



National Security Law Report

*Editor's Note: In this issue we present an exchange of views between Professors **Margaret Satterthwaite** (NYU) and **John Radsan** (William Mitchell) concerning the practice popularly known as "extraordinary rendition." This debate is the third in a series that we have presented this year on topics of pressing national concern. More will follow in the issues to come. In the same spirit, this issue also provides an edited transcript of a recent debate between Professors **John Yoo** (Berkeley) and **Jesse Choper** (Berkeley) concerning U.S. policy toward Guantanamo detainees.*

What's Wrong With Rendition?

Margaret Satterthwaite

By now, there are few—if any—commentators, policy-makers, or national security experts who will defend the policy of "extraordinary rendition." More precisely, everyone now agrees that extraordinary rendition—transferring individuals (since 9/11, usually terrorism suspects) to countries where they face a substantial risk of torture—is illegal, morally wrong, counterproductive, or a combination of the three.

Where the debate still rages is in relation to three main issues: (a) whether it is likewise wrong to transfer a terrorism suspect to a country where s/he is likely to face cruel, inhuman and degrading treatment ("CIDT") that stops short of torture; (b) whether informal promises by a receiving country—usually referred to as "diplomatic assurances"—are legally sufficient to obviate an otherwise patent risk of torture upon transfer; and (c) whether there are any legal, moral, or policy constraints on the transfer of an individual outside of legal process when risk of torture and CIDT are not a concern. In this brief essay, I will address each of these issues, arguing that (a) it is illegal to transfer suspects to countries where they are at serious risk of mistreatment short of torture; (b) diplomatic assurances are not worth the paper they are (not) written on; and (c) even absent a substantial risk of torture or CIDT, informal transfers, as currently practiced,

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Transferring Suspected Terrorists

A. John Radsan

The public continues to learn about the transfer of terrorists, but we have still not answered basic questions about a practice that has expanded since 9/11. One question is whether American transfers of suspected terrorists to other countries for detention and interrogation are immoral. A second question is whether they are bad policy. A third question is whether they are legal. For the first two questions, lawyers do not have any special advantage. But, with experience and judgment and common sense, lawyers should be able to provide greater assistance on the third question.

Although American agencies other than the Central Intelligence Agency (CIA) have taken part in rendition, CIA practices have caused the greatest uproar. Therefore, not shying away from controversy, I focus on what my former employer has done. Rendition, whether extraordinary or irregular, conflates two steps in a process, the first taking control of the suspect, the second moving him to another jurisdiction. Here, for precision's sake, I refer to "snatches" for the first step and "transfers" for the second step.

The analysis of the first step is straightforward. If the CIA snatches a suspect in another country without that country's consent or without the

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are prohibited under international law and should be formalized and regulated.

By way of necessary background, before addressing these three issues, I will briefly outline the reasons that the practice of extraordinary rendition is now nearly universally rejected. First, extraordinary rendition is illegal. The United States has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT” or “Torture Convention”) and the International Covenant on Civil and Political Rights (“ICCPR”), which both prohibit the *refoulement* (return or transfer) of individuals to countries where they are at a risk of torture. The ICCPR’s *non-refoulement* rule is implicit in that treaty’s Article 7, which categorically prohibits torture and CIDT. Article 3 of the Torture Convention explicitly prohibits the transfer of an individual “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act (“FARRA”), which included language implementing Article 3 of CAT, transforming the *non-refoulement* rule from an international legal obligation binding on the U.S. into a domestic legal standard. Congress instructed “all relevant agencies” to promulgate implementing regulations that would carry out the stated policy of the United States to refrain from transferring “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.” Most agencies did so. The Central Intelligence Agency (“CIA”) and the Department of Defense (“DOD”), two of the main actors in rendition operations, failed to create such regulations. These agencies, however, remain under a legal obligation to refrain from conduct that would violate FARRA, meaning that they may not transfer an individual to a country where the individual would be more likely

than not to face torture. In brief, then, extraordinary rendition—defined here as the transfer of an individual to a country where s/he is at risk of torture—is prohibited by international law binding on the United States and is illegal under U.S. statutory law as well.

With that settled, the first issue I address is whether the United States may lawfully transfer an individual to a country where s/he is at risk of CIDT when the abuse does not amount to torture. Confusion arises in this context because the U.S. has ratified two different treaties that each set out a different standard concerning *non-refoulement*. As discussed above, CAT prohibits transfers to a risk of *torture*. The ICCPR, on the other hand, prohibits transfers to a risk of torture *and* CIDT. This prohibition is not explicit, but stems from the non-derogable nature of the prohibition of ill-treatment set out in Article 7 of the ICCPR, and the recognition that CIDT at times becomes so severe that it amounts to torture. The ICCPR refused to draw a bright line between the two forms of ill-treatment, instead prohibiting both in stark terms. On the basis of this equality of protection, numerous international bodies have determined that the ICCPR and similar conventions prohibit all transfers to a risk of

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torture *or* CIDT. Until now, however, this rule has not been implemented domestically. Despite this failure, the United States ratified the ICCPR without relevant reservations, and it is thus bound by this requirement to refrain from transferring individuals to a risk of CIDT. Renditions to a risk of cruel, inhuman or degrading treatment should be explicitly banned by Congress.

Second, if it is impermissible for the United States to transfer individuals to countries where they face a substantial risk of torture or CIDT, will diplomatic assurances be sufficient to protect against this risk, transforming otherwise risky transfers into legal ones? Diplomatic assurances (“DAs”) are promises made by a receiving country concerning the treatment of a specific individual facing transfer. While DAs are subject to regulation when used in the context of extradition or removal from inside the United States, there are no such regulations applicable to extra-territorial transfers. Assurances have, however, been obtained by the Department of Defense when affecting transfers from Guantánamo Bay, and by the CIA when transferring individuals to countries such as Egypt, Syria, and Morocco. While DAs may seem perfectly reasonable in the abstract, they are woefully inadequate in practice. This is true for three main reasons. First, instead of being secured through a legally-authorized procedure, DAs are obtained through back-room deals by diplomats in secret. Second, assurances have not been subject to judicial review. Individuals facing rendition are by definition unable to access review, since they are picked up and transferred without any process at all. Third, once secured, assurances are not carefully monitored. This is in part because the incentive structure behind such promises ensures that both parties will minimize opportunities to discover whether breaches have occurred, since such breaches would reflect badly on both sending and receiving countries. International human rights bodies have found that both CAT and the ICCPR require that DAs fulfill three basic requirements to be permissible:

- (1) Assurances must be obtained using “clear” and established procedures.
- (2) Assurances must be subject to judicial review.
- (3) Assurances must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.

