"What Makes Extraordinary Rendition So Extraordinary?"

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Abstract

This article examines extraordinary rendition or as it is sometimes referred to, as irregular rendition. It is the abduction and transfer of an individual from one country to another. This practice is usually extralegal (outside the law) and normally conducted for the purpose of short-term detainment and interrogation.

Keywords: black sites, kidnapping, rendition, torture

"The United States' Central Intelligence Agency (CIA) has been running a global abduction and internment operation for suspected terrorists known as "extraordinary rendition"- since 2001 and has consequently captured an estimated 3,000 individuals and transported them to various sites around the world. "(Savage, 2009)

"A Council of Europe report released in June 2006 stated that the CIA had kidnapped about 100 individuals on territory (with the cooperation of Council of Europe members)- and rendered them to other countries, often after having transited through secret CIA detention centers, or so called - ("black sites"), some of which are in Europe. According to a separate European Parliament report from February, 2007, the CIA had conducted 1,245 flights to transfer its detainees, many of which were to destinations where suspects could face torture, in violation of Article 3 of the United Nations Convention against Torture." (United Nations Security Council Resolution 1507 (2003)

"Rendition is the CIA's antiseptic term for its practice of sending captured terrorist suspects to other countries for interrogation. The implication is that the CIA sends people to Egypt, Jordan and other Middle Eastern countries because they can be tortured there and coerced into providing information that they would not supply otherwise." (Ignatius, 2005).

"Others have described it as a violation of human rights. Involving disappearances, transfer, torture, aest and government approved abductions."(Chandrasekaran & Finn, 2002), and the "subsequent transfer of that person to another country for detention and interrogation." (Herbert, 2005). "As is the case with state – sponsored disappearances" (Rodley, 1999 Note 27), "extraordinary rendition appears to be a practice in which the perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses." (Priest, 2005).

The current policy traces its roots to the Administration of former President Bill Clinton. However, following the attacks of September 11, 2001, (hereafter referred to as 9/11), extraordinary rendition grew dramatically; estimates establish the number of abductions at 150 over just the last few years. The abductees have been sent to countries like Iraq, Egypt, Jordan, Afganhanistan, Guantanamo Bay as well as other locations for detention and questioning.

"Administration officials, backed by a Justice Department legal memorandum has consistently advanced the position that foreign nationals held at such facilities outside U.S. sovereign territory, are unprotected by federal and international laws. As such, the rendition program has allowed agents of the United States to detain foreign nationals without any legal process and, primarily through counterparts in foreign intelligence agencies, to employ brutal interrogation techniques that would be impermissible under federal or international law, as a means of obtaining information from suspects." (American Civil Liberties Union, 2005).

Less than two days after assuming the office of President, Obama issued several executive orders to close CIA jails and end torture.

Among these was Executive Order 13491, signed on January 22, 2009, "Ensuring lawful interrogations". Thereby revoking all Executive Orders issued prior, which were inconsistent in their content. However, this new order does not actually eliminate such secret CIA facilities, it allows, "facilities used only to hold people on a short-term, transitory basis."

"In addition Executive Order 13491 does not specifically disallow extraordinary rendition: rather it continues to allow the CIA to continue abductions of persons, thereafter forcibly sending them to another country for questioning, which may of course include the use of torture." (Aldridge, 2008).

"According to current and former U.S. intelligence officials the rendition program might be poised to play an expanded role in the future because it is the main remaining mechanism – aside from Predator missile strikes – for taking suspected terrorists off the street. The European Parliament condemned rendition as an "illegal instrument used by the United States." Prisoners captured as part of the program sued the CIA as well as, Jeppeson DataPlan of San Jose, a Boeing Company subsidiary, accused of working with the agency on dozens of rendition flights. However the Obama administration appears to have determined that the rendition program is one component of the Bush administration's war on terrorism that it could not afford to discard. The Court dismissed the lawsuit." (Miller, 2009).

Advocates for human rights have been extremely disappointed in the Court's decision, stating that it allows the transfer of prisoners to countries that may use torture. The argument called "diplomatic assurances" provided by countries in question of humane treatment had fallen on deaf ears.

"It is extremely disappointing that the Obama administration is continuing the Bush administration practice of relying on diplomatic assurances, which have been proven completely ineffective in preventing torture," said Amrit Singh, an attorney with the American Civil Liberties Union." (Johnston, 2009).

