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Extraordinary Rendition Meets the U.S. Citizen: United States' Responsibility Under the Fourth Amendment

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There are hardly any rules for illegal enemy combatants. It's the law of the jungle. And right now we happen to be the strongest animal.[1]

I. INTRODUCTION

In June 2003, Saudi Arabian authorities, at the request of the United States government, burst into a classroom at Medina University in Saudi Arabia, arrested a man named Ahmed Abu Ali, and placed him in Al-Hair prison in Riyadh.[2] Meanwhile, in the United States, agents from the Federal Bureau of Investigation searched Abu Ali's residence based on suspicion of domestic terrorist activity,[3] and they later flew to Saudi Arabia

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[1] Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 123 (responding to the thoughts of one rendition victim's wife, who asked how a practice could be against "all possible laws and human rights").

[2] *See* Caryle Murphy & John Mintz, *Va. Man's Months in Saudi Prison Go Unexplained*, WASH. POST, Nov. 22, 2003, at A01 (stating that there was no public evidence or open court hearing regarding Abu Ali's ties to terrorism).

[3] *See* United States v. Kahn, 309 F. Supp. 2d 789, 797 (E.D. Va. 2004) (deciding to convict one other man extradited from Saudi Arabia for engaging in terrorist training in Virginia).

to interrogate him.[4] At the end of 2003, U.S. officials held a grand jury hearing in Virginia regarding Abu Ali but failed to return an indictment against him.[5] He remained in Al-Hair prison for over twenty months with no charges pending.[6]

Abu Ali is one of many victims of extraordinary rendition, a counter-terrorism tactic where the United States renders suspected terrorists to other countries for imprisonment and interrogation.[7] The United States has used this method increasingly since the terrorist attacks on September 11, 2001, in an effort to expediently obtain intelligence information about terrorist operations through aggressive interrogation methods prohibited in the United States, often including torture.[8]

Abu Ali's arrest and detention represent a shift in the Central Intelligence Agency's use of "renditions," which the CIA previously employed to transfer suspects to receiving countries that wished to prosecute them.[9] Newer forms of rendition, termed extraordinary rendition, involve transferring individuals for national security concerns and do not involve a legal process.[10] The United States refers to these detainees as "illegal enemy combatants" in an attempt to cast them outside of both domestic and international law.[11] Some of these detainees were

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[4] *See* Petition for Writ of Habeas Corpus at 14, Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004) (No. 04-1258 (JDB)) (stating that FBI agents questioned Abu Ali about the *Royer* defendants and threatened to send Abu Ali to a prison in Guantanamo Bay, Cuba, as an "enemy combatant" if he did not cooperate).

[5] *Id.* at 12–13 (alleging that the U.S. government subpoenaed various friends of Abu Ali for the grand jury hearing).

[6] *See* Caryle Murphy, *Va. Couple File Lawsuit to Free Their Son Held in Saudi Arabia*, WASH. POST, July 29, 2004, at A08 (describing the family's decision to file suit against the U.S. government after attempting to work with the Department of State for over a year); *see also Abu Ali*, 350 F. Supp. 2d at 31 (denying the government's motion to dismiss due to sufficient evidence of U.S. involvement).

[7] *See* ASS'N OF THE BAR OF THE CITY OF NEW YORK & CENTER FOR HUMAN RIGHTS & GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 4 (2004), http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf [hereinafter TORTURE BY PROXY] (explaining that the high likelihood of torture after transfer to a third country is what makes this practice "extraordinary").

[8] *See* Mayer, *supra* note 1, at 106–07 (depicting the program as aimed initially at a discrete set of suspects, but which later came to encompass a large and poorly defined population, many of whom the U.S. has not charged with a crime); *see also* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 46–47, 60 (2004) (arguing that renditions are part of a secret "special-access program," which the Department of Defense expanded to Abu Ghraib Prison in Iraq); *see generally* Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44 [hereinafter *A Deadly Interrogation*] (analyzing the accountability of the CIA when interrogation results in serious injury or death).

[9] *See* Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond,* 25 LOY. L.A. INT'L & COMP. L. REV. 457, 458 (2003) (noting that rendering states are now indifferent to subsequent prosecution or detention of the transferred individuals).

[10] *See id.* (calling older forms of rendition "de facto extradition," where the rendering state would provide, at a minimum, procedural protections such as a hearing before expulsion); *see also* HERSH, *supra* note 8, at 55 (acknowledging that the CIA engaged in about seventy "extraordinary renditions" prior to 9/11).

[11] *See* Memorandum from William H. Taft IV, Legal Adviser, U.S. Dept. of State, to John C.

originally held at CIA's "black sites," which are prisons within the agency's covert internment network.[12] At these black sites, built and maintained with classified Congressional funds, the CIA kept the prisoners in complete isolation, with no legal rights and no contact with the outside world.[13]

News reports and human rights organizations estimate the number of detainees around the world to be in the hundreds or thousands.[14] However, Abu Ali is set apart from other detainees because his case is the first known case in which the United States has subjected its own citizen to this practice, violating his Fourth Amendment rights.[15]

This article argues that the United States violates an American citizen's Fourth Amendment right to be free from unlawful arrest when it subjects a citizen to extraordinary rendition, regardless of the location or custody of the detainee.[16] Part II elaborates upon the practice of extraordinary rendition and provides a history of the Fourth Amendment within the United States and abroad. Using Abu Ali as an example, Part III argues that the Fourth Amendment applies extraterritorially to citizen-detainees and analyzes U.S. responsibility for Fourth Amendment violations when the target of this method is a U.S. citizen. Finally, Part IV recommends how the legislative and judicial branches should respond to the executive's unlawful practice of rendition.

Yoo, Deputy Asst. Att'y Gen., U.S. Dep't of Justice (Jan. 11, 2002) (rejecting Yoo's argument that the Geneva Conventions, which lay out international human rights standards, do not apply to individuals captured in a "failed state" such as Afghanistan).

[12] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01 [hereinafter *Secret Prisons*] (explaining that the internment network was authorized when, six days after September 11, 2001, President George W. Bush signed a presidential finding that gave the CIA broad power to disrupt terrorist activity, including that authority to capture, detain, and kill al-Qaeda members). Presidential findings, which are required in order for the CIA to take covert action, must be approved by the CIA, the Department of Justice, and the legal advisors to the White House. *See id.*

[13] *Id.* Prisoners held within the covert system were divided into two tiers: (1) major terrorism suspects, held at black sites; and (2) prisoners with less direct involvement in terrorist operations and limited intelligence value. *Id.*

[14] *See A Deadly Interrogation*, *supra* note 8, at 45 (recounting estimations by human rights groups that the U.S. is holding around ten thousand foreign suspects in U.S. detention facilities in Afghanistan, Iraq, Cuba, and other countries); *see also* Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogation; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01 (estimating that fewer than 100 detainees have been rendered to foreign states for interrogation in secret prisons).

[15] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (presenting the first instance of a U.S. citizen categorized as an "enemy combatant," that is, an individual hostile to or engaged in armed conflict against the U.S.).

[16] *See* U.S. CONST. amend. IV (providing the right of the people to be free from unreasonable searches and seizures).

II. BACKGROUND

A. Current Trends of Extraordinary Rendition

President George W. Bush's administration argues that its counter-terrorism efforts require new rules because terrorism poses a serious threat to national security.[17] Labeled the "New Paradigm,"[18] this strategy focuses on obtaining intelligence information quickly with little emphasis on suspects' rights.[19] Extraordinary rendition, also called "rendition to torture" or "torture-by-proxy," is part of this strategy and attempts to circumvent domestic and international law by using other countries with poor human rights records to engage in methods that are unlawful in the United States.[20] Common destination states for victims of rendition have included Egypt, Jordan, Morocco, Saudi Arabia, Yemen, and Syria,[21] where standard practices include indefinite detention without charge, no access to an attorney, and torture.[22] Foreign authorities maintain custody of the

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[17] *See* Priest & Gellman, *supra* note 14, at A01 (interviewing national security officials who defended interrogations under torture as "just and necessary").

[18] Mayer, *supra* note 1, at 107 (describing the rendition program as failing to afford the same due process rights granted to criminal suspects in the U.S.); *see also* Michael Hirsh et al., *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, at 34 (posing the question of whether CIA officials may be liable for serious cases of abuse during renditions). Some foreign countries are attempting to hold CIA agents liable for rendition, requesting extradition so that agent can be prosecuted. *See also* Alessandra Rizzo, *Purported C.I.A. Operatives Sought in Italy*, GUARDIAN, Nov. 11, 2005, *available at* http://www.guardian.co.uk/worldlatest/story/0,1280,-5409415,00.html (noting that Italian prosecutors planned to charge CIA operatives with the kidnapping of Osama Moustafa Hassan Nasr, an Islamic cleric who was allegedly abducted in Milan and later detained and tortured in Egypt).

[19] *See* HERSH, *supra* note 8, at 47 (highlighting the concern of members of the intelligence community who believe violations of international law may destroy the U.S.'s moral standing and leave U.S. soldiers vulnerable to retaliation); *see also Secret Prisons*, *supra* note 12, at A01 (emphasizing that although the CIA's original scope was to hide top al-Qaeda leaders, as the agency received more information, it began to apprehend people with uncertain links to terrorism and lower intelligence value).

[20] *See* Priest & Gellman, supra note 14, at A01 (including the use of mind-altering drugs and painkillers, among other foreign interrogation methods).

[21] *See* TORTURE BY PROXY, *supra* note 7, at 13 (suggesting that foreign states can obtain better information from the detainees due to lower interrogation standards than those of the U.S.); *see also* Mayer, *supra* note 1, at 108 (reporting that other CIA prisons may exist in Thailand, Afghanistan, and Qatar). *Secret Prisons*, *supra* note 12, at A01 (confirming that CIA black sites exist in Thailand and Eastern Europe, but refusing to specify which countries at the request of senior U.S. officials). CIA flight records have recently been discovered, leading to investigations and public opposition in various countries. *See id.*; *see also* Craig Whitlock, *Europeans Probe Secret CIA Flights*, WASH. POST, Nov. 17, 2005, at A22 (reporting that officials in Spain, Norway, Sweden, Germany, Ireland, and Denmark had either opened investigations into CIA flights, demanded answers from the U.S. government, or requested that the U.S. avoid its airspace when transferring prisoners); *see also* Stephen Grey & Renwick McLean, *Spain Looks Into C.I.A.'s Handling of Detainees*, N.Y. TIMES, Nov. 14, 2005, at A8 (detailing a local Spanish magistrate's police report, which was a result of an investigation into several flights which landed in Spain and were thought to be part of the CIA's extraordinary rendition program); BBC News, Nordic States Probe 'CIA Flights,' Nov. 18, 2005, *available at* http://news.bbc.co.uk/1/hi/world/europe/4448792.stm (stating that the Icelandic media has alleged that CIA flights have landed in Iceland at least sixty-seven times since 2001).