U.S. practice concerning DAs is out of compliance with each of these requirements, and is therefore illegal under human rights law. Congress should either reject DAs outright, or strictly regulate their use.

The final issue is whether there are any legal, moral, or policy constraints on the transfer of an individual outside of legal process when risk of torture (and CIDT) is not a concern. This form of transfer—rendition without the modifier “extraordinary”—is the form that has been most vociferously defended by administration officials and commentators. For example, on December 5, 2005, Secretary of State Condoleezza Rice claimed that, “[f]or decades, the United States and other countries have used “renditions” to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.” Secretary Rice was right that the U.S. and other States have used rendition to bring individuals into their territory to face regular criminal charges. Indeed, the United States has used such “renditions to justice” as an official policy since the Regan era, when drug kingpins and criminals wanted for terrorist crimes were lured or abducted to the United States to stand trial with full Constitutional guarantees of due process. What is different now is that there is no effort to charge or bring to trial individuals who have been transferred. Instead, individuals are picked up, transferred, and interrogated or detained without charge. The detaining powers are U.S. “war on terror” allies such as Egypt and Pakistan, or the U.S. itself, which holds such individuals in practice is in fact unlawful, and should be either halted or brought in line with international law.

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Under international law, there are several basic principles that must be upheld whenever an individual is transferred from the custody of one government to that of another. First, the transferring state must respect the sovereignty of the state where the individual is found. This requirement means, for example, that a transferring state may not abduct an individual on another state's territory without the permission of that state. Of course, sovereignty concerns are not always an issue, since an individual may be apprehended on the high seas or with the cooperation of the state where the individual is found. Second, in all cases, the transferring state must respect and protect the human rights of the individual being transferred once that person is taken into their custody. This requires, at minimum, that the transferring state act in accordance with the principle of legality, meaning that the apprehension must have a basis in established law, and that the apprehension must not amount to arbitrary deprivation of liberty under international human rights law. This is especially relevant for individuals apprehended and sent to CIA "black sites" or foreign interrogation centers, where no procedures whatsoever are in place to check against arbitrariness of detention. Finally, while international law in this area is nascent, a procedural right to challenge transfer before it has been effected has been clearly enunciated by a number of international bodies. This right requires states to provide a forum in which the individual facing transfer can access a neutral decision-maker to articulate his or her challenge to the contemplated transfer. The scope of this challenge has not been clearly articulated, but at a minimum it includes the procedural right to make out a claim of *non-refoulement*. Although this may sound like a simple restatement of the earlier substantive rule against return to a risk of torture, this is in fact a right to a specific procedure—one that would allow the individual himself to articulate his subjective fear of mistreatment—and not one in which the transferring state determines, *ex parte*, whether a risk exists or not. It is up to the transferring state to determine

whether this challenge should be heard by a traditional court, an administrative body, or some other neutral decision-maker authorized by law, but in all cases, the review available must be conducted by a body that has been regularly constituted and which is governed by transparent procedures.

Until and unless the United States complies with its human rights obligations when carrying out informal transfers, it is flouting international law. What was once an informal process designed to bring scofflaws within the reach of justice has become a process aimed at taking individuals outside the rule of law.

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United States being at war with that country, the CIA's action would almost surely violate the other country's law. That illegality cannot be defined away. The snatch would constitute kidnapping or abduction or something similarly illegal under the other country's laws and would probably violate treaties and customary international law.

So it should not come as a surprise that the CIA's snatches of two suspects, as alleged in Italy and Germany, have led to indictments against dozens of CIA personnel and to condemnation from the European Union and other groups. Abu Omar, an Egyptian cleric, says he was swept in 2003 from his political asylum in Milan, Italy, then transferred to Egypt. Khaled El-Masri, a German of Lebanese origin, says he was abducted at the end of 2003 during a trip to Macedonia when he was taking time away from his family, then transferred to Afghanistan. Both men claim they were tortured during

confinement. Abu Omar was released from Egypt in 2007, uncharged. Masri was released in Albania in 2004, also uncharged. For the moment, Abu Omar has not brought a civil suit against the United States, and Masri's suit was shut down after the United States asserted the state secrets privilege.

On these two cases, the CIA may have received permission from local authorities for the snatches. When the CIA has such consent—express or implied—the analysis becomes complicated. For Abu Omar and Masri, the analysis must delve into the intricacies of Italian law or German law or the law of any other country involved such as Macedonia. Under those laws—which are beyond the expertise of most American lawyers—one should ask whether another country's intelligence service (or some entity other than the courts or magistrates) may excuse or justify what would otherwise be a kidnapping. A principled argument, so it seems, might be made that the involvement of another intelligence service, rather than authorize or decriminalize the snatch, merely adds another party to an international conspiracy.

The legality of the second step in rendition, the transfer of the suspect to another jurisdiction, is complicated. When analyzing that step, it is a disservice to pretend that commander-in-chief powers solve all riddles or, at the other extreme, to display a total bias against all transfers. Instead, reasonable people must muddle through the answers to difficult questions.

One question, assuming the Convention Against Torture (CAT) is not completely self-executing, is whether its relevant provisions have been incorporated into American law. Article 3 of the CAT states that a signatory, based on a totality of circumstances, may not transfer a person to another jurisdiction if there are substantial grounds for believing that he or she will be tortured there. The Senate ratified the CAT on the understanding that "substantial grounds" means more likely than not, but, for purposes of incorporation, Senate ratification differs from legislation passed by two houses of Congress and signed by the president.