When Barrack Obama was running for president, he stated that he would end the practice of extraordinary rendition. In an article in *Foreign Affairs*, ("Renewing American leadership," July/August, 2007), He wrote, "To build a better, freer world, we must first behave in ways that reflect the decency and aspirations of the American people". He continued, "This means ending the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands without charge or trial, of maintaining a network of secret prisons to jail people beyond the reach of the law". (Johnston, 2009).

Another recommendation that President Mr. Obama approved was a proposal to establish a multiagency interrogation unit within the Federal Bureau of Investigation (FBI), to oversee the interrogation of top terrorism suspects using largely noncoercive techniques approved by the administration. The creation of the new unit in 2009 would formally strip the CIA of its primary role in questioning high-level detainees.

"The new unit, called the High Value Interrogation Group, is composed of analysts, linguists, and other personnel from the CIA and other intelligence and law enforcement agencies. It operates under the policies set by the National Security Council, and all interrogations msut comply with the guidelines contained in the Army Field Manual, which outlaws the use of physical force. "(Johnston, 2009).

It is interesting to note that on August 28, 2009, *The Huffington Post* printed an article written by Scott Horton entitled, "New CIA docs detail brutal 'extraordinary rendition' process". In which he wrote, the following:

"Deep among the documents released to the ACLU . . . was a curious memo dated 30 December, 2004 and directed to Dan Levin, the acting head of the Justice Department's Office of Legal Counsel. The fax cover sheet has a brief note, "Dan, a generic description of the process." The name of the sender based at the CIA has been obliterated. The document provides a step-by-step manual for the extraordinary renditions."

"The process starts with "capture shock". The detainee is subject to a medical examination prior to the flight. During the flight, the detainee is securely shackled, and is deprived of sight and sound through the use of blindfolds, earmuffs and hoods. The detainee is "in the complete control of Americans". The detainee is stripped naked and shaved. A "series of photographs are taken of the HVD (High Value Detainee) while nude". A medical officer and a psychologist play key roles in the process."

"All of these practices are carefully engineered to facilitate the interrogation process. Nudity, sleep deprivation and dietary manipulation are used as standard preparatory steps.

It then details the standard "corrective techniques". These are a series of physical assaults labeled with innocuous titles like insult slap, abdominal slap, facial hold and attention grasp." "Coercive techniques" used include: walling (slamming a prisoner's head against the wall, with some protective measure to avoid severe injuries), water dousing, and the use of stress position, wall standing and cramped confinement. Because of substantial redactions it seems unlikely that this is a complete list."

The 2004 CIA memo delivered to the Justice Department explaining these procedures makes it very explicit that the techniques employed have little if anything to do with the safety and security of the personnel involved. Rather, they explain that the real function of these techniques is " to persuade the High Value Detainees (HVD's) to provide threat information and terrorist intelligence in a timely manner, to allow the Unites States Government to identify and disrupt terrorist plots" (Horton, 2009).

"The preparatory measures for extraordinary rendition, such as capture shock, nudity, body cavity search, sleep deprivation and manipulation of nutrition are designed to put the prisoner in a position in which he can be effectively interrogated. These measures are geared toward breaking down psychological resistance and making the prisoner pliable. Although not every technique designed to wear down a prisoner's resistance and make the prisoner more willing to talk is, "torture" these techniques are undeniably highly coercive and can be interpreted as torture." (Horton, 2009).

"It should be noted that President Obama's Justice Department has opposed lawsuits against U.S. officials for torture during, past renditions, arguing that the cases – all of which have been dismissed without trial – would expose state secrets if they were allowed to proceed." (Egelko,2012).

After 9/11, "sweeping interpretations of presidential power and government secrecy bore fruit in the area of extraordinary rendition. Under this doctrine, the President claims to possess inherent authority to seize individuals and transfer them to other countries for interrogation and torture. During the pre-9/11 era, Attorneys General and other legal commentators understood that (a) the President needed congressional authority for these transfers and (b) that the purpose was to bring the person "to trial." Until recently, the Justice Department held that the President could not order an individual's extradition or rendition without authority granted by a treaty or statute. However, that view of the law changed radically after the events of 9/11." (Fisher, 2008).

