F.2d at 379 (citing S. Rep. No. 93-1277 at 43 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7053-54, 7058; H.R. Rep. No. 93-650 at 72 (1974), reprinted in 1974 U.S.C.C.A.N. 7075, 7082-83). See also Krattenmaker, Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach, 64 Geo. L.J., 613, 645 (1976).

In a departure from the often murky genesis of federal legislation, Congressman William Hungate—who served as principal draftsman of the Rule—expressed a frank assessment of the underlying intentions of Congress for future generations:

The House rule on privilege is intended to leave the Federal law of privilege where we found it. The Federal courts are to develop the law of privilege on a case-by-case basis. Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase
‘governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience,’ is intended to provide the courts with the flexibility to develop rules of privileges on a case-by-case basis. For example, the Supreme Court’s rule of evidence contained no rule of privilege for a newspaperperson. The language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaperpeople any protection they may have from State newsperson’s laws.


B. Judicial Recognition of Common Law Privilege After Jaffee

In Jaffee v. Redmond, 518 U.S. 1 (1996), the Supreme Court for the first time recognized a psychotherapist-patient privilege as part of the federal common law of privilege under Rule 501 and articulated the principles governing recognition of privileges under Rule 501. It recognized three considerations: (1) the significant public and private interests that would be served by any proposed privileges, (2) weighing the public and private interest to be served by and the burden on truth-seeking that might be imposed by any privilege, and (3) “reason and experience”—the breadth of recognition of any proposed privilege by the states.

The Court in Jaffee held that the development of a privilege under Rule 501 “may be justified . . . by a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’” Id. at 9 (quoting Trammel, 445 U.S. at 50) (internal quota-
tion omitted). In other words, recognition of a privilege is justified if it “promotes sufficiently important interests to outweigh the need for probative evidence.” Id. at 9-10 (quoting Trammel, 445 U.S. at 51).

The Court began its analysis of common law privilege under Rule 501 by emphasizing that, “[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is ‘rooted in the imperative need for confidence and trust.’” Id. at 10 (quoting Trammel, 445 U.S. at 51).

“Effective psychotherapy,” the Court continued, “depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” Id. The Court pointed out that “disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace” and reasoned that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” Id.

The Court emphasized that a confidential psychotherapist-patient relationship serves important private and public interests. It serves important private interests by protecting the interests of particular patients who might not seek treatment absent an assurance of confidentiality or who might be embarrassed or disgraced in the event confidential communications were disclosed. Id. at 10-11. And it serves a significant public interest insofar as it might maintain “[t]he mental health of our citizenry.” Id. at 11.

The Court held that these interests outweighed the need for probative evidence that might be produced absent the privilege. The Court found that “the likely evidentiary benefit that would result from the denial of the privilege is modest” because in the absence of a privilege there likely would be fewer confidential communications and thus less of the very evidence at issue. Id. at 11-12. The Court was untroubled by some variation in the scope of the state privileges in this area. The fact that some states' privilege covered therapeutic social workers, while other states limited coverage to psychiatrists and psychologists was not a sufficient variation “in the scope of the protection” to “undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate.” Id. at 14 n.13.

Finally, the Court emphasized the consensus among the states and the District of Columbia regarding recognition of a psychotherapist-patient privilege in one form or another. “That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege.” The Court looked
at the language of Rule 501 that directs the federal courts to develop the law of privilege in light of “reason and experience.” The Court reasoned that “the existence of a consensus among the States” about the need to recognize the privilege indicated that “‘reason and experience’ support recognition of the privilege.” Id. at 13. Furthermore, where there is such a consensus, the Court concluded, the federal courts’ failure to recognize a privilege would “frustrate the purposes of the state legislation that was enacted” to meet the goals of the privilege. Id.

IV. A REPORTER’S PRIVILEGE EXISTS UNDER THE FEDERAL COMMON LAW AND RULE 501

Principles of common law informed by “reason and experience” furnish the relevant guide for determining whether Rule 501 recognizes a reporter’s privilege. History, precedent, and logic establish that the common law encompasses a privilege protecting a reporter from compelled disclosure of confidential information. See Riley v. City of Chester, 612 F.2d 708, 713-16 (3d Cir. 1979). In Riley, one of the earliest cases in which the federal courts recognized a common law privilege, the Third Circuit held that the “strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in Branzburg v. Hayes, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.” Id. at 615; see also Cuthbertson, 630 F.2d 139; In re Williams, 766 F. Supp. 358, 367-69 (W.D. Pa. 1991) aff’d by an equally divided en banc court, 963 F.2d 567 (3d Cir. 1991); Gulliver’s Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197, 1201 (N.D. Ill. 1978) (“[C]ourts have fashioned a testimonial privilege which inures to the benefit[] of news gatherers and enhances the free flow of information to the public at large.”).

A. Branzburg Is No Barrier to Recognition of Federal Common Law Privilege

As a preliminary matter, recognition of a federal common law reporter’s privilege is fully consistent with Branzburg. That decision held that “the public . . . has a right to every man’s evidence, except for those persons protected by a constitutional, common law or statutory privilege.” 408 U.S. at 688 (emphasis added; citation and internal quotation marks omitted). Branzburg involved only the first of those potential grounds for a reporter’s privilege and did not (because it could not) address the applicability of
Rule 501, which was enacted three years later.\(^4\) Three of the four cases consolidated in *Branzburg* were on writ of certiorari to state courts, where the issue of the scope of the privilege under federal common law could not even have arisen. And, as noted above, part of the concern expressed in the opinion in *Branzburg* was that if the Court established an immutable constitutionally based privilege, Congress and the States would be unable to adapt the contours of the privilege in light of changing circumstances, reason, and experience. 408 U.S. at 706. No such conundrum is presented by recognizing a journalists’ privilege under federal common law, which as the Supreme Court has stated “is not immutable but flexible, and by its own principles adapts itself to varying conditions.” *Jaffee*, 518 U.S. at 8 (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). *Branzburg* did not purport to answer, and could not have answered, the question whether the federal courts should now recognize a testimonial privilege for journalists under Rule 501.

**B. The Public Interest Would Be Served by Recognition of Federal Common Law Reporters’ Privilege**

Applying the *Jaffee* framework, the federal common law should recognize the reporter’s privilege. Such a privilege would clearly serve the public interest. *Jaffee*, 518 U.S. at 11 (quoting *Trammel*, 445 U.S. at 53); see also *United States v. Nixon*, 418 U.S. 683, 705 (1974) and noting that public

4. An examination of the briefing submitted to the Court in *Branzburg* makes clear that only First Amendment issues were presented to and decided by the Court:

   I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to disclose confidential information received by him in the course of his newsgathering activities?

   II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to enter the grand jury room to respond to inquiry into confidential information received by him in the course of his newsgathering activities?

Brief for Petitioner at 3, *Branzburg v. Hayes* (No. 70-85). Indeed, the Questions Presented in the companion cases of *United States v. Caldwell* and *In re Pappas* were no different. In *Caldwell*, the Question Presented was “Whether a newspaper reporter who has published articles about an organization can properly refuse, under the First Amendment, to appear before a Grand Jury investigating possible crimes by members of that organization who have been quoted in the reporter’s published articles.” Brief of Amicus Curiae Nat’l Dist. Att’y’s Ass’n, *United States v. Caldwell* (No. 70-57). In *Pappas*, the Question Presented was “Whether, consistently with the First Amendment (made applicable to the states through the Fourteenth Amendment), a professional newsmen may be compelled to appear and testify about what he saw and heard while at a Black Panther headquarters.” Pet’n for a Writ of Certiorari at 3, *In re Pappas* (No. 70-94).
interest is central to recognition of federal privilege); *Wolfle v. United States*, 291 U.S. 7, 14 (1934) (same). Nearly every federal court has confirmed the “‘important public interest’” in preserving the ability of reporters to keep confidential the identity of their sources. *E.g.*, *Bruno & Stillman, Inc.*, 633 F.2d 583; *Burke*, 700 F.2d 70; *Cuthbertson*, 630 F.2d 139; *LaRouche*, 780 F.2d 1134; *Miller*, 621 F.2d 721; *Cervantes*, 464 F.2d 986; *Farr*, 522 F.2d 464; *Silkwood*, 563 F.3d 433; *Zerilli*, 656 F.2d 705. Emphasizing those interests, courts in civil cases have rarely granted attempts to compel production of such information. As the D.C. Circuit has recognized, “[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability,” because “journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.” *Zerilli*, 656 F.2d at 711.

Similarly, in the context of criminal litigation, courts have recognized that a journalist has a right not to testify about newsgathering activities, and in particular to avoid compelled disclosure of confidential source identity. *E.g.*, *Cuthbertson*, 630 F.2d 139. Accordingly, upon a motion to quash, these courts have typically undertaken a searching assessment of the competing interests at stake, in particular the necessity for the particular subpoena and the extent to which alternative sources that do not trench on First Amendment rights have been exhausted. Far more often than not, this review has led to the quashing of the subpoena.

The journalists’ privilege implicates values at the core of the First Amendment and therefore furthers the highest aspirations of public policy. In the constitutional scheme, “[t]he press was protected” precisely for those purposes—“so that it could bare the secrets of government and inform the people.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). The Supreme Court recently reaffirmed the fundamental nature of the press freedom in our constitutional scheme in striking down as unconstitutional provisions of the Federal Wiretap Statute as they applied to publication by the press of the contents of illegally intercepted wiretaps. In *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001), the Court reiterated “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open’” (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)). The press “serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press “has been a mighty catalyst in awakening public interest in governmen-
tal affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." Estes v. Texas, 381 U.S. 532, 539 (1965).

In this time of increasing secrecy in government, see, e.g., A Zeal for Secrecy, The American Editor (May-June-July 2004); Bill Moyers, Speech, Journalism Under Fire (Society of Professional Journalists, Sept. 11, 2004), validating such substantial and direct government disruption of the journalists’ ability to keep their confidential sources confidential strikes at the heart of the newsgathering function. Indeed, there are indications that the recent high profile government activities seeking the press’s sources may already be having a negative impact on the press’ ability to report the news. E.g., Seth Sutel, Journalists, Sources Face Legal Scrutiny, ASSOCIATED PRESS, Oct. 24, 2004. The ability of the press to report on routine governmental functions will be severely curtailed absent an ability to protect sources, particularly given increased government secrecy on a number of fronts. In just the past few years, Attorney General John Ashcroft has reversed the previous policy on the treatment of Freedom of Information Act requests by encouraging the rejection of such requests if there is a legal basis, with the promise to defend the rejections in court. See Adam Clymer, Government Openness at Issue as Bush Holds on to Records, NEW YORK TIMES, Jan. 3, 2003, at A1. Additionally, in 2001, the number of classified documents rose 18%, and since 2001, three new agencies were given the power to classify documents. Id. Both Republicans and Democrats in Congress have expressed concern about such overbroad classification of documents. Id.

Confidential sources have played an integral role in the development of many stories of great public importance; without the ability of reporters to use these types of sources, many stories would have gone unreported. Many examples could be provided of newspaper stories made possible only through unnamed sources. Here are just a few that demonstrate the importance of confidential sources to the news we all rely upon:

- After trouble getting access to public documents, information from valuable confidential sources led to the reporting of a scandal that resulted in the head of a top engineering firm pleading guilty to fraud—a scandal that would have been buried without the media attention. Brendan Lyons, Laberge Admits Role in Bribery Case, ALBANY TIMES UNION, Oct. 14, 2004, at A1.
- Sealed court documents, tape recordings, and other materials provided confidentially led to a series of stories concerning world-class athletes’ use of illegal drugs, including one world-record


- In Houston, a county executive announced that he would not seek re-election after the publication of a series of articles detailing allegations of misconduct made possible by various confidential sources. See Bob Sablatura & Andrea D. Greene, *Lindsay Scraps Re-election Plans*, HOUSTON CHRONICLE, Aug 1, 1993 at A1.

- The cultural scene in upstate Saratoga was preserved after anonymous members of the board of the Saratoga Performing Arts Center confidentially revealed that financial concerns threatened the New York City Ballet’s ongoing use of the Center as its summer home. A reporter was able to break the story just hours after the board had secretly voted to end the relationship with the Ballet—and a public outcry followed. See Timothy Cahill, *Curtains to Close on Ballet at SPAC*, ALBANY TIMES UNION, Feb. 14, 2004, at A1; *Ballet Already Mulling Offers*, ALBANY TIMES UNION, Feb. 20, 2004, at B1.
Three prominent trustees of a hospital board resigned after a series of articles based on a confidential source revealed their misconduct, and the hospital was later fined $1 million for abusing its tax exempt status. See Bob Sablatura, *Former Gov. White Leaves Hermann Hospital Board*, HOUSTON CHRONICLE, Jan. 1, 1992, at A1; *IRS Fines Herman $1 Million*, HOUSTON CHRONICLE, Oct. 25, 1994, at 17A.


Without a reporter’s ability to promise confidentiality, and keep that promise, these stories and countless others just like them that are published every day would disappear. Important information the public relies upon would simply dry up.

**C. The Evidentiary Benefit Resulting from the Denial of the Reporters’ Privilege is Modest**

*Jaffee’s* next factor is of limited relevance to the most recent grand jury subpoenas to journalists, but is of relevance to many more routine subpoenas for outtakes, notes and the like. *Jaffee* looked to “the likely evidentiary benefit that would result from the denial of the privilege.” In the vast majority of subpoenas to the press, this evidentiary benefit is “modest” at best. *Jaffee*, 518 U.S. at 11. In *Jaffee*, the Court recognized the psychotherapist-patient privilege because

> [i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This
unspoken ‘evidence’ will therefore serve no greater truthseeking function than if it had been spoken and privileged.

*Id.* at 11–12. As the courts have previously recognized, the same reasoning applies to many journalistic situations: “Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.” *Zerilli*, 656 F.2d at 712. “As a result of this deterrence, the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled.” *Id.* at 712, n.46 (internal quotation marks omitted).

Of course when the communication to the press itself is the crime being investigated, as is the case with certain of the subpoenas most recently at issue, this factor may arguably be less conducive to recognition of the journalists’ privilege. But it is worth remembering in this regard that the conduct being investigated as criminal is that of the government officials, not of the press. (In fact in many of the most recent subpoenas, no articles or other information had been published by the journalist who was subpoenaed.) It is troubling that one leak investigation has resulted in at least 10 separate demands for journalists’ confidential sources, although the exact number cannot be known because of grand jury secrecy. Obviously, this kind of investigation could be subject to abuse and might be seen, rightly or wrongly, as reflecting intent to punish the press for its reporting.

**D. Most Importantly, a Majority of States Have Recognized a Reporters’ Privilege**

The strongest and clearest expression of the public interest in confidentiality of source identity is reflected in the law of the vast majority of American jurisdictions. There is an overwhelming consensus among the States that “reason and experience” favor the protection of a reporter’s confidential sources. The vast majority of the States, as well as the District of Columbia, have now established some form of reporter’s privilege. At least 30 jurisdictions have done so through statute.5 And at least 14 more
states have recognized the privilege through judicial decision.6 “It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case.” Jaffee, 518 U.S. at 13. In almost all of these 44 jurisdictions, the privilege applies in the grand jury context. Over half of the state shield statutes render absolute a reporter’s privilege not to disclose confidential sources.7 And in virtually all of the remaining statutes, the standard for piercing the reporter’s privilege is a high one, requiring more than simple relevancy to the proceeding.8


7. Alabama, Arizona, California, Delaware, District of Columbia, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania.