[22] *See*, *e.g.*, U.S. DEP'T. OF STATE, SAUDI ARABIA: COUNTRY REPORTS ON HUMAN RIGHTS

prisoners in their sovereign states, even though the United States directs the detentions and acquires the information foreign authorities obtain through interrogations.[23]

B. Extraordinary Rendition and the Fourth Amendment

The Bush administration has detained suspected terrorists outside the United States in order to free itself from the constraints of the law.[24] However, because Abu Ali is a U.S. citizen, the constitutional protections afforded to him are distinct from those afforded to non-citizen detainees.[25] Under the Fourth Amendment, Abu Ali and others unknown but similarly situated retain the right to be free from unreasonable searches or seizures, regardless of their location outside the United States.[26] *Best v. United States* and *United States v. Verdugo-Urquidez* demonstrate how the extraterritorial application of the Fourth Amendment varies depending on the detainee's nationality.[27]

In each case, after U.S. officials searched and seized documents from the foreign residence of the defendant without a search warrant, the defendant moved to suppress the evidence based on violations of the Fourth Amendment.[28] Despite nearly identical factual scenarios, the First Circuit applied the Fourth Amendment in *Best*, but the Supreme Court refused to apply it in *Verdugo-Urquidez*.[29]

The varying decisions were a result of the defendants' nationalities: Verdugo-Urquidez was a Mexican citizen while Best was a U.S. citizen. The courts agreed that the Fourth Amendment limited U.S. actions in

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PRACTICES—2003, http://www.state.gov/g/drl/rls/hrrpt/2003/27937.htm (including torture and incommunicado detention as common practices in Saudi Arabia) (last visited Sept. 12, 2005).

[23] *See* HERSH, *supra* note 8, at 66 (contending that foreign use of force and humiliation during interrogation has done little for military intelligence because the confessions are unreliable).

[24] *See generally* Letter from John Yoo, Deputy Asst. Att'y Gen., U.S. Dept. of Justice, to William H. Taft IV, Legal Adviser, U.S. Dept. of State (Jan. 14, 2002) [hereinafter Letter from John Yoo] (arguing that the Constitution does not limit executive authority to suspend international treaties) (on file with the *Connecticut Public Interest Law Journal*).

[25] *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 453 (1990) (posing the question of whether the Bill of Rights is a constraint on all U.S. law enforcement authority or a safeguard only for U.S. citizens).

[26] *Id*. at 455 (arguing that if U.S. officials cannot participate in "break-ins and stomach pumping" in California, they may not do so abroad).

[27] *Compare* Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950) (searching a U.S. citizen's apartment in Vienna, Austria weeks after officials took him into custody), *with* United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990) (cooperating with Mexican officials to search a Mexican citizen's apartment in Mexicali and San Felipe, Mexico).

[28] *Best*, 184 F.2d at 138 (stressing that Congress cannot invalidate guarantees provided to citizens under the Constitution by failing to provide a judicial officer with the ability to issue warrants); *Verdugo-Urquidez*, 494 U.S. at 270–71 (objecting based on a series of Supreme Court cases granting constitutional rights to non-citizens within U.S. territory).

[29] *Verdugo-Urquidez*, 494 U.S. at 266 (finding that the Framers' decision to add the Fourth Amendment to the Constitution only intended to protect the people of the U.S. from arbitrary action by their own government).

foreign states only where U.S. officials acted against a U.S. citizen.[30] In *Verdugo-Urquidez*, the Chief Justice elucidated the varying applications of the Fourth Amendment based on its reference to the "people."[31] The majority held that because the Preamble, which ordains and establishes the United States Constitution, referred to the "people,"[32] this suggests that the "people" encompasses a class of persons who are either part of the national community or who have developed a "sufficient connection" with the United States to be deemed part of that community.[33] Therefore, only the "people" receive Fourth Amendment protections while abroad.

1. American Constitutionalism Outside United States Territory

Prior to *Verdugo-Urquidez*, the application of constitutional rights outside the United States varied throughout history.[34] In the late nineteenth century, the Supreme Court in *In re Ross*[35] adopted a theory of restrictive territoriality.[36] In that case, a British citizen convicted of murder aboard an American ship in Japanese waters challenged the conviction because he did not receive a jury trial.[37] The Court held the Constitution "ha[d] no operation in another country," affording constitutional rights only to individuals within the United States.[38]

From 1901 to 1922, in the *Insular Cases*, the Supreme Court faced the issue of how the Constitution applied in newly acquired U.S. territories.[39]

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[30] *Id* at 271–72 (granting constitutional rights to non-citizens only when they lawfully enter the borders of the U.S.).

[31] *See id.* at 265–66 (contrasting the language and scope of the Fourth Amendment with the Fifth and Sixth Amendments, which protect the "person" and the "accused" respectively).

[32] U.S. CONST. pmbl. ("[T]he people . . . do ordain and establish this Constitution for the United States of America.").

[33] *Verdugo-Urquidez*, 494 U.S. at 265 (refusing to grant protection to the defendant because he was not a U.S. citizen).

[34] *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 911, 975 (1991) (stating that the Justices have never reached a consensus on how the U.S. Constitution applies abroad); *see also* Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1674 (1989) [hereinafter *Extraterritorial Applicability*] (contrasting two views of the constitutional limitations: that the Constitution may restrict how the government acts towards the American people and that the Constitution restricts all government actions).

[35] *In re* Ross, 140 U.S. 453, 464 (1891) (stressing that the U.S. government can only assert its authority in another country where the two countries agree upon set conditions).

[36] Roszell Dulany Hunter, IV, Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 653 (1986) (suggesting that international law, which recognized only rights of nations and not of individuals, influenced the strict territoriality approach).

[37] *See* U.S. CONST. amend. VI (assuring criminal defendants the right to a jury trial in federal cases).

[38] *Ross*, 140 U.S. at 464 (requiring that the Constitution applies as long as the individual is within U.S. borders, even for those who commit offenses elsewhere but are brought to the U.S. for prosecution).

[39] *See*, *e.g.*, Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (holding that the Sixth Amendment right to a jury trial did not apply in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (construing the grand jury provision of the Fifth Amendment to have no effect in a prosecution in the Philippines).

In a series of cases dealing with Puerto Rico and the Philippines, which the United States acquired in 1898, the Supreme Court stated that federal officials had to be "fair and decent"[40] while acting in unincorporated territories, but that only fundamental rights need apply until Congress incorporated the territories into the United States.[41] According to the Court, what constitutes a fundamental right is determined on a case-by-case basis and depends on whether the right is "implicit in the concept of ordered liberty."[42]

The Court began to relax its strict territoriality approach after World War II, when it held in *Reid v. Covert* that the government must abide by the Constitution when acting against U.S. citizens abroad.[43] In *Reid*, where a U.S. military court in Britain convicted a soldier's wife of murder, a plurality of the Court agreed that the United States must afford civilian dependents accompanying U.S. soldiers in foreign countries a jury trial; however, a majority did not agree on the justification for the Constitution's application abroad.[44] Many scholars believe *Reid* marked the abandonment of the strict territoriality approach to American constitutionalism as applied to citizens abroad, thus opening the door for courts to apply other fundamental rights to U.S. citizens abroad.[45] Supporting this contention, the *Verdugo-Urquidez* majority relied on *Reid* to limit the application of the Fourth Amendment to U.S. citizens abroad.[46]

2. An Overview of the Fourth Amendment Abroad

The targets of extraordinary rendition are subject to unlawful arrest, but often, foreign authorities act to arrest and detain them.[47] While the

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[40] Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 20–21 (1985) (granting Congress the right to determine when constitutional rights were appropriate for the new territories, but cautioning that officers could not act free from restraint).

[41] *See* Dorr v. United States, 195 U.S. 138, 146 (1904) (interpreting the Framers' intentions to mean that the Constitution conferred the power to regulate newly acquired territories upon Congress).

[42] Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (determining that a state may limit fundamental rights only if it has a compelling state interest).

[43] 354 U.S. 1, 5–6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

[44] *See id*. at 41–64 (Frankfurter, J., concurring) (restricting the Court's holding to grant civilian dependents the right to a jury trial only during peacetime); *see also id.* at 65–79 (Harlan, J., concurring) (disagreeing with the plurality's implications that every provision of the Constitution would apply to a U.S. citizen located anywhere in the world).

[45] *See Extraterritorial Applicability*, *supra* note 34, at 659–60 (noting that the strict territoriality approach has given way to an increasing interest in protecting individuals from governmental misconduct).

[46] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) (refusing the "sweeping proposition" that *Reid* extends the Fourth Amendment to non-citizens in foreign countries); *see also* Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950) (refuting the strict territoriality approach by applying the Constitution to U.S. citizens in foreign states).

[47] *See* Priest & Gellman, *supr*a note 14, at A01 (claiming that the suspected terrorists turned over

circuit courts generally follow the rule that neither the Fourth Amendment nor the exclusionary rule applies when foreign authorities act against a U.S. citizen in its own territory,[48] there are two exceptions.[49] First, if the search or seizure of a U.S. citizen "shocks the judicial conscience," U.S. courts may adjudicate the individual's Fourth Amendment claim.[50] Second, when involvement of U.S. officials is sufficient to convert foreign actions into a "joint venture," Fourth Amendment protections apply, and the United States is responsible for the actions of both foreign and U.S. officials.[51]

For example, in *Birdsell v. United States*, where the Fifth Circuit refused to apply the Fourth Amendment where Mexican officials acted against a U.S. citizen, the court noted that if the officials had acted in a way that shocked the conscience, it would have exercised authority over the foreign officials.[52] Although the circuit courts later adopted this exception, it allows courts to hold foreign, rather than domestic, authorities responsible for Fourth Amendment violations.[53]

Courts initially developed the "joint venture" exception in the federalism context, before the Fourth Amendment applied to the states, to determine whether the Fourth Amendment applied where federal and state officials acted together in a search or seizure.[54] A joint venture is a joint operation between two separate authorities, and the existence of a joint venture is contingent on aggregate federal actions in relation to the totality of the search or seizure.[55]

In *Mapp v. Ohio*, the Supreme Court held that the Fourth Amendment applied to the states; thus, courts no longer employed the joint venture

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to foreign authorities are often captives with less intelligence value to the U.S.).

[48] *See* Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965) (finding that the Bill of Rights is inapplicable to a foreign sovereign acting in its own territory).

[49] *See* United States v. Barona, 56 F.3d. 1087, 1091 (9th Cir. 1994) (justifying the exceptions on preserving the integrity of the criminal justice system).

