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A. John Radsan

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Irregular Rendition's Variation on a Theme by
Hamdi

A. John Radsan†

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The American people and their government have not reached anything close to consensus on how to handle suspected terrorists. Perhaps most controversial, the practice of "extraordinary rendition" or "irregular rendition" sparks a heated debate.

To the consternation of the human rights community and many others, the Central Intelligence Agency (CIA) is believed to have transferred around one hundred foreign suspects from areas outside U.S. territory to countries with spotty human rights records. The Department of Defense (DOD), operating less in the shadows than the CIA, has also conducted renditions. After

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1 The Central Intelligence Agency's Director, Michael Hayden, acknowledged the rendition program during a speech to the Council on Foreign Relations on September 7, 2007 in New York City. See General Michael Hayden, U.S.A.F., Director of Central Intelligence Agency, Address at the National Press Club (Sept. 7, 2007), available at http://www.democracynow.org/2006/1/24/former_nsa_head_gen_hayden_grilled#transcript (last visited Mar. 1, 2008). Rendition, the critics say, facilitates the harsh interrogations of suspects that American authorities are not willing and able to conduct themselves. See, e.g., Leila N. Sadat, Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror, 75 GEO. WASH. L. REV. 1200, 1201 (2007).

taking control of thousands of suspects in Afghanistan and other places, DOD transported many of them to an American facility in Guantanamo Bay, Cuba. As the photographs of men carted around in orange jumpsuits were released, and the protests against American policies increased, DOD started to transfer some prisoners back to their countries of origin or to other countries. Other detainees, because of their perceived danger to American national security or because the U.S. government cannot find any countries to take them, continue to languish in Cuban limbo. Strictly speaking, all the CIA and DOD transfers were irregular renditions because they were not performed in accordance with treaties between two sets of courts in two different countries, as occurs in the regular practice called “extradition.”

During the campaign against terrorism, the Bush Administration also designated two U.S. citizens as enemy combatants. Both were transferred within American custody by irregular means, and one was subject to an irregular rendition. These two citizens are Jose Padilla and Yaser Esam Hamdi.

Padilla, based on fears that he was part of a “dirty bomb” plot, was arrested at Chicago’s O’Hare Airport on May 8, 2002. Originally held as a “material witness” in New York, he was designated an “enemy combatant” and moved to a military

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4 See Douglas Jehl, Pentagon Seeks to Shift Inmates from Cuba Base, N.Y. TIMES, Mar. 11, 2005, at A1, A10.
5 Id.
8 Hamdi, found on the battlefield in Afghanistan, was subject to an irregular rendition. See infra nn. 16-24 and accompanying text. Padilla was merely transferred within the United States. See infra nn. 10-15 and accompanying text.
9 See, e.g., Lichtblau, supra note 7, at A26.
10 See, e.g., Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004). These fears were heightened by statements that “high-level” prisoners reportedly gave in the CIA’s secret prison program.
brig in South Carolina. In 2005, after the government's theories about enemy combatants were rejected by the Supreme Court, Padilla was moved to Miami to face criminal charges in federal court. There, Padilla was convicted not for dirty bombs but for material support to terrorist activities that pre-dated 9/11. Consequently, because Padilla remains in American custody after his conviction in federal court, his case cannot be categorized as an irregular rendition.

Hamdi, the more important of the two American citizens to our story, was captured in 2001 on a more conventional battlefield in Afghanistan. Piled in with many other prisoners, he was relocated to Guantanamo. When American authorities confirmed that he was a United States citizen, by virtue of his birth in Louisiana, they relocated him to a military brig, first in Virginia, then one in South Carolina. Notwithstanding Hamdi's domestic relocations, the American authorities continued to designate him as an enemy combatant. Unlike Padilla, however, Hamdi was eventually able to challenge the substance of his enemy combatant designation before the Supreme Court. Again, the government did not do as well as it expected. In the fall-out of Hamdi v. Rumsfeld, rather than deal with the details on remand, the government cut a deal with Hamdi. In exchange for

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12 Rumsfeld, 542 U.S. at 431-32.
15 Padilla was sentenced to seventeen years in prison, a term he is serving now. See Peter Whoriskey & Dan Eggen, Judge Sentences Padilla to 17 Years. Cites His Detention, WASH. POST, Jan 23, 2008, at A3.
17 Id.
18 Id.
19 Id.
20 Hamdi, 542 U.S. at 510; Padilla, No. 04-60001-CR.
21 Hamdi, 542 U.S. at 510.
22 Id.
Hamdi renouncing his American citizenship, the United States government, in an irregular rendition, transferred him to Saudi Arabia, where he had been raised after his parents had returned to their homeland.\textsuperscript{24}

It is the \textit{Hamdi} case, as I explain in this essay, which can bridge the gap between a civil libertarian camp and an executive supremacy camp in the development of American counterterrorism.\textsuperscript{25} Within \textit{Hamdi} lies the possibility of a middle way between the apologists and the severest critics of irregular rendition.

I. Overture

No matter the abstractions or the euphemisms, rendition involves holding human beings against their will in harsh circumstances.\textsuperscript{26} If, as Director Michael Hayden says, the CIA rendition program since 9/11 is on the order of one hundred people, even one case of mistaken identity should cause a reasonable person to doubt the fairness and effectiveness of existing procedures.\textsuperscript{27} Even one case in which torture results — contrary to assurances of fair treatment from the receiving country and contrary to post-transfer monitoring by the sending country (or by a third party) — is a big problem for the United States in the arena of irregular renditions. On such an important matter, American authorities must strive for perfection.

It now seems clear, after several years of the American rendition program, that the CIA has made at least one major

\textsuperscript{24} \textit{Hamdi}, 542 U.S. at 510.

\textsuperscript{25} I have already offered \textit{Hamdi} as an intermediate key to determine whether the courts should have any role in deciding financial disputes between the CIA and an alleged spy. See A. John Radsan, \textit{Second-Guessing the Spymasters with a Judicial Role in Espionage Deals}, 91 \textit{Iowa L. Rev.} 1259 (2006). In that article, I explain why I am critical of the Supreme Court’s unanimous decision in \textit{Tenet v. Doe}, 544 U.S. 1 (2005), that ruled the courts do not have such a role.


\textsuperscript{27} Michael Hayden, Director, CIA, Address at the National Press Club (Sept. 7, 2007) (transcript available at http://www.cfr.org/publication/14162/conversation_with_michael_hayden_rush_transcript_federal_news_service.html).
mistake. 28 Khaled el Masri, a German citizen of Lebanese origin, was detained at the end of 2003 by Macedonian security services. 29 After the Macedonians transferred him to American custody, the CIA was said to have transferred Masri to Afghanistan for tough talk regarding potential terrorist plots. 30 It was reported that “enhanced interrogation techniques” may have been used. 31 Months later, in a horrible twist of fate, the United States government came to accept that its officers may have confused the Masri they had in custody with another person who had a similar name. 32 Sad for all, they had created a problem for themselves and for the apparently innocent person in their custody. 33 In the end, the CIA is said to have released him in Albania to make his own way back home to Germany. 34