Another question is whether the American law which has been incorporated applies to the CIA. As required by statute, some American agencies have issued regulations that adopt the more likely than not standard for their transfers. That standard, for example, applies to immigration removals. But, even today, we cannot tell whether the CIA has issued its own regulations. John Bellinger, the State Department's legal advisor, has generally said that the United States complies with Article 3, but, given all the carve-outs in his statements, one cannot be sure he includes the CIA.

There are more questions. Does Article 3 apply only to transfers from American territory to another jurisdiction? That is John Yoo's argument, based on a parallel to the Refugee Convention. He argues, against the academic consensus, that the CAT does not have extraterritorial effect. If that is true, the CAT would not affect transfers from one point outside American jurisdiction to another point outside American jurisdiction. By this argument, as long as the CIA keeps its prisoners outside the United States it would not have to worry about the CAT. (But where does Guantanamo fall in this inside/outside dichotomy in light of the Supreme Court's decision that non-U.S. citizens at Guantanamo have access to American courts?)

Those opposed to extraordinary rendition—from the human rights community and elsewhere—often define rendition as a transfer in which the sending country knows that the suspect will be tortured in the receiving country. The opponents presume to know the CIA's motives, always setting them in the darkest terms. The suspect is transferred not because the receiving country has more interrogators who speak his language, not because the receiving country has a greater interest in him. No, the opponents say, the suspect is transferred because the CIA wants him tortured and its officers are not willing or able to do the dirty work. That is too categorical, though.

Pragmatists, different from both Yoo and the human rights community, take toward the middle. Their

analysis focuses on a particular transfer. Case by case, they work in a wide space between total approval and complete condemnation. They know that prisoners, including suspected terrorists, are transferred all the time from cells to cells, from states to states. Just so, the legality of any one transfer depends on a totality of the circumstances.

One type of transfer, extradition, suits a preference for the formal. These transfers are done according to treaty, involving a pair of courts and foreign ministries in the sending and receiving countries. Even so, extradition does not guarantee that the prisoner will be treated properly in the receiving country. Extradition is not the only way to transfer a suspect under the law.

From Guantanamo, prisoners are sometimes released to their home countries. This type of transfer, strictly speaking, is not an extradition. The courts are not involved, and negotiations related to these transfers are conducted between the United States executive branch and the executive department in the receiving country. For such transfers, United States officials claim to do their best to comply with Article 3 of the CAT. As a result, the pragmatist should concede that transfers from Guantanamo are neither *per se* legal nor *per se* illegal.

On close calls, assurances from the receiving country and post-transfer monitoring by the sending country (or by third parties) may make a difference; the assurances and the monitoring may tilt the balance toward legality. On transfers from Guantanamo, John Bellinger has made clear that assurances from receiving countries are an important factor. Often, these assurances are detailed and in writing. Less has been said, however, about any monitoring of prisoners after their transfer. Conceivably, if the Defense Department and the CIA were committed to making sure prisoners are not tortured in receiving countries, they could implement a process of open (and secret) monitoring.

In answering specific questions about rendition, extreme positions are off the mark. Sometimes the

CIA does not have substantial grounds that a suspect will be tortured upon transfer. For example, when the CIA released Masri, it was unlikely that he would be tortured—whether in Albania or in Germany. Masri was released, not in response to an extradition request, but by the most informal means. His earlier transfer to Afghanistan, to be sure, may have been a problem, but his release in Albania with the idea that he would make his way back to Germany was less of a problem.

The CAT standard, to be more specific, does not preclude a transfer if there is just a slight possibility of torture. That would be unrealistic; no matter where a prisoner is held, he is not one-hundred percent safe from abuse. No doubt, mistreatment is more likely in secret sites than in monitored facilities. Accordingly, the CIA did decrease the possibility of torture when it transferred fourteen high-level terrorists from secret prisons to Guantanamo in 2006. Those transfers, including the presumed mastermind to the 9/11 attacks, improved the situation for the prisoners. Pure positions aside, who would prefer that the CIA leave Khalid Sheikh Mohammed and company in secret sites rather than transfer them to a known site by “irregular” means?

In all, I try not to minimize the abuses or the potential for abuse. Some transfers should be off limits. For example, if Maher Arar’s allegations are true that he was tortured after transfer to Syria and if the United States again takes control of this Canadian citizen, it is difficult, if not impossible, to justify another transfer to Syria. Even a full range of written assurances from the Syrians and intrusive third-party monitoring after transfer is probably not enough to comply with the CAT in Arar’s case.

Some transfers, at one pole, are clearly illegal. Some, at another pole, are clearly legal. Yes, from time to time, there are easy cases. Otherwise, we must struggle with choices of morality, policy, and legality that occur in the daunting space between the two poles.

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and Director of the National Security Forum, and a former federal prosecutor and assistant general counsel at the CIA.

Satterthwaite Replies

In his opening essay, John Radsan addresses some of the moral, political, and legal aspects of extraordinary rendition. I am in full agreement with Professor Radsan that rigorous legal analysis is essential to this discussion. What is missing from his essay, however, is one of the critical components of such an analysis: consideration of the human rights of the individual facing transfer. By including controlling human rights law in the analysis of rendition, the true problems with the program are unveiled.

First, Professor Radsan suggests that critics of the rendition program have imputed evil motives to U.S. officials who design, approve, and undertake rendition operations. I agree that some critics of rendition engage in such over-simplified vilification. Professor Radsan's point is that this critique is unavailing because we cannot know the motives of the officials engaging in the program. In fact, these motives and intent could not be less pertinent. Under human rights law, the most relevant rule—that prohibiting *refoulement*—prevents transfers to countries where individuals are at a substantial risk of torture. The test is objective: what matters is whether a transfer is carried out in the face of a significant risk, not what the country may have

intended or hoped would befall the detainee once he is delivered to the receiving state (whether good or ill).