8. Alaska Stat. § 09.25.310(b) (withholding of the testimony would (1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or (2) be contrary to the public interest); Ark. Code Ann. § 16-85-510 (“Before any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.”); Colo. Rev. Stat. § 13-90-119(3) (information must be (a) “directly relevant to a substantial issue involved in the proceeding”; (b) “the news information cannot be obtained by any other reasonable means”; and (c) “a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.”); Colo. Rev. Stat. § 13-90-119(3) (information must be (a) “directly relevant to a substantial issue involved in the proceeding”; (b) “the news information cannot be obtained by any other reasonable means”; and (c) “a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.”); Colo. Rev. Stat. § 13-90-119(3) (information must be (a) “directly relevant to a substantial issue involved in the proceeding”; (b) “the news information cannot be obtained by any other reasonable means”; and (c) “a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.”); Fla. Stat. § 90.5015(2) (information must be “relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought”; (b) The information cannot be obtained from alternative sources; and (c) A compelling interest exists for requiring disclosure of the information”); Ga. Code Ann. § 24-9-30 (information must be (1) material and relevant, (2) unavailable by reasonable alternative means, and (3) necessary to the proper preparation of the case); 735 Ill. Comp. Stat. 5/8-907 (all other available
This widespread state recognition of the journalist’s privilege reflects the considered judgments of the states about the value of protecting journalists’ ability to report on information that the government or important public figures would rather not see reported. In Beach v. Shanley, 62 N.Y.2d 241, 245 (1984), the court announced the broad scope of the statutory privilege:

In enacting the so-called ‘Shield Law,’ the Legislature expressed a policy according reporters strong protection against compulsory disclosure of their sources or information obtained in the news-gathering process. As the statute is framed, the protection is afforded notwithstanding that the information concerns criminal activity and, indeed, even when revealing the information to the reporter might itself be a criminal act.

 Accord O’Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521, 528-529 (1988) (in instances not covered by the New York Shield Law, the New York Constitution creates a journalists privilege consistent the “tradition in this
State of providing the broadest possible protection to ‘the sensitive role of gathering and disseminating news of public events’ requiring ‘particular vigilance by the courts of this State in safeguarding the free press against undue interference’) (citations omitted); In re Schuman, 114 N.J. 14 (1989); State v. Davis, 720 So. 2d 220 (Fla. 1998) (in construing journalists’ privilege under Florida constitution and shield law, “courts must protect the press from government intimidation and from laws that effectively constitute a prior restraint on the publication of information”); In re Paul, 513 S.E.2d 219 (Ga. 1999) (“The rationale for the privilege is that ‘compelling disclosure of unpublished material or confidential sources chills the free flow of information to the public.’ News stories based on confidential sources and information enable citizens to make more informed decisions about the conduct of government and its respect for individual rights; at times the stories have aided the investigation and prosecution of organized crime and government corruption.”); Lamberto v. Brown, 326 N.W.2d 305, 308 (Iowa 1982) (“To override a privilege, the need for the evidence must be substantial; an individual’s constitutional rights cannot be subordinated by a ‘remote, shadowy threat’ to a countervailing state interest….One of the reasons for requiring a strict showing of necessity is to avoid fishing expeditions by litigants who, in effect, seek to use reporters as investigative tools.”) (citations omitted); In re Ridenhour, 520 So. 2d 372 (1988) (“Consideration should also be given to the idea that the press’ most important function is to question and investigate the government. Therefore, additional weight should be given to the reporter’s interest when the information concerns his investigation of or criticism of the government”); Diaz v. Eighth Judicial District Court, 993 P.2d 50 (Nev. 2000) (“The policy rationale behind this privilege is to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution”); Taylor v. Miskovsky, 640 P.2d 959 (Okl. 1981) (holding that “the information sought by Appellee was not relevant to a significant issue in the defamation action, and thus Appellant was entitled to invoke his First Amendment rights embodied in the newsman’s privilege statute”).

In addition to the overwhelming number of States that have recognized a reporter’s privilege, the protections offered by the Federal Executive Branch confirm the existence of a consensus that journalists should be protected from being required to reveal information obtained in the course of newsgathering. The Department of Justice has adopted policy guidelines “intended to provide protection for the news media from forms
of compulsory process, whether civil or criminal, which might impair the news gathering function.” 28 C.F.R. § 50.10.

This national consensus is important for two reasons. First, as the Supreme Court has explained,

the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. Because state legislatures are fully aware of the need to protect the integrity of the fact finding functions of their courts, the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.

Jaffee, 518 U.S. at 12–13 (citing Trammel, 445 U.S. at 48–50; United States v. Gillock, 445 U.S. 360, 368, n.8 (1980)). And second, because “any State’s promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court,” “[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” Jaffee, 518 U.S. at 13. Thus, as in Jaffee, the fact that the large majority of States, the District of Columbia, and the Department of Justice have established a reporter’s privilege in all litigation contexts counsels strongly in favor of recognizing a similar privilege under Rule 501. Cf., Hawkins v. United States, 358 U.S. 74 (1958) (retaining federal common law privilege because “most American states” continued to recognize it); Atkins v. Virginia, 536 U.S. 304, 317 (2002) (holding that the existence of similar laws in 31 states “reflects widespread judgment” about the impermissibility of the banned practice). Finally, as in Jaffee, “variations in the scope of the protection” are less important than the judgment of the vast majority of United States jurisdictions, as well as the Federal Executive Branch and

9. The guidelines specify that “all reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena” and that “negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated.” 28 C.F.R. § 50.10. Additionally, the Attorney General must authorize the subpoena, and in criminal cases, there must be reasonable grounds to believe that a crime has occurred; in civil cases, there should be reasonable ground to believe that the “information sought is essential to the successful completion of the litigation in a case of substantial importance.” Id. The Attorney General also must authorize the questioning of a member of the news media in relation to an offense he is suspected of committing while reporting a story, and the Attorney General must authorize any arrest warrants. Id. None of the regulations apply to “demands for purely commercial or financial information unrelated to the news gathering function.” Id.
V. SCOPE OF RULE 501 JOURNALISTS’ PRIVILEGE

There are two levels of protection both of which are accorded to journalists under the privilege as it has been generally recognized. The first level is a qualified privilege, usually applied to nonconfidential sources and material, involving a balancing of factors by the courts to decide if disclosure is required. E.g., In re CBS, Inc., 648 N.Y.S.2d 443, 443-444 (App. Div., 1st Dept. 1996) (“a qualified privilege exists as to nonconfidential materials obtained by journalists during newsgathering which may be overcome if the party seeking the disclosure makes a clear and specific showing that the three-pronged test of the statute has been met”); In re Subpoena Duces Tecum to Mike Ayala v. Soto, 616 N.Y.S.2d 575 (Sup. Ct. 1994) (discussing factors of balancing test). The second is an absolute privilege for confidential sources. The federal courts should adopt this two tiered approach.

According confidential sources absolute protection is in line with numerous state statutes and constitutional provisions. See n.8, supra. Moreover, as the Court explained in Jaffee when it explicitly rejected the lower court’s adoption of only a qualified psychotherapist’s privilege:

[If] the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’

518 U.S. at 17-18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)). Jaffee’s logic applies with equal, if not greater, force to a reporter’s confidential sources.

10. This established consensus in the United States is consistent with developments abroad. The European Court of Human Rights has provided reporters a high degree of protection from revealing the identity of sources and other intrusions into the newsgathering function. See, e.g., Goodwin v. United Kingdom (1996) 22 E.H.R.R. 123. In Goodwin, the European Court of Human Rights stated that “[p]rotection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.”
With respect to unpublished information that does not relate to the identity of a source, many state laws recognize a qualified privilege, which require a court to balance competing interests on a case-by-case basis and closely resembles the familiar three-prong test adopted under the First Amendment by the D.C. Circuit in *Zerilli* and in the other circuits as well. The balancing test evaluates whether: (1) the information “is relevant to a significant legal issue”; (2) the information “could not, with due diligence, be obtained by any alternative means”; and (3) there is an “overriding public interest in the disclosure.” This approach also resembles the policy endorsed by the Justice Department, and the methodology employed by state legislatures and state and federal courts throughout the country.

Finally, the privilege should be applied in the same manner irrespective of the type of proceeding at issue, be it a criminal trial, a grand jury proceeding or a civil trial. Rule 501 on its face applies to criminal and civil proceedings as well as grand juries. *Jaffee* did not distinguish between criminal and civil cases, or between criminal trials and grand jury proceedings, in fashioning a common law psychotherapist’s privilege. The District’s shield law, the law of most states and the DOJ policy guideline do not make such distinctions either.¹¹ A journalist’s interest

in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal.

*Cuthbertson*, 630 F.2d at 147.

**CONCLUSION**

The adoption of Rule 501, its legislative history, the policies articulated by the multiple courts that have recognized the need for protection of the newsgathering process, the *Jaffee* factors, and the broad consensus among the states, which have overwhelmingly acted to recognize a journalists’ privilege, all support the recognition of a federal common law journalists’ privilege. Particularly given the increased trend toward secrecy

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¹¹.Like the District’s statute, all of the other state shield laws by their terms apply to both criminal and civil cases, and all but two apply to grand jury proceedings. See authorities cited in note 3, supra; see, e.g., Ala. Code § 12-21-142 (privilege applies, among other places, “in any legal proceeding or trial, before any court or before a grand jury of any court”).
in the federal government, and the increased willingness of some federal prosecutors to seek the compelled testimony of reporters, a need exists for the federal courts to recognize and clearly articulate the scope of a federal common law privilege for journalists to protect their sources.

December 2004

The Committee on Communications & Media Law

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Corporate Ethics in an Age of Steroids

Jed S. Rakoff


I am honored to have been asked to speak at this conference—but also a bit intimidated. I understand that past speakers in this series have included such distinguished judges as Chief Judge Kaye of the New York Court of Appeals, Judges Calebresi and Feinberg of the Second Circuit, and, most importantly, “Judge Judy” of TV fame. Now there’s a tough act to follow!

My assigned topic is “Corporate Ethics,” and I want to especially focus on the role of the corporate lawyer in fostering, or failing to foster, good corporate ethics. Let me say at the outset, however, that nothing I say here is being uttered in my judicial capacity, and may not be used to recuse me from any case now or in the future—at least not any good case. But, by the same token, I don’t suggest that I have any special expertise, judicial or otherwise, on the subject of corporate ethics. Rather, over the next few minutes, I simply want to suggest to you some ideas that you may or may not agree with but that hopefully will stimulate some discussion.

The title I’ve given my little talk here today is “Corporate Ethics in an Age of Steroids.” My ulterior motive in picking this title is to allow me to make reference to the true passion of my life: baseball. For those of you who could care less about baseball, or who wonder how any grown per-
son could become so passionate about what is essentially a child's game, I apologize. All I can say in my defense is that at least I'm a Yankees fan—although, as a matter of professional courtesy, I always root for the umpires.

My wife, by contrast, is a White Sox fan. Somewhat (indeed, long, long) before her time, the White Sox were enmeshed in what became known as the “Black Sox Scandal” of 1919, in which virtually the entire White Sox team agreed to lose the World Series in return for bribes from gamblers. This, one might concede, was a bit of an ethical lapse! But it was neither the first nor last to plague baseball. Most recently, we have seen the burgeoning steroids scandal, in which some of the best known players are alleged to have taken drugs to artificially enhance their performances. Just the other day, Senator McCain threatened federal legislation if organized baseball doesn't clean up its act, and Baseball Commissioner Bud Selig deplored the bad example that using steroids sets for young fans. (Presumably he prefers the good example that baseball sets by selling endless rounds of beer to intoxicated fans, who otherwise would have no place to go to get drunk once the basketball season was over.)

Both these baseball scandals—the Black Sox debacle and the steroids scandal—raise similar questions about the benefits and/or necessity of government intervention as compared with self-regulation. For my immediate purposes, however, it is worth spending a moment noting the differences between these two scandals in terms of conduct and motivation. With regard to the Black Sox scandal, while the conduct of the Black Sox players in taking bribes was indefensible, their motivation—a deep-seated resentment over the unbelievably abysmal pay given them by the White Sox owner, Charles Comiskey—was at least understandable, if not forgivable. By contrast, in the case of the steroids scandal, the conduct is at least superficially defensible: if an athlete can take vitamins to improve his performance, why not steroids—or so the argument goes. Indeed, steroids were not fully banned from baseball until two years ago. But the motivation of the steroids-consuming stars—essentially, the greed for even more money and status on the part of individuals who already have more fame and fortune than any of us will ever achieve—seems unsupportable.

Without pushing too hard, let me try to extend these baseball analogies to the corporate misconduct of recent years, as compared to earlier periods. All of you are doubtless aware of such huge corporate scandals as Enron and WorldCom (as am I, since a small part of the Enron case and a large part of the WorldCom case have been the subject of proceedings in my courtroom). These were raw accounting scandals in which literally billions of dollars in expenses were portrayed, fraudulently, as assets or
income or both. But you may not be as much aware of the endemic use in the late 1990’s, by companies that would never think of themselves as unethical, of less clearly fraudulent but still highly questionable accounting practices that led to misleading financial statements.

One clear indicator of the size of this epidemic is a recent study by the General Accounting Office that shows that in the last five years at least 10% of all companies listed on the major stock exchanges have been obliged to restate their pre-2001 financial statements to correct for material overstatements. Another study, by the Huron Consulting Group, contends that the GAO study actually understates the problem and that the figure is closer to 15%. Both studies suggest that it is virtually unprecedented for there to be so many material restatements by so many public companies.

What is, if anything, even more remarkable, is that for a great many of these companies, business in the late 1990’s was good, often very good. Yet they were still driven to materially inflate their financial numbers. What accounts for this?

Undoubtedly there were many causes; but I agree with those like Professor Coffee at Columbia who have suggested that a major cause was that top level business executives in these companies were seeking to get rich quick (or rather, get richer quicker) by taking excessive compensation, mostly in the form of stock options. Stock options are easy for a board to approve: they don’t involve immediate expenditures of cash and there is an argument that they don’t have to be expensed on the company’s financial statements. But, of course, for an executive to get rich on stock options, the price of the company’s stock has to rise and keep rising. Hence the motivation to inflate financial statements in order to jack up the price of the stock.

Such inflation does not necessarily involve outright fraud; often it simply involves stretching accounting rules beyond their natural limits, that is to say, conduct that is not necessarily illegal though it may well be misleading and, I would argue, unethical. The driving force behind such conduct, however, is not any benefit to the company as a whole but rather the desire of controlling executives to line their own pockets by inflating the price of the stock; in other words, it involves a clear conflict of interest, which the executives resolve in favor of their personal self-interest, that is to say, unethically.

Nor is such misconduct limited to inflating financial statements. Just this past Sunday, the New York Times described how even recently some executives have artificially arranged to have the purchase price of their
options pegged at what the market price is just before the company announces positive news, so that they can reap the immediate benefit of the increased share price. This may or may not be illegal, but in effect it represents company insiders profiting at the expense of their shareholders, and therefore is plainly unethical.

Of course, a desire to get rich quick is as old as human nature. But I want to suggest that most executives of say 50 years ago had a more permanent relationship to the companies for which they worked and so stood to gain less from short term manipulations that only benefitted themselves. Their ethical lapses, when they occurred, tended to be more institutionally focused—as in the case of the foreign bribe scandals of the late 1960’s, where it was the company as a whole that directly stood to gain from the bribes that were being paid to obtain foreign sales.

Now, however, with institutional loyalties much reduced and mobility by top executives a commonplace occurrence, the ethical lapses, while affecting entire companies, tend to spring from more individualized motivations and concerns. In catchword of the 1990’s, “it’s all about me.”

This lessening of institutional focus may also make ethical lapses of executives harder to detect and police. Which brings me to the role of corporate lawyers.

I am frank to assert that, in my view, corporate lawyers, including both inside and outside counsel, have historically functioned as the ethical consciences of corporations. This view may, of course, reflect a professional bias on my part; but I don’t think so. Rather, it simply recognizes that lawyers, because of their training, their professionalism, and their immersion in the law bring a more refined, and a more objective, perspective to the determination of whether given conduct is ethically proper. To revert to my baseball analogy, a baseball player, and his agent, may be able to convince themselves that using steroids is just part of how you play the game; but I doubt very much that any player’s lawyer, however much she might defend the player in public, would have any doubt that steroid use was a form of cheating. This is because a lawyer would be the first to recognize that the essence of any game is playing by the rules; and using steroids is against the rules.

Regretfully, however, the ability, or even desire, of private lawyers to try to influence the ethics of their business clients has been steadily eroding. The reasons for this are somewhat familiar, but worth reviewing. To some extent they mirror the decline in institutional loyalty that I have already referred to in the case of business executives.
Prior to the 1970s, most corporate lawyers had a life-time relationship to a single law firm, which in turn had a more or less permanent relationship to particular corporate clients. This gave the lawyer considerable power to say “no” to a corporate client without fear of losing the client. As a young associate at a large law firm, I repeatedly witnessed senior partners telling the senior executives of major companies that a particular approach, even if arguably legal, was too risky, and that there was another approach that, while a bit less lucrative, was the more prudent course. This, I suggest, was ethical advice thinly disguised as a legal opinion. What is more, the executive, who had learned from experience to rely on the lawyer’s caution and wisdom, frequently followed the lawyer’s advice, even when it was not the executive’s original preference.