The immediate embarrassment for the Americans on the Masri case was with our German allies, including the new German leader, Angela Merkel. 35 The German authorities, to American dismay, did not keep the errors hush-hush. 36 As a form of rot at the foundations of American counterterrorism, the Masri case makes it much more difficult, if not impossible, for the CIA and the rest of the agencies aligned against terrorists to maintain the public’s blind trust in unfettered executive discretion. In that sense, Masri is to the CIA as Abu Ghraib was to the Department of Defense. Both Masri and Abu Ghraib are major blows to American counterterrorism. 37

29 Id. at 1257.
30 Id.
31 Id. at 1255.
32 Glen Kessler, U.S. Said to Admit German’s Abduction Was an Error; On Europe Trip, Rice Faces Scrutiny on Prisoner Policy, WASH. POST, Dec. 7, 2005 at A18 (discussing the el Masri affair). [hereinafter Kessler].
33 See id.
34 See Chesney, supra note 26, at 1239.
35 See Kessler, supra note 32 (discussing German reaction to the el Masri case).
36 Id. (“[I]n May 2004, then-U.S. ambassador Daniel R. Coats told the German interior minister about the Masri case but requested that the German government never disclose what it had been told, even if Masri went public.”).
The time has come for us, mindful of mistakes, to be real. For those who eschew the pure to espouse the practical, Justice Sandra Day O'Connor’s plurality opinion in *Hamdi* is a useful model.\textsuperscript{38} Tough choices must be made. Trade-offs abound. With modesty, my analysis here tracks the two major parts of O’Connor’s pragmatic opinion. First, just as Justice O’Connor agreed that the President has the authority to designate a United States citizen as an enemy combatant during our armed conflict with al Qaeda,\textsuperscript{39} I contend that the President obviously has the authority to order irregular renditions.\textsuperscript{40} But, unlike Justice O’Connor in *Hamdi*, I do not require Congress’s support, under an Authorization for Use of Military Force (AUMF)\textsuperscript{41} or some other provision, to reach my conclusion about executive authority. Some forms of irregular rendition, to be clear, fall within the President’s inherent powers. Second, just as Justice O’Connor called for more process than that proffered by the executive branch to confirm that Hamdi was indeed an enemy combatant,\textsuperscript{42} I suggest that more process and more oversight should be added to current and future transfers in America’s rendition program.\textsuperscript{43} These confirmations should

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\textsuperscript{39} See *id.* at 516-17.

\textsuperscript{40} To correspond with the public record about the rendition program and to avoid other legal snares, I limit my contention about the president’s inherent powers to non-U.S. citizens. Applying the rendition authority to U.S. citizens would implicate due process and other constitutional rights that may not apply to non-U.S. citizens. For now, the practice of rendition does not seem to apply to United States citizens; Hamdi was close, but he renounced his American citizenship at the moment of his transfer to Saudi Arabia.

\textsuperscript{41} Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (note following 50 U.S.C. § 1541 (2003)) (authorizing 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” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”).

\textsuperscript{42} See *Hamdi*, 542 U.S. at 533.

\textsuperscript{43} This suggestion does not contradict my views in a prior piece about irregular rendition, A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1 (2006) (reasoning that “[i]rregular rendition is taken into lighter shades of gray when the United States obtains reasonable assurances from the receiving country and carries out reasonable monitoring and oversight after transfer”). That piece, in
As to additional safeguards on irregular rendition, the variations are endless. A new executive order or a new statute could spell out additional process and oversight. Either way, by order or by statute, to get to a different place on irregular rendition, the law needs to change. One aspect of this new law could be a special court of federal judges who, in secret session, would review the executive branch’s determination that substantial grounds do not exist for believing that a suspect in CIA, DOD, or other American custody will be tortured in the receiving country—whether the recipient is the United Kingdom, Albania, or Syria.\textsuperscript{44}

We need a new course in American counterterrorism. Before going full circle on my pragmatic solution for irregular rendition, this essay lays down two parts of background on the basics of the \textit{Hamdi} opinion, and on the current framework of the law, including the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).\textsuperscript{45} The third part of this essay, closing a short circle, presents high notes in a variation on a theme by Hamdi.

\section*{II. \textit{Hamdi} Redux}

The \textit{Hamdi} court took on the task of answering two questions concerning the Bush Administration’s self-described war on terror.\textsuperscript{46} First, may the President order the detention of a United States citizen through an enemy combatant designation?\textsuperscript{47} (In dealing with a United States citizen who had been seized in Afghanistan, President Bush had opted away from the criminal justice system, the most regular process for detaining people.) Second, if the enemy combatant designation does apply to United

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{44} Something similar is currently used for matters involving the Foreign Intelligence Surveillance Act. \textit{See infra} nn. 134-36 and accompanying text.
\item \textsuperscript{46} \textit{Hamdi}, 542 U.S. at 509.
\item \textsuperscript{47} \textit{Id}.
\end{itemize}
\end{footnotesize}
States citizens, how much process is necessary in arriving at or confirming this designation? The Bush Administration had proposed the “some evidence” standard, which was, in essence, the President’s review of a bureaucrat’s affidavit from DOD.) In answering these two questions, three justices (in two opinions) took pure positions while six justices (in two other opinions) mucked about in the middle.

Justices Scalia, Stevens, and Thomas took pure positions that went in two opposite directions. Justices Scalia and Stevens, agreeing in dissent, stated that the detention of a United States citizen was such a serious matter that, on Hamdi’s facts, either the Executive needed to comply with the criminal justice system or the writ of habeas corpus needed to be suspended, neither of which had occurred in that case. In Justice Scalia’s words, “[a]bsent suspension, however, the Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge.” Justice Scalia and Justice Stevens, in a different case, would probably part ways when it came to the Executive’s assertion of military exigency to detain non-U.S. citizens. As made clear in Rasul v. Bush, Justice Scalia is less concerned and less pure about the detention of non-U.S. citizens

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48 Id.
49 Hamdi, 542 U.S. at 527 (“Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination.”) (citing Superintendent, Mass. Correctional Inst. at Walpole v. Hill, 472 U.S. 445, 455-57 (1985) (explaining that the some evidence standard “does not require” a “weighing of the evidence,” but rather calls for assessing “whether there is any evidence in the record that could support the conclusion”)).

50 Justice O’Connor wrote the plurality in which Justices Kennedy, Breyer, and Chief Justice Rehnquist joined. Justice Souter wrote separately, concurring in part, dissenting in part, and concurring in the judgment, and was joined by Justice Ginsburg. Justice Scalia wrote a dissenting opinion in which Justice Stevens joined while Justice Thomas filed a separate dissenting opinion. Id. at 507.

51 Id. at 554 (Scalia, J., Stevens, J., dissenting); id. at 579 (Thomas, J., dissenting).
52 Hamdi, 542 U.S. at 554 (Scalia, J., Stevens, J., dissenting).
53 Id.

54 See, e.g., Rasul v. Bush, 542 U.S. 466 (2004) (Justice Stevens, writing for the majority, and Justice Scalia, dissenting, part ways in their view of the process that should be afforded non-U.S. citizen detainees).
and their access to American courts.\textsuperscript{56} Justice Thomas, also in dissent in \textit{Hamdi}, argued that, in a war with al Qaeda, the courts should not override executive judgments.\textsuperscript{57} The President could designate Hamdi an enemy combatant.\textsuperscript{58} No further process was required.\textsuperscript{59} In Justice Thomas's words, "[t]his detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."\textsuperscript{60}

The other six justices, staying away from the black hole of inherent presidential powers, resolved the case through statutory interpretation.\textsuperscript{61} Justice O'Connor convinced Justices Breyer, Kennedy, and Rehnquist to join her for the plurality.\textsuperscript{62} Justice Souter, on the other side of the statutory debate, picked up Justice Ginsburg.\textsuperscript{63} These Justices, unlike Justices Scalia, Stevens, and Thomas, dealt with the messiness that is present between two strong positions that I have labeled "civil libertarian" and "executive supremacy" camps.\textsuperscript{64} That messiness, whether of the

\begin{thebibliography}{9}
\bibitem{56} Id. at 497-98 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting) ("[T]oday's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made . . . . Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees."). Cf. \textit{id.} at 481 (majority opinion) ("Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241.").