Second, Professor Radsan suggests that those who oppose informal transfers are placed in a moral bind when they are forced to oppose transfers like those of Khaled El Masri out of secret detention in Afghanistan. This critique arises from a failure to take into account the human rights argument concerning the entire program—that the U.S. would never face quandaries such as how to lawfully transfer a detainee back to his country of nationality had it not abducted and secretly detained him contrary to his human rights. The fact that the entire operation is unlawful under human rights law—from the moment of abduction through the secret detention and final informal transfer—means that human rights advocates often focus most attention on the transfer *into* the program rather than the informal transfer *out* of it.

Beyond these straw men, Professor Radsan's main argument explores some of the legal limits on extraordinary rendition. Here we agree on several points, though we differ on the consequences. First, limits are imposed through the public international law rule that a state may not use force on another state's territory without the host state's consent. Professor Radsan thus correctly concedes that CIA "snatches" carried out within a foreign

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state without the consent of that state's authorities will be illegal. We therefore agree that the kidnapping of Abu Omar in Milan would be illegal if the government of Italy did not consent to the action. Where I disagree, however, is in the impact of the state's consent or cooperation on the legality of the action under international law. The host state's consent will not be sufficient—on its own—to remove any illegality inherent in an extraordinary rendition, since another set of rules is binding on the United States: international human rights law. In other words, it does not matter whether Italy has consented to the abduction and rendition of Abu Omar if that “snatch”-and-transfer amounts to a violation of the detainee's human rights. As I demonstrate in my opening essay, when a detainee is abducted without any due process and transferred to a location where he faces a significant risk of torture, the operation is illegal.

Professor Radsan also examines the restrictions placed on CIA “snatches” and transfers pursuant to domestic U.S. law implementing international human rights standards (i.e. limits imposed on agencies' actions pursuant to the Congressional statute that implements Article 3 of the Convention Against Torture). Professor Radsan appears to concede that certain “snatch”-and-transfer missions would be rendered illegal if the CIA had promulgated regulations applying Article 3's rule against transfer to a risk of torture. Since the agency has not implemented the rule, he suggests, and because the treaty is not self-executing, there are no such limits emanating from the CAT. There are two problems with this argument. First, from the perspective of domestic administrative law, the CIA's failure to promulgate regulations does not exempt it from a binding rule. The relevant statute instructs all “relevant agencies” to promulgate regulations enforcing Article 3 of CAT. As one of those relevant agencies, the CIA's failure to implement regulations actually compounds the illegality of the agency's actions in carrying out an extraordinary rendition. Second, the question of whether a treaty

is self-executing or not is a domestic law question that does not resolve the matter of the treaty's force vis-à-vis the ratifying state. Indeed, international law is largely agnostic as to the methods by which a treaty is made effective in the domestic law of a state; what matters is that the treaty is binding on all organs of the state, whether or not the state has effectively implemented the treaty. CAT Article 3 is therefore binding on the CIA as a matter of public international law despite the agency's failure to implement regulations pursuant to federal statute.

Finally, Professor Radsan explains that the criminal law of the host state where a “snatch” occurs may excuse otherwise illegal activities. The local law of a country like Italy, for example, where Abu Omar was abducted, may countenance a defense of necessity as a justification for committing the otherwise criminal act of kidnapping. While we agree on this point, I disagree that the analysis ends there. Even if CIA agents and their local counterparts benefit from the application of a domestic rule of law excusing criminal acts in cases of national emergency or state necessity, the international human rights law protecting the detainee himself—i.e. the right of Abu Omar to be free from abduction and transfer to a risk of torture—still has force.

In sum, by failing to consider international human rights law, Professor Radsan implies that it does not exist—or at least that it does not matter. Human rights law is concerned with the rights of the individual being “snatched” and transferred, and it is thus central to determining whether renditions are either legal or moral.

Radsan Replies....

As much as our moderator has tried to focus us on irregular rendition, a debate about national security tends to evolve (or devolve) into different interpretations of the Constitution. Such debates take us back to first principles which have not been synthesized into a grand unified theory. Thus, two law professors, as delegates of sorts for opposing branches of our government, have accepted an

invitation to struggle toward an appropriate process for transferring people from one jurisdiction to another.

Because Professor Satterthwaite and I start from different points or because we give different weight to conflicting values, in the end, we may be both right about irregular rendition even though we have said very different things.

So, to start, the good news is that not everything between us is discord. Professor Satterthwaite and I overlap on the appropriate references in assessing the legality of irregular rendition. We both take into consideration Article 3 of the Convention Against Torture and the 1998 Foreign Affairs Reform and Restructuring Act (FARRA). We both agree that American authorities should not transfer a prisoner when it is more likely than not that the receiving country will torture him or her.

Professor Satterthwaite, unlike me, delves into the International Covenant on Civil and Political Rights (ICCPR), something she claims not only precludes transfers when there is a significant risk of torture but also when there is a significant risk of a lesser form of mistreatment called cruel, inhuman and degrading treatment. Even so, Professor Satterthwaite concedes the possibility that the ICCPR has “not been implemented domestically;” the ICCPR’s ban on transfers to countries that torture is, at most, “implicit” to that treaty. But let’s not quibble too much about one reference.

The greatest distance between Professor Satterthwaite and me concerns the value of assurances from the receiving country that a prisoner will be properly treated upon transfer. Our disagreement has several levels.

First, while she believes that assurances have been empty promises, I believe that assurances, sometimes sincere and real, can make a difference on close calls. Second, while she seems to suggest the assurances will always be negotiated between diplomats in the sending and receiving countries, I recognize that the negotiations can also involve law

enforcement and intelligence services, entities she may trust even less than the foreign ministries. Third, for assurances to be effective, she says they “must be followed by effective post-return monitoring.” But, in my view, assurances and post-transfer monitoring are separate tools for making an irregular rendition legal. In short, I do not always combine the two tools. In some cases, assurances, by themselves, may tilt the balance toward legality. In other cases, post-transfer monitoring, by itself, may be enough. And in other cases, a combination of the two tools may be enough—or still not enough. So much depends on the circumstances, much more apparent to Executive officials than to two law professors. Fourth, perhaps at the bedrock of our dispute, she does not trust our Executive branch without external checks.