However, as our economy became more regulated and our society more litigious, the cost of legal services grew exponentially. This had three immediate results. First, companies began shopping around for cheaper lawyers (not that these are easy to find). Second, where possible, companies sought to cut costs even more by assigning more of their legal work to their inside counsel. And, third, companies began looking for specialized lawyers, both inside and outside, who could address increasingly arcane regulatory issues.

What were the results of these trends? With respect to the increasing price competition among lawyers, whatever positive benefits it may have otherwise had, it led lawyers to feel the need to say “yes,” rather than “no,” to whatever a business executive who had influence over their hiring or firing wanted to do. This was, if anything, even more true in the case of the in-house lawyer, who could, in effect, be fired, or at least ostracized, at will. And lawyers, whether inside or outside, who specialized in some arcane area were not likely, in any case, to feel competent to address overall ethical issues, nor receive much attention when they did. At best they were the blind leading the blind.

A further result was the not-so-gradual extinction, at least in the corporate arena, of the so-called “lawyer-statesperson,” the Francis Plimpton or the Cyrus Vance, whose valued corporate advice always took account of the corporation’s social and ethical responsibilities. In turn, the absence of such figures resulted in more corporate excess and ethical insensitivity.

In short, a combination of trends in our profession, largely economic in nature, have limited our role in providing effective ethical advice to corporate executives, who may, in its absence, be too prone to prefer self-interest over ethical behavior.

It is easy to identify these problems and to suggest that, despite what
they preach at the University of Chicago, market efficiency is not an unalloyed benefit. But it is much harder to come up with solutions, because, for better or worse, a return to the old-fashioned relationship between lawyers and corporations is unrealistic. So what are we to do about it? Several modest initiatives are already underway, and I am enough of a pollyanna to think that they are all steps in the right direction.

First, of course, in both the legal and business professions, ethical education, not only in graduate school but also thereafter, has become increasingly required. It is sometimes said that ethics can’t be taught, either you have them or you don’t—but I totally disagree. The ethical issues that arise in a complex economy are themselves frequently complex or at least not always obvious, and a good ethical education can help sensitize both lawyers and businesspersons to such issues.

Second, there are the multitude of steps being undertaken under the general rubric of “improvements in corporate governance.” This covers many different angles, not all relating to ethical issues, and I would take the liberty here of referring you to the report entitled “Restoring Trust” that was authored by the Special Monitor that I appointed in the WorldCom case, Richard Breeden, and that sets forth a comprehensive program for the improvement of corporate governance. As implemented in the case of WorldCom itself, these improvements include, among much else:

• strictly limiting the use of stock options as executive compensation and expensing such options as are issued;
• enhancing the powers of the independent audit committee of the Board and arranging for the General Counsel to meet with that Committee without the presence of the C.E.O.;
• appointing a Vice President in charge of ethics, with considerable powers not only to require ethical education on the part of employees but also to address ongoing ethical issues in the company;
• and giving whistleblowers direct and confidential access to the general counsel.

Not every company may require what WorldCom needed in the way of changes in corporate governance, but certainly there are few companies that could not ethically profit from some of these suggested improvements in their corporate structure.

Third, Congress and the S.E.C. have acted, chiefly in the form of the
Sarbanes Oxley Act and the regulations promulgated thereunder, to increase the powers of in-house counsel, by effectively requiring such counsel to monitor signs of company misconduct and, at a certain point, report it “up the ladder” to the independent members of the Board. While such legislation always carries a stiff price in regulatory cost and potentially abusive litigation, I think Congress and the S.E.C. are on the right track in recognizing that the inside general counsel is the person most naturally situated to play the role once played by the outside lawyer-statesperson, provided he is given both the power and the incentive to do so.

There may well be many more steps that can be taken. In an article published in last summer’s issue of *Litigation* magazine, I make the very modest suggestion that the energies of so-called senior lawyers, seasoned practitioners well schooled through experience in complex ethical issues, be more fully harnessed to the improvement of ethics in the profession and in the business context as well. If, for example, the requirement in WorldCom that the company appoint a Vice President in charge of ethics training and resolution catches on with other companies, senior lawyers of the sort I am describing would be natural candidates to assume such roles.

I am sure that there are many other improvements that might be made to re-establish a greater sensitivity to good ethics in the corporate context. Will they be enough? Who knows. We can but try. To return one last time to baseball, who could ever have imagined that the Red Sox would win the World Series? But in their refusal to accept the inevitable, they provide a lesson for all of us, even Yankees fans. There is nothing even remotely inevitable about the decline in corporate and legal ethics that helped precipitate the corporate scandals of the last few years. And it doesn’t really require a Curt Schilling to turn things around. It just takes the commitment of all of us.
The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals

The Committee on Federal Courts

INTRODUCTION

In February 2002, the Department of Justice implemented certain “procedural reforms” concerning its Board of Immigration Appeals (“BIA”), which reviews decisions of immigration judges in exclusion, deportation, and removal cases. These reforms, ostensibly designed to increase the efficiency of immigration appeals and to reduce the backlog of pending immigration cases, expanded the use of affirmances without opinion by single BIA members in nearly all types of cases within the BIA’s jurisdiction. The result has been a surge in immigration appeals filed in the circuit courts of appeals from decisions of the BIA. ¹ The purpose of this Report is to analyze the impact of this surge on the Second Circuit.²

¹. This problem was highlighted by a study conducted pro bono by the firm of Dorsey & Whitney LLP for the American Bar Association. Dorsey & Whitney LLP, Board of Immigration Appeals: Procedural Reforms to Improve Case Management (July 22, 2003) [hereinafter “Dorsey & Whitney Report”]. This report is recommended for its thorough discussion of the BIA procedural reforms and their impact. The two Dorsey & Whitney attorneys primarily responsible for its report, Steven Carlson and Kathleen Moccio, addressed our Committee at its October 2003 meeting.

². We conducted our study by analyzing data prepared by the federal courts and by interviewing personnel at the Second Circuit, including Judge Jon Newman, Elizabeth Cronin (Chief of Legal Affairs), and several staff attorneys. These persons were extraordinarily helpful to us in our investigation. We also consulted with the U.S. Attorney’s Office, and received valuable
The surge has been dramatic by almost any measure. For example, in the twelve-month period from February 2002 to February 2003, monthly appeals from the BIA filed in the Second Circuit increased by 781%. As we show below, this surge in BIA appeals, particularly in the Second Circuit, has continued unabated.

In this report we (1) describe the BIA procedural reforms; (2) quantify the resulting increase in appeals from the BIA to the circuit courts of appeals with particular emphasis on the Second Circuit; (3) review the constitutional challenges to the BIA reforms, which have been uniformly rejected; (4) describe the administrative response of the Second Circuit to the BIA appeal surge; (5) assess the impact of the surge on the Second Circuit, and its other ramifications; and (6) offer our recommendations on how to deal with the surge going forward.

I. THE IMMIGRATION APPEALS PROCESS AND THE BIA PROCEDURAL REFORMS

An appeal from the decision of an immigration judge in an exclusion, deportation, or removal case is filed with the Board of Immigration Appeals, a federal administrative body which is part of the Department of Justice. The Attorney General has authority to modify the BIA's structure and procedures. The BIA may grant oral argument, award discretionary relief, and issue written decisions. Before the recent procedural changes, three-member panels of the BIA heard individual appeals.

In 1999, the BIA promulgated “Streamlining Rules” to administer its rapidly increasing caseload. Single BIA members were empowered to de-
immigration appeals

cide certain categories of cases without opinion. In 2002, noting the BIA’s continuing backlog, Attorney General John Ashcroft announced additional “procedural reforms.” These 2002 reforms are most responsible for the surge in appeals from the BIA to the circuit courts of appeals. Among other changes, these new rules expanded the number of cases referred to single-member summary review, eliminated *de novo* review of factual issues, and expanded the grounds for mandatory dismissal. At the same time, the number of BIA members was reduced from 23 to 11.

As intended, the reforms had a noticeable impact on the dispositions of appeals by the BIA. Summary affirmances increased from between 2 to 3% of all cases decided to close to 60% by October 2002. At the same time, dispositions in favor of aliens declined. Before the reforms, aliens obtained relief in approximately 25% of the BIA’s cases; by October 2002, after the procedural reforms had been implemented, that percentage fell to 10%.

The procedural reforms provoked criticism and concern. Advocates for aliens seeking asylum contended that aliens were being deported without being accorded meaningful administrative review. Feeling aggrieved by these changes, asylum-seekers began to appeal their cases to the circuit courts of appeals in record numbers. Before the procedural reforms only

increased from 18,054 to 63,763. See Dorsey & Whitney Report at Appendix 12. It appears that the largest component of the BIA’s caseload increase consisted of asylum cases, especially from Chinese nationals. See p. 253, below. See also, Dorsey & Whitney Report at 17-20 (discussing other causes of the BIA backlog).


11. See generally Dorsey & Whitney Report at 25-31. The rules allowed the Chair of the BIA to designate certain classes of cases for issuance of affirmances without opinion (“AWO”). Pursuant to this authority, the BIA designated “all cases” as appropriate for AWOs. Id. at 24-25.

12. Id. at 29-30. Some have suggested the reduction was done on a political basis and that BIA judges who were perceived to be “liberal” were those who lost their positions. See Steve H. Legomsky, *Immigration and Refugee Law and Policy* 79-82 (2003 Supp.) (describing this change as the “purge of the liberals.”).


14. Id. at Appendix 24.

15. See, e.g., American Immigration Lawyers Association, Final Comment on the Proposed BIA Reform Rule (March 20, 2002) at http://www.immigrationlinks.com/news/news1306hot (expressing a “fear that the Administration’s proposal would tilt the balance in favor of expeditiousness, instead of fostering careful and just adjudications, thereby impairing the due process rights of individuals while undermining the Board’s capacity to provide meaningful appellate review.”).
6% of BIA cases were appealed. By the end of 2003, 20% were being appealed.\textsuperscript{16} Thus, the surge.

II. THE SURGE IN BIA APPEALS IN THE CIRCUIT COURTS OF APPEALS, AND IN THE SECOND CIRCUIT IN PARTICULAR

A. The Surge in the U.S. Circuit Courts of Appeals

The change in processing BIA cases had an immediate impact. In 2002, the year the procedural reforms were put in place, the total number of immigration appeals filed in the circuit courts of appeals around the country rose by 294% (from 1,642 cases in 2001 to 6,465 in 2002). The surge continued and grew in 2003, with appeals filed from the BIA increasing an additional 35% (from 6,465 to 8,750).\textsuperscript{17}

Another way to look at this phenomenon is to examine the percentage of all appeals to the circuit courts that are appeals from the BIA. In 1999 through 2001, before the procedural reforms of 2002, BIA appeals constituted but 3% of all of federal appeals filed. In 2002, BIA appeals constituted 10.9% of all appeals filed, and in 2003 this percentage increased to 14.4%.\textsuperscript{18}

B. The Surge in the Second Circuit

The surge had even more dramatic consequences in the Second Circuit, which, similar to the Ninth Circuit, has drawn far more BIA appeals than any other Circuit. Administrative agency appeals (most from the BIA) have increased as follows in the Second Circuit from 2001 to 2003.\textsuperscript{19}

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL OF APPEALS FILED</th>
<th>ADMIN. AGENCY APPEALS FILED</th>
<th>ADMIN. AGENCY APPEALS AS % OF TOTAL APPEALS FILED</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>4,460</td>
<td>175</td>
<td>4%</td>
</tr>
<tr>
<td>2002</td>
<td>5,356</td>
<td>1,025</td>
<td>19%</td>
</tr>
<tr>
<td>2003</td>
<td>6,534</td>
<td>2,224</td>
<td>34%</td>
</tr>
</tbody>
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\textsuperscript{16} Second Circuit Clerk’s Office, INS APPEALS & BIA CASES: CALENDAR YEARS 2001-2003 (on file with Association).


\textsuperscript{18} Id. The individual circuit statistics do not break out BIA appeals from other administrative agency appeals. For all circuits combined (excluding the Federal Circuit), BIA appeals comprised 87% of all administrative agency appeals in 2003.

\textsuperscript{19} Id.
Administrative agency appeals pending in the Second Circuit increased from 1,151 at year end 2002 (22% of the 5,277 total appeals pending), to 2,992 at year end 2003 (40% of the 7,514 total appeals pending).\(^{20}\) We discuss below the practical impact of this surge, which shows no signs of abating, on the operations of the Second Circuit (see pp. 252-254, below).

III. LEGAL CHALLENGES TO THE CURRENT BIA PROCEDURES

In a number of circuits, including the Second Circuit, the BIA practice of affirmance without opinion (“AWO”) has been challenged as a violation of the Due Process Clause of the Fifth Amendment. Courts to date have rejected these challenges.

“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” \(^{21}\) Reno v. Flores, 507 U.S. 292, 306 (1993). It is not, however, “a due process violation for the BIA to affirm the [immigration judge’s] decision without issuing an opinion.” \(^{22}\) Denko v. INS, 351 F.3d 717, 730 (6th Cir. 2003) (citations omitted). This is so because “the summary-affirmance-without-opinion rule renders the [immigration judge’s] . . . decision the final agency order, and we review that decision.” \(^{23}\) Id. Accordingly, if the BIA does not independently state a correct ground for affirmance and merely endorses the decision of the immigration judge, the “BIA risks reversal on appeal” if the immigration judge’s decision is found to be erroneous. \(^{24}\) Id. But so long as the petitioner had a “full and fair hearing” before the immigration judge, and the immigration judge correctly applied the relevant legal standards in deciding the case, the petitioner is deemed to have had a meaningful “opportunity to be heard,” and thus the AWO practice in the BIA does not run afoul of the Fifth Amendment. \(^{25}\) Id. at 730 n.10.

In a recent decision, Zhang v. DOJ, 362 F.3d 155 (2d Cir. 2004), the Second Circuit likewise held that the BIA’s AWO procedure does not violate due process. In Zhang, the petitioner’s asylum application was denied following a full hearing before an immigration judge, who found petitioner’s claim that he would be persecuted in China not credible and therefore ordered his deportation. A single BIA judge affirmed the immigration judge’s decision.


The total number of appeals pending in the Second Circuit increased by 42.4% from year end 2002 to year end 2003: from 5,277 appeals pending to 7,514 appeals pending. This dramatic increase, largely a result of the increase in BIA appeals, far exceeds the modest 4.35% increase in pending appeals over this same time period in all other circuits combined. \(^{21}\) Id., Table B.
ion. Petitioner then appealed the BIA's ruling to the Second Circuit, arguing that the AWO by a single judge—in contrast to the three-judge BIA panels prior to the 2002 procedural reforms—violated his right to due process.

The Second Circuit disagreed. “Preliminarily, we observe that an alien’s right to an administrative appeal from an adverse asylum decision derives from statute rather than from the Constitution.” Zhang, 362 F.3d at 157. Here, the statute that provides an alien with a right to an appeal—the Immigration and Nationality Act—is silent as to the manner and extent of any administrative appeal, leaving that determination to the Attorney General. See 8 U.S.C. § 1101(a)(47). “Where legislation is silent as to implementation, the Supreme Court has stated that ‘administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” Zhang, 362 F.3d at 157 (quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council Inc., 435 U.S. 519, 543 (1978)). Thus, because nothing in the immigration laws requires that administrative appeals be resolved by three-member panels of the BIA through formal opinions that address the record, “the BIA was free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process.” Id.

This is the conclusion of all circuit courts of appeals that have addressed the due process issue. See also Yuk v. Ashcroft, 355 F.3d 1222, 1229-32 (10th Cir. 2004); Albatchani v. INS, 318 F.3d 365, 375-79 (1st Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 831-33 (5th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003); Loulou v. Ashcroft, 354 F.3d 706, 708-09 (8th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.2d 845, 848 (9th Cir. 2003); Mendosa v. U.S. Attorney General, 327 F.3d 1283, 1288-89 (11th Cir. 2003).