\bibitem{57} \textit{Hamdi}, 542 U.S. at 579 (Thomas, J., dissenting).
\bibitem{58} \textit{Id.}
\bibitem{59} \textit{Id.}
\bibitem{60} \textit{Id.}

\bibitem{61} \textit{id.} at 509 (majority opinion); \textit{id.} at 539 (Souter, J., joined by Ginsburg, J., concurring).
\bibitem{62} \textit{Hamdi}, 542 U.S. at 509.
\bibitem{63} \textit{Id.} at 539.

\bibitem{64} \textit{Id.} at 531 ("Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.") (majority opinion); \textit{see also id.} at 545 ("The defining
O'Connor or Souter variety, resulted from their imperfect quest for middle ground.

To me, the debate between O'Connor and Souter parallels the reasonable debate that can exist between political parties, among members of the legal academy, and among members of the public about the appropriate balance between individual liberty and group security in constructing our counterterrorism strategy. As New Age existentialists, Justices O'Connor and Souter are both engaged in their circumstances. They have not retreated to philosophical ivory towers.

In my view, the O'Connor approach seems most reasonable in resolving difficult issues in national security, particularly those related to irregular rendition. When push comes to shove, she becomes deferential toward the executive branch. Even so, the Souter approach, straddled between O'Connor and Scalia/Stevens, is reasonable in expecting Congress to be active and specific on government actions that result in deprivations of individual liberty. Souter sees the courts as a counterweight to the hydraulic pressures that the executive branch tends to exert in trying to make us all safe. In short, the difference between O'Connor and Souter in *Hamdi* should be measured in degrees, not in kind.

While neither Justice O'Connor nor Justice Souter specifically framed the *Hamdi* argument within the three categories of Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, that analytical framework helps explain their different conclusions. Justice O'Connor ended up in Jackson's first
category, the strongest for the President.\textsuperscript{66} She concluded that the AUMF, passed days after 9/11, was specific enough to satisfy the Non-Detention Act\textsuperscript{67} and to give the President the authority to detain a United States citizen as an enemy combatant.\textsuperscript{68} She saw detention as a “fundamental incident” of an armed conflict, neutralizing the danger that the enemy combatant could return to battle to hurt or kill American forces.\textsuperscript{69} Because American forces were still operating in Afghanistan at the time of the \textit{Hamdi} decision, she believed the armed conflict with al Qaeda and the Taliban was still in effect.\textsuperscript{70} Relying on \textit{Ex parte Quirin},\textsuperscript{71} she noted that the Court’s precedent did not preclude American citizens from being held as an enemy combatant.\textsuperscript{72} Overall, those were strong notes in favor of the executive branch.\textsuperscript{73}

By contrast, Justice Souter did not believe that the AUMF was specific enough to satisfy the Non-Detention Act, which had been passed to avoid a repetition of the round-up of American citizens, an infamous experience for Japanese-Americans (and Japanese aliens) during the Second World War.\textsuperscript{74} Justice Souter ended up in Jackson’s third category, the weakest for the President.\textsuperscript{75} The Non-Detention Act, Souter argued, required something much more specific.\textsuperscript{76} A stronger check on the executive branch was needed:

\begin{itemize}
  \item \textsuperscript{66} \textit{Id.} at 635.
  \item \textsuperscript{67} 18 U.S.C. § 4001(a) (2002).
  \item \textsuperscript{68} \textit{Hamdi}, 542 U.S. at 517 (majority opinion).
  \item \textsuperscript{69} \textit{Id.} at 519 (“Because detention to prevent a combatant’s return to the battlefield is a \textit{fundamental incident} of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”) (emphasis added).
  \item \textsuperscript{70} \textit{Id.} at 521.
  \item \textsuperscript{71} 317 U.S. 1 (1942).
  \item \textsuperscript{72} \textit{Hamdi}, 542 U.S. at 519 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant . . . [In \textit{Ex parte Quirin},] [w]e held that ‘[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.’”).
  \item \textsuperscript{73} \textit{Id.} at 517 (“[W]e agree with the Government’s . . . position, that Congress has in fact authorized Hamdi’s detention, through the AUMF.”).
  \item \textsuperscript{74} \textit{See id.} at 547 (Souter, J., Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).
  \item \textsuperscript{75} \textit{See Youngstown Sheet & Tube Co.}, 343 U.S. at 637.
  \item \textsuperscript{76} \textit{Hamdi}, 542 U.S. at 545 (Souter, J., Ginsburg, J., concurring opinion).
\end{itemize}
"[f]or reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory."\textsuperscript{77}

Not all of Justice O'Connor's notes were in favor of the executive branch, though. She made clear, in a rhetorical flourish that has been quoted many times, that a state of war did not give the President a "blank check\textsuperscript{78}" when it came to the rights of American citizens.\textsuperscript{79} Further, she acknowledged that the enemy combatant model, which she accepted for Hamdi, could break down in other cases because the conflict with international terrorism does not have traditional battle lines or a clear ending.\textsuperscript{80} A conflict between a state and non-state actors, after all, cannot conclude by the same sort of peace treaty that ended the conflict during the Second World War between the United States and Japan.\textsuperscript{81} In a ghost war, many years can go by without an obvious attack. Eight years went by, for instance, between al Qaeda's first attack on the World Trade Center and the second attack that did the job.\textsuperscript{82}

In the Hamdi opinion, Justice O'Connor's pragmatism was most evident when she turned to the second question, namely, how much process Hamdi deserved to contest the enemy combatant designation.\textsuperscript{83} Relying on the three-part balancing test from

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 536 (majority opinion) (citing Youngstown Sheet & Tube, 343 U.S. at 587).

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 521 ("[W]e agree that indefinite detention for the purpose of interrogation is not authorized. . . . If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF.").

\textsuperscript{81} Id. at 520 ("We recognize that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable. As the Government concedes, 'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.'").


\textsuperscript{83} Hamdi, 542 U.S. at 525.
Mathews v. Eldridge, a case that concerned cutting off disability payments from the Social Security Administration, she left it to the lower courts to find a reasonable ground for Hamdi. Hamdi's interest was to be free of a mistaken or unreasonable detention. The government's interest, on the other hand, was "in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."

In deciding how much process was necessary to decide between these conflicting interests, Justice O'Connor ruled out the extremes. The "some evidence" standard proffered by the Government was not enough. As Justice O'Connor described, "[a]side from unspecified 'screening' processes, and military interrogations in which the Government suggests Hamdi could have contested his classification, Hamdi has received no process." That was far from the optimal balance. Justice O'Connor continued, "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."