At one point, Professor Satterthwaite states that the assurances “must be subject to judicial review.” Elsewhere, she states that the transferring country may choose among “a traditional court,” “an administrative body,” or “some other neutral decision-maker.” In either statement, she is clear that she does not want Executive officials, without some external review, to be making determinations about the risk of torture or cruel treatment. As a result, our disagreement about assurances plays into separation of powers.

Even if we agreed that irregular rendition involves a shared power, we may still disagree on whether congressional actions, so far, support or take away from the president’s authority. Such disagreement explains the Supreme Court’s dissonance on other national security issues, whether it was the detention of a U.S. citizen as an enemy combatant (*Hamdi v. Rumsfeld*) or the procedures for military commissions at Guantanamo (*Hamdan v. Rumsfeld*). The Authorization for Use of Military Force (AUMF), passed days after 9/11, saved the Bush administration in *Hamdi*, but not in *Hamdan*. Now, while the Supreme Court is silent on irregular rendition, the Bush Administration may be using the AUMF, mixed in with the CAT and FARRA, to justify its policies.

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Radsan replies...

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Still, some things are clear to both Professor Satterthwaite and me. External checks, such as congressional oversight committees, help ensure that the CIA stays in line. The tension between secrecy and democracy can be reduced. But, contrary to what she says, just because Executive officials sometimes act without an external check does not necessarily mean they have descended into lawlessness and immorality. Those officials, just as legislators and judges, swear to uphold the Constitution. Indeed, in a few cases, the Constitution is explicit about the president's unfettered power. One example is the power to pardon offenses. Similarly, does Professor Satterthwaite agree that the president has an area of unfettered power in conducting our foreign policy and in serving as our commander-in-chief? To be more specific, would she call on Congress and the courts to second-guess where American generals have placed tanks and troops on a battlefield? Probably not. Therefore, the debate can be reduced to choosing a category for irregular rendition.

Professor Satterthwaite and I, in effect, are trying to decide whether irregular rendition fits within the president's core powers or whether rendition is an area of shared power with Congress and the courts. In all, we are affected by temperament as much as by text. To be sure, the principles of due process do constrain the president most in transfers of a U.S. citizen or in transfers of anyone from within U.S. territory. Quite different, however, is the CIA's reported practice of irregular rendition, which seems to apply only to non-U.S. citizens held outside U.S. territory. There, due process reigns less supreme.

So the debate about irregular rendition spins toward theology. Some have blind faith about the practice; others are extreme atheists; most are somewhere in the middle. One professor does not trust the president, guided by the rule of law and advised by political appointees, professional bureaucrats,

inspectors general, and lawyers, to do the right thing. Another professor, suspending hesitations and doubts, does.

John Yoo and Jesse Choper Debate the Military Commissions Act's Restraint of Habeas Jurisdiction (transcript of remarks)

PROFESSOR YOO: Jesse and I are going to talk about the Military Commission Act. This comes from a dialogue that we both wrote together for the *California Law Review*. It's an effort to restore the idea of writing a Socratic dialogue between two people about this basic question of the power of the courts to review federal questions, and the power of Congress to remove it.

I'll just start my opening salvo by saying, to me, it seems that the Congress stripping jurisdiction of the courts is really just an effort to restore the law to the way it was before 2004. Before 2004, the federal courts had never heard a case in *habeas corpus*, or any other kind of federal cause of action, by an enemy combatant who was held outside the United States. The only exception involved American citizens, who always had the right to challenge their detention by their government whenever or wherever they are held. But enemy prisoners who were fighting against us in war had never had that right of access to the court system. So I think what was the revolutionary change was not Congress's action [in the MCA] but the Court [in *Rasul*] for the first time saying, no, we're going to exercise that kind of jurisdiction which is traditionally used in the criminal process to test the legality of criminal prosecutions and convictions. Then you had this two-year go-around between the courts and Congress, where Congress has been trying to change the rule back to what it was before the *Rasul* decision. I think it's perfectly within Congress's powers to correct mistakes and errors by the Supreme Court in that way.

DEAN CHOPER: I want to begin with one general point. The question of the reach of federal *habeas corpus*, at least to this point, has more or less been

dependent on the reach of the *habeas* statute. So when we say that *habeas corpus* extends to a particular situation, we mean that this is the way the Court has interpreted the statute. The extent to which the Constitution may require this is largely uncharted territory.

The law always was that the federal courts have *habeas* jurisdiction over anyone who is detained within the “sovereign territory of the United States.” So, for example, in the second world war, Japanese General Yamashita was tried in the Philippines by an American court martial. He challenged his conviction by a writ of *habeas corpus*. He lost on the merits, but the Court heard his petition because the Philippines was an American possession, and thus was within the sovereign territory of the United States.

In my judgment, the Court needed no correction after *Rasul*. I thought the Court made only a tiny move in that case. It held in effect that Guantánamo was the functional equivalent, *de facto*, of sovereign territory of the United States because of the lease agreement, which the Court found gave the United States “complete jurisdiction and control.” This was a lease in perpetuity. That’s a long time, and the lease gave the U.S. total power to exclude Cuba from the property. Cuba has respected that. This may not be *de jure* sovereign territory because Cuba continues to own it. But with ownership like that, it seems to me that it was *de facto* U.S. territory. I think the big step taken by Congress in the MCA and the Detainee Treatment Act was to try to repeal jurisdiction which, in my judgment, was effectively always there under the federal *habeas* statute.