Although the new procedures have survived constitutional challenge, the way in which the BIA has implemented them has drawn judicial disapproval. The BIA, for example, came in for harsh criticism by the First Circuit in Albatchani v. INS, 318 F.3d 365 (1st Cir. 2003). While the court there did not reverse the BIA’s decision, it credited “[t]he . . . serious argument . . . that the very nature of the one-line summary affirmance may mean that BIA members are not in fact engaged in the review required by regulation and courts will not be able to tell.” Albatchani, 318 F.3d at 378-79. The First Circuit went on to observe that “[f]or example, the Board member who denied Albatchani’s appeal is recorded as having decided over 50 cases on October 31, 2002, a rate of one every ten minutes over the course of a nine-hour day.” Id.

Despite these and other harsh disparagements of the new BIA proce-
dures,21 there is no indication that the 2002 procedural reforms will be judicially or legislatively reversed or significantly altered in the near future. Thus, the surge of appeals to the circuit courts of appeals is likely to continue. If this is so, then the critical question becomes: what docket management measures, if any, have the courts formulated to cope with the surge of cases? We turn now to that topic.

IV. THE SECOND CIRCUIT’S RESPONSE

The Second Circuit quickly recognized the challenges posed by the BIA appeal surge. A senior judge, the Honorable Judge Jon Newman, led the effort to develop a response to it that would not compromise the important rights at stake.22 In May 2003 Judge Newman convened a meet-

21. Another example of the judicial disapproval of the BIA is found in several decisions authored by Judge Richard Posner, of the Seventh Circuit. In one case, Judge Posner, writing for a panel of the Seventh Circuit in Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2004), remanded the cases of several aliens denied asylum by BIA judges, finding “a pattern of serious misapplications by the board and the immigration judges of elementary principles of adjudication.” Quoting from earlier Seventh Circuit criticism of the BIA, Posner reiterated, “the Board’s analysis was woefully inadequate, indicating that it has not taken to heart previous judicial criticisms of its performance in asylum cases [citing cases]. The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.” Id. at 654.

Judge Posner’s criticisms dwell on the failure of the BIA to analyze factual records supporting claims of persecution. Agencies have long been required to provide reasoned bases for their decisions. SEC v. Chenery Corp., 332 U.S. 194 (1947). Faulting the BIA for not meeting its constitutional obligations in this regard, Judge Posner stated, in Guchshenkov v. Ashcroft, 366 F.3d 554 (7th Cir. 2004), that the BIA must dispense reasoned judgments and that its heavy docket is no excuse for not doing so:

We are mindful that immigration judges, and the members of the Board of Immigration Appeals, have heavy caseloads. The same is true, however, of federal district judges, and we have never heard it argued that busy judges should be excused from having to deliver reasoned judgments because they are too busy to think. The two cases under review, like the other cases in which we have reversed the board of late, are not so difficult that it is unreasonable for a reviewing court to expect and require reasoned judgments at the administrative level. The errors that have compelled us to reverse in these cases despite the deferential standard of judicial review of agency action are not subtle. Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level.

Id. at 560.

22. In a March 31, 2004, teleconference with this Committee’s subcommittee focusing on this issue, Judge Newman discussed his efforts to develop tools to manage the increased volume of BIA appeals. Telephone interview with Judge Jon Newman, Senior Circuit Judge Second Circuit Court of Appeals (March 31, 2004) [hereinafter Judge Newman Interview] (notes of interview on file with the Association).
ing at the Courthouse with Second Circuit staff attorneys, the United States Attorney’s Office, and private immigration attorneys with the most BIA appeals pending in the Second Circuit. The objective of the meeting was to explore how the Court could best handle the increase in BIA appeals. As a result of suggestions made at this meeting, the Second Circuit took the following steps:

- The U.S. Attorney’s Office was told that since the Justice Department was responsible for the surge, it would have to ensure that there were sufficient Assistant U.S. Attorneys designated to handle the cases.
- The BIA was urged to designate sufficient staff to ensure that the records on appeal from the BIA were submitted more promptly, since lengthy delays had resulted when the BIA changed its procedures without adding staff to process records for appeals.23
- Status conferences with Second Circuit staff attorneys were ordered for all of the cases in which records were ready.
- In instances in which the petitioner was in detention—a small minority of the BIA appeals pending in the Second Circuit24—the case was to be given priority and scheduled for conference on an expedited basis.25

23. Despite this request obtaining records remains a significant problem, according to Elizabeth Cronin, Director of Legal Affairs of the Second Circuit: “. . . it still can take months to receive the administrative record and a case is not ready to be conferenced (unless there is a glaring jurisdictional defect) until the record comes in. That, in and of itself is a cause for delay.” Response to Committee Questionnaire, Elizabeth Cronin, Director of Legal Affairs for the Second Circuit Question 4 (April 20, 2004) (on file with Association) [hereinafter Legal Affairs questionnaire response]. However, the U.S. Attorney’s Office does not consider the delays in obtaining administrative records to be the reason for the backlog in the Circuit. E-mail from James Cott, Chief of the Civil Division of the U.S. Attorney’s Office for the Southern District of New York, to Michael B. Mushlin, Subcommittee Chair Comment 9 (May 27, 2004) (on file with Association) [hereinafter USAO Email] (“It is the sheer number of appeals that is driving the process, not any delay in providing records”).

24. See Response to Committee Questionnaire, United States Attorney’s Office for the Southern District of New York Question 3 (June 17, 2004) (on File with Association) [hereinafter USAO questionnaire response] (“. . . in the vast majority of immigration cases pending before the Circuit, the Petitioner is not detained”) (emphasis original).

This situation may not be typical of other circuits, and in any event may be about to change. In April 2004, a pilot program was launched in Atlanta and Denver, “Operation Compliance,” pursuant to which immigrants who lose their cases in the BIA are arrested and “held in immigration detention sites until they exhaust their appeals or post bond.” Ricardo Alonso-Zaldivar, U.S. Testing Plan to Jail Immigration Case Losers, Chicago Tribune, April 26, 2004, at 1.

25. See Legal Affairs questionnaire response, Question 2.
Additional part-time attorneys were assigned to help process the cases. The staff attorneys began to conference together multiple cases being handled for the petitioners by the same attorney, a more efficient process for the Court and for the relatively small number of attorneys who handle the BIA appeals.

The Chief Judge was asked to authorize three extra panels of judges for Spring 2004 that would be able to hear cases if it turned out that the flow of ready cases exceeded the ability of the regular panels to hear them. To date these panels have not been needed.

To comply with the needs of the Court, the United States Attorney’s Office implemented a major shift in its resources. What was a “small” unit within its Civil Division has now grown to nine attorneys and seven support staff, all working full time on immigration matters. Further, the BIA appeal surge has been so pervasive that, since June 2003, it has become necessary to assign “all 40+ other Assistant United States Attorneys [who] are in the Civil Division [to] handle immigration cases as part of their docket.”

The U.S. Attorney’s Office also has taken steps to avoid unnecessary motion practice in these appeals. For example, in order to avoid a need for a litigated motion to stay deportation pending the appeal, the U.S. Attorney’s Office has a procedure under which, in most but not all cases, the government will defer action to deport until the appeal is decided.

The conferencing system implemented by the Second Circuit, which applies to the 80% of BIA appeals in which petitioner is represented by counsel, attempts to resolve cases at the staff attorney level. Among the possible outcomes of a conference with a staff attorney are that (i) the alien withdraws and dismisses the case; (ii) the parties agree to remand

26. See USAO questionnaire response, Question 8 (the size of the unit before the surge is not specified).
27. Id.
28. In cases where the U.S. Attorney’s Office believes that a stay is not warranted the policy does not apply and the motion for a stay is litigated. See Legal Affairs questionnaire response, Question 3.
29. See Legal Affairs questionnaire response, Question 9 (“approximately 80 percent of the cases are counseled cases . . .”). The approximately 20 percent of the appeals in which petitioners appear pro se are not conferenced. See E-mail from Elizabeth Cronin, Director of Legal Affairs for the Second Circuit, to Michael B. Mushlin, Subcommittee Chair (Sept. 2, 2004) (on file with Association) [hereinafter Legal Affairs E-mail].
the case; the parties agree to suspend the case pending either pursuit of other administrative relief or the resolution of another matter raising substantially similar issues; or (iv) the parties conclude a stipulated resolution is not appropriate and the appeal is scheduled for briefing and argument to the Court.

Some 60% of the BIA appeals conferenced are in fact resolved, and thus do not require further attention from the Court. However, only 30 to 60 BIA appeals can be conferenced each month, given the limited number of staff attorneys available. With 900 appeals waiting to be conferenced, and new filings regularly being added to the conference queue, the backlog will inevitably grow at the current conference rate, even if 100% of the conferenced appeals were settled.

V. IMPACT OF THE SURGE ON THE SECOND CIRCUIT

Because of the magnitude of the surge of BIA appeals in the Second Circuit, we expected to discover that it had caused a substantial backlog in the processing of the entire appellate docket in the Circuit. But that has not yet happened, largely because of the Court’s timely and innovative response to the surge (see pp. 249-252 above).

30. See Legal Affairs questionnaire response, Question 5. Cases are remanded by consent of the U.S. Attorney “because the government is concerned about the decision or there is a change in country conditions or an adjustment to a petitioner’s status occurs while the petition is pending (i.e. marriage).” Cases are resolved in favor of the government when the alien agrees that the appeal is futile and agrees to voluntary deportation.” Id.

The head of the Civil Division of the U.S. Attorney’s Office states that “[a]s a practical matter the government would never set out the reasons why it consents to remands in any broad way. Each case is considered individually.” See USAO Email, Comment 12.

31. It does not appear that the BIA procedural reforms have led to an increased rate of reversal or remand by the Court, for those cases not resolved at conference. In the 12-month period ended December 31, 2003, for example, the Second Circuit resolved on the merits 146 administrative appeals (most from the BIA). Of those 146 cases, one was reversed and 9 were remanded, for a 6.85% remand/reversal rate. 2003 Tables, Table B-5. By comparison, about 12.4% of all 1,982 cases resolved by the Second Circuit on the merits in 2003 were reversed or remanded. Id.

This data may be misleading, however, since it does not take into account the many administrative appeals that were terminated at conference—262 in 2003 (id., Table B-1)—some on terms that remanded the case to the BIA or provided other relief to the petitioner.

We note that the Dorsey & Whitney Report, at 48-55, highlights five appeals, all from other circuits, in which the courts found serious errors in decisions by immigration judges that the BIA had summarily affirmed.

32. The average rate of disposition at conference during the first three months of 2004 was 61%. See Legal Affairs questionnaire response, Question 4.
Statistics, at first blush, might suggest that the Circuit’s non-BIA docket has in fact suffered from the BIA surge: the number of non-administrative agency appeals pending for more than 12 months increased from 323 at year end 2002 to 1,170 at year end 2003.\(^3\) However, Court personnel are clear that this increase is not attributable to the surge in BIA appeals.\(^4\) Thus, the real consequence of the high number of BIA appeals to date has been simply the growing backlog of such appeals.

Nonetheless, if the tide of BIA appeals continues, at some point, unless additional resources are brought to bear, the processing of non-BIA appeals surely will be negatively impacted. And the tide of BIA appeals is indeed still growing.\(^5\) Over the first six months of 2004, new appeals from the BIA filed in the Second Circuit totaled 1,435, as compared with 1,150 such appeals filed during the comparable period in 2003, a 25% increase.\(^6\) Thus the need for further action to respond to this ever increasing BIA caseload is apparent.

The Second Circuit, in fact, is in the process of implementing a new

\(^3\) Here are the statistics provided by the Second Circuit Clerk’s Office:

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<th>DEC. 31, 2002</th>
<th>DEC. 31, 2003</th>
<th>% INCREASE</th>
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<tr>
<td>TOTAL APPEALS PENDING</td>
<td>4,444</td>
<td>6,587</td>
<td>48%</td>
</tr>
<tr>
<td>APPEALS PENDING OVER 12 MONTHS</td>
<td>917</td>
<td>3,133</td>
<td>242%</td>
</tr>
<tr>
<td>ADMIN. AGENCY APPEALS (MOST FROM BIA)</td>
<td>594</td>
<td>1,963</td>
<td>230%</td>
</tr>
<tr>
<td>ALL OTHER APPEALS</td>
<td>323</td>
<td>1,170</td>
<td>262%</td>
</tr>
<tr>
<td>APPEALS PENDING OVER 12 MONTHS AS % OF TOTAL APPEALS PENDING</td>
<td>20.6%</td>
<td>47.6%</td>
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See Legal Affairs questionnaire response, Question 2 (reporting that in non-immigration cases the normal processing of cases is continuing according to established time lines: a conference within six weeks of the filing of the notice of appeal and if not resolved at conference, the appeal heard within 14 weeks thereafter, absent requested extensions in the briefing schedule).

\(^5\) Id. at Question 10 ("We are still seeing a significant number of new cases every day."). See USAO questionnaire response, Question 10 ("Based on our figures, it does not appear that the surge in immigration cases is abating. In 2003 we received more than 2,200 petitions for review, and we are on a similar pace in 2004.").

\(^6\) Information provided to Committee by Second Circuit Clerk’s Office.
program to address the backlog of BIA appeals. This program will draw on the services of volunteer pro bono mediators to conference the older BIA cases, thus supplementing the conferencing performed by the Court’s own staff attorneys.  

VI. OTHER RAMIFICATIONS OF THE SURGE

The surge has had “real world” consequences beyond those indicated by the numerical data. In this section we briefly touch on those consequences as they relate to aliens seeking relief, the U.S. Attorney’s Office, and the administration of law generally.

A. Aliens Seeking Relief

For many aliens, perhaps surprisingly, the procedural reforms have had a positive result: appellate review at a favored venue, the circuit courts of appeals. This may be the reason why, contrary to our expectations, the response of the immigration bar to the surge in immigration appeals and the truncated procedures at the BIA has been subdued. We have talked to several attorneys representing immigrants who have said that they appreciate the care that the Second Circuit is giving these appeals and believe that their clients are more likely to receive a fair consideration of their position from the circuit courts than from the BIA. In part because the Second Circuit has focused additional resources to deal with immigra-

37. Letter from John M. Walker, Chief Judge of the Second Circuit, to Thomas H. Moreland, Committee Chair, (July 2, 2004) (on file with Association). Judge Walker’s letter outlines the Court’s voluntary mediator plan, under which it would schedule the oldest 300 BIA appeals for briefing and argument without conference, but schedule a conference—without altering the briefing schedule—on request of a party. The letter requests the assistance of the private bar to serve as pro bono mediators at these conferences. The Association has provided Judge Walker with a list of attorneys interested on serving as pro bono mediators.

38. The Committee on Immigration & Nationality Law of this Association did object in 2002 to the BIA “procedural reforms.” Letter from Cyrus D. Mehta to Charles K. Adkins, General Counsel, Executive Office for Immigration Review (March 20, 2002) [on file with Association]. More recently, that Committee chose not to take a position on the topic of this report, i.e., the impact of the surge in BIA appeals on the Second Circuit’s docket.

39. Not all immigration attorneys are as sanguine. One pointed out to us that many aliens cannot afford to pay for an appeal to the Second Circuit, and thus simply must accept the BIA’s (usually) AWO and be deported. Others commented to us that the change in BIA procedures severely compromised the rights of all aliens, not just those who lack funds to appeal.
tion appeals, these cases are being dealt with more attentively than they might have been otherwise. The conferencing system developed by the Second Circuit is particularly valuable, though not for pro se appellants, whose appeals are not conferenced.\textsuperscript{40}

Another reason why we did not hear more complaints about the present system from the immigration bar may be that the most of the petitioners in the Second Circuit are not in detention while awaiting their appeals, and those who are receive expedited consideration. In addition, most are not in jeopardy of being deported because the United States Attorney’s Office’s policy results in temporary stays. (see p. 251, above).

However, a delay in the appellate process, even with a stay of deportation, is not an entirely satisfactory state of affairs for petitioners. The delay puts them in limbo, and under the stress of not knowing their future. Moreover, asylum seekers cannot work until six months after legal entry into the United States, so delay renders these petitioners unable to work until their appeal is decided. The appellate delays, inherently, also postpone permanently reuniting petitioners with their families, and they cannot travel abroad to see family members while their appeal is pending.\textsuperscript{41}

B. The U.S. Attorney’s Office

Because of the increased number of immigration cases, the U.S. Attorney’s Office has altered staffing and processing of immigration cases. Despite the fact that the surge has necessitated increased and revised staffing, the U.S. Attorney’s Office has not suggested that, to this point, its resources are being diverted from other pressing matters. But were the surge to continue unabated, the ability of the U.S. Attorney’s Office to provide the same level of high quality legal representation to the government on other matters might be diminished.