At the other end of the range, a full-blown trial was not

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84 424 U.S. 319 (1976). The Mathews Court reasoned that due process determinations depend on weighing three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

85 Hamdi, 542 U.S. at 539.

86 Id. at 530.

87 Id. at 531.

88 Id. at 532-33 ("[W]e believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant.").

89 Id. at 537.

90 Id.

91 Hamdi, 542 U.S. at 537.
necessary.\textsuperscript{92} To allow the government to demonstrate that Hamdi was an enemy combatant, Justice O'Connor would consider hearsay\textsuperscript{93} and a burden in favor of the government's evidence,\textsuperscript{94} two considerations that would be unacceptable in a normal criminal trial.\textsuperscript{95} Those considerations aside, the holding of the case was "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."\textsuperscript{96} In so holding, Justice O'Connor made clear that the civilian courts are not the only means of dispensing due process.\textsuperscript{97} Even though she had not given the government everything it sought, she did offer some consolation that the government could stay out of civilian courts: "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."\textsuperscript{98}

Implicit in Justice O'Connor's approach in \textit{Hamdi} is that the government does not need to provide due process \textit{before} the person's liberty interests have been affected.\textsuperscript{99} In other words, the process to which Hamdi was entitled would occur \textit{after} he was detained as an enemy combatant.\textsuperscript{100} It would have been impractical to the point of absurdity to expect due process to be provided upon his immediate capture on the battlefield in Afghanistan.

All in all, Hamdi and the government were left with no clear victor. After \textit{Hamdi} was decided, the government, rather than sort

\textsuperscript{92} \textit{Id.} at 533 ("[T]he exigencies of the circumstances that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.").

\textsuperscript{93} \textit{Id.} at 533-34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.").

\textsuperscript{94} \textit{Id.} at 534.

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} at 533.

\textsuperscript{97} \textit{See generally id.} at 538.

\textsuperscript{98} \textit{Id.} at 538.

\textsuperscript{99} \textit{Id.} at 533.

\textsuperscript{100} \textit{Id.}
out the details through another round in the courts, negotiated a deal with the alleged enemy combatant.\textsuperscript{101} The Americans released Hamdi in exchange for his promise to renounce his American citizenship and to stay away from the battle.\textsuperscript{102} In addition, the Saudi government promised to keep tabs on him.\textsuperscript{103} Today, Hamdi is a relatively free man, back in Saudi Arabia. His case must be remembered because within the Supreme Court’s decision in \textit{Hamdi} lies a key to unlocking many of the conundrums to irregular rendition.

\section*{III. Legal References}

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)\textsuperscript{104} is a primary reference for analyzing the legality of rendition under American law.\textsuperscript{105} Article Three of the CAT states that a signatory should not “expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”\textsuperscript{106} For this

\begin{itemize}
\item \textsuperscript{101} See Jerry Markon, \textit{Hamdi Returned to Saudi Arabia}, WASH. POST, Oct. 12, 2004, at A02.
\item \textsuperscript{102} Press Release, Mark Corallo, \textit{supra} note 23.
\item \textsuperscript{103} See Joel Brinkley, \textit{Deportation Delayed for 'Enemy Combatant,'} N.Y. TIMES, Oct. 1, 2004, at A13, available at http://www.nytimes.com/2004/10/01/politics/01hamdi.html?oref=login&oref=login&pagewanted=print&position=“Saudi officials, clearly irritated, said they found the monitoring provision of Mr. Hamdi’s release agreement unreasonable. They also noted that the supervision duties, which entail ensuring that Mr. Hamdi does not leave the country for five years, were imposed upon Saudi Arabia even though no Saudi officials were involved in the negotiations.”). \textit{See also Yaser Esam Hamdi v. Donald Rumsfeld Settlement Agreement} (Sep. 17, 2004), available at http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html (detailing the final settlement agreement negotiated between the U.S. government and Hamdi).
\item \textsuperscript{104} CAT, \textit{supra} note 45.
\item \textsuperscript{105} Critics of irregular rendition also draw on the International Covenant on Civil and Political Rights. \textit{See} International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52 U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Because the ICCPR is less specific than the CAT on rendition and because it is less likely the ICCPR has become part of American law, I focus on the CAT.
\item \textsuperscript{106} CAT, \textit{supra} note 45, at art. 3.
\end{itemize}
provision to make sense, fixed definitions (or reasonably fixed definitions) of two terms, "substantial grounds" and "torture," are necessary.

When the United States Senate ratified the CAT in 1990, it identified the ambiguity latent to Article Three. To reduce the ambiguity, the Senate ratified the CAT on the understanding that substantial grounds means that it is "more likely than not" that the person will be tortured in the receiving country.107 By a cross-reference, the Senate's new definition created the illusion of mathematical certainty, connecting rendition to the fifty-one percent standard by which civil cases are decided in the United States.108

As to the second term, defining "torture" involves the same sort of ambiguities and difficulties as defining "substantial grounds." Moreover, for most people, the word "torture" conjures up many more images than the sterile, legalistic phrase "substantial grounds." Thus people become more emotional when talking about "torture" than when talking about "substantial grounds."

Some things are clearly torture. Chopping off a person's fingers to extract information or to inflict pain is an example. Some things are clearly not torture. Providing a wholesome and tasty meal—salmon, broccoli and rice—on a silver platter is an example. Between the extremes, there is much uncertainty and much room for disagreement.

The Justice Department's Office of Legal Counsel (OLC), in providing advice to the CIA about acceptable interrogation tactics, interpreted the torture statute109 which Congress had adopted as

107 Executive Session, 136 CONG. REC. S17486-01, S17486 (1990) ("That the United States understands the 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 [CAT], to mean 'if it is more likely than not that he would be tortured.").

108 See, e.g., Khup v. Ashcroft, 376 F.3d 898, 905 (9th Cir. 2004) (interpreting the "more likely than not" standard for withholding removal of an alien to require a showing of "at least a 51% chance of religious and political persecution' upon return"); Kahn v. Elwood, 232 F.Supp.2d 344, 351 n. 5 (M.D.Pa., 2002) (considering the likelihood that an alien seeking asylum would be tortured upon return to his home country, "[a] more likely than not standard means fifty-one percent or higher. Thus, Petitioner could have failed to prove that he was more likely than not going to face torture upon his return to Pakistan and still have shown that there was a '50-50 chance.").

part of the process of putting the CAT into effect under American law.\footnote{See generally Jay S. Bybee, Memorandum for Alberto Gonzales, Counsel to the President, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf [hereinafter Torture Memo].} OLC's memo, dated August 1, 2002, later leaked to the public and then retracted, was criticized for being too stingy in its definition of torture.\footnote{See Memorandum from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at http://www.usdoj.gov/olc/18usc23402340a2.htm (extending the previous legal standard of "severe" pain under the statute beyond "'excruciating or agonizing' pain" or "pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, even death.'") [hereinafter Retraction Memo].} In one part of the memo, torture was equated with the pain experienced from organ failure or death.\footnote{Torture Memo, supra note 110 ("We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.").} 