PROFESSOR YOO: Let me respond briefly at this point about Guantánamo Bay. First, Cuba does own Guantánamo Bay and could kick the United States out. We might be able to sue it for damages, just like you would with a breach of contract, but it’s not as if the territory belongs to us. There’s also a case that’s very similar that the Supreme Court decided at the end of World War II called *Johnson v. Eisentrager*, where the United States detained and then ultimately tried by military court and convicted and imprisoned a German on an American military base in occupied Germany. In that case the detainees got all the way to

the Supreme Court seeking a writ of *habeas corpus*. And in that case the Supreme Court said this is outside the territory of the United States; we’re not going to hear a *habeas corpus* petition. If you want to talk about effective jurisdiction and control, the United States’s authority in Germany in 1950 was much greater than what it is in Guantánamo Bay today. The nation of Germany did not exist in 1950. Those of you who may be World War II buffs may remember that the government of Germany was extinguished at the end of World War II, and the United States was the effective sovereign in the American occupied zone of Germany until the United States allowed Germany to restore itself as a nation. I don’t think there’s much difference actually between the *Eisentrager* case and what Guantánamo Bay is today. I think the Supreme Court just decided to change the rule. That’s its prerogative.

[But] let’s accept Jesse’s reading of the statute. It’s still the case, it seems to me, that Congress has the authority to control the jurisdiction of the federal courts. If Congress wants to limit the jurisdiction of federal courts over some classes of cases, it has that authority. It exercised that authority during the Civil War in a case that’s a little bit like this one. In the Civil War, there was a case called *Ex parte McCordle*, where a person held by Union authorities after the end of the Civil War for insurrection--attempting to overthrow legitimate government--was detained. He was a citizen on American territory. He brought a writ of *habeas corpus*. He got all the way to the Supreme Court. He argued his case. In between argument of the case and the final decision, Congress passed a statute saying there’s no jurisdiction in the Supreme Court over this case. And the Court then held it had no jurisdiction or authority to hear that case, and dismissed it.

DEAN CHOPER: I’m perfectly willing to accept that Congress may regulate the jurisdiction of the federal courts. But there are constitutional limits to all congressional power. That is the uncharted territory that we’re going to talk about. It is true that Article III grants the Supreme Court appellate jurisdiction subject to exceptions or regulations that Congress may

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make. It also provides for federal courts if Congress sets them up. So theoretically, you can say Congress may change its mind about all the federal courts, take them away, and also make exceptions to the Supreme Court's appellate jurisdiction respecting cases from state courts--so many exceptions that nothing is left. But I don't think that is what the Constitution permits. The Court decided *McCordle* in the context of the existence of another route to get to the Supreme Court. Indeed, a few years later a case came to the Supreme Court making a constitutional challenge similar to *McCordle*'s and the Court upheld its jurisdiction because the case arose as an original writ of *habeas corpus* filed in the Supreme Court, and Congress had not eliminated that form of jurisdiction. So there was another route to judicial review that *McCordle* could have, but had not, pursued.

In both the DTA and MCA, Congress cut off all Article III review subject to certain exceptions. And that's the question. My own position is that, at a minimum, anyone who is under executive detention--and that's what we're talking about at Guantánamo--usually has the constitutional right to some review by an Article III court--in contrast to a military commission, because that's an Article I court. The judges of military commissions are selected through a totally different process. If the president doesn't like the decisions that the members of the military commission make, they may be fired. (This could happen, you know, even in respect to US attorneys). So I think persons detained by the executive are ordinarily entitled to some review by an Article III judge, a person with a lifetime appointment who can render independent decisions.

PROFESSOR YOO: Well, I think that's Jesse's position. I would say that's probably the majority opinion amongst most academics in the law schools of America today. It is not consistent, as with most anything most law professors agree today, with reality.

It's never been the case that federal courts have jurisdiction over every question arising under federal law when those laws benefit individuals. Today we're

familiar with federal question jurisdiction: that the courts exercise jurisdiction over every question arising under federal law. The statute providing that jurisdiction did not exist until 1875. So, for the first hundred years of the republic there was no general right to go to federal court to have every question of federal law adjudicated. Still today there are areas where there is no full federal court jurisdiction over federal issues. Take the diversity statute. The federal diversity statute clearly is an area where federal courts do not exercise the full authority that you would think it might have under the Constitution if you were to take a broader view.

To narrow the point to executive detention, it's also not the case that historically the United States has ever allowed its courts to grant full rights to people whenever held by the Executive Branch. Think about World War II. In World War II, the United States detained over one million prisoners of war. There are no cases of all those prisoners of war bringing *habeas corpus* challenges in federal courts. In fact, many hundreds of thousands were brought back to the United States for detention. There were camps in California. It's remarkable if you ever look at the history of these camps. I wasn't aware of it until I started looking at that subject, but there were these German prisoners in camps in California where they were treated very friendly. They were allowed to check themselves out during the day and on their honor were expected to come back at night, and they would perform jobs during the day. They were very loosely guarded. None of them were granted *habeas corpus* petitions seeking their release.

The real issue is that these writs of *habeas corpus*--rights over federal jurisdiction which are so important to our criminal justice system--are really unknown when the United States is at war. Think about the Civil War. Under Jesse's theory, every prisoner in the Civil War should have been able to bring a writ of *habeas corpus*. Every person captured in the Civil War was an American citizen; Lincoln's whole theory was that they could not secede and give up their citizenship. There are no cases of them bringing and successfully winning writs of *habeas corpus*. Lincoln suspended the writ of *habeas corpus* on his own, but even after the end of the Civil War they were not permitted to

bring or seek writs of *habeas corpus*. The courts did not return and say that's unconstitutional. Rather, especially in war time, Congress has this authority which it has used to ensure that our own civilian courts are not used against us, as a private forum for prisoners to try to win their release.