[50] United States v. Mitro, 880 F.2d 1480, 1483–84 (1st Cir. 1989) (limiting conduct that "shocks the judicial conscience" to actions that violate accepted notions of due process and fundamental international norms of decency).

[51] Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968) (attaching responsibility to U.S. officers for a joint venture because the effect of the search was equivalent to a situation where U.S. officials acted on their own).

[52] *Birdsell,* 346 F.2d at 782 n.10 (permitting U.S. courts to exercise authority over shocking foreign conduct in order to administer justice fairly).

[53] *Id*. (allowing courts to exclude evidence from a foreign search if foreign actions shocked the conscience). Because this Comment focuses on U.S. responsibility under the Fourth Amendment, the following analysis will not focus on the application of the "shock the conscience" exception to extraordinary rendition.

[54] *See* Lowenfield, *supra* note 23, at 455–56 (tracing the origins of the rule to the establishment of the exclusionary rule, which made it necessary to determine whether a search was a joint venture between federal and state officials).

[55] *Stonehill*, 405 F.2d at 744 (rejecting a claim for a U.S.-Philippine joint venture where the purpose of the raids was to obtain evidence for Philippine deportation proceedings).

exception in domestic cases.[56] However, with the rise of cooperation among countries in areas such as crime and terrorism, courts have rediscovered and reapplied the joint venture concept to operations between the United States and foreign states.[57] Following the lead of the Ninth Circuit in *Stonehill v. United States*, the majority of circuits have adopted the rule requiring substantial U.S. involvement to convert the foreign actions into a joint venture,[58] leaving much to the facts and analysis of each case.[59]

In *Berlin Democratic Club v. Rumsfeld*, the D.C. Circuit established that a joint venture may also exist where foreign authorities act as agents of the United States.[60] Based on the law of agency, an agent is a representative of the principal, acts on the principal's behalf, and is subject to the principal's control.[61] The principal is responsible for its agent's actions taken within the scope of the employment,[62] regardless of whether the principal authorized, had knowledge of, or participated in the misconduct.[63]

3. An Overview of the Fourth Amendment in the United States

Once a court finds a joint venture, it applies domestic Fourth Amendment rules, which protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[64] A seizure or arrest under the Fourth Amendment occurs when an officer restrains the liberty of a citizen by means of

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[56] Mapp v. Ohio 367 U.S. 643, 643 (1961) (applying the exclusionary rule, which prohibits the admission of evidence obtained through an unreasonable search or seizure at trial, to the states).

[57] *See Stonehill*, 405 F.2d at 743–44 (using the federal-state joint venture analysis to determine whether a joint venture existed between foreign and U.S. officials).

[58] *See id*. at 743 (creating a substantial involvement standard because of a previous Supreme Court statement in Byars v. United States, 273 U.S. 28, 32 (1927), that mere participation would not create a joint venture).

[59] *See* United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978) (quoting Byars v. United States, 273 U.S. 28, 32 (1927)) (explaining that a court must "'scrutinize the attendant facts'" to determine whether U.S. participation was sufficient to convert the foreign acts into a joint venture).

[60] Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 155 (D.C. Cir. 1976) (remanding the case for discovery of facts to support plaintiffs' contention that the U.S. ordered foreign officials to investigate activities of U.S. citizens abroad).

[61] *See* Meyer v. Holley, 537 U.S. 280, 286 (2003) (requiring both that the agent manifests consent that he or she will act on the principal's behalf and that the principal consents to the agent's authority to act); *see generally* RESTATEMENT (SECOND) OF AGENCY §§ 212–67 (1958) (explaining general rules for a principal's liability to the third person in tort).

[62] Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 355 (1929) (stating that a principal is responsible for even "flagrant" acts by an agent as long as the agent had no selfish motive).

[63] *See* Stockwell v. United States, 80 U.S. 531, 546 (1871) (arguing that because a third party attributes the knowledge of an agent to the principal, the principal is liable in tort for the actions of an agent).

[64] U.S. CONST. amend. IV (guaranteeing that law enforcement officials must not search or seize without probable cause).

physical force or a show of authority.[65] However, not all interactions between officers and individuals involve a physical arrest, and the Supreme Court has granted law enforcement officials latitude to interact with individuals depending on the amount of information the officials possess.[66]

Where law enforcement obtains an arrest warrant from a neutral magistrate, courts presume the arrest is reasonable.[67] Magistrates ensure that the police have probable cause, a standard of suspicion ensuring there are facts upon which a reasonable person would conclude there is a fair probability that the suspect committed a crime.[68]

In *United States v. Watson*, the Court expanded police authority by requiring a warrant only for a misdemeanor committed outside an officer's presence.[69] This enables law enforcement to act quickly, but does not change the requirement that police must have probable cause to arrest an individual.[70] To prevent abuse of this authority, the Court ruled in *Gerstein v. Pugh* that when officials make a warrantless arrest, they must bring the arrestee before a magistrate "promptly after arrest" to ensure probable cause exists.[71] The Court later interpreted *Gerstein* to mean a magistrate must determine probable cause within forty-eight hours after a warrantless arrest.[72]

Further enabling officers to act swiftly and flexibly, in *Terry v. Ohio*, the Court ruled that if officials have reasonable suspicion to believe that an individual is engaged in criminal activity or if crime "may be afoot," they may "stop and frisk" the suspect.[73] An officer may stop an individual to absolve or develop reasonable suspicion, but may only pat down the

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[65] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (refusing to retreat from the rule that police must obtain a warrant to perform searches and seizures whenever practicable); *see also* United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 544 (1976)) (stating that the purpose of the Fourth Amendment is not to remove all encounters between police and citizens, but to prevent "'oppressive interference'" into the individual privacy).

[66] *E.g., Mendenhall*, 446 U.S. at 554 (declining to characterize every encounter between police and citizens as an arrest because such a ruling would restrict law enforcement practices).

[67] Johnson v. United States, 333 U.S. 10, 13–14 (1948) (entrusting a neutral magistrate, rather than an "officer often engaged in the competitive enterprise of ferreting out crime," with making reasonable inferences from evidence to establish probable cause).

[68] *See* United States v. Prandy-Binett, 995 F.2d 1069, 1071–73 (D.C. Cir. 1993) (including a police officer's experience and training to assess whether there was probable cause to arrest).

[69] United States v. Watson, 423 U.S. 411, 418–20 (1976) (finding this rule to be prevailing among state constitutions, statutes, and case law).

[70] *See id.* at 417 (basing the lawfulness of an arrest on the Fourth Amendment's probable cause determination).

[71] Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975) (setting a broad standard so that each state may accord the timing of the probable cause determination to its individual system of criminal procedure).

[72] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) (shifting to the government the burden of proving the existence of an extraordinary circumstance when the state does not bring an arrested individual before a magistrate within forty-eight hours).

[73] Terry v. Ohio, 392 U.S. 1, 10, 30 (finding that if the stop and frisk confirms an officer's suspicions, it may give rise to probable cause for a lawful arrest).

suspect's outer clothing if the official has reason to believe the suspect is armed.[74] Although the Court in *Terry* granted more flexibility to police, where the officials exceed their bounds so that an individual does not feel free to leave, courts will find an unlawful arrest based on lack of probable cause.[75]

III. ANALYSIS

A. Rendition of a United States Citizen Binds the United States to Fourth Amendment Constraints

When the United States detains an individual abroad through extraordinary rendition, as demonstrated by *Best* and *Verdugo-Urquidez*, the nationality of the detainee determines the applicable laws and the confines of U.S. authority.[76] Although the U.S. practices extraordinary renditions against numerous people all over the world, most known detainees are non-citizens.[77] Abu Ali and others unknown but similarly situated present a special case because they are U.S. citizens entitled to the protections of the Fourth Amendment.[78]

Detainees who have never laid foot on U.S. soil obviously do not have the "sufficient connection" to the United States as required by *Verdugo-Urquidez*.[79] But because U.S. citizens are part of the national community, whenever the United States subjects an individual to torture-by-proxy, it must consider the individual's association to the U.S. before searching or seizing the suspect or the suspect's possessions.[80] In the context of extraordinary rendition, to the status of U.S. citizenship attaches the protections of the Fourth Amendment, and the United States and its foreign

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[74] Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (emphasizing that *Terry* limits officers to a pat-down for weapons that may harm the officer, not for evidence of crime).

[75] *Terry*, 392 U.S. at 15 (underscoring that courts still retain the responsibility to guard against police conduct, which intrudes upon personal security where there is insufficient justification to arrest).

[76] Elkins v. United States, 364 U.S. 206, 209 (1960) (stating that the effect of the Fourth Amendment limits and restrains the actions and authority of the U.S. and its officials).

[77] John Yoo, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1187 (2004) (claiming that the general profile of enemy combatants as non-citizens, seized in foreign lands and imprisoned outside U.S. borders, is not unusual because most U.S. military involvement is not fought on U.S. soil).

[78] *See* James Park Taylor, *Singularity: We Have Met the Enemy and He is Us: A Legal Guide to U.S. Citizens as "Enemy Combatants,"* 29 MONT. LAW. 8, 31 (2004) (emphasizing the need to maintain the protections of the Constitution while determining the innocence or guilt of suspects in a time of terrorism); s*ee also* Johnson v. Eisentrager, 339 U.S. 763, 769–70 (1950) (emphasizing the significance of citizenship as a deep-rooted ground to claim protection from one's government).

[79] United States v. Verdugo-Urquidez, 494 U.S. 259, 271–72 (1990) (failing to define what constitutes a "sufficient connection" to the U.S., but acknowledging that the defendant's "lawful but involuntary" presence did not adequately meet that standard).

[80] Reid v. Covert, 354 U.S. 1, 6 (1957) (recognizing that the protection of rights and liberties of U.S. citizens in foreign lands is an age-old concept that the U.S. has "jealously preserved" from government encroachment through limits prescribed in the Constitution).

counterparts must abide by these rights regardless of where they may act.[81]

The case of Abu Ali represents a modern-day version of *Best*, where the United States' counterparts were subject to the limitations of the Fourth Amendment when they arrested and detained Abu Ali in Saudi Arabia.[82] Because the United States has directed Abu Ali's detention outside the territorial jurisdiction of the United States—and as a U.S. citizen—he may hold the United States responsible for his seizure and detention.[83] Along with *Best*, Abu Ali's case demonstrates that the United States cannot escape the constraints of the Constitution by detaining its citizen-suspects outside U.S. borders.[84]

B. Transferring Citizen-Suspects to a Foreign State Does Not Transfer Responsibility for Fourth Amendment Violations

Among arguments defending the practice of extraordinary rendition[85] is one contention that the United States does not violate the Fourth Amendment because the detainees are in foreign custody.[86] But U.S. officials may avoid the limitations imposed by the Fourth Amendment when they arrest and transfer a suspected terrorist without a warrant or probable cause outside the United States only where that suspect is a non-citizen.[87] When the suspect arrested and rendered is a U.S. citizen, the

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[81] *Verdugo-Urquidez*, 494 U.S. at 265 (comparing the Fourth Amendment to the Preamble and the First, Second, Ninth, and Tenth Amendments, all of which refer to "the people").