Similarly, despite OLC's retraction, not all of the Bush Administration's extreme arguments about rendition have been put to rest. Professor John Yoo has put forward a two-part argument
that Article Three of the CAT does not apply to the CIA's renditions.\footnote{John Yoo, Transferring Terrorists, 79 Notre Dame L. Rev. 1183, 1227-32 (2004).} First, assuming that the CAT is a not a self-executing treaty, the Administration's defenders note that it is unclear whether the CIA, in response to legislation in 1998,\footnote{Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822-23. The Act's statement regarding the "United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture" tracks the CAT and adds the phrase "regardless of whether the person is physically present in the United States." Id. This additional phrase expresses an extra-territorial intent. Id.} adopted any regulations to adopt the Article Three standard.\footnote{The Department of Homeland Security, the Justice Department, and the State Department then enacted regulations to apply Article Three standards in these divisions. See 8 C.F.R. §§ 208.16-18, §§ 1208.16-18 (2007); 22 C.F.R. §§ 95.1-.4 (2007); David Weissbrodt & Amy Bergquist, Extraordinary Rendition and the Torture Convention, 46 Va. J. Int'l L. 585, 605 (2006). To the degree the CIA has adopted these standards, the information remains classified. Radsan, supra note 43, at 21.} For example, the State Department's legal advisor, John Bellinger, when referring to the Article Three standard for DOD transfers from Guantanamo, is careful to stay neutral about CIA practices.\footnote{John Bellinger, Legal Advisor to the Secretary of State, The United States' Response to the Questions Asked by the Committee Against Torture (May 6, 2006), http://www.state.gov/g/drl/rls/68562.htm.} Second, inferring from a Supreme Court decision that limited the reach of the Refugee Convention,\footnote{See Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993). The Court held that: The text of Article 33 [of the United Nations Convention Relating to the Status of Refugees] thus fits with [the] understanding that "expulsion" would refer to a 'refugee already admitted into a country' and that 'return' would refer to a 'refugee already within the territory but not yet resident there.' Thus, the Protocol was not intended to govern parties' conduct outside of their national borders." Id. at 182 (quoting Haitian Refugee Center v. Gracey, 809 F.2d 794, 840 (D.C. Cir. 1987) (footnotes omitted)). See also id. at 179-80 ("If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.").} the Administration's defenders argue that, for purposes of American
law, the CAT does not reach beyond American territory.122 Thus, the CAT applies only to transfers from within U.S. territory to third countries and not to transfers between two points outside U.S. territory.123 It is the latter category, to be sure, that is most relevant to CIA renditions. With that said, it is difficult to gauge how much support John Yoo has for such arguments about executive power. Outside the Administration, Professor Yoo seems to be in the minority.124

There is a separate argument that, even if Article Three is part of American law, the president can invoke his commander-in-chief powers to override the CAT on irregular renditions that are necessary to national security.125 John Yoo, and his colleague David Addington from the Office of the Vice President, have pushed this argument for the President.126 Just as President Bush’s

122 See Yoo, supra note 117, at 1229 ("[T]he [CAT] is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained outside of U.S. territory at Guantanamo Bay or in Afghanistan.").

123 See id.

124 See, e.g., Theodor Meron, Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties, 89 AM. J. INT’L L. 78, 82 (1995) ("Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction."); Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 GEO. WASH. L. REV. 1333, 1368 (2007) ("Given the wording of article 3’s directive—'[n]o State Party shall’—the most ordinary meaning would be that a state party may not, regardless of where it is acting, ‘expel, return (refouler), or extradite a person’ who is in its custody or control . . . . In light of the object and purpose of the treaty, this reading is not only the best one, it is also in line with the rules that have developed concerning extraterritorial application of human rights treaties generally.’); David Weissbrodt & Amy Bergquist, Extraordinary Rendition: A Human Rights Analysis, 19 HARV. HUM. RTS. J. 123, 143 (2006) (reasoning that because drafters intended Article 3 of the CAT to be broader in scope than Article 33 of the Refugee Convention, the “history of the [CAT] clarifies that the drafters intended Article 3 to have extraterritorial effect”)(referencing J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 125 (1988)).

125 See Torture Memo, supra note 110.

lawyers have compared the interrogation of suspected terrorists to “tactical decisions” on the battlefield, they may argue that the transfer of suspected terrorists is a core executive power upon which Congress may not intrude. Others will dispute the analogy. So much depends on the specific facts, such as whether a transfer involves the mastermind of the 9/11 plots or whether it involves a person who merely drove Taliban soldiers in a rusty truck from one Afghan village to another. In other words, Khaled Sheikh Mohammed poses a greater threat to American national security than Salim Hamdan does.

Those who believe in a significant overlap between the Executive and Congress on war powers and foreign policy powers, what Professor Corwin coined the “invitation to struggle,” will tend to reject arguments about an executive override. Further, at the factual level, they will remind us that there is a significant difference between getting involved in a general’s movement of tanks during a battle (an area in which Congress may not intrude) and the movement of human beings from one jurisdiction to another (an area in which Congress seems invited to intrude). Yet, because the courts use the political question doctrine and other techniques to avoid becoming ensnared in such arguments, the debate about executive power continues between the branches of government as well as between the law professors.

IV. The Hamdi Resolution

Justice O’Connor’s mindset, as described, is to work toward the middle between extreme arguments, whether those arguments

127 See Torture Memo, supra note 110 (arguing that the President’s commander-in-chief power encompasses interrogation).

128 See EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 201 (Randall W. Bland et al., eds., 5th rev. ed. 1984) (“All of which amounts to saying that the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.”).

129 See id. at 263 (discussing the President’s power under the “Commander-in-Chief” clause of the Constitution).

130 See id. at 206-7 (noting that based on the political question doctrine “the Court has subsequently held . . . that it must accept as final and binding on itself the determinations of one or other or both of ‘the political departments,’ with respect” to questions on foreign affairs).
are for executive power or for civil liberties. \textsuperscript{131} Hers is a hybrid approach. When she dealt with the designation of a United States citizen as an enemy combatant, she straddled systems of civilian and military justice.\textsuperscript{132} Ever practical, she would advise us to adopt a similar solution for irregular rendition.

The urgency in detaining an enemy combatant on the battlefield differs from the urgency the government experiences in an irregular rendition. In the rendition context, the government likely has had time to take the person away from the battlefield, somewhere safer in American custody. Indeed, the rendition may come long after the enemy combatant designation.\textsuperscript{133} For those reasons, if the Fifth Amendment applies, the suspected terrorist can make a much stronger case for due process before he is transferred to another jurisdiction. Process after he is transferred does not make sense because it would be difficult, if not impossible, to take him back into American custody if the process later determines that he should not have been transferred.

Independent review is crucial to providing fairness on renditions. This essential independence can come from a special court. Whether the special court for irregular renditions comes into existence by executive order or by statute, its creators should be mindful of "standing" and the requirements of a "case or controversy." In all, we must continue to comply with the Constitution.

The constitutional requirements, however, are not insurmountable. In a different context—related to searches and electronic surveillance within the United States to gather foreign intelligence—the Constitution does not get in the way of a reasonable arrangement. Under the Foreign Intelligence Surveillance Act of 1978 (FISA),\textsuperscript{134} federal judges, appointed by

\textsuperscript{131} See supra text accompanying notes 18-44 (explaining Justice O'Connor's decision and reasoning in Hamdi).

\textsuperscript{132} See supra nn. 34-42 and accompanying text.