DEAN CHOPER: It is certainly true that my view is in the majority among academics. Indeed, "the majority" puts it mildly. But I also think my view is that of the majority of the present members of the United States Supreme Court. Perhaps not every aspect of it, but surely some of it, as the Court held about four years ago in the *Hamdi* case. Hamdi was an American citizen being held as an enemy combatant—not a prisoner of war. I'll call him an unlawful enemy combatant. He was captured in Afghanistan and brought to Guantánamo. When it was discovered that he was an American citizen, he was transferred to the United States. Hamdi claimed that he had nothing to do with the Taliban. The Court held that the Due Process Clause gave him some right to challenge his detention. Eight justices of the Supreme Court ruled against the government. Only Justice Thomas dissented.

It is certainly not my view that there is a constitutional right to an Article III judge for every question arising under federal law. It's perfectly plain that Congress has substantial regulatory authority over the federal court system. We are not talking about a diversity case, or a statutory interpretation case. It is an individual constitutional rights case. Further, I want to say that I'm not talking about every executive detention. There are different kinds of detentions. So far as prisoners of war are concerned, I would not change the rule one bit. A conventional prisoner of war, captured on the battlefield, who has concededly been fighting against us, has no right to review in a federal court. Such persons are protected by the Geneva Conventions, and by the laws of war, and by various other treaties. That means two things. First of all, they can't be interrogated. We've all seen the movies: name, rank, and serial number. That's all they have to reveal. But no one takes the view that that's all that's being done to the persons being detained on Guantánamo. Indeed, the justification for some of these detentions is getting information from those

incarcerated. They are clearly not your ordinary prisoners of war.

The second category contains persons being tried for war crimes, which means they could end up in prison after the trial. I would grant these defendants some right to review by an Article III judge. My view is that this is guaranteed by the Due Process Clause, bolstered by the *habeas corpus* provision. I know of no case apart from the World War II ruling in *Johnson v. Eisentrager* that stands in opposition. But this is 60 years later. Many Supreme Court decisions have been handed down since then that disagree with those decided more than a half century earlier. I am persuaded that a majority of the present Supreme Court would likely follow my position.

One last category involves people who are not conventional prisoners of war and who are not being tried for any war crime. They are simply being detained but claim not to be unlawful enemy combatants. There are a number of people claiming that. In respect to these, I would distinguish between aliens and citizens, and between whether or not they are in the United States—although I'd put Guantánamo, as I have said, within the territory of the United States. My approach would be that American citizen in this category have a right to some Article III review on the issue of whether they are unlawful enemy combatants. The Court held in *Hamdi* that that is a constitutional right. I would extend *Hamdi* one step to aliens who are within the territory of the United States. Although this is surely not found in the explicit language of the Constitution, as *Johnson v. Eisentrager* tells us, and although this may never have been considered by the Framers, it does seem to me to be the proper rule.

PROFESSOR YOO: This debate is very useful because Jesse's very honest, and when you debate with a lot of people about the subject, they will say there should be rights for [the detainees, but] they never explain where the right comes from. Jesse is being honest and resorting to the last refuge of the academic scoundrel, which is the Due Process Clause. That is, if there's something you think isn't right, where else are you going to find it? Where do you find the right to privacy, the right to abortion, or other non-

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textual rights recognized by the Supreme Court? It's got to be the Due Process Clause. At least Jesse's being open and honest and saying he's not pulling this principle from the cases; he's pulling it from the same place the Court has found a great number of other made-up rights.

Let's look and see whether this comports with our notions of due process, because if you take a look at the Court's jurisprudence, it says that the Due Process Clause ought to be interpreted in terms of what Americans historically and traditionally think ought to be the process that's due. Now [Jesse is] perfectly right; POWs who traditionally are governed by the Geneva Conventions never receive any right to a hearing. The remarkable thing about Jesse's position is, I think, for people who are illegal combatants--people who actually violate the laws of war, who fight the way the Al Qaeda does without wearing uniforms or by launching surprise attacks on civilians--ought to get more process than the prisoners of war who follow all the laws of war. You would say if you are a member of Al Qaeda and you're an illegal enemy combatant, you actually have a right to federal court. If you follow all the rules, you don't get a right to federal court. There is a sort of a strange incentive system that it creates.

Historically, this has never been true. Enemy combatants have existed for many years. The most well-known example, pirates, were the classic sort of illegal enemy combatants. If you think about the classic nonstate fighters who waged war against the civilized world, they received no due process historically. And if you think about it, how could you fight a war if the Due Process Clause really applied to illegal enemy combatants? Will we have a due process hearing, either ex-post or ex ante, to determine whether or not there was enough evidence to launch a Hellfire missile from a drone at a certain target? Is that covered by the Due Process Clause? The Due Process Clause requires compensation if the police used force inappropriately. Will we have that same standard in the use of force if we're at war? These are the reasons I think most people, most judges, historically recognized the

Due Process Clause just doesn't apply at all to wartime operations in a period of military conflict.

I do agree with Jesse on this one point though, that all this history and tradition and practice may provide little basis for predicting what the justices are going to do in the future. There are clearly, I think, four justices on the Supreme Court — Stevens, Ginsburg, Breyer, and Souter — who want to extend the Due Process Clause and want to extend federal jurisdiction to the activities of the government in the war on terror. I think it's clear there are four justices who don't. And it's really Justice Kennedy in play, who nobody knows ... well, I'm sorry, it's not that nobody knows what he wants to do because I think Justice Kennedy might know, but I'm not sure he knows yet. Ever since Justice O'Connor left the Court, Justice Kennedy has moved into the middle and is casting votes sometimes with the four liberals, sometimes with the four conservatives. I think it's quite unpredictable what he's going to do, but I think, like Justice O'Connor, this has had the effect of increasing Justice Kennedy's power on the Court, and through the Court's power, power over national policy on the whole range of issues, including global warming and abortion and so on. So, Jesse may be right. Jesse watches Justice Kennedy's votes much more closely than I do. It actually pains me to look at them, but Jesse enjoys watching Justice Kennedy's activities, so he might be right that that's what Justice Kennedy will do in the end.