[82] *Cf.* Taylor, *supra* note 78, at 31 (arguing that if citizen enemy combatants have violated U.S. law, the U.S. should indict and charge them in the U.S. court system where a jury can determine their guilt or innocence).

[83] *See* Best v. United States, 184 F.2d 131, 140 (1st Cir. 1950) (failing to suppress evidence based on an alleged Fourth Amendment violation solely due to delicate post-Nazi conditions in Austria at the time); *see also* Hamdi v. Rumsfeld, No. 03-6696, slip op. at 26 (U.S. June 28, 2004) (holding that a citizen-detainee seeking to challenge his detention in Guantanamo Bay during the "war on terror" must receive notice of the factual basis for his classification and an opportunity to rebut the government's assertions before a judicial officer).

[84] *See Hamdi*, No. 03-6696, slip op. at 24 (reaffirming a citizen's right to be free from involuntary detention by his or her own government without due process of law).

[85] *Compare* Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1462 (2000) (likening the balance of public safety and individual liberty in the world of terrorism to the common defense of necessity, where the actor chooses the lesser of two evils, acts to prevent imminent harm, anticipates the causal relationship between his or her conduct and that imminent harm, and has no legal alternatives to violating the law), *with* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 305 (2003) (arguing that a speculative future benefit cannot justify the physical abuse of an individual).

[86] *See* Mayer, *supra* note 1, at 110 (recounting the opinions of scholars who perceive the CIA as believing it has "extralegal abilities" outside the U.S.); *see also* Response to Order to Show Case [sic] Supporting Dismissal of Pet'r and Opposition to Pet'rs' Motion to Compel Discovery and Production, at 14 (asserting that because the Saudis have physical custody of Abu Ali, U.S. courts have no jurisdiction over Abu Ali's claims against the U.S. government).

[87] United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (refusing to extend the Fourth Amendment to non-citizens abroad because of the harmful consequences for U.S. conduct outside its boundaries).

United States and its foreign counterparts must abide by the limits of the Fourth Amendment even though their acts take place outside U.S. borders.[88]

In cases of extraordinary rendition, foreign authorities may act as the arrestors, custodians, or interrogators of the citizen-detainees.[89] Although the Supreme Court has not decided the issue, circuit courts agree that the Fourth Amendment does not apply to foreign authorities that unlawfully arrest U.S. citizens in their own territory,[90] reasoning that a U.S. judicial reprimand is unlikely to deter future instances of prolonged detention and torture by foreign officials.[91] However, recognizing the potential for cooperation between the United States and foreign states, circuit courts have applied the joint venture exception to prevent U.S. officials from circumventing constitutional constraints through operations with foreign officials.[92]

Renditions to torture exemplify the type of cooperation of which U.S. courts disapprove.[93] When the United States renders a suspected terrorist to a third country, the foreign authorities do not act against U.S. citizens for their own benefit; rather, they act in cooperation with or on behalf of the U.S. government.[94] Therefore, because the United States remains in control, courts can no longer apply the failure-to-deter rationale and may hold the United States responsible for its actions and the actions of its foreign counterparts where either violates the Fourth Amendment.[95]

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[88] Reid v. Covert, 354 U.S. 1, 6–7 (1957) (rejecting immediately the notion that the U.S. can act against its citizens without constitutional restraints solely because it acts outside U.S. borders).

[89] TORTURE BY PROXY, *supra* note 7, at 15 (detailing the development of renditions, which began in the late 1980s in order for the U.S. to apprehend wanted individuals in unstable states, like those experiencing civil war).

[90] Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965) (holding the Fourth Amendment inapplicable to foreign actions even though U.S. officials provided the information that led to the arrest and search of defendant).

[91] *See*, *e.g.*, Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967) (reasoning that "no prophylactic purpose is served" by applying the Fourth Amendment to foreign authorities because a U.S. court decision will not change the policies of a sovereign nation).

[92] United States v. Andreas, No. 96 CR 762, 1998 WL 42261, at *2 (N.D. Ill. Jan. 30, 1998). *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1419 (1989) (arguing that courts have prevented the government from doing indirectly what it cannot do directly since the beginning of the regulatory state).

[93] *Andreas*, 1998 WL 42261, at *2 (preventing the use of evidence seized abroad in violation of the Fourth Amendment to indict and prosecute criminal defendants within the U.S.).

[94] *See* Mayer, *supra* note 1, at 109 (describing U.S. difficulties with admitting CIA evidence obtained through renditions to torture because foreign governments may refuse to testify due to the possible exposure of their cooperation with the U.S.); *See also* Priest & Gellman, *supra* note 14, at A01 (quoting an unnamed U.S. official who stated, "[w]e don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.").

[95] *See Extraterritorial Applicability*, *supra* note 34, at 1683–84 (asserting that when the U.S. participates in actions of foreign officials, deterrence through the exclusionary rule is feasible).

1. Where There Is Substantial United States Participation in the Rendition of a Citizen-Suspect, the United States Is Responsible for Violations of the Fourth Amendment

While United States participation will differ depending on the facts of each rendition,[96] courts may hold the U.S. responsible for renditions of citizen-suspects under the joint venture exception where U.S. officials directly participate in the rendition or where the United States employs foreign authorities as its agents.[97] Where there is substantial U.S. participation in the rendition of a citizen-suspect, a joint venture exists between United States and foreign authorities, and the United States becomes responsible for the totality of the actions under the Fourth Amendment.[98] The rationale supporting such an exception is that courts do not support the bypass of U.S. laws by U.S. investigations abroad in ways that the Constitution plainly prohibits;[99] extending authority over such cases would deter the United States from engaging in further instances of rendition to torture.[100]

United States involvement in extraordinary renditions of U.S. citizen-suspects is sufficient to convert foreign actions into a joint venture between the United States and the foreign state. Similar to the situation in *Lustig v. United States*, where the Court found a joint venture restricted federal action on state territory, the Fourth Amendment applies to renditions and limits U.S. actions on foreign soil.[101] In *Lustig*, after a federal officer reported possible criminal activity to the state police,[102] the state police searched the room and handed over all seized documents to the federal officer, who examined them and selected what evidence to use at trial.[103]

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[96] Priest & Gellman, *supra* note 14, at A01 (alleging that U.S. participation in interrogations varies depending on the country, ranging from observation to handing over questions for foreign authorities to ask detainees).

[97] *See* United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976) (adopting the second exception as the Fifth Circuit held in *Birdsell* and the Ninth Circuit held in *Stonehill*). *But see* United States v. Barona, 56 F.3d 1087, 1090 (9th Cir. 1995) (applying a good faith rationale and the laws of the foreign state before deciding whether U.S. involvement converted foreign actions into a joint venture).

[98] United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983) (finding a joint venture where Americans—who provided firepower, back-up assistance, and interpreters—insisted that Canadian police seize defendant's ship).

[99] United States v. Andreas, No. 96 CR 762, 1998 WL 42261, at *2 (N.D. Ill. Jan. 30, 1998) (following the majority of circuits in a case of first impression by adopting the joint venture exception).

[100] *See* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 41 (D.D.C. 2004) (asserting that the executive's authority over foreign relations does not override the right of a U.S. citizen to challenge his or her arbitrary detention under control of the executive). *But see Extraterritorial Applicability*, *supra* note 34, at 1682–83 (cautioning that the U.S. judiciary must limit its interference in foreign affairs because the Constitution delegated the foreign policy function to the executive branch).

[101] Lustig v. United States, 338 U.S. 74, 79 (1949) (emphasizing that the search related to evidence of violations of federal, not state, law).

[102] *Id*. at 76 (alerting local police that the officer had seen no evidence of counterfeiting but was confident something was going on).

[103] *Id*. at 76–78 (noting that it was irrelevant that the federal officer stayed at police headquarters

Holding the Fourth Amendment applicable to the search, the Court stated that because a search is a "functional, not merely a physical, process," it is not complete until appropriation is made of the seized objects.[104] Therefore, the Supreme Court established the "silver platter doctrine," which courts have applied to cases involving United States and foreign cooperation.[105] Under the doctrine, a joint search includes one in which there was federal involvement, but does not include a search by foreign authorities who turn over evidence to U.S. officials "on a silver platter."[106]

In creating the silver platter doctrine to prevent federal officials from eluding the Constitution, the Court in *Lustig* based its decision on two main factors.[107] First, the Court looked to whether the federal official was the "moving force" behind the pursuit.[108] Second, the Court examined federal participation in the appropriation of evidence acquired during the search.[109]

At a minimum, the United States will be the moving force behind foreign actions to seize and detain the citizen-suspect.[110] For example, in the case of Maher Arar, a Canadian citizen detained in Syria for over ten months, U.S. officials arrested Arar before his transfer to Syria where Syrian officials maintained custody of him.[111] Other rendition victims have reported that hooded men seized and transferred them to foreign states, but once uncovered, the men were American officials.[112]

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while state police carried out the search).

[104] *See id*. at 78 (verifying that a joint venture exists because the federal officials had an actual share in the "total enterprise" of finding and choosing evidence by unauthorized means).

[105] *See* Byars v. United States, 273 U.S. 28, 33–34 (1927) (emphasizing the judiciary's duty of protecting against seemingly legal methods that indirectly "strike at the substance of the constitutional right").

[106] *Lustig*, 338 U.S. at 78 (refusing to differentiate between participation at the beginning of a search from participation after the search has begun because the distinction would draw too fine a line in the application of Fourth Amendment principles). *Contra* Elkins v. United States, 364 U.S. 206, 223–24 (1960) (repudiating the silver platter doctrine by holding the Fourth Amendment and exclusionary rule applicable to the states).

[107] *See Lustig,* 338 U.S. at 75–80*; see also Extraterritorial Applicability*, *supra* note 34, at 1684–85 (criticizing the doctrine's difficult applicability and suggesting that courts base the doctrine on the purpose of the search or seizure rather than the level of U.S. participation).

[108] *Lustig,* 338 U.S. at 75–78; *see also* United States v. MacConnell, 868 F.2d 281, 284 (8th Cir. 1989) (requiring prior involvement in the search to find a joint venture between federal and state officials) (citing *Lustig*, 338 U.S. at 79).

[109] *See Lustig*, 338 U.S. at 78–79 (finding a joint venture even though the state officials did not search the room to assist with the enforcement of federal laws).

[110] *See*, *e.g.*, Colin Campbell, *Man Held in Syria Is Free*, N.Y. TIMES, Oct. 7, 2003, at A9.