\textsuperscript{133} See generally Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (discussing how designating someone as an enemy combatant often occurs during exigent circumstances during "ongoing military conflict"). Since enemy combatant classification can occur quickly in order to detain someone, rendition may not happen until that enemy combatant status is argued, as in Hamdi. See id.

the Chief Justice, review ex parte applications from the
government for searches and electronic surveillance.\footnote{See id. § 1805.} Thus,
FISA is the model for anyone who would like to create a special
court to handle difficult matters of national security. Indeed, FISA
is the common reference for those who propose to try terrorists by

Applying Hamdi's logic to rendition, the soon-to-be-
transferred person should have an opportunity to be heard in front
of a neutral decision-maker before his or her rendition occurs.
Basic due process can thus be satisfied by including other
participants via the special court. At a minimum, the prisoner
should be allowed to present facts to the special court and to
attempt to rebut facts which the government has presented. The
rest is details.

\section{A. A Totality of Circumstances}

Whatever the details to the rendition process, the special court
should consider several factors in deciding whether it is more
likely than not (defined as a fifty-one percent chance)\footnote{See supra text accompanying note 48.} that a
prisoner will be tortured upon transfer to a third country. While
Article Three of the CAT does not offer many specifics, it does
state that "all relevant considerations" should be taken "into account." That means the executive branch—or the special court in the suggested new approach—should do more than flip a coin to reach its decision. Of particular importance, according to the CAT, is "a consistent pattern of gross, flagrant or mass violations of human rights" in the receiving country. In other words, the special court should consider the receiving country's general reputation for protecting human rights. That reputation relates to respect for the rule of law and, when focusing on detention, how people are treated in prisons and other facilities that restrict individual liberty.

The analysis of rendition must dig down into specifics. To the extent facts are available about the receiving country, the special court could distinguish between the treatment of common criminals and the treatment of those who are accused of links to terrorism. The experience with terrorists is most relevant because, since September 11th, many renditions from American custody (probably most of those from CIA custody) involve people who are accused of being terrorists.

In determining the human rights record for the receiving country, several factors will be useful to the special court. First, the U.S. State Department, as part of an annual report, describes the human rights practices of many countries. The State Department, which uses this reporting to prod improvements, does not seem to have a total bias toward minimizing human rights abuses in other countries. Further, the State Department draws

138 CAT, supra note 45, at art. 3(2).
139 Id.
140 Mary Crane, U.S. Treatment of Terror Suspects and U.S.-E.U. Relations, Council on Foreign Relations, (Dec. 6, 2005), http://www.cfr.org/publication/9350. "Press reports indicate the United States has captured more than 100 terrorism suspects since 9/11 and rendered them to Egypt, Jordan, Morocco, Pakistan, Uzbekistan, and other nations." Id.
141 These reports are available for browsing through the State Department's website at http://www.state.gov/g/drl/rls/hrrpt/.
143 But cf. Human Rights First, Press Release, Human Rights Group Revives
on other sources, inside and outside the government, to present an objective assessment of human rights conditions in other countries.\textsuperscript{144} As a result, American courts, in making decisions about transfers from the immigration context, consider State Department reports to be authoritative—but not definitive.\textsuperscript{145} Those reports help regular courts determine whether, consistent with American law, non-U.S. citizens can be deported or removed to other countries.\textsuperscript{146}

Second, human rights organizations issue reports about the human rights practices in many countries. Those reports are also treated with respect.\textsuperscript{147} They may not have an official stamp, but they are much higher in terms of credibility than the musings of the typical blog. Non-governmental organizations (NGOs) such as Amnesty International, Human Rights Watch, and Human Rights First, to name just a few, have also written pieces against the United States practice of irregular rendition since 9/11.\textsuperscript{148} As they make clear, they are trying to influence policy. For this reason,

\begin{itemize}
\item \textit{Critique of State Department Annual Report and Recommends Changes to Address Backsliding in Objectivity}, Oct. 17, 2003, http://www.humanrightsfirst.org/media/2003_alerts/1017.htm (noting that the 2006 report tended to ignore human rights violations done in the name of counter-terrorism). “The fairness and objectivity of much of the State Department’s reports makes all the more glaring the serious omissions and distortions in sections on some key allies in the U.S.-led ‘war on terrorism.’”\textit{Id.}
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\item \textit{See Tian-Yong Chen v. U.S. I.N.S, 359 F.3d 121, 130 (2d Cir. 2004) (“[Courts] should be careful not to place excessive reliance on [the Department of State Country Reports] . . . Such State Department reports...often provide a useful and informative overview of conditions in [a country] . . . But their observations do not automatically discredit contrary evidence . . . and they are not binding [on the court].”).}
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\item \textit{See id.} (using a State Department report to help decide whether the plaintiff should be deported).
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\item \textit{See M.A. v. U.S. I.N.S, 899 F.2d 304, 313 n.6, 323 n.9 (4th Cir. 1990)} (acknowledging that reports by human rights organizations are treated with respect by courts).
\end{itemize}

\begin{itemize}
their reports and publications may, at times, be considered as much the products of persuasive advocates as the neutral purveyors of fact on any particular rendition. The human rights community, which errs away from any possibility of abuse, tends toward the formal process of rendition known as extradition.\footnote{See id. at 31-33 (recommending the U.S. end its rendition program).}

Third, on the rendition decision, books and articles may supplement the governmental and non-governmental reports about human rights practices. Some of these books are easily found in the world history and political science sections in public libraries. Further, depending on the circumstances, the receiving country may have an independent press that exposes government misconduct.\footnote{See, e.g., The Syrian Human Rights Committee, http://www.shrc.org (publishing articles about the progress of and violations of human rights in Syria).} No matter the circumstances, the American media, especially the elite newspapers, do serve a purpose in explaining what occurs in places like Serbia, Somalia, and the Sudan. These sources, while not absolute, will assist the special court in determining the relative truth on the ground.

One advantage to all three sets of sources (country reports, NGO reports, and books and articles) is that they are not classified. For this reason, our government cannot reasonably push for a closed or a streamlined process on a rendition because of a need to protect these sources. Unlike assurances from the receiving country or post-transfer monitoring of the prisoner, as discussed below, almost everything about human rights conditions can be discussed in the special court’s open session. Once those facts are in, the prisoner’s counsel and the government’s counsel can try to shape the special court’s conclusions. In the classic adversarial style of the United States legal system, the sifting and sorting of points and counter-points can lead the advocates to disparate arguments. The special court, after hearing the arguments, is free to choose those conclusions that make most sense.

Not only does the court need to hear about the receiving country, it needs to hear about the prisoner. The legality of irregular rendition, in the end, is fact-based, and thus must be a specific evaluation of the particular case at hand. The risk is not torture in the abstract; the risk is that a particular prisoner will be
tortured upon transfer.\textsuperscript{151} Therefore, although a country such as Syria may have a very poor human rights record,\textsuperscript{152} it is possible, even if unlikely, that a prisoner will not be tortured there. The past does not always doom the future. Conversely, it is possible that a prisoner will end up being tortured in a country that has close to a perfect human rights record. A rosy past in Finland does not always bloom for the future.

To reach a conclusion about a specific prisoner going to a specific country, the special court needs to hear details about the prisoner’s experiences, if any, in the receiving country. The prisoner may have already fled persecution in that country. The prisoner may have relatives in that country who are being treated unfairly. The prisoner may have already been tortured there. To provide these facts, the prisoner himself is an important source. He may be able to corroborate his version with statements from other witnesses and with a written record. Similarly, the United States government may offer contrary evidence. In all, working from the same facts, the prisoner has an interest in accentuating the risk while the government has an interest in minimizing it. Back and forth, the special court will benefit from vigorous advocacy on both sides.