C. The Proper Administration of the Law

One way to look at procedural reforms is to view them as a wholesale transfer of administrative appellate decision-making responsibility from the BIA to the U.S. Attorney’s Office at the conferencing stage and to the judges of the circuit courts of appeals at the argument and decision stage. The important issue raised by this is one of propriety: was it proper for the Department of Justice, in order to alleviate its own backlog of immigration appeals, to create rules that shifted the backlog to the circuit courts?

\textsuperscript{40} See footnote 29, above.

\textsuperscript{41} Email from Kathleen Moccio, Esq. to Michael B. Mushlin, Subcommittee Chair, (July 6, 2004) [on file with Association].
As evident from some of the criticism we have heard, at least some federal judges are asking why the circuit courts should be forced to endure the BIA’s “dumping” of immigration cases. Our review of this issue prompts us to ask the same question.

VII. CONCLUSIONS AND RECOMMENDATIONS

We commend the Second Circuit and its judges and staff for their innovative work to address the surge. We also commend the United States Attorney’s Office for shifting its resources to assign attorneys to handle the onslaught of cases and for its humane stay policy.

While much is being done to mitigate the problems caused by the surge, however, no assurance can be given that all is well and that matters are in hand. In fact, as we have documented above, despite the great efforts of many the surge continues to be serious and threatens to metastasize into a significant problem for the administration of justice in the Second Circuit. While the surge in BIA appeals has not yet caused other appeals to be delayed, if the surge continues—as it has to date—at some point disposition times for all litigants in the Second Circuit will likely be adversely affected.

Thus, at a minimum we recommend that the Second Circuit receive additional resources to continue and to expand its innovative conferencing program. In particular, more conference attorneys and support staff will be needed to address what appears to be a permanent increase in BIA appeals. The Second Circuit’s new program using volunteer pro bono attorneys to conference cases may be a partial answer to the problem, but for this program to succeed the volunteers will need costly training and supervision on an ongoing basis. Further, even the optimum use of pro bono attorneys will not avoid the need for more full time staff attorneys, given the volume of BIA appeals.

We also believe that the inequality in the treatment of pro se appellants should be ended. Those litigants are not given the benefit of the conferencing system because they lack counsel. We therefore support the provision of counsel, paid or pro bono, to them. We recognize that it may be neither feasible nor efficient to assign counsel to every pro se appellant, especially if, as the Court’s Office of Legal Affairs advises, many of the pro se appeals are clearly frivolous.\(^{42}\) But, as that Office also advises, efforts are made to identify potentially meritorious pro se appeals. At minimum, counsel should be appointed in such cases at the earliest practicable time so that they can be conferenced.

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\(^{42}\) Legal Affairs email, Sept. 2, 2004.
Contrary to its need for increased resources, the Court's budget is effectively being cut. In our interview with Judge Newman he indicated that the present “maintenance budget” for the federal court system is a cause for real concern, for in practice such a budget will result in cuts in staff “at a time when we need additional people.” This will make it even more difficult for the Court to stay current with its docket. The U.S. Attorney’s Office may also need additional resources to handle the volume of BIA appeals.

Our review leads us to question the wisdom of the BIA procedural reforms and to suggest that these reforms merit broader investigation and study by Congress and others. To the substantial extent, as appears, that the BIA has ceased in practice to play the administrative appellate role which is its reason for existence, some corrective action is in order. The present dysfunctional and inefficient system wastes taxpayer money and unfairly imposes on the circuit courts almost the entire burden of assuring that the statutory rights of aliens, and the interests of all citizens in an effective immigration system, are vindicated.

Finally, attention should be paid to the substantive aspects of the BIA appeals. The “vast majority” of BIA appeals concern denials of asylum applications, and over half, more specifically, concern asylum claims by Chinese nationals based on China’s “one couple-one child” policy. See generally Paula Abrams, Population Politics: Reproductive Rights and U.S. Asylum Policy, 14 GEO. IMMIGR. L.J. 881 (2000). While the law on this subject is beyond the scope of this report, and the intensely factual nature of asylum cases may limit the utility of general legal principles, the Second Circuit may wish to focus on whether a clarification of the law might be among the appropriate responses to the deluge of these BIA appeals.

August 2004

43. Judge Newman Interview, March 31, 2004 (see n.22 above).
44. See USAO questionnaire response, Question 1.
45. See Legal Affairs questionnaire response, Question 1. Substantial numbers of these asylum applications are granted by immigration judges or the BIA: approximately 2,500 were granted in each year from 2001 through 2003. Billy Shields, Chinese Migrants Smuggled Through Caribbean Say They Are Fleeing Forced Sterilization, Assoc. Press, Jan. 4, 2004.
# The Committee on Federal Courts

Thomas H. Moreland, *Chair*

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* Subcommittee chair
** Subcommittee member
* Abstained from consideration of this report
Proposed New York Court Rules Regarding Interrogatories

The Committee on State Courts of Superior Jurisdiction

I. INTRODUCTION

The Committee on State Courts of Superior Jurisdiction (the “Committee”) is concerned with the extent to which interrogatories are abused, particularly in commercial cases.1 The Committee undertook to study the subject, identify the problems and make recommendations with regard to existing law, court rules and practice with a view to improving the utility of this discovery tool.2

The Committee determined that an effective way of addressing this problem would be to prepare a proposed rule on Interrogatories that the Committee recommends for adoption by the Commercial Division of the Supreme Court of New York County on a pilot basis, as discussed in section IV.

2. The report was drafted by a subcommittee consisting of Michael Graff, Paul Levinson, Andrea Masley and Irvin H. Rosenthal.
The Committee examined the Federal Rules of Civil Procedure and local Federal Court rules, which mandate initial disclosures by parties before formal interrogatories and document requests are exchanged. Initial mandatory disclosures followed by interrogatories and document demands limited in number, are credited with reducing discovery abuse in Federal Courts. The Committee concluded that although initial disclosures are not a part of New York discovery practice, they are essential for any limitation on interrogatories to be effective.

II. HISTORY OF THE FEDERAL RULE ON INITIAL DISCLOSURES

The history of Federal Rule of Civil Procedure Rule 26(a)(1) Initial Disclosures has not been static and free from revision. As adopted by the U.S. Judicial Conference in 1993, the rule was more comprehensive than the present rule, and is also more comprehensive than the rule which is recommended by this Committee. Under the 1993 federal rule, a party was obligated to disclose witnesses and documents, whether favorable or not, that it did not intend to use. Rule 26(a)(1) stated that a party shall provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information:

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

The current federal rule, which became effective on December 1, 2000, provides:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

3. Paul V. Niemeyer (U.S. Circuit Judge, Fourth Circuit; Chair, Civil Rules Advisory Committee), Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?, 39 B.C. L. Rev. 517, 521 (1998).


(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

The current federal rule limits disclosure obligations to information the disclosing party may use in its claims or defenses, eliminating any requirement of disclosing adverse information the disclosing party has in its possession. In so amending the rule, the Advisory Committee noted the strong reluctance of attorneys to act as an attorney for their client's adversary by locating and producing, unasked, documents and information damaging to their clients. The amendment narrows the disclosure obligations to identification of witnesses and documents that the disclosing party may use to support its claims and defenses. A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.

“Subdivision (e)(1), which is unchanged by the 2000 amendment, requires supplementation if information later acquired would have been subject to the disclosure requirement had it been in the possession of the disclosing party at the time of the initial disclosures. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.”

The current federal rule originated, according to the Honorable Paul V. Niemeyer, the Chair of the Civil Rules Advisory Committee, because of “the persistence of complaints and questions about the merit of broad discovery and its expense.” “Plaintiffs’ lawyers tended to complain more about the cost of depositions, while defendants’ lawyers focused more on the cost of document production.” Many argued for the amendment of


8. Paul V. Niemeyer (U.S. Circuit Judge, Fourth Circuit; Chair, Civil Rules Advisory Committee), Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?, 39 B.C. L. Rev. 517, 521 (1998).

9. Id.
the 1993 version of Rule 26 as a means to establish a nationally uniform practice.\textsuperscript{10} According to participants at the conference organized by the Federal Civil Rule Advisory Committee’s Subcommittee on Discovery in Boston in 1997, “[i]n districts where initial mandatory disclosure has been practiced, it is generally liked, and the users believe that it lessens the cost of litigation.”\textsuperscript{11}

In 1998, the Association of the Bar of the City of New York supported the mandatory disclosure in Rule 26, but objected to the burden on attorneys to produce adverse information.\textsuperscript{12} It stated that the 1993 federal rule jeopardized the attorney-client relationship because it required the lawyer to reveal what is discovered about the client, regardless of whether it is good or bad. By narrowing Rule 26, the federal Advisory Committee addressed the Association’s concern, at least in part, removing possible tensions with the attorney-client relationship and the work-product doctrine.

The recommendations of this Committee are thus consistent with the published views of this Association and represent a method of improving the effectiveness of the existing discovery scheme embodied in the CPLR as well as making the practice between the federal and state courts more uniform.

Using the Federal model, the Committee has developed a procedure for New York courts that takes the form of a new court rule. Under the new rule, the discovery process begins with the “initial disclosure” of four basic inquiries: names and addresses of persons with discoverable information that support claims or defenses; descriptions or copies of documents which support claims or defenses; computation of damages; and insurance agreements. As these initial disclosures will provide information that will form the basis for the drafting interrogatories (as well as document requests) by the non-disclosing party, the rule requires that the interrogatories themselves shall be case specific and limited in number (including discrete subparts), without further court order. The proposed rule includes uniform definitions, provides procedural requirements for the assertion of a claim of privilege; and provides standards for electronic formatting.

The goal is to promote timely and appropriate disclosure while reducing the economic burden on all parties and the delay and waste of re-

\textsuperscript{10} Id. at 523.
\textsuperscript{11} Id.
sources engendered by motion practice related to discovery disputes. In the view of the Committee, the Rule will hopefully achieve its goal to the extent that the New York Courts adopt and strictly enforce its provisions.

III. COMPARISON OF PROPOSED RULE TO FEDERAL ANALOGS AND REASONS FOR DIFFERENCES

The Subcommittee looked to existing provisions in the Federal Rules of Civil Procedure and the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York (“Local Civil Rules”) for guidance in drafting the proposed rule. The Subcommittee also considered New Jersey Rules Governing Civil Practice, Rules 4:10 and 4:17; Massachusetts Rule of Civil Procedure Rule 33 and Florida Rules of Civil Practice, Rule 1.340. We now briefly address the salient features of the rule including a comparison with other rules as appropriate.

Section I of the proposed Rules adopts an initial disclosure requirement similar to that found under the federal rules. Each of the state rules canvassed incorporated diverse features of the federal rules, but none contained an initial disclosure requirement. The Committee determined that initial disclosure is necessary in order to make any limitation on the number of interrogatories workable. The items to be provided as “Initial Disclosure” by the parties under Section “I(A)” of the proposed Rule, attached, are identical to those required under Fed. R. Civ. P. 26(a)(1). In addressing (a) the timing of the exchange of Initial Disclosures by each respective party and (b) objections to the exchange of Initial Disclosure, the Committee sought to address the unique procedural posture that litigants find themselves in at the commencement of an action in the courts of the State of New York—i.e., that a judge is not initially assigned on the filing of the Complaint, but will only be assigned upon the affirmative act of the filing of a Request for Judicial Intervention (RJI) by a party. Accordingly, in contrast to federal practice under Fed.R.Civ.P. 16(b) and Fed.R.Civ.P. 26(f), where a Scheduling Conference is conducted with the judge within a definite time frame, a preliminary conference will not be scheduled in state court unless and until requested by a litigant. In these circumstances, in Paragraphs “B” and “C” of Section “I” of the Proposed Rule, the Committee created a structure for such conferences consistent with practice under the CPLR. Finally, in Paragraph “D” of Section “I,” the Committee “carved out” certain types of actions from the Rule, as they are necessarily exempt from Initial Disclosure, since disclosure is not customarily accorded in such actions.
In Section “II,” entitled “Interrogatories,” the Committee sought to curb the perceived abuses of this disclosure device by limiting interrogatories to 25 in number, including all discrete subparts. This provision is modeled on Fed.R.Civ.P.33(a), which contains the same numerical limitation. So, too, the “Responses and Objections” provisions set forth in Section “III” of the Rule are derived from Fed.R.Civ.P. 33(b). Paragraphs “H,” “I,” “J” and “K” of this Section of the Proposed Rule, dealing with identification of documents and records, computer-generated and computer–stored information, and the timing of production of documents, are derived from Local Civil Rule 33.1. The Committee also added two “new” provisions (Paragraphs “N” and “O”) proscribing the random use of form interrogatories and imposing a “reasonableness” requirement on the interpretation of interrogatories.

As for Section “IV,” providing for the “Assertion of a Claim of Privilege,” the Committee simply adopted the appropriate provisions of Local Civil Rule 26.2(a).

Section “V,” calling for “Cooperation Among Counsel,” is derived from Rule 26.5 of the Local Civil Rules. This provision is consistent with the evolving judicially-sanctioned doctrine requiring ever greater degrees of professionalism and courtesy among opposing counsel with respect to discovery issues in general.

The “Definitions and Rules of Construction” set forth in Section “VI” are virtually identical to those set forth in Local Civil Rule 26.3.

The requirement to provide interrogatories in “Electronic Format” set forth in Section “VII” was adopted to facilitate compliance with Paragraph “B” of Section “III,” which itself is addressed to the requirement under CPLR 3133(b) that the party serving responses to a specific interrogatory must set forth the interrogatory and then directly follow it with

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13. Massachusetts Rules of Civil Procedure 32 limit the number of interrogatories to 25. Alaska Rules of Civil Procedure Rule 33, Illinois Court Rule 213, Maine Rule of Court 33, Tennessee Knox County Local Chan. Ct. Rule 8 and Texas R. Civ. P. 168 limit interrogatories to 30. Kentucky Rules of Civil Procedure §33.01 also limits interrogatories to 30, but excepts from the count “(a) the name and address of the person answering; (b) the names and addresses of the witnesses; and (c) whether the person answering is willing to supplement his answers if information subsequently becomes available.” California Civil Procedure §2030(c) limits interrogatories to 35. Alabama, Arizona and Pennsylvania Local Court Rules limit interrogatories to 40. Al R RCP 33; Az R. C. P, Rule 33.1; PA Dauphin Cty, Civ. Local Rule 4005. The Georgia Civil Practice Code §9-11-33 and Nebraska Court Rules 33 limit interrogatories to 50. In the state of Washington, the limitation on interrogatories depends on whether the case is designated expedited, standard or complex. Wash. Pierce County Local Rule 1. Wisconsin limits prisoners to a total of 15 interrogatories, documents and admissions. Wis. Stat. § 804.015.
the response. The Committee perceived that Rule 3133(b) is often ignored, as the responding party simply neglects to “type in” the interrogatory and only provides the response. By providing for “electronic format,” the responding party can thereby simply reformat his adversary’s interrogatories without having to “type them in” and then set forth responses immediately following.

Initially, members of the Committee on State Courts of Superior Jurisdiction expressed concern over a perceived reluctance of justices to impose sanctions for discovery abuses. 14 Like Federal Rule of Civil Procedure Rule 37 (attached as endnote), CPLR 3126 (attached as endnote) and 22 NYCRR §130 (attached as endnote) provide authority for sanctions for discovery abuses in state court. 15 Recent decisions suggest that this concern may be overstated. 16 However, Section “VIII,” entitled “Sanctions,” was drafted with the intent of vesting discretion with state judges to invoke the full panoply of remedies to forestall obstructionist tactics or frivolous conduct in complying with the new Rule. 17

Finally, the “Scope” provision of Section “IX” is also “new” when compared to Rule 26, but part of Federal Rule 33.

The Committee rejected requiring disclosure of experts, adopting the approach taken under the Federal Rules. The Committee believes that such disclosure would be premature at the initial stages of litigation.

Another concern raised by some Committee members was that the Rule would rob defendants of priority in discovery. However, because plaintiffs cannot serve discovery until responsive pleadings are served, defendants can maintain priority by serving discovery demands with their answer. The initial disclosure is made within 30 days after the answer is served. Accordingly, defendants may continue to serve discovery requests with their answers. This is a departure from the Federal Rules, which bars discovery requests until after the Initial Disclosure. However, it is consistent with New York practice. Likewise, the Rule does not affect the use of a bill of particulars. Since a bill of particulars precludes a party from also serving interrogatories, the initial disclosure would be made, but additional interrogatories would not be allowed.