Throughout most of the history of the United States, the chief executive had no authority over the use of extraditions or renditions. According to Thomas Jefferson, who served as Secretary of State, he believed that fugitives transferred from one country to another needed to be resolved by the Congress. Either by way of a treaty with the country in question or a statute. And as such, he informed the President, George Washington, in a letter in 1791 that "fugitives were not to be surrendered to "tyrannical laws" (Jefferson, 1791/1986). The following year, in a letter to Charles Pinckney, Jefferson underscored the risks of giving up fugitives "to a despotic government instead of a free one." (Jefferson 1792/1990).

Even under relatively free governments, such as England's, Jefferson found the punishments "so disproportionate to the crimes that he thought of rendition or extradition as repugnant." (American State Papers: Foreign Relations 258, 1833).

In his view, all excess punishments were a crime. It followed that "to emit a fugitive to excessive punishment is to be 'accessary' to the crime" *(American State Papers: Foreign Relations 258,1833).* Jefferson believed that in deciding to return someone to another country, the Legislative Branch had to decide the seriousness of the crime involved.

Attorneys General remained firm that congressional action was required by treaty or specific statute for extradition or rendition. To resolve the matter, Congress had to act. "In 1821, Attorney General William Wirt prepared a lengthy analysis on the President's authority to deliver to another country subjects of that nation charged with offenses: without specific authority granted by the legislative branch, either by treaty or statute, the President has no power to make the delivery". (Op. Attorney General 509, 1821).

The President's dependence on treaties and statutes to transfer someone to another country was well- established throughout most of the United States' history. In 1936, the Supreme Court spoke unanimously about the President's lack of authority to act independently and unilaterally in such matters:

"It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power", (Valentine v. United States, 1936).

In 1979, the Office of Legal Counsel (OLC) reviewed the President's power to transfer someone in U.S. custody to another country. The legal rule was plain: "The President cannot order any person extradited unless a treaty or statute authorizes him to do so." (4 A Op. Off Legal Counsel 149, 1980).

After the events of 9/11, "the Bush Administration defended the need to detain and interrogate suspected terrorists. Putting "extraordinary" in front of "rendition" changed the meaning of the term fundamentally. It was not the simple addition of an adjective to a noun: a process formerly bound by statutory and treaty law – reinforced by procedural safeguards in Court – had entered the realm of independent and arbitrary executive law. Checks and balances disappeared. It enabled Presidents not only to act in absence of statutory or treaty authority, but even in violation of it.

"Rendition operates within the rule of law; however extraordinary rendition falls outside of it. Rendition brings suspects to federal or state court; extraordinary rendition does not. The harsh and aggressive methods used in extraordinary rendition would undermine potential prosecutions because a court would exclude confessions or evidence that had been illegally coerced." (Priest, 2005).

"As the term suggests, this extraordinary practice appears to be a perversion of what is an acknowledged practice – U.S. officials' covert rendition of individuals suspected of involvement in terrorism to "justice" that is, for trial or criminal investigation either to the United States or to foreign states." (The Center for Human Rights and Global Justice, 2005).

"There are two other noteworthy points about the definition of extraordinary rendition. First, this practice entails many different levels of involvement of U.S. and other foreign state actors. Second, the definition of extraordinary rendition uses the "more likely than not" standard for assessing an individual's risk upon transfer as this is the test that the U.S. employs when assessing that risk. However, the relevant human rights treaties contain significantly more protective standards concerning the level of risk of torture or cruel, inhuman, or degrading (CID) treatment that an individual faces upon transfer." (Center for Human Rights and Global Justice, 2005).

The key international instruments that apply to extraordinary rendition are as follows:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT);
- International Covenant on Civil and Political Rights 1966 (ICCPR);
- Convention relating to the Statute of Refugees 1951 (1951 refugee Convention) and its Protocol; and
- Geneva Convention relative to the Treatment of Prisoners of War 1949 (Geneva III), Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva IV)

Taken as a whole, these treaties, together with customary international law, set out three relevant obligations for states:

- Prohibition against torture, and to varying degrees, a prohibition on CID treatment;
- Prohibition against the return or transfer of an individual to another state where that individual faces the risk of torture; and
- Requirement to prevent, criminalize, investigate and punish acts of torture, conspiracy in torture and aiding and abetting acts of torture. (Center for Human Rights and Global Justice, 2005).