[111] *Id.* (describing the release of Maher Arar from Syria, after his year-long detention, as sudden and unexpected).

[112] *See* Mayer*, supra* note 1, at 123 (retelling Hadj Boudella's account of rendition, in which masked figures in Bosnian uniforms handcuffed and transferred him to a military airbase immediately after his release from prison in Bosnia; one member in the seized group later saw one of the abductors remove his uniform, revealing that he was American); *see also* Don Van Natta Jr.& Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. TIMES, Jan. 9, 2005, at 1 (strengthening Khaled el-Masri's claims of rendition through lengthy interviews and corroborating documents).

Without foreign involvement, the situation is simply a U.S. venture where American officials are both the moving force and the main actors; thus, the United States is responsible for all actions under the Fourth Amendment.[113] In situations where the United States requests that foreign authorities arrest and detain the citizen-suspect for U.S. purposes, the *Lustig* court indicates that the United States is still responsible because its role as the moving force is sufficient participation to partially convert the foreign acts into a joint venture between foreign and U.S. authorities.[114]

Second, the crux of *Lustig* was that the federal officer received and examined the evidence.[115] In the context of extraordinary rendition, foreign interrogators obtain evidence in the form of confessions for U.S. intelligence purposes.[116] Foreign authorities interrogate the suspects and hand over the information to U.S. intelligence officials, who examine it for use in destroying terrorist networks and preventing terrorist attacks.[117] By acquiring and appropriating the evidence obtained by foreign authorities, American officials wholly convert the foreign actions into a joint venture between the two states.[118]

United States participation in Abu Ali's case has surpassed the federal participation in *Lustig* because Saudi authorities have stated that their actions in arresting and imprisoning Abu Ali were at the behest of U.S. orders.[119] More significantly, the U.S. Attorney used information obtained from interrogations of Abu Ali in a domestic case that charged eleven defendants with participating in terrorist training in Virginia.[120] The court

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[113] *See* Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950) (applying the Fourth Amendment extraterritorially to U.S. actions against U.S. citizen in foreign states).

[114] *Lustig*, 338 U.S. at 77–78 (assuming that the federal officer was not the "moving force" of the search, but nonetheless finding a joint venture between federal and local authorities).

[115] *See id*. at 79 (rejecting the argument that state officials' examination of the evidence before the federal officer arrived negated a joint venture).

[116] *See* Letter from William J. Haynes II, General Counsel of the Department of Defense, to Kenneth Roth, Executive Director of Human Rights Watch (April 2, 2003) (admitting that the U.S. interrogates enemy combatants to elicit information and that the "war on terror" may require the transfer of enemy combatants to foreign states, on behalf of the U.S., for prolonged detention).

[117] *See* Mayer, *supra* note 1, at 110 (reporting that American officials would provide Egyptian interrogators with questions in the morning and the Egyptian officials would return with information in the evening).

[118] *See Lustig*, 338 U.S. at 79 (noting that the state officers specifically looked for evidence of violations of federal law).

[119] *See* Caryle Murphy, *Saudis Plan Terror Case Against Va. Man, Family Says*, WASH. POST, July 30, 2004, at A09 (quoting a Saudi official as stating that the Saudis detained Abu Ali with "full knowledge and support of the US [sic] government."); *see also* Petition for Writ of Habeas Corpus, *supra* note 4, at 12–13 (comparing Abu Ali's case to Sabri Benkhala, who Saudi authorities arrested around the same time as Abu Ali and who a U.S. consul informed that his arrest was at the request of the FBI).

[120] *See*, *e.g.*, Kevin Bohn, *"Virginia Jihad" Suspects Charged With Plotting to Fight U.S.*, (Sept. 26, 2003), *available at* http://www.cnn.com/2003/LAW/09/25/ virginia.terror.suspects/ (associating the *Royer* defendants with Lakshar-e-Taiba, a Pakistani terrorist group fighting India over Kashmir, a northern region of India) (last visited Apr. 5, 2005).

convicted Seifullah Chapman, a defendant in the case, based on sealed information that American officials acquired from Abu Ali while he was in Saudi Arabia.[121] Thus, like the federal officials in *Lustig*, U.S. authorities appropriated the statements obtained from Abu Ali in order to determine what evidence to use in trial.[122] Such participation in the arrest and detention of Abu Ali is comparable to *Lustig* and substantiates a joint venture between the United States and Saudi authorities.

2. *Where the United States Empowers Foreign Authorities to Render Citizen-Suspects, the United States Is Responsible for the Resulting Fourth Amendment Violations*

Even where there is no direct participation by U.S. officials, if the foreign authorities who render citizen-suspects act as American agents, a joint venture between United States and foreign officers exists and the U.S. is responsible under the Fourth Amendment.[123] Often, there is limited government disclosure concerning extraordinary rendition in order to prevent culpability of U.S. officials, making it difficult to ascertain whether American officials have taken part directly in the arrests, detentions, or interrogations of citizen-suspects.[124] Regardless of actual U.S. participation, as the director and primary beneficiary of these operations, the United States is responsible for foreign authorities that act on behalf of the U.S. under the joint venture exception.[125]

For example, in *Berlin Democratic Club*, a group of American citizens formed various organizations in West Berlin and in the Federal Republic of Germany (FRG).[126] Under an FRG statute, the United States could "suggest" that FRG officials engage in electronic surveillance of these groups.[127] Where the American "suggestions" were effectively orders,[128]

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[121] *See* United States v. Khan, 309 F. Supp. 2d 789 (E.D. Va. 2004) (testifying in *Royer* that the FBI's search of Abu Ali's home was part of the *Royer* investigation).

[122] *See Lustig*, 338 U.S. at 79 (insisting that the federal officer used his expertise and discretion to accept and reject evidence that related to the crime).

[123] *See*, *e.g.*, United States v. Morrow, 537 F.2d 120, 140 (1976) (finding insufficient evidence to convert foreign authorities into U.S. agents where Canadian and U.S. law enforcement officials engaged in normal lines of communication that are often necessary for apprehension of international criminals).

[124] *Cf.* TORTURE BY PROXY, *supra* note 7, at 6 (pointing out that although the U.S. government has denied the practice of extraordinary rendition in all official settings, numerous officials speaking off the record have acknowledged openly the method); *see also Extraterritorial Applicability*, *supra* note 34, at 1685 (proposing that the level-of-participation test encourages U.S. officials to circumvent the rule by using foreign proxies).

[125] *See* Mayer, *supra* note 1, at 116 (suggesting that the information extracted from extraordinary-rendition detainees would shock the conscience of any U.S. court).

[126] *See* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 147 (D.D.C. 1976) (alleging numerous acts of warrantless searches, including electronic surveillance, covert infiltration of activities, and distribution of the organizations' files to military and civilian agencies).

[127] *See id*. at 155 (explaining that FRG law provided for members of the North Atlantic Treaty Organization, a group of nations that consults and acts jointly on security issues, to suggest from whom

the court held that the United States violated the citizens' Fourth Amendment rights even though no U.S. officials physically participated in the surveillance.[129]

Similarly, in many cases of rendition, U.S. officials do not physically seize, search, or interrogate the detainee, leaving these responsibilities to foreign authorities.[130] Nonetheless, the United States remains in control by selecting whom to render abroad, directing the operations, and using the information obtained for U.S. intelligence purposes.[131] As in *Berlin Democratic Club*, direct participation by American officials is not a prerequisite in finding culpability; U.S. authorization of foreign acts alone creates an agency relationship between the United States and foreign officials.[132] If the foreign custodians did in fact exercise independent control over these detainees, the custodians could review U.S. "suggestions" regarding how to treat the prisoners and possibly reject them.[133]

Abu Ali's case is a prime example of agency because U.S. participation in his detention has not been visible. For example, the media and the United States government have reported that FBI agents "attended" one of the Saudis' interrogations of Abu Ali, but the U.S. has been careful not to concede any direct American participation.[134] But while the Saudis arrested and imprisoned Abu Ali, the FBI was present and active behind closed doors.[135] They visited him in Saudi Arabia, interrogated him, searched his U.S. residence, and testified concerning his status in a

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the FRG should obtain intelligence information).

[128] *See id*. (holding that the plaintiffs were entitled to discovery of facts that would demonstrate that the U.S.'s "suggestions" were not commands, but that FRG officials reviewed the suggestions before carrying them out).

[129] *See* Reid v. Covert, 354 U.S. 1, 16 (1957) (finding that no agreement or law with a foreign nation may sanction a power upon the executive, which is free from the restraints of the Constitution).

[130] *See* TORTURE BY PROXY, *supra* note 7, at 14 (suggesting that George Tenet, former Director of the CIA, thought it would be better for foreign authorities to interrogate suspected terrorists because they may be able to use more aggressive interrogation methods).

[131] *See*, *e.g.*, United States v. Khan, 309 F. Supp. 2d 789 (E.D. Va. 2004) (sealing Abu Ali's confessions in court, but using them to convict defendants in the case).

[132] *See*, *e.g.*, Nash v. Towne, 72 U.S. 689, 704 (1866) (indicating that regardless of the principal's level of participation in a transaction between an agent and a third party, the principal is the responsible individual against whom a third party may bring a claim).

[133] *See* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 155 (D.D.C. Cir. 1976) (recommending review of U.S. "suggestions" as a rebuttal to the application of the Fourth Amendment to the search of U.S. citizens by the FRG).

[134] *See* Associated Press, *U.S. Citizen May Have Right to Fight Saudi Jailing* (Dec. 17, 2004) *available at* http://www.msnbc.msn.com/id/6727210/ (last visited Apr. 5, 2005) (reporting the D.C. District Court's decision to allow jurisdictional discovery based on the plaintiff's presentation of evidence of U.S. involvement in Abu Ali's case); *see also* Ken Coates, *A Season of Cruelty*, MORNING STAR, Mar. 10, 2003, at 7 (recounting an instance of extraordinary rendition in Saudi Arabia, where U.S. officials observed the live investigations through one-way mirrors).