15. See also, 22 NYCRR §37.
Process

The Committee urges that the Commercial Division of the Supreme Court of New York County adopt the proposed Rule on a pilot basis. Accordingly, any case assigned to the Commercial Division or which a litigant has requested to be assigned to the Division, would be expected to follow the new interrogatory Rule. If the Rule works effectively in this pilot, the Committee recommends that it be expanded to the other Commercial Divisions in the State. In addition, if the experience in the Commercial Divisions warrants, consideration should be given to expanding the use of the Rule more generally, starting with a few counties, again as a pilot project. In New York State practice, as judges are not assigned at the beginning of a case, the Rule cannot effectively be adopted on a judge-by-judge basis. Otherwise, practitioners will not know whether the Rule will apply to their case.

Only if these pilot programs prove successful will the Committee recommend adoption of the Rule either by the Chief Administrative Judge as a Court Rule or by the Legislature as part of the CPLR.

October 2004

The Committee on State Courts of Superior Jurisdiction

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Federal Rule of Civil Procedure Rule 37 provides:

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct
or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (c) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney’s fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses in
curred in making that proof, including reasonable attorney’s fees. The
court shall make the order unless it finds that (A) the request was held
objectionable pursuant to Rule 36(a), or (B) the admission sought was of
no substantial importance, or (c) the party failing to admit had reason-
able ground to believe that the party might prevail on the matter, or (D)
there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to
Interrogatories or Respond to Request for Inspection. If a party or an
officer, director, or managing agent of a party or a person designated
under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to
appear before the officer who is to take the deposition, after being served
with a proper notice, or (2) to serve answers or objections to interrogato-
ries submitted under Rule 33, after proper service of the interrogatories, or
(3) to serve a written response to a request for inspection submitted under
Rule 34, after proper service of the request, the court in which the action
is pending on motion may make such orders in regard to the failure as are
just, and among others it may take any action authorized under subpara-
graphs (A), (B), and (C)) of subdivision (b)(2) of this rule. Any motion
specifying a failure under clause (2) or (3) of this subdivision shall in-
clude a certification that the movant has in good faith conferred or at-
ttempted to confer with the party failing to answer or respond in an effort
to obtain such answer or response without court action. In lieu of any
order or in addition thereto, the court shall require the party failing to
act or the attorney advising that party or both to pay the reasonable
expenses, including attorney’s fees, caused by the failure unless the court
finds that the failure was substantially justified or that other circumstances
make an award of expenses unjust.

The failure to act described in this subdivision may not be excused
on the ground that the discovery sought is objectionable unless the party
failing to act has a pending motion for a protective order as provided by
Rule 26(c).

(e) [Abrogated]

(f) [Repealed]

(g) Failure to Participate in the Framing of a Discovery Plan. If a
party or a party’s attorney fails to participate in the development and
submission of a proposed discovery plan as required by Rule 26(f), the
court may, after opportunity for hearing, require such party or attorney
to pay to any other party the reasonable expenses, including attorney’s
fees, caused by the failure.
2. CPLR 3126 provides:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

3. 22 NYCRR 130-1.1 Cost; Sanctions provides:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor’s office, legal
aid society or public defender’s office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court’s own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

22 NYCRR §130-1.2 Order awarding costs or imposing sanctions

The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. An award of costs or the imposition of sanctions or both shall be entered as a judgment of the court. In no event shall the amount of sanctions imposed exceed $10,000 for any single occurrence of frivolous conduct.
PROPOSED NEW YORK COURT RULE REGARDING DISCOVERY: INTERROGATORIES

The purpose of this Rule is to improve the usefulness of interrogatories as a discovery tool by providing initial disclosure by the respective parties, to thereby enable interrogatories subsequently served to be more pointed and directed, to provide uniform definitions, to provide for assertions of a claim of privilege, to reduce the economic burden on both the proponent and the respondent, and to reduce the delay and waste of resources devoted to motion practice relating to discovery disputes. The goal is timely and appropriate disclosure.

I. INITIAL DISCLOSURE:

Except where the use of interrogatories is otherwise circumscribed under the provisions of the CPLR or an Order, within 30 days after an answer is served, a party must, without waiting for a discovery request, provide other parties the following items (“Initial Disclosure”):

1. the name and, if known, the address and telephone number of each person likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

2. a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

3. a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

4. a copy of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

A. Timing: The Initial Disclosure must be exchanged within 30 days after an responsive pleading of the first answering defendant is served,
unless, before the 30 days expires, a different time, not to exceed 30 additional days, is set by stipulation, unless the Court orders otherwise. Plaintiff and defendant shall exchange the Initial Disclosure with each additional defendant or third party defendant who has answered, within 30 days after such additional defendant or third party defendant has answered. Any party first served or otherwise joined after the exchange of the Initial Disclosure must exchange the Initial Disclosure with all other parties within 30 days after answering, unless a different time, not to exceed 30 additional days, is set by stipulation or court order. A party must make its Initial Disclosure based on the information then reasonably available to it and is not excused from making its Initial Disclosure because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party’s Initial Disclosure or because another party has not made its Initial Disclosure. If a party who has exchanged his Initial Disclosure thereafter obtains information that renders such Initial Disclosure incomplete or inaccurate, an amended or supplemental Initial Disclosure shall be exchanged by said party as soon as practicable in the circumstances.

B. Objections: A party may object to exchanging the Initial Disclosure at a court conference held or by motion initiated prior to expiration of the 30 days above provided. Failure to move before the timed fixed for the exchange of the Initial Disclosure constitutes waiver. Any party may request a preliminary conference to address objections to another party’s Initial Disclosure or to seek relief due to another party’s failure to exchange the Initial Disclosure. In ruling on the objection, the court shall determine what disclosures—if any—are to be made, and set the time for exchange of the parties’ respective Initial Disclosure.

C. Exemptions: Actions which are exempt from initial disclosure include, but are not limited to, any action or proceeding where there will be no discovery such as, but not limited to, Article 78 actions; special proceedings; an action to enforce or quash a subpoena; a proceeding ancillary to proceedings in other courts; and an action to enforce an arbitration award.

II. INTERROGATORIES:

Except where the use of interrogatories is otherwise circumscribed under the provisions of the CPLR or an Order, a party who has made an Initial Disclosure may thereafter, without leave of court or written stipulation, serve upon any other party one or more sets of written interrogatories, not exceeding 25 in number, in the aggregate, including all discrete sub-
parts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Without leave of court or written stipulation, additional interrogatories may not be served.

III. RESPONSES AND OBJECTIONS

A. Each interrogatory shall be responded to separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall respond to the extent the interrogatory is not objectionable. A timely response must be made to all interrogatories to which no specific objection is made.

B. Each response is to immediately follow the specific interrogatory to which it responds in accordance with CPLR 3133(b). The responses are to be signed by the person making them, and the objections are to be signed by the attorney making them. The person responding to the interrogatories shall designate which of such information is not within the responding person's personal knowledge and as to that shall “Identify” (as that term is defined herein) every person from whom such information was received, or, if the source of the information is documentary, “Identify” that “Document” (as that term is defined herein). If any response is made by reference to a document or documents, a copy of each such document shall be annexed and identified as to the specific interrogatory to which it is responsive.

C. The party upon whom the interrogatories have been served shall serve a copy of the responses, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties.

D. All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party’s failure to object is excused by the court for good cause shown.

E. The party submitting the interrogatories may move for an order under CPLR 3126 with respect to any objection to or other failure to respond to an interrogatory. Failure to so move shall not preclude a party entitled to either Initial Disclosure or a response to an interrogatory from objecting at trial to the introduction of evidence of facts upon the ground that the party required to disclose failed to provide Initial Disclosure or to respond to a proper interrogatory.
F. An interrogatory otherwise proper is not necessarily objectionable merely because a response to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be responded to until after designated discovery has been completed or until a pre-trial conference or other later time prior to the close of disclosure.

G. Option to Produce Business Records. Where the response to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient response to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory a reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the response may be ascertained.

H. Whenever a party responds to any interrogatory by reference to Documents from which the response may be derived or ascertained, the specifications of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the response as readily as could the party from whom discovery is sought.

I. The responding party shall make available any computerized information or summaries thereof that it either has, or can adduce by a relatively simple procedure. Such information shall also include definitions and field codes necessary for the use and understanding of the computerized information and summaries.

J. The responding party shall provide any requested relevant compilations, abstracts or summaries in its custody or readily obtainable by it, notwithstanding that the information may be derived from documents that have been made available to the interrogating party.

K. Unless otherwise ordered by the court, the Documents shall be made available for inspection and copying within 10 days after service of the responses to interrogatories unless some other date is agreed upon by the parties.

L. If a party who has furnished responses to the interrogatories served

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or subsequent or additional interrogatories served thereafter obtains information that renders such responses incomplete or inaccurate, amended responses shall be served as soon as practicable in the circumstances, and in any event not later than 20 days prior to the disclosure end date set by the court. Thereafter, amendments may be allowed only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date.

M. Unacceptable objections: A party may not be excused from the duty of disclosure merely because its investigation is incomplete. The party shall make its Initial Disclosure based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (L). A party is not relieved from its obligation of disclosure merely because another party has not made its Initial Disclosure or has made inadequate disclosure or merely because its investigation is incomplete.

N. Using Form Interrogatories: Attorneys using form interrogatories shall review them to ascertain that they are relevant to the subject matter involved in the particular case. Form discovery requests which are not relevant to the subject matter involved in the particular action shall not be used.

O. Interrogatories to be Read Reasonably: Interrogatories shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.

P. Assertion of a Claim of Privilege: Where a claim of privilege is asserted, and a response to an interrogatory or part of an Initial Disclosure is not provided on the basis of such assertion:

1. The attorney asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

2. The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(a) For documents: (i) the type of Document, e.g., letter or memorandum; (ii) the general subject of the Document;
(iii) the date of the Document; and (iv) such information as is sufficient to identify the Document for a subpoena duces tecum, including, where appropriate, the author of the Document, the addressees of the Document, and any other recipients showing the Document, and, where not apparent, the relationship of the author, addressees, and recipients to each other;

(b) For oral communications: (i) the name of the person making the communication and the names of the persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication, (ii) the date and place of the communication; and (iii) the general subject matter of the communication.

IV. COOPERATION AMONG COUNSEL:
Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be civil and courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

V. DEFINITIONS AND RULES OF CONSTRUCTION:
The full text of the definitions and rules of construction set forth in subparagraphs (A) and (B) hereof is deemed incorporated by reference into all interrogatories. No interrogatories shall use broader definitions or rules of construction than those set forth in paragraphs (A) and (B) hereof. This rule is not intended to broaden or narrow the scope of interrogatories permitted by CPLR Article 31, and shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations, or (iii) a more narrow definition of a term defined in paragraph (A).

A. The following definitions apply to all discovery requests:

1. Communication. The term “communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

2. Discrete subparts. Subparts of the subject interrogatory that seek information beyond more particularly describing or defining the response to the subject interrogatory.

3. Document. The term “Document” is defined to include writings, drawings, graphs, charts, photographs, phonorecords, and
other media compilations from which information can be obtained, translated, of necessary, by the respondent through detection devices onto reasonably usable form, including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate Document within the meaning of this term.

4. Identify (with respect to persons). When referring to a person, “to identify” means to give, to the extent known, the person’s full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

5. Identify (with respect to Documents). When referring to Documents, “to identify” means to give, to the extent known, the (i) type of Document; (ii) general subject matter; (iii) date of the Document; and (iv) author(s), addressee(s) and recipient(s).

6. Parties. The terms “plaintiff” and “defendant” as well as a party’s full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose an obligation on any person who is not a party to the litigation.

7. Person. The term “person” is defined as any natural person or any business, legal or governmental entity or association.

8. Concerning. The term “concerning” means relating to, referring to, describing, evidencing or constituting.

B. The following rules of construction apply to all Initial Disclosure exchanges and all interrogatories and responses:

1. All/Each. The terms “all” and “each” shall be construed as all and each.

2. And/Or. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

3. Number. The use of the singular form of any word includes the plural and vice versa.
VI. ELECTRONIC FORMAT:

A. When a party serves written interrogatories on another party, said party shall also serve same in electronic format either by email or on a 3 inch computer diskette or on a CD-ROM, in either (i) WordPerfect version 5.1 or higher format or (ii) Microsoft WORD 97 version or higher format.

B. When a party serves written Responses to Interrogatories on another party, said party shall also serve same in electronic format either by email or on a 3 inch computer diskette or on a CD-ROM, in either (i) WordPerfect version 5.1 or higher format or (ii) Microsoft WORD 97 version or higher format.

VII. ENFORCEMENT AND SANCTIONS:

A. If a party or party’s attorney shall default with respect to responding to a demand for responses to interrogatories served upon that party, the Court upon motion, or the Court’s own initiative, shall make such orders with regard thereto as are just, including but not limited to the enforcement provisions of CPLR 3126, including striking pleadings and/or precluding the proffer of evidence by the defaulting party, and/or imposing costs and/or sanctions, including awarding reasonable attorneys’ fees.

B. A default shall be:

1. a party’s failure in good faith to provide timely and complete responses to the interrogatories as required by these Rules;
2. the interjection of spurious objections to an interrogatory or interrogatories;
3. the failure to articulate with reasonable particularity an objection made;
4. the failure to have a written response to an interrogatory immediately following the question to which it responds;
5. the failure to produce copies of relevant Documents demanded in the possession or control of a party.
6. the failure to timely provide a privilege log containing the information required pursuant to Section(IV) hereof with respect to Documents withheld on account of a claimed privilege.

C. In lieu of, or in addition to, any other sanction, the Court shall require the party or attorney representing the party, or both, to pay the reasonable expenses, including attorneys’ fees, and expenses incurred by
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reason of any non-compliance with the provisions of the CPLR relating to written interrogatories or this Rule.

IX. SCOPE:

Interrogatories may relate to any matters which can be inquired into under CPLR, and the responses may be used to the extent permitted by and admissible pursuant to the rules of evidence.
Formal Opinion 2004-03

Government Lawyer
Conflicts: Representing a Government Agency and Its Constituents

The Committee on Professional and Judicial Ethics

TOPIC: Organization as Client: Special Considerations for a Government Lawyer.

DIGEST: Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. This opinion addresses various questions relating to government lawyers’ conflicts of interest in civil litigation. The questions may ultimately be analyzed differently for government lawyers than for lawyers who represent private entity clients because of the legal framework within which government lawyers function. Questions such as who the lawyer represents, who has authority to make particular decisions in the representation, and whether the lawyer may represent multiple agencies with differing interests are largely determined by the applicable law. In dealing with government officers and employees, the government lawyer must comply
with DR 5-109 and DR 5-105, as informed by applicable law. If the agency constituents are unrepresented, DR 5-109 requires the lawyer to clarify his or her role, as well as to report any discovered wrongdoing, as described in this opinion. When the government lawyer proposes to represent the constituent, a threshold question is whether the representation will be in the constituent’s official or personal capacity. If the constituent would be represented personally, the lawyer must first determine whether the representation is permissible under the conflict of interest rule, DR 5-105, and the lawyer must comply with the rule’s procedural requirements in light of the framework described in this opinion.

**CODE:** DR 2-110; DR 4-101; DR 5-101(A); DR 5-105; DR 5-109; DR 7-101; DR 7-102(A); DR 7-104(A)(2); EC 7-7; EC 7-8; EC 7-14.

**QUESTION**
What are the ethical obligations of a government lawyer in dealing with potential conflicts of interest (a) among government agency clients; (b) between a government agency and its constituents represented by the government lawyer; and (c) between an agency and unrepresented constituents?