"Reflecting the seriousness of the offense of torture, an evolving body of international law also requires the criminalization and prosecution of ancillary acts, such as complicity and aiding and abetting torture. This body of law is reflected in multilateral treaties that set out legal standards and a basis for criminal sanctions, and also in the norms of customary international law." (Center for Human Rights and Global Justice, 2005)

Conclusion

"The countries directly involved in extraordinary rendition may themselves provide the most effective means of addressing the practice. Countries that have orchestrated extraordinary renditions have sacrificed the moral authority to be leaders in promoting the rule of law and respect for human rights." (Malinowski, 2005).

"Countries with poor human rights records that have been enlisted to receive suspects may react with hostility when their partners in torture persist in criticizing their human rights practices." (Russell, 2005).

"In order to regain international legitimacy, the architects of extraordinary rendition may need to take dramatic steps to show the world that they intend to play by the rules." (Feldman, 2005). "Only then will they have a genuine opportunity to compel other countries to comply with the important obligations embodied in contemporary human rights instruments." (abdn.ac.uk/law, 04/18/09)

References

abdn.ac.uk/law, 04/18/09
Aldridge, Robert C., "America in Peril", Hope Publishing House, Pasadena, California, April 30, 2008
Article 3 of the United Nations Convention Against Torture. (Resolution 1507 (2006)
Briefing Paper – "Torture by Proxy: International Law Applicable to 'Extraordinary Renditions' ". The Center for Human Rights and Global Justice, New York University School of Law, December, 2005 @ pg 6
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)
Convention relating to the Statute of Refugees 1951 (1951 refugee Convention) and its Protocol
Egelko, Bob, "Obama's Stance on Rendition different for lawsuits", San Francisco Chronicle, page A 12
"Ensuring Lawful Interrogations", Executive Order 13492, 22 January, 2009
"Fact Sheet: Extraordinary Rendition", American Civil Liberties Union, December 6, 2005
Feldman, Noah, "Ugly Americans", New Republic, May 30, 2005 @ 23
Fisher, Louis, June, 2008, "Extraordinary Rendition: The Price of Secrecy", American University Law Review, Vol 57, #5 1405 @ 1406
Geneva Convention relative to the Treatment of Prisoners of War 1949 (Geneva III), Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva IV)
Herbert, Bob, Op-Ed, "It's Called Torture", New York Times, February 28, 2005, page A19
14 Horton, Scott Huffington Post entitled, "New CIA Docs Detail Brutal 'Extraordinary Rendition' Process, . August 28, 2009,
Ignatius, David, "Rendition Realities", Washington Post, Wednesday, March 9, 2005, page A21
International Covenant on Civil and Political Rights 1966 (ICCPR);
Johnston, David, "U.S. Says Rendition to Continue, but with More Oversight", The New York Times, August 25, 2009
Malinowski, Tom, Washington Advocacy Director, Hudson Institute, "America's Mission: Debating Strategies for the Promotion of Democracy and Human Rights", State Department Briefing, Federal News Service, (June 20, 2005)
Memo dated 30 December, 2004 and directed to Dan Levin, the acting head of the Justice Department's Office of Legal Counsel
Miller, Greg, "Obama preserves renditions as counter-terrorism tool", Los Angeles Times, February 01, 2009
"New CIA Docs Detail Brutal 'Extraordinary Rendition' Process", Huffington Post, August 28, 2009
Obama, Barrack, Foreign Affairs, ("Renewing American Leadership", July/August, 2007)
Priest, Dana, "CIA's Assurances on Transferred Suspects Doubted", Washington Post, March 19, 2005 @ A1
Priest, Dana, "Wrongful Imprisonment: Anatomy of a CIA Mistake", Washington Post, December 4, 2005, @ A1
Rodley, Nigel S., The Treatment of Prisoners Under International Law, (2nd ed. 1999) note 27 @ 244
Russell, Alec, "Quit Terror War Base, Uzbekistan Dictator Orders U.S. Special Forces", Daily Telegraph, (London) August 1, 2005
Savage, Charles, "Obama's War On Terror May Resemble Bush's in Some Areas", The New York Times, February 17, 2009
Valentine v. United States, ex rel., Neidecker, 299 U.S. 5, 9 (1936)
1 American State Papers: Foreign Relations 258, Washington, D.C., Gales & Seaton, 1833
1 Op. Att'y General 509 (1821)
4 A Op. Off Legal Counsel 149 (1980).
22 The Papers of Thomas Jefferson 266, (1791) Charles T. Cullen, ed., Princeton University Press, 1986
23 The Papers of Thomas Jefferson 360 (1792), Charles T. Cullen, ed., Princeton University Press, 1990