[135] *See* Karen Branch-Brioso, *Document Ties American Held by Saudis to Al-Qaida*, ST. LOUIS POST-DISPATCH, July 26, 2003, at 6 (quoting a Saudi Embassy spokesperson who stated that the FBI office overseas had "full and complete and direct access" to Abu Ali from the moment of his arrest).

domestic terrorism case.[136] Saudi Arabia's failure to claim responsibility for Abu Ali's imprisonment, combined with these examples of U.S. involvement, support a strong agency relationship between the two states. Where the United States has "suggested" that Saudi authorities imprison Abu Ali indefinitely, the United States is responsible for Fourth Amendment violations against him.[137]

C. Extraordinary Rendition: An Unlawful Arrest Under the Fourth Amendment

Once a court establishes a joint venture between American and foreign officials, the next step is to determine whether the foreign officials engaged in an unreasonable search or seizure under the Fourth Amendment.[138] Despite the foreign context in which the search or seizure occurs, the few courts that have faced this inquiry have applied domestic Fourth Amendment principles.[139] Thus, once the courts find sufficient participation to convert the acts into a joint venture, they must apply the appropriate Fourth Amendment standards to the particular facts.[140]

Under established Fourth Amendment principles, extraordinary rendition of a citizen-suspect is effectively an unlawful arrest. *Terry* allows law enforcement officials to stop and frisk suspected terrorists without probable cause, but the United States exceeds the bounds of an authorized *Terry* stop through rendition to torture.[141] By acting outside the permissible limits of Supreme Court decisions, American officials and their counterparts violate the Fourth Amendment by arresting citizen-

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[136] *See generally* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 31 (D.D.C. 2004) (alleging U.S. control over Abu Ali in order to reach discovery of Abu Ali's arrest and detention through evidence of all known incidents of U.S. involvement).

[137] *Compare Berlin Democratic Club*, 410 F. Supp. at 155 (finding for the plaintiffs because the U.S. government failed to factually demonstrate that its "suggestions" to FRG officials were not effectively orders), *with Abu Ali*, 350 F. Supp. 2d at 31 (entitling Abu Ali to discovery of the facts of his arrest and detention partially because the U.S. government failed to offer facts to rebut Abu Ali's allegations).

[138] *See*, *e.g.*, United States v. Hensel, 699 F.2d 18 (1st Cir. 1983) (agreeing with the lower court's finding of a joint venture between U.S. and Canadian officials but failing to find a violation of the defendant's right to privacy under the Fourth Amendment).

[139] *See* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1230 (9th Cir. 1988) (applying domestic Fourth Amendment principles to a U.S. search in Mexico after determining that U.S. and Mexican officials engaged in a joint venture), *rev'd on other grounds*, 494 U.S. 259 (1989); *see also* United States v. Peterson, 812 F.2d 486, 494 (9th Cir. 1987) (declining to find an unreasonable search on the high seas based on the exigent circumstances exception to the Fourth Amendment). *But see Extraterritorial Applicability*, *supra* note 34, at 1682–83 (arguing that a separate analysis is necessary for U.S. actions abroad to prevent excessive judicial interference into the executive function of foreign affairs).

[140] *See Hensel*, 699 F.2d at 25–26 (refusing to find a Fourth Amendment violation for a warrantless search undertaken on the high seas because U.S. and foreign officials had probable cause, an "exception for searches on the high seas").

[141] *See* Terry v. Ohio, 392 U.S. 1, 10 (1968) (understanding that officers may have limited information but need to deal flexibly with rapidly changing and often dangerous situations).

suspects without probable cause or judicial review.[142]

1. Without Probable Cause, Rendition of a Citizen-Suspect Is an Unlawful Arrest Under the Fourth Amendment

By seizing citizen-suspects and transferring them to another location based on only reasonable suspicion, U.S. officials or their foreign counterparts effectively convert a lawful stop into an arrest.[143] *Terry* authorizes encounters or stops between law enforcement and citizen-suspects based on reasonable suspicion because such stops do not intrude upon the constitutionally protected interest of individual privacy.[144] However, certain police actions, such as the transfer of an individual from one location to another, convert a legal stop into an arrest.[145]

For example, *Hayes v. Florida* demonstrates a scenario in which the officers exceeded the limits of *Terry* by stopping the defendant and bringing him to the police station for fingerprinting.[146] At trial, the suspect argued that the officers illegally detained him under the Fourth Amendment because they did not have probable cause, a warrant, or consent for the arrest.[147] In finding that the police officers had breached the authorized limits of a temporary seizure by transporting Hayes to the police station, the Supreme Court established that the rendering of an individual from one place to another marks the conversion from a stop to an unlawful arrest.[148]

Similarly, renditions are notable for the act of rendering, or transferring, the suspected terrorists to another country for interrogation.[149]

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[142] *See id*. at 26 (distinguishing an arrest from a stop because an arrest is the first stage of a criminal prosecution to which attaches restraint of an individual's liberty).

[143] *See*, *e.g.*, Florida v. Royer, 460 U.S. 491, 507 (1983) (requiring probable cause in order for the officer to stop the defendant in an airport, retain his ticket, and move him to an interview room for investigative purposes).

[144] *See* United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (contending that the Fourth Amendment proposes to avoid "arbitrary and oppressive interference" with individual privacy, not to eliminate all contact between police and individuals).

[145] *See*, *e.g.*, Davis v. Mississippi, 394 U.S. 721, 722–23 (1969) (reversing the lower court's decision to admit evidence where an officer transported an individual ninety miles and detained him overnight without probable cause or a warrant); *see also* Minnesota v. Dickerson, 508 U.S. 366 (1993) (excluding the evidence seized during a *Terry* stop because the frisk amounted to a search for evidence rather than a permissible protective search for the safety of the officer or others).

[146] *See* Hayes v. Florida, 470 U.S. 811, 812 (1985) (explaining that the individual was reluctant to go to the police station, but consented when the officers threatened to arrest him).

[147] *Id*. at 815 (confirming the rule that transportation to a police station for investigative detention without probable cause or a warrant violates the Fourth Amendment).

[148] *See id*. at 813–14 (rejecting the government's contention that because fingerprinting is a more reliable crime-solving mechanism, its use is acceptable during an illegal arrest).

[149] *See* Fitzpatrick, *supra* note 9, at 457–58 (explaining that states only resort to renditions when there is no extradition treaty with the requesting state or when they want to avoid the legal process of formal extradition); *see also* Duncan Campbell, *September 11: Six Months On: U.S. Sends Suspects To Face Torture*, THE GUARDIAN (London), Mar. 12, 2004, at 4 (quoting an anonymous U.S. official, who said, "[a]fter September 11, [extraordinary renditions] have been occurring all the time. It allows us to

Assuming that law enforcement officials have reasonable suspicion to stop an individual, they may question the citizen-suspect about alleged ties to terrorism and perform a frisk if there is reason to believe the individual is armed.[150] However, the Supreme Court established in *Hayes* that moving a citizen-suspect to another location without probable cause is an effective arrest under the Fourth Amendment.[151]

Furthermore, the purposes of extraordinary rendition also suffice to convert the stop into an unlawful arrest.[152] While the officers in *Hayes* transferred the defendant for fingerprinting, the United States renders suspected terrorists to forcibly obtain intelligence information through interrogation.[153] Comparing fingerprinting to interrogation, the Supreme Court has found interrogation to be a higher intrusion upon privacy and personal security.[154]

Applying these factors to Abu Ali, if the United States had reasonable suspicion that Abu Ali had ties to terrorism, it would have been permissible for U.S. officials or Saudi authorities to stop and frisk him within the bounds of *Terry*.[155] By seizing Abu Ali and immediately transferring him to and detaining him in a prison, Saudi authorities effectively arrested Abu Ali without probable cause, a warrant, or his consent.[156] Assuming Saudi authorities only had reasonable suspicion and acted as agents of the United States, the U.S. is responsible for restraining Abu Ali's liberty without probable cause.

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get information from terrorists in a way we can't do on U.S. soil"). *But see* TORTURE BY PROXY, *supra* note 7, at 17 (quoting a former CIA agent as stating that transferring the suspect to a third country produces better cooperation and more information as a result of factors such as cultural affinity and Arabic translators).

[150] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (finding no Fourth Amendment violation where the officer stopped two men and frisked them for weapons because they walked past a store over twenty times).

[151] *See Hayes*, 470 U.S. at 815–16 (triggering the full protection of the Fourth Amendment when police cross the line of permissible procedures, such as forcibly removing persons from their home and transporting them elsewhere). *But see* People v. Hicks, 68 N.Y.2d 234, 241 (1986) (suggesting that transporting a suspect for the purpose of witness identification may be permissible under the Fourth Amendment).

[152] *See* TORTURE BY PROXY, *supra* note 7, at 14 (stating that extraordinary rendition allows CIA interrogators to go to countries who closely cooperate with the U.S. in order to use interrogation methods banned in the U.S.).

[153] *See* HERSH, *supra* note 8, at 55 (contradicting the Bush Administration's refusal to discuss extraordinary renditions with numerous reports of prisoners sent to ally countries for extensive interrogation).

[154] *See Hayes*, 470 U.S. at 814 (construing interrogation to be more intrusive than fingerprinting because it involves probing the private life and thoughts of an individual); *see also Davis*, 394 U.S. at 727 (concluding that interrogation is a more serious intrusion than fingerprinting because officers can employ it repeatedly in order to harass an individual).

[155] *See Terry*, 392 U.S. at 26–27 (recognizing that a reasonable apprehension of danger may exist long before an officer has probable cause to arrest a person for prosecution of a crime).

[156] *See* Davis v. Mississippi, 394 U.S. 721, 727–28 (1969) (acknowledging that fingerprinting is a low intrusion of privacy but holding that Davis's detention for fingerprinting violated the Fourth Amendment because officials did not have probable cause or a warrant).

2. Where There Is Sufficient Probable Cause to Arrest a Citizen-Suspect, Precluding Judicial Review of the Warrantless Arrest Violates the Fourth Amendment

In certain cases of extraordinary rendition, the United States may have probable cause to believe some citizen-suspects have ties to terrorism, giving it sufficient justification to arrest the individuals without a warrant.[157] But the existence of probable cause from the perspective of U.S. intelligence officials is not enough;[158] a magistrate must check police power by confirming that probable cause exists in order for the citizen-suspect to legally remain in detention.[159]

In *County of Riverside v. McLaughlin*, a class action suit alleged that the County of Riverside policy for a probable cause determination within two days was unreasonable under the Fourth Amendment.[160] In holding that the two-day requirement was reasonable in light of the "promptly after arrest" standard set out in *Gerstein*, the Supreme Court capped the time a state has to bring arrestees before a magistrate at two days.[161]

Extraordinary rendition violates this well-established rule. First, individuals subject to rendition remain in detention for months or years without review by a magistrate or other judicial officer.[162] Moreover, the goal of rendering citizen-suspects outside the United States is to shift the aim of detention from punishment to interrogation and to exclude the detainees from any legal process.[163] The Supreme Court has consistently held that judicial review is an important check on police power.[164] Through extraordinary rendition, the United States deliberately

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[157] *See* United States v. Watson, 423 U.S. 411, 418 (1976) (authorizing warrantless public arrests based on probable cause although courts prefer and may more readily accept arrests supported by a warrant); *see also* 18 U.S.C. § 2332 (2005) (laying out criminal penalties for the crime of terrorism, which Congress has designated as a felony).

[158] *See* Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975) (understanding that a mandatory warrant requirement may hinder law enforcement, but finding that the reasons to allow a warrantless arrest evaporate after the suspect is in custody).