**OPINION**
1. The Government Lawyer’s Enabling Authority.
This opinion addresses conflicts of interest that government lawyers encounter in the exercise of their official duties in the context of civil litigation. Many of the questions faced by government lawyers are similar to those faced by lawyers for private organizations. Therefore, substantial guidance is offered by this Committee’s recent opinion on conflicts of interest encountered by lawyers for corporations and other private entities. See ABCNY Opinion 2004-02, *Representing Corporations and their Constituents in the Context of Governmental Investigations*—WL—(June 2004). However, the questions are often more complex for government lawyers, who may have different sources of legal authority and different obligations from those of lawyers representing private clients.
Other than DR 9-101(B), which relates to “revolving door” issues that arise when lawyers enter or leave public service—issues that this opinion will not address—no Disciplinary Rule specifically deals with government lawyers’ conflicts of interest. Nor does any Disciplinary Rule specifically address issues unique to government lawyers in civil litigation. The provisions of DR 7-103, Performing the Duty of a Public Prosecutor or Other Government Lawyer, relate solely to criminal prosecution. However, an Ethical Consideration, EC 7-14, provides general guidance to government lawyers in civil as well as criminal representations. Although EC 7-14 does not specifically address conflicts of interest, it does inform our discussion of this subject.

The starting point for our analysis is DR 5-109, Organization as Client. The keystone concept of DR 5-109(A) is that “a lawyer employed or retained by an organization . . . is the lawyer for the organization and not for any of the constituents.” However, government lawyers are not necessarily “employed or retained” by the organization they represent. Instead, they generally act under specific legal (including statutory or constitutional) authority, as may be elaborated by case law. See, e.g., paragraph 18 of the Preamble and Scope of the American Bar Association’s Model Rules of Professional Conduct (government lawyers may have legal authority to exercise authority “concerning legal matters that ordinarily repose in the client in private client-lawyer relationships”); Restatement (Third) of the Law Governing Lawyers § 97 (2000), Representing a Government Client; EC 7-11 (“responsibilities of a lawyer may vary according to . . . the obligation of a public officer”).

Accordingly, a first step in the analysis of the duties and obligations of a government lawyer is a determination of the specific statutory framework that authorizes the government lawyer to act. The relevant statutory framework for any given government lawyer is, of course, a question

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1. EC 7-14 provides as follows:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretion should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to the lawyer should so advise his or her superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results. The responsibilities of government lawyers with respect to the compulsion of testimony and other information are generally the same as those of public prosecutors.
of law as to which this Committee cannot opine. The following discussion is intended, however, as background to indicate the analysis a government lawyer might undertake. The discussion also provides a more specific framework within which to consider the conflicts we address under the Disciplinary Rules.

Reservation of litigating authority to a specific law department is the common model for government at all levels. For example, 28 U.S.C. § 516 reserves to Department of Justice attorneys, under direction of the Attorney General, “the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested.” Section 547 of Title 28, U.S.C., directs United States Attorneys to “prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned.”2 N.Y. Exec. L. § 63(1) gives the New York State Attorney General similar authority to “[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any officer thereof which requires the services of attorney or counsel, in order to protect the interest of the state . . . .” At a local level, §394 of the New York City Charter provides that “the corporation counsel shall be attorney and counsel for the city and every agency thereof, and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested.” Section 501(1) of the N.Y. County Law provides that “[t]he county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law.”3 Other statutes pertinent to the government lawyer’s authority in a given case may include those authorizing a specific agency to engage in or enforce specific conduct; authorizing a particular agency to sue or be sued; specifying the manner in which certain lawsuits are to be

2. We also note the existence of 28 U.S.C. § 530B and 28 C.F.R. Part 77, which specifically subject attorneys of the Department of Justice to the rules of professional responsibility of the states in which they practice law.

3. There may be exceptions where, for example, the government law office has a conflict of interest. See, e.g., Williams v. Rensselaer County Bd. of Elections, 118 A.D.2d 966, 500 N.Y.S.2d 190 (3d Dep’t 1986) (Commissioner of county’s Board of Elections was entitled to independent counsel in litigation in which his interests conflicted with those of the county); Judson v. City of Niagara Falls, 140 A.D. 62, 129 N.Y.S. 282 (4th Dep’t 1910) (city council may employ independent counsel to conduct investigation of city departments where, otherwise, corporation counsel would appear as legal advisor of two antagonistic departments and the committee investigating them), aff’d, 204 N.Y. 630, 97 N.E. 1107 (1912).
brought; dictating how any judgment is to be paid; local enabling statutes; and so forth.

In addition to government law departments, it is equally common that government agencies will employ agency counsel. For one of innumerable examples, N.Y. Pub. Auth. Law §1265(8) provides that the Metropolitan Transportation Authority shall have power “to retain or employ counsel, auditors, engineers and private consultants on a contract basis or otherwise for rendering professional or technical services and advice.” (Emphasis added.) Within New York City, Section 397 of the New York City Charter permits the mayor, on consultation with corporation counsel and the affected agency head, to delegate to any agency “responsibility for the conduct of routine legal affairs of the agency,” subject to monitoring by the corporation counsel and the authority of the mayor, on recommendation of corporation counsel, to suspend or withdraw such delegation.

In referring to “the government lawyer,” we do not mean to imply that the particular lawyer in question directly enjoys the authority given by statute to the attorney general or other statutorily-designated attorney. The work of most government law departments is carried out by assistants to the statutorily-designated attorney, operating by delegation of authority in a hierarchical structure. This opinion assumes that assistant government counsel is operating under properly delegated authority, a matter as to which the assistant is required to assure him- or herself by reference to policies, procedures, and supervisory consultation. Assistant government counsel is particularly alerted to the need for supervisory consultation in addressing questions of professional responsibility, including those discussed in this opinion.

2. Who is the “Client”?

Often, a government lawyer employed by a particular agency will have little difficulty identifying the “client agency.” See, e.g., Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Prof’l Conduct: “[T]he employing agency should in normal circumstances be considered the client of the government lawyer.” However, a government lawyer operating under general authority to litigate “for the Government,” or to “protect the interest of the state,” or to act as “counsel for the city and every agency thereof,” will occasionally need to ask, “who is my client?” This question may arise, for example, in the face of strategic or policy conflicts between the government lawyer and the represented agency, as well as in the context of inter-agency conflicts.

The Restatement suggests there is no “universal definition of the cli-
ent of a government lawyer.” Restatement (Third) of the Law Governing Lawyers § 97, comment (c), Identity of a governmental client. The Restatement notes, without adopting, general assertions that “government lawyers represent the public, or the public interest,” but ultimately concludes that “[f]or many purposes, the preferable approach on the question [of who is the client]. . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation. . . .” Id. See Restatement §97, comment (f), Advancing a governmental client’s objectives. Ethics opinions also discuss the identity of the government client. In ABCNY No. 1990-04 this Committee opined that “[i]f the City is a litigant, it is important to determine which agency of the City is involved. Where a governmental body is organized into a number of different departments or agencies, each department or agency should be treated as a distinct person for purposes of the rule which forbids the concurrent representation of one client against another.” In Opinion 1999-06, we similarly noted that “treating different governmental departments or agencies as separate clients for the application of conflicts rules is in keeping with recent opinions treating separate corporate entities in the private sector as distinct clients for conflicts purposes.” Other ethics bodies have reached similar conclusions. For example, D.C. Opinion No. 268 opined that “the identity of the City government client depends upon a number of discrete considerations and must be decided on a case-by-case basis.” See also ABA Formal Op. 97-405, Conflicts in Representing Government Entities. The Federal Bar Association has stated that “the client of the federally employed lawyer . . . is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business,” and that “the lawyer’s employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.” Op. 73-1, The Government Client and Confidentiality, 32 Fed. Bar. J. 71 (1973). See also J. Rosenthal, Who is the Client of the Government Lawyer?, in Ethical Standards in the Public Sector, ABA Section of State and Local Government (P. Salkin ed. 1999).

Ultimately, the question of who is the government lawyer’s client is a question of law and not of ethics, and one to which the government lawyer must give careful consideration in each case. For purposes of this opinion, we will assume unless otherwise stated that the government agency is for practical purposes the “client agency.” Understanding that the lawyer has a client should serve as a reminder that, generally speaking, the
government lawyer owes the client agency the ethical duties that lawyers generally owe entity clients—e.g., duties of competence and diligence, duties of loyalty and confidentiality, and a duty to communicate with agency representatives to learn their views regarding the representation and to update them on how the representation is proceeding.

3. Disagreements Between the Government Litigating Attorney and a Represented Agency

Separate from the question of the identity of the government lawyer’s client is the question, “who has authority to make any given decision about the conduct of the litigation?” This question may be important when the government lawyer has a substantial disagreement with representatives of the agency client about the conduct of the representation. Ordinarily, certain decisions in a representation are ultimately made by the client after receiving the lawyer’s advice—for example, decisions concerning the objectives of the representation such as whether to initiate, settle or dismiss litigation—and certain other decisions about how to achieve the client’s objectives are made by the lawyer in light of the client’s interests and objectives. See ECs 7-7 and 7-8. However, the applicable statute may delegate to the government lawyer some or all decisions that, in a private representation, would be ordinarily entrusted to the entity client. Thus, the extent to which a government lawyer may make decisions in litigation on behalf of a government agency is both an ethics question and a legal question dependant on the government lawyer’s enabling authority. 4

4. See, e.g., The Attorney General’s Role as Chief Litigator for the United States, 6 U.S. Op. Off. Legal Counsel 47, 1982 WL 170670 (O.L.C.), discussing the Attorney General’s “full plenary authority over all litigation” and his role in “coordinat[ing] the legal involvements of each ‘client’ agency with those of other ‘client’ agencies, as well as with the broader legal interests of the United States overall.” The opinion also emphasizes “that in exercising supervisory authority over the conduct of agency litigation, the Attorney General will generally defer to the policy judgments of the client agency,” and that “policy concerns . . . implicated in decisions dealing with litigation strategy . . . will [be] accommodated . . . to the greatest extent possible without compromising the law, or broader national policy considerations.” The New York State Attorney General is reported to have a similar view of his authority. See J. Weinstein, Some Reflections on Conflicts between Government Attorneys and Clients, 1 Touro L. Rev. 1 (Spring, 1985), n. 17, available on Westlaw as C317 ALI-ABA 959, citing Attorney General’s Memorandum, Powers of the Attorney General in the Conduct and Control of Litigation for State Agencies. See also Feeney v. Commonwealth, 366 N.E.2d 1262 (Sup. Ct. Mass. 1977) (Massachusetts’ Attorney General may decide to appeal over the objections of state officers whom he represents); Sec’y of Admin. and Fin. v. Attorney Gen., 326 N.E.2d 334 (Sup. Ct. Mass. 1975) (Attorney General may refuse to appeal over the objection of the State Secretary of Administration and Finance).
Where the enabling authority entrusts the government lawyer to make decisions that would ordinarily be made by the client, the lawyer should act in light of the relevant public interests and obligations of the client agency and based on appropriate consultation with agency representatives. When the enabling authority delegates these decisions to agency representatives, the government lawyer should provide relevant advice. Where appropriate, the government lawyer may vigorously probe the strengths and weaknesses of the agency’s position and offer views about how the agency should exercise its authority in light of the relevant public interests and legal mandate. EC 7-14 urges the government lawyer to use his or her discretion to avoid or to recommend against litigation that is “obviously unfair.” Whether a government lawyer may have an ethical obligation to identify and seek a substantively “just” result in a particular case, even where that may be at odds with the agency’s legally authorized litigation position, is beyond the scope of this opinion. See, e.g., B. Green, Symposium: Legal Ethics for Government Lawyers: Straight Talk for Tough Times: Must Government Lawyers “Seek Justice” in Civil Litigation?, 9 Widener J. Pub. L. 235 (2000).

Ultimately, the government lawyer must act consistently with DR 7-101(A)(1), Representing a Client Zealously, which provides that, with limited exceptions, “[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of the client. . . .” See also DR 5-101(A), Conflicts of Interest–Lawyer’s Own Interests. In all but the most unusual cases, of course, the government lawyer will be able to provide competent and diligent representation notwithstanding disagreement with agency representatives. However, if the government lawyer is not authorized to determine the agency’s objectives and because of strong philosophical disagreement with the agency, the government lawyer is unable to seek to achieve the lawful objectives determined by the government representative with decision making authority, then the lawyer may be permitted or required to withdraw from the representation. See DR 2-110(c)(1)(e) (a lawyer may withdraw if a client “insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules”); ABA M.R. 1.16(b) (except in matters pending before a tribunal, a lawyer may withdraw if the client “insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”).

4. Inter-Agency Conflicts

There are any number of circumstances in which a government lawyer may represent more than one agency in a given litigation or matter,
and certain agencies, including agencies not directly involved in litigation, may have different or conflicting interests in the matter. To what extent does DR 5-105, *Conflict of Interest; Simultaneous Representation*, govern such conflicts? DR 5-105(B) provides that

A lawyer shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

The Preamble and Scope of the American Bar Association's Model Rules of Prof'l Conduct, paragraph 18, notes that government lawyers "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." On the other hand, W. Josephson and R. Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 How. L.J. 539 (1986), take the position that separate agencies must be viewed as separate clients. Accordingly, Josephson and Pearce would apply DR 5-105(B) directly.

While the scope of the government lawyer's authority to represent agencies with conflicting positions is ultimately a mixed question of law and ethics, the practical reasons for treating separate agencies like separate clients, and the practical considerations embodied in DR 5-105(B), suggest that representation of conflicting agencies by government lawyers from the same law department is to be avoided. See, e.g., *County of Franklin v. Connelie*, 95 Misc. 2d 189, 207 408 N.Y.S.2d 174, 186 (Sup. Ct., Essex County 1978), rev'd on other grounds, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (3d Dep't 1979) ("[t]he Court is convinced, as it also believes that the Attorney General is, that it was not proper under all of the facts surrounding this proceeding to have the Attorney General representing all defendants on the arguments before the Court. . . . Clearly, there were conflicts between the [APA] and the Division of State Police and the Office of General Services as the approval of the project wended its way through the labyrinth of bureaucracy. . . ."); cf. *Chapman v. New York*, 193 Misc.2d 216, 220 n.2, 748 N.Y.S.2d 465, 469 n.2 (Ct. of Claims 2002) (suggesting Attorney General may wish to apply for appointment of independent counsel to challenge constitutionality of private bill that resuscitated a claim for damages against the state). On the other hand, where a
government lawyer is charged with protecting the interests of the federal government, the state, or a locality, nothing in the disciplinary rules restrains the government lawyer from attempting to mediate a common position between agencies with conflicting interests.


In many instances an agency official may be named in his or her “official capacity” or in some similar designation. The Advisory Committee Notes to the 1961 Amendment of Federal Rule of Civil Procedure 25(d)(1) describe such actions as “in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action.” They include, for example, “actions against officers to compel performance of official duties or to obtain judicial review of their orders . . . [or] to prevent officers from acting in excess of their authority . . . [and i]n general . . . whenever effective relief would call for corrective behavior by the one then having official status and power . . . .” They do not include “actions which are directed to securing money judgments against the named officers enforceable against their personal assets . . . .”

Thus, unless circumstances indicate otherwise, a government lawyer representing an official named solely in his or her official capacity would still, in effect, be representing the client agency alone, and, unless circumstances indicated otherwise, the government lawyer would deal with the named official as a constituent of the agency rather than as someone personally represented by the government lawyer. Representation of the entity in this context is analogous to the representation of an entity in the private context. See DR 5-109 and ABCNY Opinion 2004-02; see also NY CPLR §1023, Public body described by official title; NY CPLR Art. 78, Proceeding against body or officer; cf. Restatement (Third) of the Law Governing Lawyers § 97, comment (c) (2000), Identity of a governmental client. Issues regarding constituents represented only “in their official capacity” are discussed further in this opinion in section 7, Dealings with Unrepresented Agency Constituents. To the extent the government lawyer deals directly with the official-capacity party in the lawsuit, a clear statement of the limitations of the lawyer’s role in the matter is ordinarily required. See infra §7.

6. Representation of Agency Constituents

In addition to representing governmental entities, it is common for government litigating attorneys to represent individual government employees in their personal capacity for acts undertaken in their official
capacities. For example, at the federal level, 28 C.F.R. §50.15(a) (2004) provides that a present or former federal official may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity . . . when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States.

Section 50.15(a)(3) of 28 C.F.R. makes clear that “Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege.”

At the state level, N.Y. Public Officers Law §17 provides that upon compliance with certain conditions, “the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of an alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties. . . .” Similar authority is given to the New York City Corporation Counsel by §7-109 of the Administrative Code of the City of New York, which provides:

The corporation counsel, in his or her discretion may appear, or direct any of his or her assistants to appear, in any action or proceeding, whether criminal or civil, which may be brought against any officer, subordinate or employee in the service of the city, or of any of the counties contained therein, by reason of any acts done or omitted by such officer, subordinate or employee, while in the performance of his or her duty, whenever such appearance is requested by the head of the agency in which such officer, subordinate or employee is employed or whenever the interests of the city require the appearance of the corporation counsel. . . .