There is this other issue we haven't gotten to yet, which is the *habeas corpus* issue. And it's very interesting. I knew very little about this before I wrote this article, but apparently in American cases from the Marshall Court on, the Court has said that there is no constitutional right to *habeas corpus* beyond that which Congress has created, at least as of 1789. And so, the question I think would be: in 1789, would the Framers--the people who wrote the first *habeas corpus* statute--have thought that this right extended to enemy prisoners of war? I think that history shows that this was not the case, that there is no historical record of enemy prisoners having this right under the *habeas corpus* statutes either in England or the United States at that time, so that there's no *habeas corpus* right that's constitutionally compelled to allow these kinds of lawsuits.

DEAN CHOPER: It may be true that the Due Process Clause is the last refuge of academic scoundrels. But that doesn't mean that it's the last refuge only for academic scoundrels—or only for academics or only for scoundrels. First of all, I want to be clear that I suggest a big difference between being held as a prisoner of war—for whom I give no Article III review—and being held in Guantánamo. You can neither prosecute prisoners of war for war crimes nor interrogate them.

So, my approach is that the Guantánamo detainees get *habeas corpus* while prisoners of war don't. But who would you rather be if you were sitting around in an American detention facility? Would you want to be a prisoner of war under the Geneva Convention, or would you rather be a suspected Al Qaeda member on Guantánamo? I hope the question answers itself.

I also differ with John on another point. I don't think judges do agree that there is no constitutional right extending some form of Article III review to these prisoners. I believe that a majority of the present court, and maybe more than a majority, does not agree. Eight justices held in *Hamdi* that the Constitution gives an American citizen held as a member of Al Qaeda as an unlawful enemy combatant a due process right to some sort of hearing. That includes justices at both ends of the Court spectrum, with the only exception being Justice Thomas. Justices Stevens and Scalia—those are strange bedfellows—both said that someone held as an unlawful enemy combatant (which means that they have committed war crimes and are not prisoners of war) can't just be held indefinitely. The government must either prosecute them or allow them to bring *habeas corpus* unless there is a suspension of the writ. We can talk about whether there has now been a legitimate suspension. If you want, you can even read the article when it appears.

I agree that I'm going beyond that. I think five justices would extend it to aliens and they'd extend it to Guantánamo. Could you imagine if the government prosecuted someone there and sentenced him to death? This is not a situation in which *habeas corpus* has ever been denied, with the exception of *Johnson*

v. Eisentrager, and I don't believe they were sentenced to death in that case. The *Johnson* decision undeniably there, but so was *Plessy v. Ferguson*. I'm quite serious about that. Even Justice Scalia said that *Ex parte Quirin* was not one of the best days for the United States Supreme Court.

I want to say one more word about *habeas corpus*. I don't agree that the Supreme Court has held that there is no constitutional right to *habeas corpus* beyond that which existed in 1789. I think John and I read the cases differently. John knows a lot more than I do about the history, but people who also know a great deal about it take a directly contrary position to the very language that John cites. But even if we go back to 1789, I think it is true that *habeas corpus* existed, particularly in the English common law, for executive detention. Now was it executive detention in time of war? Not that I know of anyway. But I don't know the opposite either.

John Yoo and Jesse Choper are members of the faculty at Boalt Hall. Their debate occurred on April 5, 2007, under the auspices of the Federalist Society for Law and Public Policy.

In Case You Missed It ...

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. “In Case You Missed It...,” featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at robert.chesney@wfu.edu.

- *United States v. Holy Land Foundation* (N.D. Tex. Oct. 22, 2007) - This material support prosecution involving allegations that officials at a large charity knowingly funneled money to Hamas ended in a mix of acquittal and mistrial. Prosecutors plan to retry the case.
- *United States v. Valdes Londono* (S.D. Fla. Oct. 22, 2007) - At much the same time that the Holy Land Foundation prosecution came to an end, a defendant in Miami pled guilty to material support charges based on allegations of attempting to assist a FARC official in entering the U.S. illegally.
- *United States v. Jawad* (Military Commission) - Military commission prosecutors have sworn charges against Mohammed Jawad in connection with a grenade attack on U.S. soldiers in Afghanistan. The charge sheet, which will now be reviewed by the Convening Authority, is available here: <http://www.defenselink.mil/news/Oct2007/Jawad%20Charge%20Sheet.pdf>
- *United States v. Qing Li* (S.D. Cal.) - A grand jury has indicted a defendant on charges of violating the Arms Export Control Act, based on allegations of an attempt to export accelerometers to China.
- *Alhami v. Bush* (D.D.C. Oct. 2, 2007) - Order granting injunction prohibiting the transfer of a Guantanamo detainee to Tunisia (his country of citizenship) in light of the possibility that the Supreme Court in *Boumediene* may strike down the jurisdictional provisions of the Military Commissions Act (MCA), thus enabling the district court to consider Alhami's claim that he faces an undue risk of torture if transferred. Such claims are barred by the MCA, and cannot be heard by the D.C. Circuit pursuant to the review provisions of the Detainee Treatment Act (DTA).
- *Boumediene v. Bush* (Supreme Court) - The briefs in the Guantanamo detainee litigation (challenging the MCA), including amicus briefs, are available online here: <http://www.mayerbrown.com/probono/commitment/article.asp?id=3706&nid=3193>.
- *Ruzatullah v. Gates* (D.D.C. Oct. 2, 2007) - Order prohibiting the U.S. military from transferring an Afghan detainee from a U.S. facility in Afghanistan to the custody of the Afghan government, in light of possibility that the Supreme Court's eventual ruling in *Boumediene* might clarify whether the court has jurisdiction over the detainee's claims.
- *Bismullah v. Gates* (D.C. Cir. Oct. 3, 2007) - Opinion denying government's petition for rehearing of panel's earlier decision regarding the scope of the D.C. Circuit's review under the DTA, but also clarifying certain aspects of that earlier ruling. The en banc petition, in contrast, remains pending. The rehearing denial opinion is posted here: <http://www.scotusblog.com/wp/wp-content/uploads/2007/10/bismullahorder.pdf>.