One disparity not easily resolved between the prisoner and the government is their access to witnesses and documents. Here, the government has a strong advantage. The government has formal and informal means of securing witnesses, along with a budget to pay for their expenses. To even the playing field on witnesses, the prisoner could be given some sort of subpoena power. If this is done, the government might then be asked to assist the prisoner in making witnesses available from foreign jurisdictions. Alternatively, the witnesses might testify through telephone or video links. These issues, like much else in the \textit{Hamdi} intermediate zone, are not easily resolved on irregular rendition. Unlike Justice O’Connor, however, we cannot remand the case to the lower courts to sort out the details. Using \textit{Mathews v. Eldridge} as our guide, the best we can do with each proposal for additional

\textsuperscript{151} Because the United States is a signatory to the CAT, at least as a matter of policy, it should not transfer a person to a country where he will be tortured. \textit{CAT, supra} note 45, at art. 3.

\textsuperscript{152} See generally \textit{Syrian Human Rights Committee, supra} note 150.
process is a cost-benefit analysis.\textsuperscript{153}

To parse the issue of access to counsel, the special court should draw on experiences from criminal cases that have involved classified information—although the stakes in an irregular rendition are not exactly the same as those in a criminal trial.\textsuperscript{154} The trial of Zacarias Moussaoui, a French citizen connected to the 9/11 plot, provides a recent example of how a court resolved a prisoner’s access to witnesses as well as the government’s right to protect its intelligence sources and methods by continuing to interrogate high-level detainees in secret locations.\textsuperscript{155}

1. \textit{Assurances}

Assurances from the receiving country that the prisoner will be treated fairly upon transfer are another important factor in renditions.\textsuperscript{156} Those assurances could be oral or in writing. They could come from the head of state, the foreign minister, the head of the security service, or from lower level officials. The assurances could be general or, through an annex, could list a number of prohibited practices.

Whatever the form of the assurances, many in the human rights community have viewed them as empty promises.\textsuperscript{157} Many commentators assert that assurances are a thin cover for American officials who put their heads in the sand to ignore obvious signs of

\textsuperscript{153} See Mathews v. Eldridge, 42 U.S. 319, 335 (1976).

\textsuperscript{154} The government’s goal in a criminal case is a conviction plus a sentence that may be as extreme as the death penalty. Irregular rendition, on the other hand, may seek something other than detention; it may suit the American authorities simply to be rid of the prisoner. In any event, the often stated purpose of irregular rendition is to be able to conduct an aggressive interrogation. By contrast, in the criminal justice system, the gathering of information, if any, usually occurs in exchange for a lesser plea or a lighter sentence.

\textsuperscript{155} United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004); see also Jerry Markon and Timothy Dwyer, \textit{Jurors Reject Death Penalty for Moussaoui}, \textit{WASH. POST}, May 4, 2006, at A1 (describing the outcome in Moussaoui’s trial).

\textsuperscript{156} See 8 C.F.R. § 208.18 (C)(2) (2008) (requiring that before removing an alien, the Attorney General has to determine if the assurances are “sufficiently reliable”).

torture. Further, statements from the former head of the Counterterrorism Center and from the former Director of the Central Intelligence Agency demonstrate that there is more of a focus on the war on terror and less of a focus on the legality of their actions.

Unlike those in the human rights community who are most critical of all CIA practices, and unlike CIA officials who are cavalier in their public comments, I sincerely believe that assurances can make a difference on the legality of a particular transfer. As the State Department's legal advisor has made clear, assurances are a significant part of the process when prisoners are transferred from Guantanamo to other countries. So what works in Guantanamo should work in other places.

At Guantanamo and elsewhere, assurances do not matter that much at the extremes. Assurances from Syrian officials will probably not tilt the balance toward legality for a transfer to Syria, because of its reputation for torture. And assurances from Finland are probably not necessary. But on a close call, when the chances of torture hover around fifty percent, the assurances may make a difference. All other things being equal, written assurances are worth more than oral ones, and multiple layers of assurances from diplomats, spooks, and jailors hold more value.

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159 Investigation of September 11 Failures; Hearing Before a Joint Session of the Senate and House Intelligence Committees, 107th Cong. (2002) (testimony of Cofer Black, Dir. of the CIA’s Counter-Terrorism Center) (“There was ‘before’ 9/11 and ‘after’ 9/11. After 9/11, the gloves came off.”), available at 2002 WL 31151504.

160 Porter Goss, former Director of the CIA, acknowledged that the United States has only a limited capacity to ensure that detainees will be treated humanely. Douglas Jehl & David Johnston, Rule Change Lets C.I.A. Freely Send Suspects Abroad, N.Y. TIMES, Mar. 6, 2005, at A1. He stated, “[b]ut of course once they’re out of our control, there’s only so much we can do.” Id.

161 See Guiora, supra note 136.

162 See id.
than a single signature.

The special court's consideration of assurances, however, may need to be ex parte. Receiving countries may be less likely to make any assurances to American officials if they are going to be shared with people outside a small group in the executive branch. To assuage the concerns of foreign countries that cooperate with the United States in combating terrorism, it will be easier for American officials if they can truthfully say that the details of the assurances will only be shared with the special court, not with the prisoner himself or with his counsel.

The ex parte aspect to the process, to be sure, does undermine full advocacy from both sides on a rendition decision. Yet, in other civil and criminal cases, the courts have done justice even though some parts of the process do not involve both parties. On Freedom of Information Act\textsuperscript{163} cases, for example, in the civil setting, the executive branch often goes to court, ex parte, to explain the risks of disclosing classified information. Similarly, under the Classified Information Procedures Act\textsuperscript{164}, prosecutors are allowed to make ex parte presentations in criminal cases. Therefore, having an ex parte aspect to the irregular rendition process does not equate with injustice. The \textit{Hamdi} model, to repeat, accepts the messiness of drawing lines in the gray. A full-blown model of due process is not practical on all national security decisions.

2. \textit{Post-Transfer Monitoring}

A factor related to assurances is post-transfer monitoring. This is a dynamic factor, a future possibility that the special court should consider in making a present decision about rendition. All other things being equal, the balance tilts toward legality if the receiving country agrees to visits with the prisoner after the transfer. Unescorted visits mean more than escorted ones. And visits by third-parties, such as the International Committee of the Red Cross, mean more than visits by American officials because the Red Cross does not have a vested interest in concluding that

\begin{itemize}
\item \textsuperscript{163} 5 U.S.C. § 552 (2007).
\end{itemize}
the transfer did not lead to torture.\textsuperscript{165}

Post-transfer visits, like assurances of fair treatment before transfer, do not guarantee that the prisoner will be safe from torture. Nothing can. It is possible for the prisoner to be tortured in a way that does not leave obvious marks or in a way that causes him not to mention the torture to the Red Cross representatives.

It is not pleasant to imagine all the possibilities. As an extreme example, imagine if the prisoner has been tortured by Syrian interrogators who pretended to be Red Cross officials. As a consequence, the prisoner may not trust anyone. The sad truth is that the prisoner can become completely disoriented and manipulated. This is not to condone such mistreatment. This is to accept, despite all the checks, all the controls, and all the process, that evil things continue to be done to human beings. The \textit{Hamdi} model, while not giving up on ideals, is realistic about the limits of law.