Likewise, N.Y. General Municipal Law §50-k(2), provides for representation of New York City employees for “any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his
duties and was not in violation of any rule or regulation. . . .” Such representation is conditioned on the employee’s “full cooperation” in the defense of the action and related actions, and a failure or refusal to cooperate authorizes the corporation counsel “to withdraw his representation.” Id. §50-k(4). (The interplay of this provision with DR 2-110, Withdrawal from Employment, is beyond the scope of this opinion, but DR 2-110 must be consulted in connection with any such withdrawal.)

Employees represented pursuant to provisions similar to the above are no longer mere “constituents” of the client agency, they are represented clients in their own rights. See, e.g., American Bar Association (ABA) Informal Op. 1413 (1978) (“a Government lawyer assigned to represent a litigant . . . has an attorney-client relationship with the litigant, and . . . the lawyer’s status as a Government employee does not exempt him or her from professional obligations, including those to preserve a client’s confidences and secrets, that are imposed upon other lawyers”). Obviously, individual representation raises the possibility of conflicts with the government litigator’s obligation to protect the interests of his or her overarching jurisdiction. These conflicts must be addressed under statutes and regulations that may govern individual representations as well as under the conflicts provisions of the disciplinary rules.

For example, 28 C.F.R. §50.15 (2004) contains extensive provisions addressing the possibility of a conflict between the “interest of the United States” and that of the individual employee; of conflicts between multiple individual employees; and the retention of private counsel in the event of such conflict. N.Y. Public Officers Law §17(2)(b) also provides for representation of an employee by private counsel “whenever the Attorney General determines based upon his investigation and review of the facts and circumstances of the case that representation by the Attorney General would be inappropriate, or whenever a court of competent jurisdiction, upon appropriate motion or by a special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by private counsel. . . .” N.Y. County Law §501(2) directs “the county attorney [to] represent the interests of the board of supervisors and the county” whenever “the interests of the board of supervisors or the county are inconsistent with the interests of any officer,” in which case the officer may retain private counsel. See also N.Y. Public Officers Law §18. A government lawyer assigned to represent an individual constituent should be alert to these statutes and should advise the individual client about them, as relevant, when discussing conflicts of interest.
Beyond statutory or regulatory provisions, the individual client of a government lawyer is entitled to the protections afforded by the conflict provisions of DR 5-105. The government lawyer evaluating representation of an individual employee must explore potential conflicts at the very outset of the relationship. DR 5-105(A). During this process the government lawyer and the government employee must both have a clear understanding of whether preliminary discussions are privileged and who controls the privilege, the agency or the employee. See NYC Eth Op. 2000-1 (prospective client confidences). If the privilege belongs to the individual, there should be a clear understanding as to whether or not the information gained during the representation may be shared with the agency client. See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations, nn. 9, 11 & 12 and accompanying text, discussing information sharing agreements and prospective waivers of confidentiality. If information disclosed by the individual will be shared with the agency, and especially if the agency has authority to assert or waive the privilege with respect to such information, the government lawyer must consider whether an essentially unprivileged discussion (from the perspective of the employee) will be sufficiently “full and frank” to provide a reliable basis for a conflict determination.

Having gathered the necessary facts, the Government lawyer must decide whether it is possible to represent the individual consistent with DR 5-105. In most if not all cases, DR 5-105(A) will be implicated, because the lawyer would be representing the differing interests of an individual and the government. Therefore, the lawyer will have to apply the “disinterested lawyer” test of DR 5-105 to determine whether multiple representation is appropriate. See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations. Under DR 5-105(C), the lawyer may represent multiple parties with differing interests only “if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.”

In some cases, the test will not be met, because a disinterested lawyer would not believe that a single lawyer can competently represent the individual and the government. For example, where a government agency and an individual agency constituent are both parties, the availability of different defenses for governmental entities than for individuals may lead to an insurmountable conflict. See, e.g., Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993) (conflict for lawyer representing both officer
and municipality in action under 42 U.S.C. § 1983 (2004) to take position beneficial to municipality but detrimental to officer; Dunton v. County of Suffolk, 580 F.Supp. 974 (E.D.N.Y. 1983), rev’d, 729 F.2d 903 (2d Cir.), opinion amended, 748 F.2d 69 (2d Cir. 1984) (disqualifying conflict to represent both county and individual police officer in action under 42 U.S.C. § 1983 where county intended to argue that officer’s actions were ultra vires). The government lawyer must consider potential conflicts between represented individual constituents and the interests of the governmental jurisdiction even if a government agency is not a party to the action.

If a non-waivable conflict surfaces in a privileged initial interview of a government employee, the government lawyer may be disqualified from further representation of the agency as well as of the employee. See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations. However, depending on the nature of the conflict and the size of the government law department, judicial decisions may permit the use of appropriate screening mechanisms to avoid disqualification of the entire government law department and the assignment of another government lawyer to represent the agency itself. Cf. People v. English, 88 N.Y.2d 30 (1996); Matter of Schumer v. Holtzman, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182, (1983); United States v. Vlahos, 33 F.3d 758, 763 (7th Cir. 1994); ABA Formal Op. 342 (1975).

Assuming the “disinterested lawyer” test has been satisfied, the government lawyer must obtain appropriate consent after “full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” DR 5-105(C). See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations. The question of who is authorized to consent on behalf of the government, state, municipality or agency client must be addressed. Cf. NYSBA No. 629 (government agencies may in otherwise proper circumstances give consent to cure a conflict). Whether the government lawyer or an agency representative is authorized to consent on behalf of the “government” in a particular matter will ultimately depend on the scope of the legal authority conferred on the government lawyer and the agency.

Notwithstanding best efforts at the outset of a representation, counsel must be prepared to deal with conflicts that arise suddenly in the middle of a representation. If that occurs, the lawyer must consider whether the unanticipated conflict requires terminating the representation or whether, under the “disinterested lawyer” test, the representation can continue with consent after full disclosure. See DR 5-105(B), DR 2-110(B)(2), and (C)(2); cf. NYSBA No. 674 (1995) (discussing conflict that arises in joint represen-
7. Dealings with Unrepresented Agency Constituents.

In the course of representing an agency or agency employee, a government lawyer will spend a great deal of time dealing with agency personnel who are not individually represented by the government lawyer and who have not retained personal counsel. These will include constituents whose acts or omissions are the subject of the litigation but who are not parties to the action; constituents who are fact witnesses; and constituents otherwise designated to speak for the agency in discovery or trial. Dealings will occur most commonly in the context of investigatory interviews; deposition preparation and depositions; and trial preparation and trial. These are dealings where the agency constituent (and government lawyer) may not be entirely without confusion as to the role of the government lawyer.

DR 5-109(A) provides the following initial guidance to the lawyer in such circumstances:

When a lawyer employed or retained by an organization is dealing with the organization’s directors, officers, employees, members, shareholders or other constituents, and it appears that the organization’s interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

DR 7-104(A)(2) further instructs that a lawyer may not “[g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.” In order to avoid confusion, as well as to avoid a finding that the government lawyer inadvertently entered into a lawyer-client relationship with the constituent, see, e.g., Restatement (Third) of the Law Governing Lawyers §14(1)(b) (2000) and comment thereto, the government lawyer must analyze

5. A personal representation would require, among other things, a conflict analysis, informed consent, and compliance with agency procedures. ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations, contains a pertinent discussion of the factors to be considered in evaluating conflicts and structuring such a representation to minimize potential conflict. Compare U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum, Relationship between Department of Justice Attorneys and
in advance exactly what his or her role will be in dealing with the constituent in the proceeding at issue, and then provide such affirmative explanation of that role as may be necessary to the situation.\(^6\)

For example, in the context of investigatory interviews, the government lawyer might explain that he or she is the attorney for the agency, or a component thereof; and might also explain from whom within the organization—for example, the agency head, component head, or other official—he or she takes substantive direction in the matter. The government lawyer might then explain that he or she has been assigned to find out the facts relating to a particular matter; and, as may be appropriate, explain to the constituent the nature of any privilege and who holds the privilege.

Understanding and explaining the government lawyer’s role in the context of formal adversarial proceedings, as in preparing for or appearing with a constituent at a deposition or trial, is more complex. In this regard, the government lawyer may, for example, explain the nature of the action; the status of the agency or component as a party or potential party; and that he or she represents the agency or component in the matter. The government lawyer might also explain to whom within the organization, such as the agency head or other delegated official, he or she reports on the matter and who is responsible for setting the agency’s position in the litigation. Then, depending on the circumstances, the government lawyer might explain that the employee is being prepared and called to testify in a matter relating to the employee’s conduct as a constituent; and that it is in the agency’s interest that the employee is fully prepared for the deposition. It may also be appropriate, depending on the circumstances, for the government lawyer to reassure the employee that the agency sees nothing wrong with how the agency or the particular constituent handled the matter at issue and will vigorously defend the case. The DR 5-109(A) warning may be given as required, or earlier as counsel may prefer.

\(^6\) There may be situations where the government perceives that its paramount legal obligation is to obtain information from the individual and that it is not free to provide the necessary clarification. An analysis of such situations is beyond the scope of this opinion. There may also be situations where the lawyer for the government becomes the lawyer for these constituents as well. A specific analysis of such situations is also beyond the scope of this opinion.
Depending on the nature of the proceedings and how the lawyer expects them to be conducted, the lawyer may further explain that as agency counsel he or she will make objections; advise the constituent on issues of agency privilege; and deal in other ways with counsel at proceedings involving the examination of an agency constituent.

Additional obligations may arise later and unexpectedly. For example, the agency constituent may disclose negative information regarding the facts at issue, or regarding personal conduct relevant to credibility that may be embarrassing—or worse—for the constituent. Sometimes, although the government lawyer does not represent the constituent personally, it may be in the interests of the agency for the government lawyer to object to a line of inquiry or take other action in order to prevent unwarranted intrusion into the privacy of its constituent. In many instances, however, particularly given the heightened obligations of candor incumbent on a government lawyer, the government lawyer may intend to disclose embarrassing information received from the constituent. It may be necessary to explain to the constituent that the agency intends to make such disclosure, and that the constituent would have to obtain personal counsel to press any objection. See, e.g., United States v. Schaffer Equip. Co., 11 F.3d. 450, 457 (4th Cir. 1993) (government lawyers breached “general duty of candor to the court [that] exists in connection with an attorney’s role as an officer of the court” by failing to reveal government expert’s falsification of credentials). See also Restatement (Third) of the Law Governing Lawyers § 97 comment f. In this regard, we believe that it is always appropriate for government counsel to advise that under no circumstances may the constituent testify falsely. Cf. NYSBA No. 728 (2000) (DR 7-104(A)(2) “has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel”).

NYSBA No. 728, which dealt with a government attorney’s role as “investigator of the facts relevant to his client’s cause,” addressed another issue government lawyers occasionally confront in dealing with witnesses and agency constituents: whether there is an ethical obligation to advise the constituent of the risk of self-incrimination. The opinion addressed that question in the context of a municipal attorney interviewing an unrepresented claimant against the municipality whose claim related to a matter that had also led to criminal proceedings against the claimant. The opinion noted that an advice of rights might both serve (by promoting fair dealing) and disserve (by impeding information gathering) the municipality’s interests. Thus, “[t]he municipal attorney might reason-
ably conclude that the municipality’s interest in dealing fairly with the public justifies advising the unrepresented claimant to secure a lawyer, even in circumstances where a private party’s lawyer would be disinclined to give this advice.” *Id.* However, “there is nothing in the disciplinary rules that explicitly requires the municipality’s attorney to advise the unrepresented claimant about the need for a lawyer or the risk of self-incrimination,” and the opinion thus left it to the municipality’s law department (or as may have been delegated to individual attorneys) to decide, “as a matter of sound public policy and professional judgment,” whether or not to give advice about the need for an attorney and the risk of self-incrimination. *Id. Cf.* United States v. Valdez, 16 F.3d 1324 (2d Cir.) (discussing trial court’s discretion to advise unrepresented witness of his right against self-incrimination), cert. denied, 513 U.S. 810 (1994); People v. Siegel, 87 N.Y.2d 536, 663 N.E.2d 872, 640 N.Y.S.2d 831 (1995) (similar).

8. Wrongdoing by an Agency Constituent

When confronted with wrongdoing by an agency constituent, DR 5-109(B) provides the following guidance:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

1. Asking reconsideration of the matter;
2. Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
3. Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

DR 5-109 provides useful direction to the government lawyer. We note that reporting organizational wrongdoing may again require the government lawyer to confront the question of what organization he or she represents in a given matter in order to determine “the highest authority that can act in behalf of the organization as determined by applicable law.” See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, comment (c), Identity of a governmental client (regarding the different forms and divisions in which government agencies may exist); comment j, Wrongdoing by a constituent of a governmental client (“referral can often be made to allied governmental agencies, such as . . . a state’s office of attorney general”); ABA Model Rules of Professional Conduct, Rule 1.13 Comment, Government Agency (“in a matter involving the conduct of government officials, a government lawyer may have authority [under applicable law] to question such conduct more extensively than that of a lawyer for a private organization under similar circumstances”). A related question is what entity may have authority to authorize disclosure of information that may be otherwise privileged. See RESTATEMENT §74, comment e, Invoking and waiving the privilege of a governmental client (noting that in some states, the attorney general has authority to waive the privilege, and in other states, the decision is made by another executive officer or agency). In addition, many government agencies are subject to statutes and regulations governing the reporting of waste, fraud and abuse. The nature of any privilege and who controls it must be clearly understood by the government attorney. These are issues of law which the government attorney must resolve as may be necessary to comply with DR 5-109(B)(3).

Finally, DR 5-109(C) provides that “[i]f, despite the lawyer’s efforts in accordance with DR 5-109(B), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in a substantial injury to

7. For example, relying principally on 28 U.S.C. § 535 (2002), the Professional Ethics Committee of the Federal Bar Association has stated that it “does not believe there are any circumstances in which corrupt conduct may not be disclosed by the federally employed lawyer,” apart from circumstances involving personal representation of an individual by the government lawyer. Op. 73-1, The Government Client and Confidentiality, 32 Fed. Bar. J. 71 (1973). This is a question of law as to which we do not opine.
the organization, the lawyer may resign in accordance with DR 2-110.”

DR 5-109(C) provides its small comfort equally to the government lawyer as to private counsel for an organization. But as discussed above, government counsel will have many alternatives to consider before concluding that withdrawal is the only recourse.8

**Conclusion**

Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. However, the conflict of interest questions encountered by government lawyers in civil representation may be particularly complex, and the questions may ultimately be analyzed differently for government lawyers, because of the legal framework within which they function. For example, threshold questions about the identity of the public client, and about whether particular decisions in the representation are entrusted to the government lawyer or to an agency representative, must be determined by reference to the law establishing the government law department, and not exclusively by referring to disciplinary provisions. Similarly, the question of whether a government law department may represent multiple government agencies with differing interests, or even antagonistic positions, is in part a question of law, although ethical considerations suggest that, at the very least, it is advisable to avoid representing public agencies in disputes with each other.

In dealing with individuals within the government (e.g., officers or employees of a government agency), government lawyers must comply with DR 5-109, which generally governs the representation of an entity. When the agency constituents are unrepresented and the government lawyer does not propose to represent them, the lawyer must clarify his or her role as set forth in this opinion. In that event, the government lawyer will be limited in the extent to which he or she may provide advice to the individual. When the lawyer learns of wrongdoing by an unrepresented constituent of the agency, the lawyer must take steps to prevent or rectify the wrongdoing as required by DR 5-109(C) as well as in accordance with legal obligations.

When the government lawyer proposes to represent the constituent, a threshold question is whether the constituent will be represented in his or her official or personal capacity. If the constituent would be repre-

8. There may also be situations where it is permissible or necessary for the government lawyer to withdraw written or oral opinions or representations that the lawyer previously gave. See 4-101(C)(5). An analysis of such situations is beyond the scope of this opinion.
sentenced personally, the lawyer must first determine whether the representation is permissible under the conflict of interest rule, DR 5-105, and must comply with the rule's procedural requirements in light of the framework provided in this opinion.

September 2004

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