[159] *See id*. at 114 (reasoning that the consequences of prolonged detention may be serious, including interference with one's job and impairment of family relations, and thus, determination of probable cause is necessary).

[160] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 47–48 (1991) (arguing that because the two-day requirement excluded weekends and holidays, warrantless arrestees may remain in detention without review for up to seven days).

[161] *See id*. at 58–59 (pointing out that states may choose to make a determination within less than forty-eight hours but that forty-eight hours is reasonable).

[162] *See Gerstein*, 420 U.S. at 114 (emphasizing that a neutral magistrate is essential to provide protection from unjustified interference with personal liberty).

[163] *See* Major General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* (2004) (reporting that the primary goal in assigning a Guantanamo Bay general to Abu Ghraib Prison in Iraq was to maximize effective interrogation of the detainees), *available at* http://www.npr.org/iraq/2004/prison_ abuse_report.pdf.

[164] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (emphasizing that an unchecked system of detention has the potential to become a method of oppression and abuse of individuals who do not present a threat to national security).

circumvents this judicial authority and unreasonably leaves the guilt of citizen-detainees in doubt.[165]

In Abu Ali's case, the United States may have had probable cause to request that the Saudis arrest Abu Ali, but prolonged detention without judicial review goes beyond the scope of a warrantless arrest.[166] As a U.S. citizen, the Fourth Amendment applies to Abu Ali's arrest and detention, and a judicial officer must determine that a factual basis for Abu Ali's arrest and detention meets the probable cause standard in order for the arrest to be lawful and reasonable.[167] Because the United States detained Abu Ali for over twenty months, the U.S. has clearly surpassed the two-day cap set in *County of Riverside*, even where it had probable cause to detain him, making his arrest unlawful under the Fourth Amendment.[168]

D. National Security Is Not a Defense to the Rights of United States Citizens

After the terrorist attacks of September 11, 2001, national security has become the top U.S. priority, and the Bush administration has urged that it needs new rules to meet the threat of terrorism.[169] Although national security is a critical government interest, it cannot justify the rendition of U.S. citizens, especially after the Supreme Court recently confirmed that the United States may not dispose of the rights of citizen-detainees even with higher powers imparted upon the executive branch during wartime.[170]

Hamdi v. Rumsfeld posed the question of what legal process, if any,

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[165] *See* International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* 4 (2004) (reporting that U.S. intelligence officers believed 70% to 90% of the prisoners in Iraq had been arrested by mistake); *see also* Mayer, *supra* note 1, at 110 (suggesting that some of the detained individuals may be innocent, but after violating their rights, the U.S. cannot reinstate them into the court system); *see also Secret Prisons*, *supra* note 12, at A01 (concluding that the original standard for capturing and transferring suspects has been lowered as the scope of the internment program has increased).

[166] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991) (asserting that the flexibility *Gerstein* granted to the states to decide the time frame for a probable cause determination has limits because states have no legitimate interest in arbitrarily detaining individuals without probable cause).

[167] *See* Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950) (extending application of Fourth Amendment protections to a U.S. citizen arrested and searched in Europe).

[168] *See*, *e.g.*, Bullock v. Dioguardi, 847 F. Supp. 553, 567 (N.D. Ill. 1993) (denying a motion to dismiss where the government gave no justification for a seven-day delay in its probable cause determination).

[169] *See* Fitzpatrick, *supra* note 9, at 491 (arguing that U.S. disregard for fundamental rights of terrorist suspects ironically mirrors terrorists' attitudes towards their Western enemies); *see also* Priest & Gellman, *supra* note 14, at A01 (quoting Cofer Black, the head of the CIA Counterterrorist Center, stating that "[t]here was a before 9/11, and there was an after 9/11 . . . . After 9/11 the gloves came off").

[170] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (refusing Hamdi's proposal to preclude entirely the detention of enemy U.S. citizens during a time of war); *see also* Rasul v. Bush, No. 03-334, slip op. at 17 (U.S. June 28, 2004) (authorizing judicial review even for non-citizens held indefinitely outside the territorial jurisdiction of the U.S.).

was due a U.S. citizen captured and imprisoned in Afghanistan and detained indefinitely in the United States as an enemy combatant.[171] In finding that a citizen-detainee must receive both notice of the factual basis for his status as an enemy combatant and a fair opportunity to rebut the government's factual assertions before a neutral decision-maker, the Supreme Court emphasized that a citizen's "most elemental of liberty interests" is to be "free from physical detention by one's own government."[172]

The Supreme Court in *Hamdi* permitted the United States to detain citizen-suspects for the duration of war, but only if the U.S. legitimately determined their status as enemy combatants.[173] Despite the weighty government interest in national security during wartime, extraordinary rendition of a U.S. citizen without allowing access to judicial review is equally significant.[174] Because of the high risk of an erroneously detained individual, the United States must notify its citizen-detainees subject to rendition on the basis for their detention and permit the citizen-detainee to challenge the U.S. evidence before a judicial officer.[175] However, because the primary purpose of rendition is to obtain intelligence through interrogation and torture, according to *Hamdi*, the Supreme Court may forbid wholly such indefinite detention.[176]

Abu Ali is entitled to the same judicial review the Supreme Court afforded the petitioner in *Hamdi*. While the difference between their cases is that the United States detained Hamdi in Afghanistan and later brought him to the U.S. for indefinite detention while Abu Ali remained in Saudi Arabia for over twenty months at the behest of the U.S. government, the issue is the same.[177] National security and the interests of the United States during wartime do not provide the executive branch with the authority to do away with the rights of U.S. citizens as it chooses.[178] The Court's

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[171] *See Hamdi*, 542 U.S. 507 at 532–33 (rejecting the government's contention that courts should review the detention of a citizen-detainee under a deferential standard with the focus exclusively on the government-proffered facts).

[172] *Id.* at 22 (considering the interests of the erroneously detained individual in its balancing of individual and government interests).

[173] *See id*. at 12 (basing its decision primarily on established laws of war, which require the release of prisoners of war immediately after the close of active hostilities).

[174] *See id*. at 25 (emphasizing the privilege of U.S. citizenship and the need to preserve the rights for which the U.S. fights abroad).

[175] *See id*. at 27 (entitling the affected individuals with the right to be heard before a judicial officer).

[176] *See id*. at 10 (alerting the parties that the purpose of detention is to provide protective custody and to prevent enemy belligerents from returning to the battlefield).

[177] *See* Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) (leaving "untouched" the right of a U.S. citizen to challenge one's detention by the U.S. in a foreign state). The difference between the *Hamdi* and *Abu Ali* cases is one of jurisdiction—the question of whether a U.S. court may adjudicate the claims of each petitioner. Abu Ali's case presents the question of whether a U.S. court can review the detention of a U.S. citizen abroad, a question the Supreme Court has yet to answer.

[178] *See* Fitzpatrick, *supra* note 9, at 482 (relying on international court decisions to conclude that

decision in *Hamdi* not only prohibits Abu Ali's detention because its purpose is interrogation, but also emphasizes that an unchecked system of detention poses a high risk to the liberty interests of detainees.[179] When prisoners are U.S. citizens, the U.S. government may not disregard its "constitutional promises."[180]

E. Wartime Authority Does Not Negate the Limits of the Constitution

Some scholars believe that when U.S. officials apprehend a suspected terrorist in a foreign country, the rigid requirements of the Fourth Amendment may be an unreasonable in light of exigent circumstances, the extraterritorial nature of the search, or practicalities such as access to a U.S. magistrate.[181] While U.S. courts have not ruled directly on this issue, in *Rasul v. Bush*, the Supreme Court considered the nature of extraterritorial acts in a time of war and found the denial of judicial review of executive detentions was a violation of the Constitution.[182]

Rasul challenged the indefinite detention of non-citizen "enemy combatants" in Guantanamo Bay through petitions for habeas corpus that requested review of the foreign detentions.[183] The case presented a habeas, not Fourth Amendment, issue, but while the Supreme Court did not require a time period for judicial review of foreign detentions, it stated that a detention of more than two years violated either the U.S. Constitution or U.S. laws.[184] Furthermore, Justice Kennedy emphasized in his concurring opinion that while military or wartime necessity may serve as justification for a few weeks, as the length of detention increases, an argument for continued detention weakens.[185]

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national authorities cannot assert a national security or terrorism defense whenever they choose to ignore the lawfulness of detentions); *see also Hamdi*, 542 U.S. 507 at 534 (declining to accept the government's contention that a trial-like system would impose too heavy a burden on the military because of the privilege afforded to U.S. citizenship).

[179] *See Hamdi,* 542 U.S. 507 at 533 (stressing that U.S. society does not permit public intolerance or animosity to serve as a sufficient basis for indefinite detention).

[180] *Id.* at 535 (sanctioning the creation of special judicial proceedings during wartime to avoid a heavy burden on the executive during a time of exigency).

[181] *See Extraterritorial Applicability*, *supra* note 34, at 1689–90 (arguing that courts must apply the Fourth Amendment concept of "reasonableness" with sensitivity to the location of the search); *see also* Hunter, *supra* note 34, at 660–61 (agreeing that the Constitution must authorize all U.S. actions, within the U.S. and abroad, but finding that practicalities may prevent uniform application in every circumstance); *see also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (altering Fourth Amendment requirements for searches in a school setting).

[182] *See* Rasul v. Bush, 542 U.S. 466, 474 (2004) (recognizing a court's authority to review executive detention in a variety of cases occurring during wartime and peacetime).

[183] *See id*. at 472 (alleging that the government did not file formal charges against the petitioners, permit access to counsel, or provide access to the courts).

[184] *See id*. at 483 n.15 (holding that executive control over petitioners' detention for over two years without charge and without access to counsel "unquestionably describe" U.S. misconduct).

[185] *See id*. at 472 (Kennedy, J., concurring) (suggesting that indefinite detention without any form of judicial review presents a weaker case of military necessity).