The United States, having weighed all the relevant factors under the CAT, may transfer a prisoner to a third country under the law,\textsuperscript{166} but its responsibilities should not end there. After transfer, if the United States obtains credible information, whether through open or secret sources, that the prisoner has been mistreated, it should insist that the mistreatment stop. It should encourage transfer of the prisoner back to the United States or to a country with a better human rights record.

Despite any prior assurances, if the United States has a bad experience with a country—particularly a "close call" that results in torture—that may be enough, by itself, to take the country off the list for possible renditions. The bad experience in the gray, so to speak, will taint the country into the black for the near future. The \textit{Hamdi} approach, however, is not categorical. Even countries like Syria and Egypt, which have very poor human rights records, might do enough over the long-term for reasonable practitioners of


\textsuperscript{166} See supra Part III (discussing the legality of renditions).
rendition to suspend disbelief about the risks of torture. But emerging from the black will not be easy; the time it takes to clean up a country’s record will be measured in years, not days.

B. Specific Procedures

The lesson from *Hamdi* is that a fair process on irregular rendition does not need to involve a full civilian trial in which all the rules of evidence apply. *Hamdi*, in so many words, states that the proper criminal trial is not the only way to provide justice in the United States. Hearsay, to protect some legitimate government secrets, might be permitted in deciding on irregular renditions. Shifting the burden of proof — on more likely than not — from the government to the prisoner might also be permitted. Some of the purity and protections of traditional models will, necessarily, be left behind. The purists, those who always espouse the commander-in-chief override and those who always prefer the criminal justice model, may not be pleased. Alas, *Hamdi* is a place for pragmatists, caught between two poles.

Further, *Hamdi* identified but did not resolve the difficult issue of access to counsel. In Hamdi’s case, concerning the designation of a United States citizen as an enemy combatant, the government did not permit him access to counsel for many months. Whether or not he had a right to counsel from the beginning of his detention, Justice O’Connor said it was clear he had a right to counsel going forward in the case. Such counsel would help determine whether Hamdi fell within the enemy combatant category or not.

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167 See generally State Department Reports, *supra* note 141.
169 *Id.* at 533.
170 *Id.* at 575.
171 See generally *id.* at 533 (discussing the exigency that makes full protections impractical).
172 *Id.* at 539.
173 *Hamdi* had been allowed limited access to counsel by the time his case arrived at the Supreme Court. *Id.*
174 *Hamdi*, 542 U.S. at 539.
175 See *id.*
On irregular rendition, what role, if any, is there for counsel? The traditional criminal justice model would push for counsel. The executive power camp, on the other hand, would see counsel as an unnecessary interference. Those who see the issue through the *Hamdi* lens will continue to doubt themselves. In answering such questions, it is clear that the more we seek process the more we will lean toward including counsel for the suspect. What is not so clear, however, is how much the issue in a rendition case (whether the prisoner will be tortured in a third country) equates with the issue in a criminal case (say, whether the defendant committed the bank robbery or transferred funds with "an intent to defraud"). To some, the rendition case seems more about facts and less about the application of facts to legal standards. But even the fact/law duality, like so many other dualities in the law, can be blurred.

In the mush that is *Mathews v. Eldridge*, the opposing interests can be identified and distinguished on a rendition. The prisoner does not want a process that incorrectly leads to his transfer. If a mistake is made against him, he may be tortured or killed in the receiving country. That is as distressing as the *Hamdi* fear of a mistaken designation which leads to indefinite detention in a United States facility. By contrast, the State's interest is to protect national security and to comply with requests from other countries by transferring people away from the United States through informal means.

In no surprise to the American public, the President and his functionaries have hinted that irregular rendition is an important part of their strategy for combating terrorism since 9/11. Although not many people accept the Bush Administration's arguments at face value, far fewer say that irregular rendition is of no importance to the United States. Something must be done, after all, about suspected terrorists. Not many people, as much as

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176 *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (finding that criminal defendants have a right to counsel under the Sixth Amendment of the Constitution).

177 *See* Hamdi, 542 U.S. at 510-11 (noting the Government argued that, because of Hamdi's enemy combatant status, he did not need to be afforded a right to counsel).


they oppose Guantanamo, have suggested releasing all those prisoners into the United States.

In sum, the rendition proceeding does not need to be a formal trial which requires an advocate's mastery and a full appreciation of the rules of evidence. Even if counsel for the suspect is permitted, the executive branch will insist, as it does in civil and criminal cases which involve classified information, that all counsel obtain a security clearance to participate in the proceeding. That insistence would be reasonable. As noted, many negotiations about rendition take place in the privileged realm of diplomats and intelligence officers. Since the back and forth often treads on sensitive matters of state, some countries may only take prisoners if their cooperation with the United States is kept secret.

Another possibility is for the special court to maintain a list of cleared advocates for the prisoners about to be transferred by rendition. What this possibility loses in free choice of counsel, it regains in having experienced and trustworthy representation. As in many other administrative settings, there is a full range of choices somewhere between appointed counsel and pro se representation. This essay, in homage to *Hamdi*’s pragmatism, offers a sketch for those who seek solutions in the daunting space between the extremes.

**C. Legislative Action**

Under my broad umbrella, any proposal to tinker with the current practice of irregular rendition could be covered as a *Hamdi* variation. Just so, Senator Joe Biden’s legislative proposal, the National Security with Justice Act, is a variation on our theme.

In a bill which Senator Biden introduced in 2007, he tries to take irregular rendition away from the total discretion of the CIA and the Pentagon. Under his bill, for a rendition to be legal, it must be certified as necessary by the Attorney General or the Deputy Attorney General, then approved by the FISA court.

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180 See 5 U.S.C. § 555(b) (2008) (granting the claimant right to counsel in administrative hearings, but providing for pro se representation as well).


182 See id.
through a specific order that, among other things, gives the name
of the person to be transferred. 183 Rendition, under Senator
Biden's variation, would not be an affirmative tactic in American
counterterrorism. Rather, it would be an alternative when
“ordinary legal procedures” have failed. Unless the executive
official can show that it would be futile to try these ordinary
procedures or that they would be “inadequate” to protect
intelligence sources and methods, he or she must describe to the
FISA court the ordinary legal procedures that have been tried. 184

Thus, Senator Biden is more ambitious than I have been in this
essay. Not only does he propose more process, he tinkers with the
substance of the law. He would apply a “substantial likelihood”
test to the possibility that a suspect will be subjected to either
torture or to cruel, inhuman, and degrading treatment, arguably a
lesser form of mistreatment than torture. 185 That goes beyond the
specific terms of the Convention against Torture. 186 Article 3 of
the CAT, assuming it has extraterritorial effect and has not been
trumped by a commander-in-chief override, only prohibits
transfers when there are substantial grounds for believing torture
will occur in the receiving country. 187

My approach to irregular rendition is more incremental than
Senator Biden's. Trying to leave the substantive markers unchanged, I go step by step on procedures to provide a better
policy. If, at the end of all these steps, one is still convinced that
the practice of rendition is unfair and ineffective, then one can
change the markers. If nothing else, this essay shows an academic
more modest than a politician. 188 One time, realism takes the
place of idealism.

183 See id.
184 See id.
185 See id.
186 His supporters would probably argue that he goes no farther than the ICCPR or
other parts of international law.
187 CAT, supra note 45, at art. 3.
188 But I suspect that the written contributions from other academics on this
symposium will be as idealistic as, if not more idealistic than, Senator Biden.