In light of *Rasul*, while wartime may serve as a mitigating circumstance for the United States' failure to strictly abide by the rules in its practice of extraordinary rendition, actions taken extraterritorially are not wholly exempt from Fourth Amendment limitations.[186] While the United States may have some latitude to act outside the bounds of Fourth Amendment principles in its practice of extraordinary rendition, the government cannot disregard all rules of law because of the current "war on terror." Finally, where the suspect is a U.S. citizen, the protections afforded the prisoner vary significantly. The government itself conceded that if a U.S. citizen was in detention at Guantanamo Bay, the courts would have jurisdiction over the citizen's claims.[187] The *Abu Ali* decision reiterated this point, finding that the ability to challenge one's detention is a fundamental right of U.S. citizenship.[188]

IV. RECOMMENDATIONS

The United States has attempted to bypass the legal process by transferring suspected terrorists to foreign states and placing them in foreign custody;[189] however, these actions do not escape the law and the legislative and judicial branches should act to stop the executive branch from continuing its practice of rendition to torture. Congress has already taken note of extraordinary renditions and its use of torture but has failed to take action due to pressure from the White House.[190] For example, in December 2004, the Senate approved an extension of the prohibition against torture and cruel, inhumane, and degrading treatment to the CIA by a vote of ninety-six to two, but four lawmakers removed the restrictions from the final bill when the White House demonstrated vigorous opposition to the bill.[191] Senator John McCain continued to push for the

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[186] *See id*. at 480 (applying federal law to prisoners in Guantanamo Bay, over which the U.S. exercises control through a lease agreement negotiated with Cuba); *see also* Hunter, *supra* note 34, at 661 (basing extraterritorial application of constitutional limits on the concept that social contract demands protections for the contracting party (in this case, the citizen) regardless of location).

[187] *See Rasul*, 542 U.S. at 481 (refuting the idea that the coverage of the habeas corpus statute varied based on the citizenship of the detainee).

[188] *See* Abu-Ali v. Ashcroft, 350 F. Supp. 2d 28, 41 (D.D.C. 2004) (declaring that the U.S. may not use a foreign intermediary to detain a citizen-suspect in order to avoid habeas jurisdiction of U.S. courts).

[189] *See* Letter from John Yoo, *supra* note 22, at 1–2 (refusing to grant captured Taliban and Al-Qaeda members prisoner of war status, and the protections that that status confers under international law).

[190] *See*, *e.g.*, Press Release, United States Congress, *Rep. Markey Seeks Answers to Why U.S. Is Sending Prisoners to Countries That Practice Torture* (July 15, 2005) (describing Representative Edward J. Markey's efforts to gain support to legislatively ban the practice of extraordinary rendition).

[191] *See* Douglas Jehl & David Johnson, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1 (discussing the potential effects of the proposed bill, including requirements that the CIA and the Pentagon report to Congress about its interrogation methods).

bill throughout 2005; however, Vice President Dick Cheney has lobbied strongly against the bill, pressuring Senator McCain to include an exception for CIA agents.[192] Senator McCain has refused to agree to such an exception, but the bill has yet to become law.[193] Congress must continue to disregard White House pressure and ban torture as well as the practice of extraordinary rendition.[194] Alternatively, Congress should propose special tribunals for review of detainees who are subject to extraordinary rendition.[195]

Secondly, the courts have the opportunity to hold the executive accountable for extraordinary rendition in two pending cases, those of Maher Arar and Ahmed Abu Ali.[196] Arar presents the case of a non-citizen arrested in the United States and transferred to Syria, where he remained in detention for over ten months.[197] Abu Ali, as discussed above, presents the first case of a U.S. citizen subjected to rendition to torture.[198] Through

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[192] *See* Dept. of Defense Authorization Act for Fiscal Year of 2006 ("McCain Amendment"), S. 1073, 109th Cong. (2005) (banning torture and cruel, inhuman and degrading punishment of any person under custody or control of the U.S.); Demetri Sevastopulo, *Treatment of Foreign Prisoners Is Fuelling Disputes in Administration*, FINANCIAL TIMES, Nov. 7, 2005, at 8 (describing Senator McCain's campaign to change U.S. law, motivated by his experience as prisoner of war in Vietnam).

[193] *See* Sevastopulo, *supra* note 192 (reporting that the Senate approved the bill by a vote of ninety to nine, after which Vice President Cheney sought to reach a compromise with Senator McCain).

[194] *See* Torture Outsourcing Prevention Act, H.R. 952, 109th Cong. (2005) (proposing a ban on U.S. renditions of suspected terrorists to countries contracted to torture the individuals for the U.S.).

[195] *See* Jim Garamone, *Tribunals Begin for Guantanamo Detainees*, AFIS NEWS, July 30, 2004 (reporting that the tribunals will adequately determine whether each prisoner is in fact an enemy combatant), *available at* http://www.defenselink.mil/news/Jul2004/ n07302004_2004073009.html. *But see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 443 (D.D.C. 2005) (holding that the military tribunals set up by the executive to review the detention of prisoners in Guantanamo violated the detainees' right to due process).

[196] *See* Complaint, Arar v. Ashcroft, Case No. CV-00249-DGT (E.D.N.Y. 2004) (filing suit against John Ashcroft, former Attorney General, and various other U.S. officials under domestic and international law); *see also* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 69 (D.D.C. 2004) (ordering the parties to go to jurisdictional discovery in order to determine whether the U.S. was, as alleged by Abu Ali, in control of Abu Ali's detention in Saudi Arabia).

[197] *See generally We All Have a Right to Truth*, *available at* http://www.maherarar.ca (posting Arar's personal narrative of his rendition along with new developments regarding his suit against the U.S. and the Canadian investigation of the matter).

[198] *See generally* Petition for Writ of Habeas Corpus, *supra* note 4 (explaining that Abu Ali falls under the category of extraordinary rendition victims because he was placed in the custody of a foreign government for interrogation purposes). While the District Court for the District of Columbia dismissed Abu Ali's civil case on September 19, 2005, his criminal case is currently pending, and his defense attorney plans to raise allegations of torture in both a pretrial motion to suppress and at the trial itself. *See* Abu Ali v. Gonzales, 387 F. Supp. 2d 16, 19–20 (2005) (emphasizing that while Abu Ali's habeas petition is moot, nothing in the opinion precludes Abu Ali from seeking remedies for the injuries he allegedly suffered in Saudi Arabia); *see also* Jerry Markon, *Al Qaeda Suspect Tells of Bush Plot*, WASH. POST, Sept. 20, 2005, at A14 (explaining that federal Judge John D. Bates dismissed the suit because the civil issues became moot after Abu Ali's return to the U.S. in February 2005). Judge Gerald Lee, who presided over Abu Ali's criminal trial, denied the defense's motion to suppress which argued that Abu Ali's confessions should be excluded from evidence because they were obtained through torture. Abu Ali's attorneys, however, failed to press the issue of joint venture or agency, thus Judge Lee did not give a complete ruling on whether that argument could justify exclusion of the evidence. *See also* United States v. Abu Ali, 2005 U.S. Dist. LEXIS 25552, *122–*128 (2005)

these cases, the courts, based on its directive power, should find the executive accountable over Arar and Abu Ali's rendition and prolonged detention.[199]

V. CONCLUSION

On the night of February 21, 2005, the FBI informed the Abu Ali family that Ahmed Abu Ali had returned to the United States and was in U.S. custody.[200] The next day, Abu Ali appeared in the U.S. District Court for the Eastern District of Virginia, where the United States charged him with six counts of conspiracy to materially support terrorist organizations, including Al-Qaeda, based on his activities in Saudi Arabia from 2002 to 2003.[201] Although the charges have brought public attention to his case, the charges have also diverted attention from the larger issue: where was Abu Ali for the past twenty months?

Abu Ali's criminal trial began in October 2005. After his motion to suppress allegedly tortured confessions was denied, he was convicted on all counts.[202] Some have heralded this decision as demonstrating the ability of and the benefits of using the U.S. criminal justice system to try terrorism cases.[203] While American courts are certainly prepared to try such cases, Abu Ali's case has demonstrated that American courts may not be equipped to properly hold the United States accountable for illegal counterterrorism practices such as extraordinary rendition. As the United

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(finding that the defense presented "no credible evidence" that Saudi Arabian officials acted as U.S. agents).

[199] *See* Johnson v. Eisentrager, 339 U.S. 763, 790–91 (1950) (refusing to review the detention of a non-citizen by the U.S. in a foreign country, but also refusing to decide whether a citizen has the right to request a U.S. court to review his detention in a foreign country); *see also Abu Ali*, 350 F. Supp. 2d at 69 (indicating that the court would review Abu Ali's detention if discovery revealed evidence that the U.S. had controlled and directed his detention in Saudi Arabia). *Cf.* Rasul v. Bush, 542 U.S. 466, 485 (2004) (holding that an "enemy combatant" may challenge his detention in Guantanamo Bay, Cuba, a leased but not sovereign territory of the U.S., in federal court).

[200] *See* CNN International, *Saudi Arabia Handing Over U.S. Citizen*, Feb. 22, 2005 (describing an FBI call to the Abu Ali family concerning unspecified charges the government expected to file the next day).

[201] *See* Indictment, United States v. Abu Ali, Crim. No. 1:05CR53 (E.D. Va. filed Feb. 3, 2005) (alleging Abu Ali and a co-conspirator plotted to assassinate President Bush by getting close to him on the street or by detonating a car bomb). In September 2005, a grand jury returned a second indictment, adding three counts to the charges and accusing Abu Ali of a total of nine counts of terrorism, conspiracy to assassinate President Bush, and conspiracy to commit aircraft piracy and to destroy an aircraft. *See also* Jerry Markon, *N.Va. Man Indicted in Plot Against Bush*, WASH. POST, Sept. 9, 2005, at A04 (stating that if Abu Ali was convicted on the assassination count, he may face life in prison).

[202] *See* Jerry Markon, *Va. Man Convicted in Plot to Kill Bush*, WASH. POST, Nov. 23, 2005, at A01 (reporting that the jury returned with a verdict on the third day of deliberation and noting that one juror was particularly convinced by Abu Ali's thirteen-minute videotaped confession). Abu Ali plans to appeal the conviction. *See id*.

[203] *See*, *e.g.*, *Belated Justice for a Terrorist*, WASH. POST, Nov. 28, 2005, at A20 (asserting that because Abu Ali's trial was held "under the auspices of a conscientious judge," it is difficult to view him as a victim of civil liberties abuse by the U.S. government).

States continues to fight the "war on terror," the courts and Congress should ensure that the executive branch acts within the bounds of the Constitution. It is therefore crucial that the courts both acknowledge the U.S. role in these unlawful practices and hold the United States accountable for violating the rights it should have afforded Abu Ali—and should afford other prisoners—all along.[204]

[204] In October 2005, Abu Ali lost a motion to suppress in his criminal trial, in which the defense argued that the confessions Abu Ali made in Saudi Arabia should be thrown out because they were made under torture. *See* Reuters, *U.S. Judge to Keep Qaeda Suspect's Confessions*, Oct. 24, 2005, *available at* http://today.reuters.com/news/ newsArticle.aspx?type=domesticNews&storyID=2005-102 4T212410Z_01_KRA477023_RTRUKOC_0_US-SECURITY-ABUALI.xml&archived=False (stating that the federal judge did not explain his reasons for denying the motions). It is worth noting that Abu Ali's defense counsel based its motion to suppress entirely on the torture claims and did not argue suppression of the confession based on Abu Ali's unlawful arrest or detention under the Fourth Amendment, as analyzed in this article.